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IN THE SUPREME COURT OF ZAMBIA SCZ JUDGMENT NO. 5 OF 2008

HOLDEN AT LUSAKA APPEAL NO. 10 OF 2006

(Criminal Jurisdiction)

B E T W E E N:

ANTI CORRUPTION COMMISSION APPELLANT

AND

BARNNET DEVELOPMENT CORPORATION LIMITED RESPONDENT

CORAM: Lewanika, DCJ, Chitengi and Silomba, JJS

On the 4th April, 2006 and 30th January, 2008.

For the Appellant: Mr. N. Nchito, MNB

For the Respondent: Mr. J. P. Sangwa, Simeza Sangwa & Associates

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J U D G M E N T

SILOMBA, J. S., delivered the judgment of the Court.

Case referred to:

The University of Zambia Council Vs J. M. Calder (1998) S. J. 21

We regret the delay in the delivery of the judgment. This was due to the busy work schedule.

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At the hearing of this appeal, the late Deputy Chief Justice, Mr. Justice David Lewanika, was a member of the panel but passed on before the judgment was ready. This judgment is, therefore, by majority.

This appeal is against the judgment of the High Court dated the 21st November, 2005. The action in the Court below was began by originating summons in which the respondent (as plaintiff) sought, among other things, two orders. The first order sought was that the directive dated 6th June 2003, restricting the plaintiff's power to dispose of or otherwise to deal with the property known as Stand No. 6955, Lusaka, without the consent of the Director General of the Anti-Corruption Commission was illegal hence null and void *ab initio*. The second order was for a declaration that the restriction notice dated 2nd September 2002, directing that all income generated by the property be paid into the respondent's account is illegal hence null and void *ab initio.*

The originating summons was supported by an affidavit sworn by the respondent's managing director. The affidavit evidence of the respondent

disclosed, among other things, that on the 7th March 2002, the appellant, through its Director General, issued a restriction notice for Stand No. 6955, Lusaka, the property of the respondent, pursuant to Section 24 (1) of the Anti-Corruption

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Commission Act No. 42 of 1996 (hereinafter called "the Act"). The restriction notice was issued on the basis that the appellant was conducting investigations into offences alleged or suspected to have been committed under the said Act.

The respondent denied through the affidavit that it has ever been a subject of investigation for an offence alleged or suspected to have been committed under the Act. On the 14th March 2002, the respondent, through its advocates, wrote to the appellant to complain about the restriction notice. In response, the appellant informed the respondent that the notice merely restricted the disposal of the stand to maintain the status quo pending the conclusion of the investigations.

Notwithstanding the assurance given, the appellant did, on the 2nd September 2002, issue another directive to the respondent directing it to deposit income generated by the property into its account pending the conclusion of the investigations. Subsequently, on the 8th November 2002, the respondent's advocates demanded the withdrawal of the portion of the restriction notice directing the payment of income into the appellant's account but this was ignored.

The affidavit disclosed further that the restriction notice that was issued on the 7th March 2002 expired on the 7th March 2003 and that on the 6th June 2003 another restriction notice was issued by the appellant.

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On the 5th September 2005, the respondent filed a further affidavit in support in which it was disclosed that the appellant had issued a third restriction notice dated the 4th March 2005 over the same property contrary to the law that limits the life-span of every restriction notice to one year.

In response, the affidavit evidence of the appellant in opposition to the originating summons confirmed that the appellant had issued a restriction notice on the 7th March 2002 on grounds that investigations were being conducted into offences alleged or suspected to have been committed under the Act; that Stand No. 6955, Longacres, Lusaka, formerly owned by Indeco Estates Development Corporation Limited, (hereinafter to be called "Indeco Estates"), was sold to Joritas Enterprises Limited at the time when Richard Sakala was chairman of the board of Indeco Estates.

The affidavit disclosed that the investigations were instituted because it was reasonably suspected that Richard Sakala had used his position as board chairman to acquire the stand by hiding in some individuals or companies. The affidavit

evidence then catalogued the events and circumstances in which the stand was bought by Joritas Enterprises Limited, transferred to Mwelwa Mumba Waine of the United Kingdom (UK), a close friend of Richard Sakala, who formed a

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company called Hermark that later sold the property to the respondent on the instructions of Richard Sakala.

Because of the alleged fraudulent nature of the transactions in the transfer of the stand, from one person to the other, the appellant thought that the respondent did not have good title to the property. On the basis of the foregoing evidence, it was contended that all actions taken by or on behalf of the appellant in this matter were lawful.

The affidavit evidence and the submissions of counsel for the appellant and the respondent were reviewed by the learned trial Judge.

The learned trial Judge found that the appellant was not legally permitted by any provisions of the Act to collect rentals and ordered the refund of any rentals so collected with interest. He also found that the respondent was not a subject of an investigation for an offence alleged or suspected to have been committed and neither was it under prosecution for any offence.

As far as the learned trial Judge was concerned, the endless renewals of the restriction notices were an abuse of authority because they were not backed by the law. He accordingly ordered the appellant to withdraw the restriction notice

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registered against the respondent's property on the 8th March 2002 from the Lands and Deeds register within 14 days from the date of the judgment.

There were three grounds of appeal that were argued before us. These were;

1. **The learned trial Judge erred in law and in fact when he held that the appellant had not demonstrated that the respondent was a subject of investigations as there was no such requirement under the law, the fact that the appellant stated that the respondent's acquisition of Stand No. 6955, Lusaka, was under investigation was sufficient;**

2. **The learned trial Judge misdirected himself in law and fact when he held that the appellant herein was issuing endless renewal restriction notices, when in fact the appellant was merely issuing fresh restrictive notices, which the law does not forbid and not renewals; and**

3. **The learned trial Judge erred in law and in fact when he held that the appellant herein was not legally permitted by any provisions of the Act to collect rentals from the respondent as Section 24 (1) of the Act grants wide ranging powers to the appellant commission.**

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The appellant filed written heads of argument, which were argumented by oral submissions. Mr. Nchito, counsel for the appellant, submitted that it was common cause that investigations in criminal matters were conducted in a secretive fashion for the purpose of discovering any available evidence. From the appellant's affidavit in opposition, counsel submitted that it was clearly demonstrated that Stand No. 6955, Lusaka, was under investigations and that the public officer responsible for the acquisition of the stand by the respondent was Richard Sakala.

Counsel referred us to what he termed the concept of "chain conspiracy" to demonstrate the commission of corrupt practices by public officers and its relevance to the present case. Counsel submitted that in the case at hand there was a similar chain-like manner in the line of transactions involving Stand No. 6955,

which were commandeered by Richard Sakala, a person under investigations under Section 24 (1) of the Act.

Counsel outlined the chain conspiracy in the transfer of the stand from Joritas Enterprises to Mwelwa Mumba Waine and later to Hermarks and finally to the respondent orchestrated by Richard Sakala. He asserted that in the light of the

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overwhelming evidence the respondent could not be said to have good title to the property due to the dubious fashion it was acquired.

Counsel submitted and pointed out that Section 37 of the Act is so broad that it allows the appellant to question title to property, which is reasonably suspected to have been dubiously acquired by a public officer abusing or misusing his office, position or authority to obtain such property. In the case of the property in issue, counsel submitted that the acquisition of the stand by the respondent could clearly be traced to Richard Sakala's position as chairman of Indeco Estates, the initial owners of the stand.

In his oral submission on ground one, counsel submitted that the learned trial Judge misapprehended the law in Section 24(1) of the Act when he stated in his

judgment that the law presupposes two situations to exist prior to exercising the power to issue a restrictive notice; that there should be an investigation of the person connected to the property for which an offence has been committed and that there is already a prosecution against the person. Counsel submitted that under the law it is not envisaged that the two situations (investigation and prosecution) must co-exist but that one must exist.

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On ground two, the appellant counsel reiterated, in his heads of argument, that the task of proving corruption and related offences was difficult and given the victimless nature of the crime direct evidence might not be available. He submitted that in certain cases perpetrators of the offences went to extreme lengths to cover up their wrong doing. Counsel made the foregoing submission to justify why the legislature did not forbid the issuance of fresh restriction notices. As far as he was concerned, if investigations were not concluded at the expiry of twelve months a fresh notice could be issued under the law.

In his oral submission, counsel stated that the law in issue did not provide for a renewal of a restrictive notice and that no such renewals were done or purported to be done by the appellant. What was done, he submitted, was the

issuance of a new restrictive notice at the end of twelve months in accordance with the law and as far as he was concerned the new notice was different from the expired one.

On ground three, counsel admitted in the heads of argument that Section 24 (1) of the Act did not expressly authorize the appellant to collect rent. Counsel, however, contended that the words "not dispose of or otherwise deal with any property" in the said Section 24 (1) were instructive in understanding the mischief

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sought to be addressed by the legislature. As far as Counsel was concerned, the power of the appellant in restricting the disposing of property or in dealing with the property included the power to direct that rentals collected be kept in safe custody pending the conclusion of the investigations.

According to counsel, the jurisprudence behind this was that a person being investigated should not benefit from the proceeds of the property. To this extent, counsel submitted that if the legislature had omitted the above quoted clause from the said Section (24 (1) the outcome of the on-going investigations would have been rendered nugatory or a mere academic exercise.

In his oral submissions, counsel argued that the learned trial Judge was wrong to have restricted the meaning of the notice to exclude the collection of rent.

In response to the arguments of the appellant, Mr. Sangwa, counsel for the respondent, also relied on the filed heads of argument which he argumented with oral submissions. With respect to ground one, counsel submitted in his heads of argument that under Section 24 (1) of the Act the Director General had power to issue restrictive notices, but that there were safeguards against possible abuse of the power. Counsel submitted that under Section 24 (5), the law allowed any person aggrieved by a directive in the restrictive notice to challenge the directive

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before the High Court, which had wide powers to confirm, reverse or vary the directive.

Counsel further submitted that if the High Court had to exercise its power to confirm, reverse or vary the directive the basis of the decision, that is the subject of review, ought to be availed to the Court. In respect of this appeal, counsel contended that it was not enough for the appellant to state that the respondent's acquisition of Stand No. 6955 was under investigations as such proposition defeated the essence of the powers of the High Court under Section 24 (7) of the Act.

In the view of counsel, there had to be a full disclosure to the trial Court as to the basis of and circumstances leading to the decision to issue a restrictive

notice. In the absence of such information, the trial Court would have no choice but to reverse the directive given in the restrictive notice, counsel submitted.

As far as counsel was concerned, all the restrictive notices that had been issued did not disclose who was being investigated and the nature of the offence alleged or suspected to have been committed. Counsel submitted that in order to comply with Section 24 (1) it was incumbent upon the appellant to disclose the identity of the person or entity under investigation and the nature of the offence

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alleged or suspected to have been committed. Counsel submitted that when the matter came up before the trial Court, the concerns raised by the respondent under Section 24 (1) were not addressed by the appellant, not even in the affidavit in opposition sworn to by one, Isaac Chilanga, the Chief Investigations Officer of the appellant.

Counsel submitted further that the appellant was not competent to question the respondent's title to Stand No. 6955 because under Section 33 of the Lands and Deeds Registry Act a certificate of title was conclusive evidence of ownership of the stand by the respondent. Counsel submitted that the powers of the appellant under Section 24 (1) were in aid of investigations of offences under the Act and

that it was not part of the statutory function of the Director General to question the ownership of any property.

On the facts alluded to in the affidavit in opposition, counsel submitted that there was no doubt that Indeco Estates, as original owners of Stand No. 6955, Lusaka, received value for the property; that if there were any problem with the way the respondent acquired the property, after it had passed through other private hands, it was up to the aggrieved party, and not the appellant, to go to Court and seek the necessary relief.

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Counsel submitted, in his heads of argument, that the appellant had raised issues, which were never disclosed in the affidavit in opposition presented to the lower Court. Counsel took exception to the assertion in the appellant's heads of argument that Stand No. 6955 was transferred to the respondent on the instructions of Richard Sakala, a person under investigations, and that the transfer was without the consent of Mwelwa Mumba Waine and her co-director, Mark Waine. Counsel submitted that in the affidavit in opposition before the trial Court there was no mention that Richard Sakala was the person under investigations.

Besides, counsel submitted that there was no mention that the transfer of the property was made by Richard Sakala. According to counsel, even if Richard

Sakala did what was alleged there was no evidence to show the connection between him and the respondent as an entity in its own right.

In his oral submission, counsel repeated what was contained in the heads of argument. He however, conceded that the learned trial Judge misapprehended the law when he said that under Section 24 (1) of the Act two situations must co-exist, that is, an investigation and prosecution of the person prior to exercising the power to issue a restrictive notice.

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Coming to ground two, counsel submitted in his heads of argument that the appellant's arguments show little regard for the rule of law. He submitted that the powers vested in the appellant were there for a specific purpose and could only be used in furtherance of that purpose. Whereas the appellant had a duty to enforce the law this had to be balanced against the respondent's interest to enjoy its property rights, counsel argued.

Counsel submitted that between 7th March, 2002 and 4th August, 2005, there had been three restriction notices issued under the guise of investigations, resulting in the respondent being denied its proprietary interests and rights in the property. With these restrictions in place, counsel submitted that the burden was on the

appellant to prove to the trial Court that it was necessary to continue the restrictions on the rights of the respondent to the property.

In his oral submission, counsel submitted that the law did not provide for renewal of notices and that the three restriction notices that were issued were independent of each other. He submitted that under the law, a restriction notice lasted for twelve months, if not earlier revoked; that it was, therefore, incumbent upon the appellant to complete all investigations within the twelve months.

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As for ground three, counsel submitted in his heads of argument that it lacked foundation. He submitted that the appellant had admitted that Section 24(1) of the Act did not expressly authorize it to collect rent and wondered on what basis the appellant was contending otherwise. He argued that to construe Section 24 (1), so as to confer authority on the appellant to collect rent, was clearly a violation of the right to property as guaranteed under Article 16 of the Constitution.

As far as he was concerned, the section did not empower the appellant to deprive the owner of the property, the property in the property but merely to restrict his ability to deal with the same without the consent of the Director General.

Counsel contended that the import of the law in Section 24 (1) of the Act was that a person under investigation retained all the proprietary rights, including the right to rent in the property, except that he could not alter them and sell or mortgage the property without the consent of the Director General.

In his oral submission, counsel merely emphasized what is contained in the heads of argument.

We have carefully considered the record of the proceedings before the trial Court, including the judgment of the Court that is the subject of appeal. We have

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also carefully evaluated the heads of argument of the parties and the oral submissions made before us by counsel representing the parties. In the manner the grounds of appeal have been presented and argued, it is clear to us that they are distinct and separate from each other and the best way to dispose of them is to deal with them seriatim.

The argument of the appellant, under the first ground of appeal, is that a criminal investigation is, by its nature, conducted in secrecy and as such there cannot be full disclosure of the investigations. As far as the appellant is concerned, the affidavit evidence filed before the lower Court showed that there was an

investigation going on relating to the manner Stand No. 6955, Lusaka, was acquired by the respondent.

On the other hand, it is contended by the respondent that the appellant has not provided clear evidence to sustain the issuance of the restriction notice under Section 24 (7) of the Act. As far as the respondent is concerned, there is no evidence on the identity of the person being investigated and as such the learned trial Judge is said to have exercised his discretion properly on review when he ordered the withdrawal of the restriction notice against Stand No. 6955, Lusaka.

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The power to issue a restriction notice by the Director General of the appellant commission under Section 24 (1) of the Act is not in dispute. Whether the Director General has power to issue a fresh restriction notice or simply renew the one already in force is a matter that will be considered in the second ground of appeal.

The power of the appellant to issue a restriction notice has been challenged for lack of supportive evidence. To appreciate the extent of the authority vested in the Director General, we propose to reproduce Section 24 (1) of the Act, which is couched in the following terms÷

24 (1) "The Director-General may, by written notice to a person who is the subject of an investigation in respect of an offence alleged or suspected to have been committed under this Act, or against whom a prosecution for such offence has been instituted, direct that such person shall not dispose of or otherwise deal with any property specified in such notice without the consent of the Director-General".

By the foregoing provision and as conceded by counsel for the respondent, the "investigation and prosecution" of the person for an offence under the Act need not exist at the same time for a restriction notice to issue. It was, therefore, a

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misdirection for the learned trial Judge to have come to the conclusion that there should have been both investigation and prosecution for a restriction notice to be issued.

In this appeal case, the basis for issuing a restriction notice was that an investigation had been launched against the respondent in the manner it allegedly acquired Stand No. 6955, Lusaka. This was the allegation and the affidavit in opposition filed by the appellant commission, clearly outlined the allegation, consistent with a corrupt act, that needed to be investigated.

In the affidavit evidence of the appellant, the person at the centre of the investigation is Richard Sakala, chairman of the board of directors of the disbanded Indeco Estates and a person with close links with the respondent. It is not in dispute that Indeco Estates was a wholly Government owned company. As chairman of the board, the allegation is that he corruptly facilitated the transfer of the stand to the respondent through various stages by using companies and individuals as shields and by under-valuing the Stand. In our view, it cannot be said that there was no ***prima facie*** evidence on which to issue a restriction notice as the person or persons, the subject of investigations, is or are mentioned.

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We agree that under Section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by the holder of the certificate, in this case the respondent. But we also know that under the same section or Section 34, a certificate of title can be challenged and cancelled for fraud or for reasons of impropriety in its acquisition. So the statement that a certificate of title is conclusive evidence of ownership of land is only true when there is no challenge based on fraud. We note that in this appeal, the appellant is alleging fraud. We allow ground one.

On ground two, the thrust of the argument of the appellant is that because of the difficult nature of the investigations, involving sophisticated perpetrators of criminal offences, the appellant was justified in issuing fresh restriction notices in order to conclude investigations. As far as counsel is concerned, the law does not provide for the renewal of a restriction notice. The respondent's reaction is that the appellant's arguments show little regard for the rule of law and the constitutional right of the respondent to the property. Counsel agreed with the appellant's counsel that there was no provision for the renewal of a restriction notice under the law.

At the outset, we agree with both counsel that there is no provision for the renewal of a restriction notice under the law. What is in issue here is whether the

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appellant commission can issue a fresh restriction notice after the earlier one has expired. Under Section 24 (3) of the Act, the life of a restriction notice is 12 months if not earlier cancelled by the Director General. To constitute a fresh restriction notice, the appellant must show that the notice was issued well after the previous notice had expired and not before it expired. See the case of ***University of Zambia Council Vs J. M. Calder***

In this regard, we are satisfied that all the restriction notices that were issued between the 7th March, 2002 and the 4th August, 2005 were fresh notices because

they were not issued during the currency of the expired notices. We are also satisfied that these fresh notices were valid because there is no provision under the Act that expressly forbids the issuance of fresh notices. In the event we allow the second ground of appeal.

With regard to the last ground of appeal, we note that the respondent has challenged the power of the appellant to direct the payment of rentals, realized from Stand No. 6955, Lusaka, into an account controlled by the appellant. While the appellant is of the strong view that it has such power under Section 24 (1) of the Act, the respondent thinks that the proposition has no foundation in law.

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The arguments, as we see them, clearly point to the need for the Court to interpret the extent of the powers of the Director General under Section 24 (1), reproduced above. We have already taken the position that the Director General can issue a restriction notice but of relevance now is whether he can also restrict the collection of rent by the respondent in the restriction notice. The appellant agrees. The respondent has argued to the contrary, pointing out that a person under investigation retains all the proprietary rights, including the right to rent the

property and collect rent, except that he cannot sell or mortgage the property without the consent of the Director General.

As a starting point, we agree with both counsel that Section 24 (1) does not expressly give powers to the Director General to restrict the respondent's right to access the rent realized from the properties, the subject of investigations, during the currency of the restriction notice. In our view and as pointed out by the appellant's counsel, the words "……shall not dispose of or otherwise deal with any property specified in such notice ..……" found towards the end of Section 24 (1) are crucial to the resolution of the issue at hand.

The section generally forbids a person who is under an investigation for an offence alleged or suspected to have been committed under the Act or is under

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prosecution from disposing of or otherwise dealing with the property specified in the restrictive notice . The words "dispose of" as used in the section mean to sell, transfer or part with possession or ownership of the property. The words "deal with" mean, in their ordinary usage, to manage the property. Further, "manage" means to be in charge or make discussions in a business or an organization. So the act of obtaining a mortgage or collecting rent in respect of the property, the subject of investigations, is to deal with or manage the property.

Our understanding of the restriction notice is that once it is in force, the freedom of the party affected to dispose of or deal with the property specified therein is limited as every activity on the property is subject to the consent of the Director General. You cannot rent the property and collect rent or mortgage or transfer it without the consent of the Director General. We note, however, that in this particular case, the Director General did allow the respondent to collect rent on the understanding that the rent collected was to be deposited in the account controlled by the appellant.

We do not think that the measures taken were contrary to the spirit and intent of Parliament in enacting Section 24(1). As far as we can ascertain, the measures were deliberately intended to protect the interests of the State in case the

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matter was concluded in its favour. However, if the investigations showed that the respondent was innocent, the rent collected during the period of the restriction notice, would inevitably be refunded to the respondent, as legitimate owner of the property, with interest. Ground three also succeeds.

Having succeeded in all the grounds of appeal, we allow the appeal with costs, both in this Court and in the Court below, to be taxed in default of agreement.

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D. M. LEWANIKA
DEPUTY CHIEF JUSTICE

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P. CHITENGI **S. S. SILOMBA**
SUPREME COURT JUDGE **SUPREME COURT JUDGE**