ZAMBIA NATIONAL HOLDINGS LIMITED AND UNITED NATIONAL INDEPENDENCE PARTY (UNIP) v. THE ATTORNEY-GENERAL (1994) S.J. 22 (S.C.)

SUPREME COURT
NGULUBE, C.J., SAKALA, CHAILA, CHIRWA AND MUZYAMBA, JJ.S.
S.C.Z. JUDGMENT NO. 3 OF 1994

Flynote

High Court - Juridiction of - Article 94 of the Constitution - How it should be construed in relation to other laws governing the exercise of the jurisdiction of the High Court

Compulsory acquisition - Constitutionality of - Compensation under the Lands Acquisition Act - Compensation postponed till after determination of the case

p23

Statutory instruments - Force of - Procedure for enactment of - Cap 2 and Article 80 of Constitution

Headnote

The appellants brought a petition in the High Court to challenge the decision for 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 itnerests of the Republic to acquire this property whereupon the appropriate Minsiter 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 aid as compansation but as it 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 petition was unsuccessful and the appellants appealed.

Held:

(i) 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

(ii) Statutory instruments only come into force in when made in accordance with the relevant section of Cap 2 and Article 80 of the Constitution

(iii) The LandsAcquisition Act did not contravene the spirit and intent of Article 16(1) of the Constitution

(iv) The appellants did not discharge the burden which was on them to demonstrate mala fides on the part of the President

(v) The acquisition here was not unlawful for want of a prior tender of compensation

Cases referred to:

(1) Garthwaito v Garthwaito (1964) 2 ALL E.R. 233.
(2) Guaranty Trust Co. of New York v Hannay & Co. (1914-16) ALL E.R. Rep. 224.
(3) Miyanda v The High Court (1984) Z.R. 62.
(4) Codron v Macintyre and Shaw (1960) R. & W. 416
(5) Oliver John Irwin v The people S.C.Z. Judgment No. 4 of 1993.
(6) M v Home Office (1992) 4 ALL E.R. 97.
(7) Elsie Moobola v Harry Muweza S.C.Z. Judegment No. 3 of 1991
(8) Johnson v Sargant (1918) 1 K.B. 101
(9) Harel Freres Ltd. v Minister of Housing (1986) L.R.C. (Const.) 472.
(10) Re: Pan Electronics Ltd. S.C.Z. Judgment No. 4 of 1988.
(11) Commissioner of Stamp Duties v Atwill and Others (1973) 1 ALL E.R. 576

For the Appellant: J.B. Sakala and A.J. Mumba, of JB Sakala & Co.

For the Respondent: A.G. Kinariwala, Principal State Advocate

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p24

Judgment

NGULUBE,C.J.: delivered the judgment of the court.

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 itnerests of the Republic to acquire this property whereupon the appropriate Minsiter 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 as it 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 or 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 Proceeding 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:

Provided that:

(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

(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 State."

In the judgment after trial and though the remarks in that behalf were all obiter

p25

and immaterial to the decision, the learned trail 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 adquacy 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 fo 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 law-fully available, that person may apply for redress to the High Court which shall:

(a) hear and determine any such applicantion

(b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2);

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 30 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 apropriate for the purpose of enforcing or securing the enforcement of, any of the provisions of Articles 11 to 26.

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 unconstitutional 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

p26

that the court below was in error when in the earlier ruling it refused to grant an interioucutory 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 apportunity 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 miscenception about the word "juristiction", 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 juristiction 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 stick 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 ocurt's lack of jurisdiction to entertain a suit based on the personality of a party, as for instance against a foreign severeign 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 cannotes 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 or 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 40 "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

p27

to alter its practice proprio motu within the limits which it imposes on itself by the doctrine of precendent, 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 at page 64:

"The term "jurisdiction" should first be udnerstood. In the 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 jurisidction extends, or both. Faced with a similar question of jurisdiction, two of their Lordships in Codron v Machintyre and Shaw (4), had this to say:

Tredgold, CJ., cautioned, at page 420.

> "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 lattter 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 teh application, but not be any limits on the general jurisdiction of the court to hear and determine the application."

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 then of lesser tribunals and courts whose jurisdiction in a cumulative sense is limtied 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 awares 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 exerciseits 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 contrue the word "unlimited" in vacuo and then to proceed to find that a law allegedly limiting the powers of the court is unconstitutional. The

p28

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 lesser courts. However, the High Court is not exempt from adjudicating in accordance with the law including complying with procedural requirments as well as substantive limitations such as those one finds in madatory sentences or other specification of available penalties or, in civil matters, the types of 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 Hohn 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 for the juridiction 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.1231) (of the Criminal Procedure Code) did infact limit the powers of teh 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 enforcment 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 Minsiters 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 interiocutory 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, comliance with fairly coercive perrogative 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 Arctile 16(1) of the constitution. This Arcticle reads:

p29

> "16 (1) Except as provided in this Article no property of any description shall be compulsorily taken possession of, and he 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 (i) had to fit into one of the spigeon holes" 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 (i) to the extent that it is shown that such law provides for the taking possesssion or acquisition of any property or interest there in or right there over."

and goes on to list numerous situatuins such as satidfaction of any tax, execution of judgments or orders 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 adquate 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 constitu- tion. 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."

p30

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 confomable to the constitution so that the word "adquate" 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 s.6(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 it Cap. 295, 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 approved by the legislature during the One Party era. We shall return to this aspect under another ground of appeal. However, in relation to the backdating of the Statutory Instrument's effect, Mr. Sakala relied on Article 80 of the constitution which provides for

p31

publication and the coming into force of statutory instuments. He also relied on s.19 of the Interpretation and General provisions Act, Cap. 2. Subsection (1) which is relevant to this discussion reads:

> "19. (1) Subject to the provisions of this section...
>
> (a) the date of commencement of a statutory instrument shall be the date of its publication in the Gazette or, where a later date is specific therein, such later date; and
> (b) every statutory instrument shall be deemed to come into for immediately on the expiration of the day next prededing the date of this commencement."

The law is clear and Mr. Kinariwala's argument that this extraordinary statutory instrument should be treated on the same footing as an enactment by parliament can not be entertained. However, the question is whether a statutory instrument can legally have or be given retroactive effect. We bear in mind that in terms of s.21 of Cap. 2, a statutory instrument becomes part of the written law and the question whether it is intended to have retrospective effect is to be answered by the application of principles identical with those by which the question is determined in relation to statutes. We have lifted these sentiments out of paragraph 747 of Halsbury's laws of England, volume 86, 3rd Edition, A perusal of paragraphs 644 and 647 of the same reference book supports the view that there is nothing objectionalbe to written laws having retroactive effect, in relation to pending litigation and existing causes of action, when they do not affect substantive rights or impose new liabilities or when the new provisions can be classed with provisions as to procedure only, In Elsie Moobola v Harry Muwezwa, (7 we considered the introduction of new remedies as falling to be classed with provisions as to procedure so that the presumption against retrospective effect did not apply to the distribution of the estate of a deceased husband which was to be effected after the coming into force of a new enactment which was not in operation when he died.

Two points emerge from what we have been saying. The first is that statutory instruments can only come into force in the manner ordained by the relevant section of Cap. 2 and Article 80 of the constitution. Citing Johnson v Sargant (8) as one of their authorities Keir & Lawson, the learned authors of Cases in constitutuonal Law, 4th Edition, have this to say at page 25;

> "But there is this difference in the operation of statutes and acts of subordinate legislation: a statute takes effect on the earliest moment of the day on which it is passed or is declared to come into operation, while orders, regulations and other acts of subordinate legislation take effect only when they are published to the outside world. This is a reasonable distinction, for whereas the passing of a statute is invariably presended by prelonged and open discussion, many acts of subordinate legislation are imposed on the public without previous warning (see Johnson v. Sargant, (1918) 1 K. at p. 103, and Statutory Instuments Act, 1946 S.3)"

p32

We believe the foregoing answers the point about the coming into force of the statutory instrument under discussion. The second point is whether the Statutory instrument having come into operation only when it was published, can have effect on pending litigation such as this case where the issue of compensation has not been litigated or adjudicated.

Contrary to the appellant's submissions, the issue of compensation which has not been litigated relates to a remedy on new principles of assessment and the amendments effected to the Lands Acquisition Act in such event will apply in accordance with the reasoning in the Moobola (7) case. In any event the application of the new principles of assessment can only be prospective on the facts of this case although they will apply to an existing cause of action.

It will not be unlawful to make the deductions now provided for. As will shortly appear when we come to the fourth ground of appeal, the deductions can not be resisted on other grounds to be discussed in a moment. In sum, we are satisfied that the lands Acquisition Act did not contravene the spirit and intent of Article 16(1) of the Constitution as alleged in the second ground of appeal. On the contrary, if we take the liberty to borrow from the language of the headnote in Harel Freres Ltd v Minister of Housing (9) a case from Mauritius - the procedure for the compulsory acquisition of land in Zambia prescribed by the Lands Acquisition Act gives faithful effect to the spirit and intent of Article 16(1) of the constitution. It gives the landowner recourse to the courts to challenge the legality and constitutionality of the compulsory acquisition and, in default of agreement, the question of compensation can also be referred to the course. The ground of appeal in this behalf is unsuccessful.

The third ground of appeal alleged error on the part of the learned trial judge when he held that the compulsory acquisition of the appellants' property had not been done in bad faith. it was not in dispute that the Lands Acquisition Act gives the power to the President to resolve in his sole judgment when and if it is desirable or expedient in the interests of the Republic to acquire any particular land. Quite clearly, a provision of this type does not mean that the President's resolve can not be challenged in the courts both as to legality and other available challenges whereby arbitrariness and other vices may be checked. There was no dispute on the law that the exercise of statutory powers could be challenged if based on bad faith or some such other arbitrary, capricious or ulterior ground not supportable within the enabling power.

The appellants alleged that the acquisition was based on an ulterior motive or an intent simply to punish the appellants and they relied on the evidence of two senior members of the present ruling party, who confirmed that it was the publicly stated intention of the MMD party even before it ascended to power that it would retrieve properties acquired with public funds so as to benefit the people of Zambia as a whole. The learned trial judge found that, far from demonstrating bad faith, the MMD had demonstrated good faith to the extent that they did not plan to take away indiscriminately all the appellants' properties but only those acquired or built with State money. The simple answer to this ground was that the appellants did not discharge the burden which was on them to demonstrate mala fides on the part of the President. Their additional argument that the backdating of the statutory instrument already discussed showed such

bad faith can not persuade us to their point of view. The Statutory Instrument was issued and amendments to the Lands Acquisition Act effected under powers lawfully available to the President and the desire evinced therein to obtain full credit for State funds utilized when computing the amount of compensation demonstrated, in our considered opinion, the highest regard for the interests of the Republic which would otherwise be called upon to keep on paying several lots of public money when the State had received no valuable or any consideration for the large contribution originally made to the construction of the Complex.

The fourth ground of appeal alleged error on the part of the learned trial judge when he decided that a grant made by parliament could be retrieved especially grants made to UNIP "if it can be shown that the sovereign or Parliament that granted it was corrupt or that donations were made in circumstances bordering on duress or undue influence." The argument was that a grant, like a gift, once given can not be retrieved. Mr. Sakala submitted that there could have been no undue influence in this case because ofthe intervention of an independent parliament which authorised the grants. The learned trial judge had, in dealing with this case, made a lot of gratuitous and uncomplimentary political remarks against the appellants. he had at one point in the judgement specifically warned that he intended to go astray and did so with a vengeance and in unfortunate language, prompting Mr. Sakala to claim that his clients had not had a fair trial. All litigants are entitled to courteous treatment, However, we do not see that the trial was necessarily unfair especially that the issues were largely legal ones to be decided on the law. Thus, although there was no evidence to support an allegation of corruption, the point about undue influence was quite valid. As we pointed out in Re pan Electonics Ltd. (10) where there is a relationship of trust and confidence, and inexplicably large gifts are made, the presumption of undue influence will be rebuttable only on proof of full, free and informed thought on the part of the donor. It can not be argued that gifts can never be retrieved since there are exceptions, such as undue influence, which can vitiate the gift if the donor who had acted to his prejudice repents of the transaction. The evidence on recard shows that the appellants were in a position to and did dictate to the Government of the day to transfer to themselves the land in question which had previously been allocated to certain Minstries. We take judicial notice that, during the One Party era, UNIP controlled and formed the legislature and the Government. Even the first appellant enjoyed a special status as evidenced by amendments to the Income Tax Act introduced by Act No. 12 of 1982 and Act No. 14 of 1987, both of which have since been replaces by Act No. 11 of 1992. The 1982 Act

emended S.41 of CAP. 668 specifically in relation to donations for the construction in Lusaka of the eadquarters of the United National Independence party which were deductible as charitable donations. The 1987 Act added Zambia national holdings Ltd. to the list of organisations whose income was exempt from tax. In truth, there was between the second appellant and the Government the plainest and clearest fiduciary relationship which raised a presumption of undue influence so strong that it could be rebutted only on the strongest evidence. The intervention an "independent" Parliament which was formed by the second appellant to authorise the Government also formed by the second appellant to make the large donations for

p34

which there was no quid pro quo of any kind can not conceivably be regarded as evidence rebutting the presumption and the irrefutable fact of undue influence. As long as there was any sort of control by the ruling Party over the Government and Parliament, the last two could not be regarded as having been in a position to form an entirely free and independent unfettered judgment. The gift or the grant in this case is recoverable on behalf of the Republic quite independently of the principles of assessment under the Lands Acquisition Act and when coupled with those principles, the case for taking the Government donations into account when computing the compensation payable is, in our most considered view, unanswerable and unassailable. Because it is unnecessary for the decision here, we have refrained from discussing the possibility that there was also a resulting trust on the facts disclosed.

In any case, we consider that this is not unreasonable to expect that any political party forming the Government and having the control of public funds will consider itself at doing so in trust for the people of this country and for their common advancement benefit. The fourth ground of appeal also fails.

The fifth ground of appeal read that "the learned trial judge erred and misdirected himself in law when he ruled that the provisions of S.11(4) of the Lands Acquisition Act which require that possession of the land in dispute can only be taken after payment of just compensation into court were not breached by the respondent who entered the premises without fulfilling that condition precedent". The learned trial judge infact held the view that the appellants were correct in contending that the tender of compensation was a condition procedent to the taking of possession but found that there was no need for such extra payment when the complex had been constructed with Government money.

Under S.11 of the Lands Acquisition Act which sets out the procedures thereof, Subsection (1) deals with disputes other than one relating to compensation; subsection (2) provides for disputes as to the amount of compensation to be referred to the court; subsection (3) which talked about the finality of any compansation determined by the National Assembly was repealed by statutory instrument No. 110 of 1992; while subsection 94) and its proviso reads....

> "(4) The existence of any dispute as aforesaid shall not affect the right of the President and persons authorised by him to take possession of the property:
>
> Provided that where a dispute exists as to the amount of compensation or the right to acquire the property without compensation, possession may be taken only after payment of the amount regarded by the Minister as just compensation.....
>
> (i) in the case of a dispute as to the amount of compensation, to the person entitled to compensation (or into court if the identity of such person, or any question of apportionment, is also in dispute);
>
> (ii) in the case of a dispute as to the right to acquire the property without compensation, into court."

At first glance, the proviso relied upon makes curious reading since it seems to undermine the substantive provision. However, guided by the attitude adopted

p35

by the Privy Council in Commissionr of Stamp Duties v Atwill and Others (11) which we have

no reason to discount, we too consider that it is very frequently the function of provise merely to limit or qualify rather than to add to the substantive provision. However, there may be situations where a proviso will not necessarily have that restricted effect. Having examined s. 11(4) against the packared of the scheme under the Act for the resolution of disputes, we are satisfied that the proviso should be construed as having qualified the substantive provision so as to introduce a procedural condition presendent whenever there is a dispute. However, it is also clear that the existence of a dispute in fact is a sine qua non for the invocation of this proviso. On the facts of this case - and Mr. Sakala was constrained to concede that the whole argument may have been a moot point - there was no dispute between the parties or before the court concerning the amount of compensation within the intention of s.11. The parties had neither agreed nor disagreed on any sum of money and they specifically requested the court not to go into the question of compenstion which was postponed until after the determination of the challenge based on legality and constitutionality. In any event, it is unnecessary for the purpose of this judgment to consider what would be the result if possession were taken without a prior tender of compensation or if the State contemplated an acquisition without compensation since no such dispute exists in this case. The learned trial judge was on firm ground in his conclusion, though not in his reasons for the conclusion. The acquisition here was not unlawful for want of a prior tender of compensation.

The sixth and last ground of appeal related to the order for costs awarded against the appellants. Undoubtedly, this case raised constitutional issues of general importance and the practice in this court has been to depart from the general rule of costs following the event when the litigation has made a significant contribution of public importance particularly on issues which came before the court for the first time. We agree with the appellants that these considerations ought to ahve weighed in favour of the practice referred to. We allow this ground of appeal and set aside the order for costs made below.

In sum., the appeal is unsuccessful but for the reasons just given each side will bear its own costs both here and below.

Appeal dismissed.
