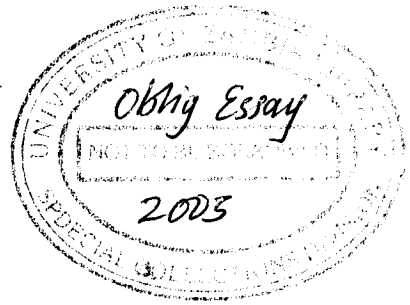



THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW



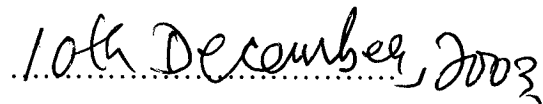
I recommend that the Obligatory Essay prepared under my supervision by Jones Jowitt Gwaba entitled:

“A CRITICAL DISCUSSION AND ANALYSIS OF THE RELEVANCY, IF ANY,
OF THE LANDS ACQUISITION ACT, 1970 AND THE LANDS ACT, 1995
IN ZAMBIA’S LIBERALISED MARKET ECONOMY”

be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements relating to format as laid down in the regulations governing obligatory essays.


.....

Judge K.C. CHANDA (RTD), LL.M (ZAMBIA)
(Supervisor) LL.M (LONDON)
LL.B (ZAMBIA)
AHCZ


.....

Date

UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

OBLIGATORY ESSAY

ON

A CRITICAL DISCUSSION AND ANALYSIS OF THE
RELEVANCY, IF ANY, OF THE LANDS ACQUISITION ACT, 1970
AND THE LANDS ACT, 1970

BY

JONES JOWITT GWABA
(COMPUTER NUMBER 97299367)

SUBMITTED TO THE UNIVERSITY OF ZAMBIA IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS OF
THE BACHELOR OF LAWS (LLB) DEGREE PROGRAMME

UNIVERSITY OF ZAMBIA

LUSAKA

NOVEMBER, 2003

DEDICATION:

This paper is dedicated to my dear wife Mary-Regis Mwiila and my first cousin Redman Miyanda Gwaba who encouraged me to take up studies in Law. It is also dedicated to my children who challenged me to take up studies on my fortieth birthday. My only regret is that Miyanda has not lived to witness the completion of my work.

God's blessings to you all!

ACKNOWLEDGEMENTS

This work is only complete by my rendering profound thanks to my supervisor, Mr. Justice K.C. Chanda (rtd), Senior Lecturer, School of Law, University of Zambia for sparing time to guide me and produce this piece of work. I am forever indebted to him for his constructive criticisms and invaluable suggestions.

It would be grossly unfair for me not to thank my dear wife Mary-Regis for all the assistance and encouragement that she has and continues to give me in my work. My children Mary-Bernadette, Yolathe, Frances, Bibiana and Frank-Sheppard also appear on my list of thanks for their support and tolerance during my long hours of absence from home. I acknowledge the inconvenience that I caused them and I am proud of them all. Had it not been for Mary-Regis this work might not have been what it is.

Special tribute also goes to my Secretary Ms. G. Doroba and Ms B. Musonda for assisting in typing and re-typing my essay. I greatly appreciate their spirit and I am glad to proudly say my work was ably typed despite other office work.

I would also like to record a special word of thanks to the Management at my place of work for releasing me from office work to enable me complete this work in particular and my studies in general. I indeed thank them all for everything that they did.

Lastly, but by no means least, I wish to register my sincere gratitude to Mr. J. Mbiji, Information Officer and the Management at Zambia Land Alliance for allowing me unbridled access to various latest articles, publications and materials on the land question in Zambia. I have no doubt that this work would not have been the same without their co-operation and support.

ABSTRACT

This essay attempts to answer the question whether or not the Lands Acquisition Act of 1970 and the Lands Act of 1995 are necessary pieces of legislation in Zambia's liberalized market economy. This comes in the light of the fact that whereas the Lands Act, 1995 seeks to promote investment, both local and foreign, in agriculture, the Lands Acquisition Act, 1970 permits the President to compulsorily acquire land if, in his opinion and in the interests of the Republic, he deems it necessary so to do.

At the time of Zambia's independence in 1964, the country inherited different laws in relation to the system of land tenure. The land tenure system in Crown lands, making up 6% of the territory, was governed by English Law while in the Reserves and Native Trust Lands it was governed by customary law. At independence the Crown Lands were re-named State Lands, with English Law continuing to be applied. This duality of laws applicable to these land tenure systems has continued to exist to this very day. The Reserves and the Trust Lands have since been re-named customary areas.

Following government's inability to acquire vacant and undeveloped land owned by 'absentee landlords', the Lands Acquisition Act was promulgated in 1970. This was followed five years later by the enactment of the Lands (Conversion of Titles) Act of 1975 which abolished freehold tenure and converted it into leasehold tenure. This statute did not allow any transactions in land without the consent of the President, all Zambian land having been vested in the holder of that office for and on behalf of the people of Zambia. This piece of legislation was very much in tune with the One Party State socialist learnings of the Administration of then President Kenneth David Kaunda.

In 1991, the Kaunda Administration lost the Presidential and Parliamentary elections to the Movement for Multi-Party Democracy (MMD) led by Frederick Jacob Titus Chiluba – a party with very strong capitalist leanings. With the inherited socialist economy in ruins, the Chiluba Administration abandoned the Kaunda Administration's economic policies wholesale. One of the casualties of this change in policy was the Land

(Conversion of Titles) Act of 1975 following the enactment of the Lands Act, 1995. While the Lands Act, 1995 sought to protect the interests of landholders in customary areas, it at the same time permitted the conversion of customary tenure into leasehold tenure. The argument was that land under customary tenure could only be used as collateral for credit if the holder had title to it.

These policy changes, which appear to have been induced by international financial lending institutions and donors, have brought about their own problems such as erosion of the authority of traditional rulers, prospects of marginalization and over-population in the remainder of customary areas and land speculation.

In this scenario of land shrinkage, will the State eventually invoke the provisions of the Lands Acquisition Act and re-acquire land from, investors? or will it allow insidious landlessness to continue under the present form of the Lands Act, 1995? Possible courses of action are, therefore, being offered by way of recommendations.

This essay comprises five chapters. The first chapter is an introductory one, identifying the problem under investigation and the method of research. The second chapter focuses on the land tenure system in pre-colonial Zambia, the third in colonial Zambia and the fourth in post-colonial Zambia. With each epoch, the country's land tenure system has undergone some changes which help understand the current land law and policy in Zambia. Chapter five argues in favour of the retention of the Lands Acquisition Act of 1970 while chapter six argues against the retention, in its present form, of the Lands Act of 1995. Chapter seven carries our conclusions and recommendations namely, that the Lands Acquisition Act of 1970 is more relevant to Zambia now than before the enactment of the Lands Act, 1995; and the Lands Act, 1995 itself should be comprehensively reviewed in order to stem land speculation and insidious landlessness, particularly in relation to the poverty stricken dwellers in customary areas.

TABLE OF CONTENTS

	PAGE
Dedication	i
Acknowledgement	ii
Abstract	iii
CHAPTER ONE	
-----	1-5
1.0. Statement of the Problem	1
1.1. Definition of Terms and Concepts	2
1.3. Methodology and Data Collection	5
CHAPTER TWO	
-----	6-11
2.0. Traditional Land Tenure System	6
2.1. Group Title to Land Ownership	7
2.2. Vesting of Land in the Chief	9
CHAPTER THREE	
-----	12-21
3.0 Alienation and Administration of Land	12
3.1. Sources of Title to Land	12
3.2. Native Reserves	15
3.3. Crown Lands	15
3.4. Land Tenure Under the Federation of Rhodesia and Nyasaland	16
3.5 Northern Rhodesia (Gwembe District) Order-in-Council..	17
3.6 Status of Land in Barotseland	17
3.7. Nature of Interests in Reserves and Trust Land	19
3.8. Land Alienation to European Settlers	20

CHAPTER FOUR

-----	22-29
4.0. Vesting of Land in the President	22
4.1. The 1975 Land Reforms	25
4.2. The Land (Conversion of Titles) Act, 1975	25
4.3. Land Control under the Land (Conversion of Titles) Act, 1975	27
4.4. Extension of Control under the Land (Conversion of Titles) (Amendment No. 2) Act, 1985	28

CHAPTER FIVE

-----	30-39
5.0. Government Inability to Acquire Land	30
5.1. The Relevancy of the Lands Acquisition Act, 1970	34

CHAPTER SIX

-----	40-49
6.0 The Lands Act, 1995	40
6.1. Vesting of all Land in the President	41
6.2 President not to Alienate Land and Customary Tenure	41
6.3. Customary Holdings to be Recognized and to Continue.....	43
6.4 Conversion of Customary Tenure to Leasehold Tenure.....	43

CHAPTER SEVEN

-----	50-54
7.0. Land Tenure Systems in Zambia	50
7.1. Lands Acquisition Act, 1970 to Continue	50
7.2. Inadequacies of the Lands Act, 1995	51
7.3. Recommendations	52

CHAPTER ONE

INTRODUCTION

1.0 STATEMENT OF THE PROBLEM

This essay is concerned with answering the question whether or not there is any relevance, in a liberalized market economy, of the Lands Acquisition Act, 1970 and the Lands Act, 1995. What has necessitated this discussion and analysis is the fact that in 1991 Zambia made a deliberate transition from a One Party State to a multi-party democratic dispensation. One significant consequence of this was the change in the country's economic policies.

Whereas under the One Party State the Administration of Kenneth David Kaunda advocated a centrally controlled economy, the successor Administration of Frederick Jacob Titus Chiluba advocated a liberalized market economy consistent with private ownership of property. In this latter set up, the role of the State is merely to provide an enabling environment for economic investment and growth, with the so-called market forces of supply and demand playing a prominent role. In the former, the commanding heights of the economy are controlled by the State and communal ownership of property is its hallmark.

In a liberalized market, of which the philosophy is non-State participation in the economy, is it not a contradiction that the State should, by virtue of the fact that the Lands Acquisition Act, 1970 gives the President power "whenever he is of the opinion that it is desirable or expedient in the interests of the Republic so to do, to compulsorily acquire any property of any description?"¹

On the other hand, the Lands Act, 1995 seeks to promote private investment, particularly in agriculture, by encouraging leasehold tenure over land governed by customary

¹ Lands Acquisition Act of 1970, section 3.

law. In this regard, all land in Zambia vests absolutely in the President and is held by him in perpetuity for and on behalf of the people of Zambia.² The Act further empowers the President to “alienate land vested in him” to any Zambian or non-Zambian national.³

1.1. DEFINITION OF TERMS AND CONCEPTS

In order to intelligibly discuss the terms and concepts that form the basis of this essay, it is necessary that from the outset the said terms and concepts are defined. Law, simply defined, is a set of rules and norms governing society.⁴ Law plays various roles in society and is generally regarded as an instrument to attain ends and also as a technique of social ordering or engineering. It can also be seen as a means of planning and directing change or as a means of furthering development.⁵ Thus law is an instrument of change. In the sphere of land law, the people must be in effective control of land in order for them to be able to make a meaningful living out of it. The basic need of the landowner is security for his rights; he requires to be protected in his ownership and his enjoyment of the land. For this reason, the laws regulating land should accordingly change with time, social, economic and political requirements. To this extent, the law will determine how land is held in each particular society at any given time.⁶

Land, from a legal point of view, means not only the ground but also the sub-soil and all the structures and objects like buildings, trees and minerals standing or lying beneath it. This concept of land is often expressed in the Latin maxim “*quic quid platantur solo so cedit*”, meaning whatever is attached to land becomes part of the land. The Lands Act, 1995

² The Lands Act No. 29 Of 1995, section 3

³ Ibid., sections 3(2) and 3(3)

⁴ LORD LLOYD OF HAMPSTEAD, INTRODUCTION TO JURISPRUDENCE 49 (3rd ed. 1972).

⁵ A.A. Nefu Millo, *The Development of Land Ownership in Zambia, Tanzania and Nigeria* (1980). Obligatory Essay. University of Zambia. Lusaka. P.2

⁶ M. Haimbe, *The Effect of the Lands Act, 1995 on Customary Land Tenure and Agricultural development. Is this the way forward?* (2000). Obligatory Essay. University of Zambia. Lusaka. P.3

defines “land” to mean “any interest in land whether the land is virgin, bare or has improvements, but does not include any mining rights as defined in the Mines and Minerals Act in respect of land.”⁷ The significance of defining land lies in the fact that land is the core of every society. Its importance as an asset for development does not only depend on its Geography, but also on its importance as a basic resource for the production of food, water and mineral resources.⁸ Thus land is of fundamental importance to the life of any society. The importance of this basic need has been attributed to the fact that land, despite its increase in demand, does not grow. This proposition advocates for more and efficient use of land. It is common knowledge, therefore, that there ought to be law that must regulate the use of land, ownership and disposal. An evaluation of the governing system regarding land is thus a necessary condition in the process of identifying rights of parties, their access to the resource and to help appreciate legal and institutional impediments towards its enjoyment.⁹

Any discussion of matters relating to land policy have to inevitably make reference to land tenure system. This is because the land tenure system of any given country has a long-term impact on the development of any country’s agricultural sector in particular and the economy in general. For countries like Zambia that wish to diversify their economies through the promotion of this sector, the land tenure system must be formulated in such a way as to be conducive to agricultural development and economic growth in general. This entails that the land acquired should be utilized and not abandoned for any lengthy number of years. In this regard, the laws relating to land determine the tenure system in turn.

⁷ *Supra* note 2, section 2

⁸ M.K. Hansungule, *Land and Tree Tenure Project*, LITERATURE REVIEW (1995)

⁹ L. Muleya, *The Effect of the Zambian Land Tenure System on Agricultural Development*. LL.M. Thesis (1990). University of Zambia. Lusaka. (Unpublished).

Colson defines “tenure” as being “either the legal rules regulating the acquisition and use of land, the pattern of holdings at a given period, distribution of rights in land among the population or a combination of these.”¹⁰ On the other hand, Collins defines tenure as simply “a right to hold property.”¹¹ Other scholars have referred to tenure as a system of or condition upon which land is held. For purposes of this essay, tenure is simply defined as the system of land ownership. It refers to the rights of and the extent to which the population can exercise such rights in ownership of property.

In most states, tenure has varied from one epoch to another. This had been necessitated by the very fact that various administrative authorities have governed the territories from one epoch to another.¹² For instance, the shift from the pre-colonial era to the time a territory became a colony inevitably meant that the land tenure system had to be modified to suit the colonial settlers. The modification, however, meant that the tenure was to be introduced to suit the obtaining social, economic and political environment. The result, in the case of Northern Rhodesia, was the duality of tenure being introduced, which was carried over into independent Zambia on 24th October, 1964.

1.2. SCOPE

For purposes of an orderly discussion and analysis of the issues at hand, this essay has been divided into seven chapters, with this one as the first. The next three chapters devote their attention to the land tenure systems in Zambia from the pre-colonial period through to the colonial and post-colonial periods. Chapter Five discusses the relevancy of the Lands Acquisition Act, 1970 in Zambia’s liberalized market economy while the sixth chapter

¹⁰ E. Colson, *Land Law and Land Holding among the Valley Tonga*, SOUTH-WEST JOURNAL OF ANTHROPOLOGY, VOL. 22 NO. 1 (1966).

¹¹ P.H. COLLINS, DICTIONARY OF LAW 239 (2ND ed., 1986).

¹² C.M.N. White, *A Survey of African Land Tenure Systems in Northern Rhodesia*, J.A.A. VOL. NO. 4 (1959).

discusses that of the Lands Act, 1995. The final chapter draws some conclusions and makes a number of recommendations. The Lands Act, 1995 brought about a radical change in the country's land tenure system. This change has not been kindly received in some quarters of the country's population, particularly the traditional rulers and some non-governmental organizations, prompting the Government seriously to start thinking of formulating a new land policy. It is, therefore, hoped that this essay will contribute, in no small measure, to the debate on the country's land policy, particularly as to whether the Lands Act, 1995 should be maintained in its current form, modified, or even repealed. As for the Lands Acquisition Act, 1970, arguments are put forward justifying the need for its retention, more so given the present form of the Lands Act, 1995 and the free market economy presently being pursued by Zambia.

1.3. METHODOLOGY AND DATA COLLECTION

The bulk of this research material came from sources held by the University of Zambia Library, the National Archives, the Zambia Land Alliance, published works, gazette notices and other official publications.

Analysis of the data is not confined to the legal-framework alone, but also focuses on socio-economic and political factors in so far as they relate to land law and policy.

CHAPTER TWO

PRE-COLONIAL SYSTEM OF LAND TENURE IN ZAMBIA

2.0. TRADITIONAL LAND TENURE SYSTEM

The Republic of Zambia is a former colony of Britain. The name 'Zambia' was adopted at independence on the 24th October, 1964. Before then, the territory was known as Northern Rhodesia following the establishment of direct Colonial Office rule in 1924. Prior to that, during the 1880s and 1890s the British South Africa Company (BSA Co.) had secured control over the territory through military expeditions, concessions from African leaders, and treaties with rival European powers. In the period preceding the advent of the BSA Co., the land tenure system that prevailed in the territory that would become later day Zambia was based on the various traditional or customary practices of the various ethnic groups. It is acknowledged that even in present day Zambia, "No single body of customs prevails across the country; in fact, local variations are common. The term customary law encompasses a host of different prevailing customs"¹

The traditional land tenure system allowed persons within a given area to easily access land through their traditional rulers. That land could be freely passed on to family members through inheritance in accordance with the existing traditional customs and norms. However, this system did not allow for exclusive rights in land as it was mostly held in common by the community. Individual ownership of land on a title deed was not provided for under this system.² During the pre-colonial period, people were linked to land through their membership to communities. An individual's right to land came with citizenship in a village.³ The village

¹ M. Roth and S.G. Smith (ed.), *Land Tenure, Land Markets and Institutional Transformation in Zambia*, RESEACH PAPER 124 (1995).

² Ministry of Lands, *Draft Land Policy*, 5 (2000).

³ L. Bastiaan, *Land Tenure in Zambia*, (1999).

membership meant access to land and consequently villagers' concern was social relationships rather than property rights. It was the relationships to persons through whom land was acquired and by whom it could be used that were crucial, not rights to land as such.

Bentsi-Enchill shares the above view and states:

“That land tenure systems should and do vary from community to community stands to reason and is largely accounted for by the unique historical development of each political grouping and consequent variation of legal and institutional structures in different polities. Therefore, tenure systems represent relations of men in society with respect to that essential and often scarce commodity, land. Accordingly, although actual patterns differ from system to system, there are certain uniformities of type in the relationships involved which make it possible to apply a common scheme of analysis to the different systems.”⁴

2.1. GROUP TITLE TO LAND OWNERSHIP

It is perhaps the phenomenon of group title, the fact that everywhere groups of varying size are recognized or recognizable as the owners of land, that most forcibly strikes the foreign observer almost as distinctive or different. In *Amodu Tijani V Secretary, Southern Nigeria*⁵ Lord Haldane, quoting Raines, C.J. gave this opinion:

“The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village, or the family, never to the individual.”

Group title, however, is not incompatible with ownership by individuals of similar or lesser interests in land. Nor is it peculiar to African systems.

In the large number of traditional African polities, the allodial title is regarded as being in the community as a whole or in a chief as ‘trustee for all the people’. Beneath the umbrella of this group title is a progressive individualization of interests specific to particular portions of the group-owned land and vested in sub-groups and individuals. It is the unapportioned areas which, like public lands everywhere, remain under the direct supervision of the appropriate group organization.

⁴ K. Bentsi-Enchill, *Do African Systems of Land Tenure Require a Special Terminology?* 115 VOL. 9 NO. 2 (1966)

⁵ *Amodu Tijani V Secretary, Southern Nigeria* (1921) 2 A.C. 399

The fact of land belonging to the community under African customary law is also acknowledged by Elias, a prominent African Scholar who writes:

“ With respect to land, a Nigerian chief is reported to have said: ‘I conceive that land belongs to a vast family of which many are dead, few are living and countless members are unborn’. The universality of this concept throughout both Sudanese and Bantu Africa has been confirmed again and again wherever indigenous societies have been studied. Land is corporately owned and not normally inalienable.”⁶

He further argues that land-holding by African customary law is neither ‘communal’ holding nor ‘ownership’ (in the strict English sense of the term). The term ‘corporate’ would be a better description of the system of land-holding, since the relation between the group and the land is invariably complex in that the rights of the individual members often co-exist with those of the group in the same parcel of land. But individual members hold definitely ascertained and well-recognized rights within the comprehensive holding of the group. The chief is everywhere regarded as the symbol of the residuary, reversionary and ultimate ownership of all land held by a territorial community. He holds on behalf of the whole community in the capacity of a caretaker or trustee only.⁷ Elias’s views are supported by later studies of traditional systems of land tenure in sub-Saharan Africa. According to the Food and Agricultural Organization (FAO), traditional sub-Saharan society is dominated by lineage relations. “The lineage based system of land relations can be characterized as a system under which land is held under corporate tenure, implying that it is subject to strong communal regulation. The general principle underlying it is that each member of the group is entitled to be allocated a sufficient amount of land to support his family. Moreover, the allottee has possession and use of the land as long as it is cultivated and the heirs would

⁶ T.O. ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW 162 (1956).

⁷ *Ibid.*, at 164.

normally be given the land that was cultivated at the time of his death, unless the rights of access are subject to periodic rotation.”⁸

What the above means is that the individual (or household) who possesses and cultivates the land is considered as a temporary trustee or manager of the corporate property of the whole lineage and, as a result, is not allowed to dispose of the land freely since it belongs to the higher social entity whose representatives only are empowered to make decisions in land matters. The FAO is emphatic that:

“Indeed, in so far as the land is emotionally identified with the ancestors whom it is believed to provide with an everlasting shelter, the objective of keeping it under the control of the community is viewed as an infallible way of maintaining the community’s social integrity. Even if the lineage territory comprises more land than can be cultivated by its members, the surplus land is entrusted to the chief who has to keep it on behalf of the whole social group. Revealingly, members of the group do not lose their right of cultivation of land by leaving the tribal territory; upon their return, they always reclaim their right. It is only when they are formally expelled from the group that individuals lose all their membership rights, including access to cultivable lands.”⁹

2.2. VESTING OF LAND IN THE CHIEF

In the Zambian case, it has been noted, for example, that most chiefs in the Gwembe Valley area of Southern Province are largely a creation of the colonial administration. Chiefs, therefore, hold little locally legitimate authority over the use and allocation of land. Headmen and chiefs cannot, for instance, dispossess individuals of their lands, nor do chiefs possess any allodial rights to local land and resources. Individuals and lineages control most lands and unclaimed areas are held loosely by the village as a whole, not by the headman or chief. Historically, therefore, chiefs have not held the power to grant land, they have simply served as repositories of knowledge about who owned which land.¹⁰

⁸ J-P. Platteau (ed.), *Land Reform and Structural Adjustment in sub-Saharan Africa: Controversies and Guidelines*, 88 FOOD AND AGRICULTURAL ORGANIZATION ECONOMIC AND SOCIAL DEVELOPMENT PAPER 107

⁹ Ibid. at 89

¹⁰ T. Brown and B. Siamwiza, *Chiefs, Commoners and Enclosures in the Gwembe Valley, Zambia*, 7 RESEARCH PAPER NO. 17 (2002).

The nature of indigenous title to land in Northern Rhodesia is very aptly captured by Mvunga who quotes Mackenzie-Kennedy, Chief Secretary to the Northern Rhodesia Government, who was once a Native Commissioner and gave his impressions of indigenous tenure in the territory excepting Barotseland as follows:

“The land... as a tribal property, is vested in the chief, to be allotted by him in accordance with the needs of his tribesmen, each one of whom was normally entitled to as much as he could make use of, abandoned lands reverting to the tribe to be re-allotted by the Chief or one of his ad hoc nominees, whether sub-chief, clan head or village headman.

...While agricultural lands were allotted to individuals, pastoral tracts were used communally. The cultivator acquired a right to the land against all others so long as he made use of it: the gardens lying fallow could not be occupied by anyone else until definitely abandoned. The stock owner acquired no rights as against his fellow villagers over his grazing areas...

... Unoccupied and waste lands were held for the tribe and rights to grazing, timber and other forest produce, hunting, and fishing rights, the right to use water and to manufacture salt, the right in fact to all Nature's gifts, were held in common.”¹¹

A Land Tenure Committee set up by the Northern Rhodesia Government to examine measures of providing land both in rural and urban areas, amongst which its terms of reference were, to investigate, *inter alia*, “the systems of land tenure and inheritance prevailing in the native areas of the Territory, with particular reference to applicability to the conditions brought about by changes in social, political and economic lives of inhabitants...” reported as follows:

“As far as it is possible to generalize, native land tenure in Northern Rhodesia excluding Barotseland, can be described as communal ownership by the tribe vested in the Chief, coupled with an intensely individual system of land usage. Every individual member of the tribe has the right to as much arable land as he needs for himself and his family, and so long as he is making use of this land he enjoys absolute legal security to tenure”¹²

From the Committee's findings, it is apparent that an individual has the right to use the land, probably for as long as he or his heirs want to or until he is excommunicated for some serious offence. In such an event, his land reverts to the Chief for re-allocation. The Chief has what Mvunga calls “interests of control”. White, the government Land Tenure Officer,

¹¹ Mvunga, M.P. (1982), *Land Law and Policy in Zambia*, 20 ZAMBIAN PAPERS NO. 17

¹² *Ibid.* at 16

who conducted an inquiry in all the provinces except Barotseland, shared this view. He stated:

“Specific land rights are acquired and exercised by individuals. Such land rights are attributes of persons, and they emerge as individualistic rights, except in limited cases where some elements of lineage land holding is present.... Consequently, in general the sum total of rights which make up the features of African land tenure in Northern Rhodesia can only be regarded as equivalent to individual tenure.”¹³

What should be noted in all the foregoing is that customary land tenure in present day Zambia did not disappear with the advent of colonial rule in the former territory of Northern Rhodesia. This system of land tenure has continued to survive and we will be dealing with it in later chapters, particularly in relation to the Lands Act, 1995.

We now proceed to look at the land tenure system during the colonial period. This is important because the colonial period introduced a system of land tenure that was alien to customary land tenure and this system has also continued to exist side by side with the traditional system.

¹³ C.M.N. White, *A Survey of African Land Tenure*, J.A.A. VOL. 12 NO. 1 (1959).

CHAPTER THREE

LAND TENURE SYSTEM IN COLONIAL ZAMBIA

3.0. ALIENATION AND ADMINISTRATION OF LAND

The emissaries of Cecil Rhodes and the BSA Co. arrived in Barotseland in 1884 to make a treaty with then – paramount chief Lubosi Lewanika. Treaties concluded with most of the chiefs in Zambia during the 1890s guaranteed “African” rights to large areas of tribal land in exchange for mineral concessions. In 1889, the Barotseland North- Western Rhodesia Protectorate was created¹ as a result of the grant of the Royal Charter to the B.S.A. Co. to make treaties with the local people to the north of the Zambezi River and to make land grants. Lewanika gave the B.S.A. Co. concessions for the present Southern and Copperbelt Provinces between 1900 and 1909. The B.S.A.Co. went ahead to alienate and administer land on the basis of the extent of the ‘territory’ claimed by Lewanika. However, this concession does not appear to have granted land rights to the Company over unalienated land. Lewanika did not at this stage part with his land as grants by the Company to European settlers were dependent on his approval.

3.1. SOURCES OF TITLE TO LAND

The sources of title to land in Northern Rhodesia were said to be the declaration of protectorate and the granting of concessions. The B.S.A. Co. claimed ownership of land in North Eastern Rhodesia by virtue of being the administering authority. It was on this basis that the company proceeded to alienate or grant unoccupied or vacant land. The view that protectorate status meant ownership of vacant land by the Crown or its agent was in 1901 judicially endorsed in the British Central Africa Protectorate (later Nyasaland) in the case of

¹ North-Western Rhodesia Order-in-Council of 1889 created protectorate status in North-Western Zambia.

*Cox V African Lakes Corporation Limited*² (also known as the “Kombe Case”). Nunan, J., ruled that the effect of a protectorate, “was to vest in the Crown the entire soil of the British Central African Protectorate not especially exempted and to confer upon the Crown the same prerogative and sovereign rights as in England...”

In 1919, the view that protectorate status entailed ownership of vacant lands by the Crown or its agent was dispelled by the Privy Council in *re: Southern Rhodesia*.³

The central issue in this case was to establish who owned the vacant and unoccupied lands in Southern Rhodesia: was it the Crown, the B.S.A. Co. or the indigenous people? The Privy Council rejected the Company’s argument that they owned the land by virtue of the fact that they were the first to occupy the territory. In rejecting the argument, the Privy Council stated that “in itself and by itself, occupation is not title”. It went further to assert that the Crown could only establish ownership or dominion over the land by an express indication and such an indication should be expressed by an Order-in-Council. In *Sobhuza II V Miller and Others*,⁴ the Privy Council upheld the effect of an Order-in-Council which expropriated indigenous land.

The British government took over the administration of the then Northern Rhodesia from the B.S.A. Co. on 1st April, 1924. Thus, with effect from that date, the B.S.A. Co. assigned and transferred to the Crown all such rights and interests in land as it claimed to have acquired by virtue of the concessions granted by Lewanika. The change of administration was followed with the passage of the Northern Rhodesia Order-in- Council of 1924⁵ which,

² M.P. MVUNGA, THE COLONIAL FOUNDATIONS OF ZAMBIA’S LAND TENURE SYSTEM (1980)

³ *Re: Southern Rhodesia* (1919) A.C. 211

⁴ *Sobhuza II V Miller and Others* (1926) A.C. 518

⁵ The Northern Rhodesia Order-in-Council was published in the Government Gazette Notice No. 4 of Friday 21st March, 1924.

amongst others, constituted the office of the Governor in place of the Administrator. Further, the Northern Rhodesia Order-in-Council of 1924 revoked the Orders-in-Council of 1911.

The Order-in-Council of 1924 empowered the Governor to make and execute grants and dispositions of lands within the territory.⁶ In addition, the Order-in-Council provided that a native may acquire, hold, encumber and dispose of land on the conditions as a person who is not a native,⁷ provided that no contract for alienating land could be valid unless it was made in the presence of a Magistrate and attested by him or her. The Order-in-Council of 1924 also provided for the securing of the interests of the indigenous population.⁸

Shortly after the 1924 Order-in-Council came into operation, a number of Commissions were appointed to inquire into what lands should be set aside for occupation by the African population. As a result of the work of the Commissions, the Northern Rhodesia (Crown Land and Native Reserves) Order-in-Council of 1928 was passed.⁹ By this Order, land other than that in Barotseland was divided into Crown Land and Native Reserves respectively. The 1929 Northern Rhodesia (Supplemental) Order-in-Council extended the areas of reserves as described in the schedule of the 1928 Order-in-Council. Generally, Crown Land consisted of land earmarked for European settlements and mining along a narrow strip of about 32 to 48 kilometres on either side of the railway

line from Livingstone to Copperbelt, including thin pockets of land near Chipata, Mbala, Mkushi, Mumbwa and Mwinilunga.¹⁰

⁶ Order-in-Council of 1924, Article 2

⁷ *Ibid.*, Article 42

⁸ *Ibid.*, Article 43

⁹ The Order-in-Council of 1928 was Gazetted on Friday 27th April, 1928.

¹⁰ M. Roth and S.G. Smith (ed.), *Land Tenure, Land Markets and Institutional Transformation in Zambia*, 15 RESEARCH PAPER 124 (1995).

3.2. NATIVE RESERVES

The 1928 Order-in-Council provided that the lands designated as native reserves were to be vested in the Secretary of State and set apart for the sole and exclusive use and occupation of the indigenous population of Northern Rhodesia. It laid down the following principles:-

- (a) No portion of any native reserve could be granted to any person other than a native, except for a lease for a period not exceeding five years. However, the Governor was empowered to set aside in any native reserve a tract of land for use as a government station or for other public purpose;
- (b) No person other than a native could occupy any portion of a native reserve except by permission by the Governor, with the approval of the Secretary of State;
- (c) The Governor could with the approval of the Secretary of State make adjustments of the boundaries of any native reserve as may appear to be necessary or desirable.

This demarcation of land into reserves meant that all land outside the reserves became Crown land on which the native population could not settle without the permission of the Crown.¹¹ The settlers could, however, acquire land in reserves only for a period of five years if this was considered by the Governor to be in the interest of the indigenous people.

3.3. CROWN LANDS

Land alienation for white settlers along the line of rail was initially framed in terms of freehold tenure for a preliminary period of five years during which personal occupation and development of the alienated land was mandatory. In other areas, farms were alienated to settlers for periods not exceeding 99 years, while leases of ranches of over 6,000 hectares

¹¹ A. Ng'andwe, *National Conference on Land Policy and Legal Reform in Third Republic of Zambia, 19th-23rd July, 1993*, Report at P.9.

were issued for terms not exceeding 30 years.¹² Considerable disaffection with freehold tenure arrangements eventually led to a review of land policy by the Eccles Land Tenure Committee in 1943. The Committee recommended that the freehold system be replaced by a 99 year lease on grounds that it ensured greater control over land by the state. The Legislative Council approved this in 1946. What is noteworthy here is that the interests created in Crown lands were those known to English Law.

The growing population and overstocking in reserve land suggested that there was need to set aside more land for the native population.¹³ Above all, it was felt that no useful long-term decisions affecting land could be taken without an understanding of African land tenure which hitherto had been ignored.¹⁴ As a result, in 1942 – 1943 a Commission was appointed by the Governor to inquire into what land in Northern Rhodesia had not already been alienated with a view that it be set aside and constituted as native trust land.¹⁵ Consequently, on 14th October, 1947 the Northern Rhodesia (Native Trust Land) Order-in-Council was promulgated.

The creation of Native Trust Lands was meant to benefit the indigenous people. The Governor was, however, obliged to consult the Native Authority before land in the Trust Land was accessed for any purpose.¹⁶ It is, therefore, clear that by 1947 three categories of land had been established; Crown Land, Reserves and Trust Land.

3.4. LAND TENURE UNDER THE FEDERATION OF RHODESIA AND NYASALAND.

The status of various African lands in the territories of Southern Rhodesia, Northern Rhodesia and Nyasaland remained the subject of their respective territorial laws during the

¹² *Supra* note 10 at 15.

¹³ *Supra* note 11 at 9

¹⁴ M.P. Mvunga, *Land Law and Policy in Zambia*, 15 ZAMBIAN PAPERS NO. 17 (1982).

¹⁵ P. Matibini, *Historical Background and Legal Analysis of The Lands Act*. (Paper presented to the Catholic Commission for Justice and Peace Workshop). P.6.

¹⁶ Ministry of Lands, *Draft Land Policy*, 5 (2002).

Federation of Rhodesia and Nyasaland. The Federal Government could, however, utilize African lands, in the same way as territorial governments, for public purposes only.¹⁷ This prohibition in the Federal Constitution appears to have been included to assure the interests of Africans who were very suspicious of the effects of the creation of the Federation.¹⁸ African opinion seems to have been that the trust land scheme was more vulnerable to interference than its counterpart due to its flexibility. The African move was to exert pressure for a merger of trust land into reserves.

Neither the Colonial Office nor the territory's administration saw in these African demands circumstances warranting the merger of the two lands. Thus by 1955, the Colonial Office's official stand was rejection of conversion of trust land into reserves.¹⁹ The merger between the two thus never took place and these remained distinct until well after independence.

3.5. NORTHERN RHODESIA (GWEMBE DISTRICT) ORDER-IN-COUNCIL, 1959

To meet problems arising from the construction of the Kariba Hydro-Electric Dam and the inundation of portions of reserves and native trust land, the Northern Rhodesia (Gwembe District) Order was passed on 27th February, 1959. The Order also conferred upon the Governor special powers relating to the making of grants of land and fishing rights and it prevailed over previous Trust Land and Reserve Orders to the extent of any inconsistency.

3.6. STATUS OF LAND IN BAROTSELAND

The policy of land reservation through the Native Reserves and Trust lands did not until much later apply to land in Barotseland proper. According to the Barotseland North-Western

¹⁷ Federation of Rhodesia and Nyasaland (Constitution) Order-in-Council No.1199 of 1953, section 33(1).

¹⁸ M.P. Mvunga, *Land Law and Policy in Zambia: An Appraisal of the Lands Acquisition Act*, Ph.D. Thesis. University of London (1977), at 290

¹⁹ *ibid.*, at 291

Rhodesia Order-in-Council of 1899, lands in the central regions of Barotse were set apart for the Litunga and the Lozi people.²⁰ To this end, neither the Northern Rhodesian Government nor the Colonial Office could legislate or get involved in matters pertaining to Lozi land. Overall power over Lozi land lay in the Litunga.

Immediately before Zambia attained her political independence on 24th October, 1964, the Zambia (State Land and Reserves) Order 1928 to 1964 was enacted. By this Order, all rights relating to Crown land in Northern Rhodesia that were vested in Her Majesty were transferred to and vested in the President of the Republic of Zambia.²¹ Furthermore, it provided that all trust land was to be vested in the President and was to be administered and controlled by the President for the use and common benefit, direct or indirect of the natives of the Republic of Zambia.²² Significantly, the Order²³ re-enacted the provisions of the Northern Rhodesia (Crown Land and Reserves) Order-in-Council of 1928 in total.

With regard to Barotseland, shortly before independence it was felt that provision should be made to retain the status quo in regard to the land issue in that area within the unitary form of government of independent Zambia. This was achieved by the Barotse Agreement of 1964, negotiated and entered into by the succeeding Zambian Government, of the one part, and the Litunga of the other.²⁴ According to the Agreement, “ the Litunga of Barotseland and his Council shall continue to have the powers hitherto enjoyed by them in respect of land matters under customary law and practice.”²⁵

²⁰ *Supra* note 14 at 78

²¹ Zambia (State Land and Reserves) Order 1928 to 1964

²² *Ibid.*, section 4(1)

²³ *Ibid.*, section 5

²⁴ *Supra* note 14 at 78

²⁵ The Barotse Agreement 1964, Cmnd. 2366, Clause 5(2).

3.7. NATURE OF INTERESTS IN RESERVES AND TRUST LAND

There can be little doubt that interests in these lands were those held under customary law. The relevant instruments of creation, however, make no specific mention in regard to the intended interest of customary law.²⁶ Section 7 of the Zambia (State Land and Reserves) Order merely states that: “The President shall within each Reserve assign land to natives, whether as tribes or portions of tribes...”. The Trust Land Orders are virtually silent in regard to the intended interest.

Mvunga argues that “the import of the whole reserves scheme, as embodied in the Orders, must suggest that customary tenure is by implication recognized and conferred with legal title, a title which pertains to whatever rights in land exist under customary law.”²⁷ He proceeds to advise that notwithstanding the apparent effect of a vesting Order as creating and vesting statutory interest in the President, it is important not to lose sight of the intended objective – the provision and recognition of land rights under customary law. He concludes by stating that, “In determining ultimately the nature and content of such land rights only customary law is relevant... In Reserves and Trust land interest is primarily governed by customary law.”²⁸

It is also worth noting that the basic difference between Reserves and Trust land emerges from the provisions in the respective Orders for individual grants to non-natives. Leases and Rights of Occupancy, were initially intended for non-Africans. The former pertained to Reserves and the latter to Trust Land. Rights of Occupancy could be for as long

²⁶ *Supra* note 19 at 340.

²⁷ *Supra* note 19 at 342.

²⁸ *Ibid.*, 343-344

as 99 years,²⁹ whereas ordinary leases in Reserves were merely for 5 years except where a tenant was a missionary or charitable organization for which there was a provision for a grant of a 33 year lease.³⁰

3.8. LAND ALIENATION TO EUROPEAN SETTLERS

Prior to British direct rule, the B.S.A. Co. favoured granting freehold estates in fee simple with the imposition of a development clause prior to the grant of final title. Stanley, the first Governor of the territory, being more accustomed to the South African freehold tenure, was inclined to continue with this system of alienation. The only amendment Stanley offered was an insertion in the granting conveyance of a clause requiring permission from the Crown for laying out of any land or part thereof as a building estate.³¹

Stanley's preference for freehold tenure was put to the test by the Colonial Office on the recommendation of the East African Royal Commission that consideration should be given by the Crown in respect of Northern Rhodesia to substituting the B.S.A. Company's freehold grants by leasehold, revisable at stated intervals along the lines of the Tanganyika Ordinance. Stanley's reaction to the Colonial Office's intimation of a leasehold policy was absolute rejection, stating that it was suitable only to a European who was a temporary inhabitant uninterested in permanent settlement.³² Thus freehold still retained a foothold in the tenure of land in the territory but not for long before it was questioned and revised by Stanley's successor, Governor Maxwell on the ground that such tenure was vulnerable to speculation. Acknowledging that European reaction would be insurmountable, Maxwell searched for a compromise and came up with a more accommodating formula. In this, he

²⁹ Zambia (Trust Land) Orders, 1947-1964, Revised Laws, section 5 (6).

³⁰ Zambia (State Land and Reserves) Orders, 1928-1964, Revised Laws, section 6A(1) (a)-(d).

³¹ *Supra* note 19 at 296.

³² *Ibid.*, at 299.

drew a distinction between areas already settled and new areas for settlement. In the case of the former, he conceded to the status quo because a reversal could not be achieved without bitter resistance. As for the latter, he advocated an absolute abandonment of the freehold policy for immediate grant of leasehold tenures.³³

Although Maxwell's proposals met heavy resistance from the white settlers, they were ineffective as a pressure group and it became clear that the Imperial Government was the sole determining factor in the formulation of this leasehold policy. Hence leasehold and freehold were to exist side by side with emphasis on the former whenever possible.³⁴

³³ *Ibid.*, at 302.

³⁴ *Ibid.*, at 308.

CHAPTER FOUR

POST COLONIAL LAND TENURE SYSTEM IN ZAMBIA

4.0. VESTING OF LAND IN THE PRESIDENT

On 24th October, 1964, the Republic of Zambia was born. With the intention of retaining the status quo, the Zambia (State Lands and Reserves) Order 1964, coming into force immediately before the 24th October, 1964, vested both what was previously called Crown Land and Native Reserves in the President.¹ The Zambia (Trust Lands) Order 1964, on the other hand, vested the former Native Trust Lands in the President.²

The previous Reserves and Trust Land Orders-in-Council were not revoked and their continued operation received the sanction of the Zambia Independence Order 1964, the instrument providing for the establishment of the new Republic.³ The Zambia Independence Act equally provided for the continued operation of existing law, notwithstanding the change in the constitutional status.⁴ Pursuant to this authority, nomenclature modification to the Reserves and Trust Land Orders were effected in accord with the agreement reached at the Independence Conference that such lands should vest in the President.⁵

Thus the categories of land and the interests therein were the same as before independence. The acquisition of political sovereignty by indigenous people, however, brought with it new aspirations demanding a new *modus operandi* for the distribution and enjoyment of the country's resources: Because land was regarded as the most important of these resources, there was need to focus attention on the system of land tenure.⁶ Consequently,

¹ See State Land, Reserves and Trust Land Orders, Appendix 5 (1965 ed.), sections 3-5.

² Ibid., sections 3 and 4.

³ See section 4(1).

⁴ See sections 2(1) and 9.

⁵ See Report of the Northern Rhodesia Independence Conference, 1964, Comnd. 2365. Annex C

⁶ M.P. Mvunga, *Land Law and Policy in Zambia: An Appraisal of the Lands Acquisition Act*, Ph.D. Thesis. University of London. (1977) at 363.

on 24th November, 1964 a Cabinet Land Policy Committee was established to review all aspects of land policy which were inherited at independence and to submit recommendations on a comprehensive Zambian land policy.⁷

As a result, in June, 1965 the Land Commission was appointed to collect information on various aspects of land law and in particular land tenure. The Commission submitted its report in 1967. In general terms, the Commission made, among others, the following recommendations; wit:

- (a) That the Orders in Council be revoked and replaced by a Land Administration Act;
- (b) That there must be provision of land administration and an integrated land tenure system;
- (c) That the law applicable to land held under statutory tenure should be amended, simplified and enacted as part of the legislation of the country rather than the received law; and
- (d) That a system of registered title should be introduced and made applicable to land held under both statutory tenure and customary tenure.⁸

The Commission's report was neither officially rejected nor adopted by government. However, legislation subsequently passed showed total disregard of its recommendations.⁹ In 1970, there was a move to introduce some reform in the tenure of agricultural land, the effect of which would have been the repeal of the Agricultural Land Act and its replacement. The main purpose of the proposed legislation was to prevent the selling of agricultural land "at a

⁷ The Cabinet Land Policy Committee comprised the Ministries of Lands and Natural Resources (Chairman), Finance, Agriculture, Commerce and Industry, Justice, Local Government and Housing, and the Attorney General.

⁸ Report of the Land Commission 1967 (Government Printer, Lusaka, 1967) at P. 14

⁹ A.C. Mulimbwa, *Law and Agricultural Development in Zambia*, Ph.D. Thesis. University of London. (1987) at 199.

higher price than originally bought.”¹⁰ It was further proposed that freehold title would no longer be granted. As a result, the Minister of Lands and Natural Resources proposed to make the following recommendations to Cabinet¹¹:

- (a) All freehold should be converted to leasehold;
- (b) Cabinet should authorize the Minister of Lands and Natural Resources to pay compensation to any person losing their freehold title
- (c) Leases should be for any number of years not exceeding 100 years;
- (d) The right to convert leasehold land to freehold should be discontinued; and
- (e) Developers of land in the reserves should be given old titles to State Land if they so desire.

All these recommendations (except that relating to compensation) were incorporated into the land reforms of 1975, under the Land (Conversion of Titles) Act.¹²

The Zambian Government, in an attempt to achieve uniformity in the treatment of land in all parts of the Republic, by the Western Province (Land and Miscellaneous Provisions) Act,¹³ vested all land and interests in Western Province in the President as reserve land under the Zambia (State Lands and Reserves) Order 1928 to 1964. Thus land in the Western Province came on par with any other reserve in the country.¹⁴

After this notable government attempt to obtain uniformity in the status of land, further developments of policy continue to emerge without any indication of systematic treatment of the matter. The whole land question appears to have been tackled on a piece-

¹⁰ *Ibid.*

¹¹ *Supra* note 8 at 11

¹² Act No. 20 of 1975

¹³ Act No. 47 of 1970. Section 2 of the Act provides: “All land in the Western Province is hereby vested in the President as a Reserve within the meaning of land under the Zambia (State Land and Reserves) Order 1928 to 1964.”

¹⁴ M.P. Mvunga, *Land Law and Policy in Zambia*, 80 ZAMBIAN PAPERS NO. 17 (1982).

meal and *ad hoc* basis. Every issue that attracted immediate attention was disposed of on that basis.¹⁵

In this context, absentee landlords were singled out in a manner that precipitated the passage of the Lands Acquisition Act 1970. Following the flight of European settlers after independence in 1964, the Government had problems in legally acquiring large tracts of land that fell out of production due to the constitution which provided for and guaranteed deprivation of property except on any grounds provided under the section. The 1969 referendum paved the way for the introduction of far-reaching reforms and modifications in the system of land ownership and tenure.

4.1. THE 1975 LAND REFORMS

The uncertainty in land policies that marked the first decade of independence finally came to an end with then President Kenneth Kaunda's 30th June, 1975 "watershed speech" to the 6th UNIP National Council. On that date, the President announced specific land reform measures that were to take effect immediately on 1st July, 1975. Although lacking in detail, the "watershed speech" spelt out the major focus of the reform and it was left to the legislature to work out the statutory provisions that would effectuate¹⁶ the broad principles expressed by the President.

4.2. THE LAND (CONVERSION OF TITLES) ACT OF 1975

The Land (Conversion of Titles) Act of 1975 was the most significant legal reform in the life of post-colonial Zambia. Apart from the Lands Acquisition Act, 1970, this Act was the first to affect tenure and estate in a general way in Zambia. Other than the vesting of land in the President and the conversion of titles to land, the Land (Conversion of Titles) Act of

¹⁵ Ibid., at 81.

¹⁶ See *Daily Parliamentary Debates*, Tuesday 12th August, 1975

1975 also imposed of restrictions on the extent of agricultural holdings and abolished the sale, transfer and other alienation of land for value.

The Act was passed on 10th August, 1975, but was applied retrospectively to 1st July, 1975,¹⁷ the day on which the President announced the land reforms in the “watershed speech”. In retrospect, a question that might be raised is whether or not the Act applied to all categories of land, in particular to reserves and trust lands. It is noteworthy that the Act¹⁸ provided that unless a contrary intention appears, land includes “land of any tenure”. Thus this broad definition of land included land under customary tenure.¹⁹ At any rate, most of the provisions of the Act did not apply to land governed by customary land tenure. In order to enable the State to acquire the power of control over land hitherto held under freehold, it was necessary to convert freeholds into leaseholds.²⁰ The conversion, therefore, applied to estates and leases granted for periods in excess of 100 years.

The Act did not provide for payment of compensation by the President or any other person by reason of the conversion of the title to land or in respect of the extinguishments, restriction or abridgement of any rights or interests in or over land resulting from the operation of the provisions of the Act.²¹ Just and fair compensation was, however, payable in respect of unexhausted improvements where the statutory lease had expired by effluxion of time, but had not been renewed.

¹⁷ *Supra* note 10 at 206.

¹⁸ Land (Conversion of Titles) Act No. 20 of 1975, section 2.

¹⁹ *Supra* note 8 at 14.

²⁰ *Supra* note 20 section 5.

²¹ *Ibid.* section 30.

4.3. LAND CONTROL UNDER THE LAND (CONVERSION OF TITLES) ACT, 1975

The importance of the Land (Conversion of Titles) Act lies primarily in its provisions relating to the control of land. The Act not only imposed covenants regarding, *inter alia*, the use of agricultural land but also empowered the government to impose a maximum area of agricultural land that a person could hold at any given time. Specifically, the Act provided that no person shall sub-divide, sell, transfer, assign, sublet, mortgage, charge or in any manner encumber or part with the possession of his land without the prior consent in writing of the President.²² Over the years, this section generated a great deal of litigation.

Some of the defects pointed out in relation to the section requiring State consent were:

- (a) The lack of regulations governing the determination of prices, premiums or rent;
- (b) The absence of an appellate system such as a land tribunal to which aggrieved parties could appeal against the decisions of the Commissioner of Lands in matters pertaining to land;
- (c) The absence of enforcement provisions for contravening the section; and
- (d) Administrative delays in processing applications for consent.²³

The introduction of the Act was associated with increased corruption in the administration of land. To this end, there was an argument that the solution to corruption in land allocation was the introduction of a tax or rent, the increase of which would effectively reduce the demand for agricultural land.²⁴ Anxiety concerning corruption was seen to be partially eliminated by a new procedure for land alienation. The new procedure sought to effectuate the decentralization of land administration. To this effect:

²² *Ibid.*, section 13.

²³ *Supra* note 10 at 216.

²⁴ J.W. Bruce and P.P. Doner, *Agricultural Land Tenure in Zambia's Perspectives*, 20 RESEARCH PAPER NO. 76.

"All District Councils will be responsible, for and on behalf of the Commissioner of Lands, in the processing of applications, selecting of suitable candidates and making recommendations as may be decided upon by them. Such recommendations will be invariably accepted unless in cases where it becomes apparent that doing so would cause injustice to others or if a recommendation so made is contrary to national interest or public policy."²⁵

The procedure outlined above applied to applications for vacant or undeveloped land. If a District Council is dissatisfied with the decision of the Commissioner of Lands, an appeal can be made to the Minister of Lands and Natural Resources within thirty (30) days from the date the decision of the Commissioner of Lands becomes known.²⁶ The decision of the Minister is final.

4.4. EXTENSION OF CONTROL UNDER THE LAND (CONVERSION OF TITLES) (AMENDMENT NO. 2) ACT, 1985

Following government's concern that land was going into the hands of foreigners at the expense of Zambian nationals, the Land (Conversion of Titles) Act was amended to provide that no land in Zambia would as from 1st April, 1985 be granted, alienated, transferred or leased to a non-Zambian.²⁷ However, the rights and interests acquired by non-Zambians prior to that date were preserved. A non-Zambian could only acquire an interest in land under the following circumstances:

- (a) If it is a person who has been approved as an investor;
- (b) If it is a non-profit making, charitable, religious, educational or philanthropic organization or institution which is registered and approved by the Minister for purposes of the section;

²⁵ Ministry of Lands and Natural Resources, *Procedure on Land Alienation*, (Land Circular No. 1 of 1985, Government Printer, Lusaka. P.1).

²⁶ *Ibid.*, at 2.

²⁷ Land (Conversion of Titles) (Amendment) (Number 2) Number 15 of 1985 amended section 13 by the insertion of a new section 13A which came into effect on 1st April, 1985.

- (c) If the interest or right in land is being inherited upon death or is being transferred under a right of survivorship or by other operation of the law; or
- (d) If the President has given his consent in writing under his hand.

The position that no land could be granted, alienated, transferred or leased to a non-Zambian after 1st April, 1985 except as provided under the Act was affirmed by the Supreme Court of Zambia.²⁸

²⁸ *G.F. Construction (1976) Limited V Rudnap Zambia Limited and Another*, SCZ Judgment Number 18 of 1999.

CHAPTER FIVE

IS THE LANDS ACQUISITION ACT, 1970 RELEVANT IN ZAMBIA'S LIBERALIZED MARKET ECONOMY?

5.0. GOVERNMENT INABILITY TO ACQUIRE LAND

In 1991 Zambia's political dispensation underwent a transformation from a single party participatory democracy to a multi-party political dispensation following Presidential and Parliamentary elections at which the Movement for Multi-Party Democracy (MMD) emerged victorious. During the electoral campaign, the MMD propounded economic policies that advocated liberalization, with emphasis on market forces and non-state participation in the economy. The buzz- word was; "government has no business in business."¹

In this chapter we shall discuss whether or not the Lands Acquisition Act, 1970 is relevant in a liberalized market economy. We shall turn our attention to the Lands Act of 1995 in the next. A liberalized market economy is an economy consistent with private ownership of property in which the State's primary role is that of providing an enabling environment where the market forces of supply and demand reign supreme. The liberal philosophy of a free market advocates non-State participation in the economy.

In Zambia, the colonial government divided land into Crown Land (later known as State Land), Trust Lands and Reserves. The law applicable to State land was the English land law whereas all land in the trust areas and reserves was held under customary land law. The division of land into Crown land and reserves was effected through the Northern Rhodesia Order-in-Council of 1924. This Order was followed by the enactment of the Public Lands Acquisition Ordinance, which only applied to Crown Land. "Under section 3 of the ordinance the governor was empowered to acquire any land required for any public purpose for an estate

¹ Movement for Multi-Party Democracy Manifesto, Campaign Committee. MMD. Lusaka. (1991).

in fee simple or for a term of years as he may think proper, paying such consideration or compensation as may be agreed upon or determined under the provisions of the ordinance".² By way of summary, public purposes meant government projects such as railways, dams, hospitals, schools, etc., but did not include alienation to private individuals.³

The Public Lands Acquisition Ordinance has its origins in the pre-1924 legislation promulgated by the B.S.A. Co. which inserted a clause in the certificate of title issued to settlers reserving the power to acquire land with compensation if the land was required for public use.

At the time of Zambia's independence in 1964, the Crown lands, trust lands and reserves were vested in the President⁴ while the private estates that had been created by the grants made to individuals by the Governor and previously by the B.S.A. Co. were preserved.

Before the enactment of the Lands Acquisition Act, 1970,⁵ the government's power to acquire land compulsorily was very limited. Section 18 of the constitution⁶ provided:

"(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied, that is to say-

(a) The taking of possession or acquisition is necessary or expedient-

- (i) In the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement;
- (ii) In order to secure the development or utilization of that, or other property for a purpose beneficial to the community; and

(b) Provision is made by a law applicable to that taking of possession or acquisition-

² S. AMOO, *law and development and the expropriation laws of Zambia* in M.Ndulo (ed.) LAW IN ZAMBIA 247 (1984).

³ A.C. Mulimbwa, *Law and Agricultural Development in Zambia*, Ph.D. Thesis. University of London (1987) at 238.

⁴ Zambia (State Land and Reserves) Orders 1928 to 1964, sections 5 and 6.

⁵ Act No. 2 of 1970.

⁶ Statutory Instrument Number 1652 (British).

- (i) For the prompt payment of adequate compensation; and
- (ii) Securing to any person having an interest in or right over the property a right of access to a court or other authority for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation”.

Subsection (2) provided, further, that if the above conditions were satisfied, any person who was entitled to compensation under it was not to be prevented from remitting the whole compensation within reasonable time of receiving it to any country of his choice outside Zambia. As part of Chapter III of the constitution which dealt with fundamental rights and freedoms, section 18 could not be amended without a referendum being held.⁷ Section 18 was seen as yet another obstacle that the British had introduced primarily to protect the interests of the white minority under a black government.⁸ The President was, therefore, expressing the general opinion when in 1969 he told the General Council of the United National Independence Party:

“As humanists, we are dedicated to upholding the protection of fundamental rights and the freedom of the individual. However, property rights must be subject to the common good and to the general interests of the community. The existing section 18 of the constitution must be examined and replaced by more realistic provisions”.⁹

Like the constitution, the colonial Public Lands Acquisition Ordinance (which at independence became an Act) was too restrictive with regard to the purposes for which compulsory acquisition could be effected. This Ordinance contained the limitation that land could only be acquired for “public purposes” as statutorily defined. The government was, therefore, handicapped both under the constitution whose conditions did not include

⁷ Zambia Independence Constitution, section 72.

⁸ See the contribution of Mr. S. Kapwepwe, *Zambia Daily Parliamentary Debates*, 2-18 December, 1969.

⁹ K.D. Kaunda, *Zambia's Economic Revolution*, (Zambia Information Services, Government Printer, Lusaka. 1968. P. 47).

alienation to other private farmers and the ordinance which also failed to permit acquisition of land that was either vacant or undeveloped.

Government's first step was to mount a campaign and hold a referendum that would have the effect of amending section 18 as well as section 72 itself under which fundamental rights and freedoms were entrenched so that in future further amendments could be introduced without further referenda. On the 17th June, 1969, the government secured the desired majority vote in the referendum and subsequently introduced five amendments to the constitution. Section 72 was amended by the deletion of subsection 3, thereby removing the requirement of referendum.¹⁰ By another amendment, the original section 18 was repealed and replaced by a new section 18.¹¹ This section enabled government to acquire land compulsorily under a law relating to, *inter alia*, "abandoned, unoccupied, unutilized or undeveloped land" and a law relating to "absent or non-resident owners" as defined in such law.¹² Following the constitutional amendments, the Lands Acquisition Act was passed and became law on the 10th of February, 1970. This piece of legislation was targeted at absentee landlords who held land, not with the intention of putting it under production; but for purposes of speculation.

It is apparent from this Act that the State, though not having immediate use for such land, wanted all the same to have the land in its name for use whenever need arose. In addition, land held by indigenous people indirectly benefits the State because other than being vested in the President, the use that the indigenous people put the land to would be one of the reasons why the State would need to acquire the land. Although land acquisition by the State

¹⁰ Constitution Amendment) (Number 3) Act, No. 10 of 1969, section 2.

¹¹ Constitution of Zambia Act, No. 27 of 1973, Article 18.

¹² Constitution (Amendment) Number 5) Act, No. 33 of 1969, section 4.

is in apparent contradiction to a liberalized market economy, it is submitted that this is necessary.

5.1 THE RELEVANCE OF THE LANDS ACQUISITION ACT, 1970

(a) THE RIGHT OF EMINENT DOMAIN

It is worth noting that at the time that the Lands Acquisition Act was enacted in 1970, Zambia was in fact pursuing a liberalized market economy. State participation in the economic affairs of the nation came much later. It is submitted, therefore, that there is nothing new to the relevancy of the Lands Acquisition Act to present day Zambia, for the objectives at the time of the enactment of the Act have remained the same; the State wanting to have some form of control over the country's most valuable resource- land.

The Lands Acquisition Act has the same effect as the United States doctrine of eminent domain whereby the State has a role to play in land transactions. The right of eminent domain is another attribute of sovereignty by which the State may appropriate or divest private property whenever the exigencies demand it. "The eminent domain legislation could be described as legislation used to extinguish private ownership of land when it conflicts with group-plans for the use of the piece of land."¹³ The rationale for this is that despite the increase in demand, land does not grow. With the Lands Acquisition Act subsisting, it means that even in a liberalized market economy, the government retains some form of control over transactions in land. The Act enables the government to facilitate its citizens' access to land, particularly in the future, owing to population growth. Compulsory acquisition has a re-distributive effect on the land ownership pattern in the country. In most cases, this redistribution results in an increase in the quantum of state lands at the expense of

¹³ *Supra* note 2 at 247.

private lands. At any rate, if the real property were a *res nullius*-something belonging to no one- it would be valueless in the economic sense and moreover, there would be no need for compulsory acquisition.

(b) INTERESTS OF THE REPUBLIC

Section 3 of the Lands Acquisition Act states that:

“Subject to the provisions of this Act, the President may, whenever he is of the opinion that it is desirable or expedient in the interests of the Republic so to do, compulsorily acquire any property of any description.”¹⁴

What the above provision means is that even in a liberalized market economy, compulsory acquisition of land is necessary because national interests should override the interests of the individual. This, in our view, demonstrates that compulsory acquisition of land, even in a liberalized market economy is not necessarily an anathema to capitalism.

It is also important to observe that the expression “in the interests of the Republic”, should not be equated to the expression “public purposes”, so that the land acquired must be used for specific government purposes. One might, therefore, argue that it is “in the interests of the Republic” that farms or agricultural lands that are not productive must be acquired for purposes of alienation to members of the public who wish to develop them for the common good.

It is further submitted that the expression “in the opinion” of the President would seem to confer a discretionary power in the President so that his determination whether or not acquisition is in the interests of the Republic cannot be contested in a court of law. This was the view of the Supreme Court of Zambia in the case of *Nkumbula V The Attorney General for Zambia*.¹⁵ The case concerned the appointment by the President of a Commission of

¹⁴ Lands Acquisition Act, 1970, section 3.

¹⁵ *Nkumbula V The Attorney General for Zambia* (1972) Z.L.R. 204.

Inquiry, if in his opinion, such appointment was for the public welfare under the Inquiries Act, No. 45 of 1967. In this case, delivering judgment, Brown, J.P., said:

“The words ‘in the opinion of the President’ clearly make the matter one for the subjective decision of the President and it has never been doubted that a decision made under a power expressed in such terms cannot be challenged unless it can be shown that the person vested with the power acted in bad faith or from improper motives or extraneous considerations or under a view of the facts or the law which cannot reasonably be entertained” (P.209).

Furthermore, compulsory acquisition, under the Lands Acquisition Act is not done haphazardly. For instance, section 15(5) states, *inter alia*, that no compulsory acquisition can be effected within six months following the acquisition by the owner of his title to or interest in the land. The procedure for compulsory acquisition gives the landholder an opportunity to present his side of the story if he resists acquisition. The Act allows the Minister to petition the Registrar of Lands and Deeds to have the land registered if the landholder has not surrendered it and no caveat has been lodged.¹⁶ If one has been lodged, then the Minister cannot proceed on the petition to register. The right of the Minister to petition the Registrar of Lands and Deeds is dependent on the prior agreement between the Minister and the landholder. If the Minister and the landholder have not reached agreement, acquisition cannot be effected. All this goes to show that the Lands Acquisition Act can still operate in an orderly manner and without hindrance in a liberalized market economy.

(c) LACK OF RESOURCES FOR ACQUISITION OF LAND

A further relevance of the Lands Acquisition Act in Zambia’s free market economy lies in the fact that Government has no money with which to compensate holders whose land might be acquired or brought on a “willing seller, willing buyer” basis. “The main difficulty in acquiring land with compensation has been lack of funds for this purpose. Mr. B.R. Sharma, Commissioner of Lands between 1970 and 1974 was emphatic on this. In his

¹⁶ Supra note 14 section 19.

recollection, during his tenure as Commissioner, he managed to secure only K50, 000 for purposes of acquiring land needed for development".¹⁷ The fact that Government had no funds then, and the country's economy is in a worse position now than it was in the early seventies (with an external debt of \$7.2 billion U.S. Dollars as per "The Post" edition of 1st August, 2003 quoting Finance Minister N.P. Magande), makes it even more imperative for the Lands Acquisition Act to remain on the statute books. In this scenario, if the Act were to be done away with simply because of its apparent incompatibility with the philosophy of non-state participation in economic matters in a liberalized free market economy, it would not be far-fetched to envision a situation whereby ultimately all the arable land would end up being purchased by the rich with no possibility of the Government ever re-acquiring it.

(d) ACQUISITION AND DEVELOPMENT OF IDLE LANDS

Mvunga points out that one of the difficulties associated with the administration of the Lands Acquisition Act is the shortage of skilled staff and transport at the Ministry of Lands.¹⁸ This state of affairs has resulted in the absence of systematic field investigations of locating the properties that need to be acquired within the provisions of the Act. With the free market economy now back in place, the Lands Acquisition Act remains relevant, particularly in so far as idle lands are concerned because these must eventually be acquired by the State for alienation to potential developers. The only way that this can be done legally in the face of a near bankrupt central treasury is through the Lands Acquisition Act. Should the potential developers fail in their duty to develop the lands so alienated to them, the beauty and relevancy of the Lands Acquisition Act is that such lands can be compulsorily re-acquired by the State. Attention would, however, have to be first paid to the administrative problems at

¹⁷ M.P. Mvunga, *Land Law and Policy in Zambia: An Appraisal of the Lands Acquisition Act*, Ph.D. Thesis, University of London. (1977) (Unpublished) at 473.

¹⁸ *Ibid.* at 473

the line Ministry in order to effectively implement the policies being pursued by the Government.

(e) SECURITY FOR SUSTENANCE OF THE POPULATION

It is now common knowledge that eighty percent of Zambia's population is wallowing in abject poverty. Of the remaining twenty percent, only a fraction constitutes the indigenous population. To repeal the Lands Acquisition Act in Zambia's liberalized market economy and let the market forces of supply and demand free rein would be tantamount to selling the country to rich foreign nationals and the local petty bourgeoisie. In these circumstances, it is submitted, the Lands Acquisition Act provides the only assurance to the impoverished majority population that as long it subsists, they will have a government that has power to at least provide them with the basic resource for sustenance – land.

(f) SIGNIFICANCE OF AGRICULTURE

Following the decline in the country's fortunes as a result of low prices of copper on the world market, it is only logical that emphasis should necessarily shift to agricultural development that undeniably is associated with availability of land for production purposes. In light of this, it makes good sense that the Government should have some form of control over land so that an enabling environment is created. Furthermore, with the advent of the Lands Act of 1995 which provides for an individual to secure good title to land in a customary area, this situation allows for the creation of a Zambian elite of landholders and/or speculators and this can hardly be beneficial to the country. The continued existence of this class of privileged persons is certainly detrimental to the economic development of the nation, particularly the agricultural sector. The fact that these people can do whatever they like with their land also means that they could leave it undeveloped and/or unutilized in the hope that

they could eventually cash in on it. Without the instrument of the Lands Acquisition Act, the free market economy “allows for unjust enrichment at the expense of hindering development because land remains in the hands of a person not dedicated to developing it while waiting for a phenomenal purchase price on it”.¹⁹ The Lands Acquisition Act provides the only viable means of redressing such a situation and hence its continued relevance in Zambia’s liberalized market economy.

(g) DISPLACEMENT AND OVER-POPULATION OF CUSTOMARY AREAS

Related to the advent of a free market economy, the Lands Act of 1995, and the ability of individuals to acquire certificates of title to land held in customary areas is the issue of the possible eventual displacement of people from the customary areas that will have been alienated. This form of empowerment of certificates of title holders is likely to ultimately result in over-population of what will remain of customary areas. With this very real likelihood; it is necessary that the Government should retain some form of legal mechanism for such an eventuality, and once again, it is the Lands Acquisition Act that provides that legal mechanism. While some people might argue that there is abundant land in Zambia given that 94% of this land is under customary tenure, it is submitted that the displacement and over-population of what will remain of the customary areas could occur insidiously over a period of 100 or even 1,000 or more years from now.

It is our conclusion, therefore, that the Lands Acquisition Act, 1970, will always be relevant to Zambia irrespective of the preferred economic set up for, it is the duty of government to protect the interests of the Republic and its population by providing it with public amenities, structures and the basic economic resource for sustenance.

¹⁹ K.K. Patel, *Land Tenure and Economic Development in Zambia*, OBLIGATORY ESSAY. University of Zambia (1971/1972) at 10.

CHAPTER SIX

IS THE LANDS ACT, 1995 RELEVANT IN ZAMBIA'S LIBERALIZED MARKET ECONOMY?

6.0 THE LANDS ACT OF 1995

The Land (Conversion of Titles) Act continued in force until September, 1995 when the Lands Act was enacted following a shift in policy by the new Movement for Multi-Party Democracy (MMD) Administration which advocated a free market economy with the participation of both local and foreign investors. It committed itself to leaving the running of the economy in the hands of private individuals.

In terms of land law, a shift in policy from that of the previous government meant that there would be less interference in the land market. This in turn meant that all those obstacles in the Land (Conversion of Titles) Act of 1975 that were seen as a hindrance or impediment to an open land market had to be removed under the new Act. The Lands Act of 1995 has the following as its primary objectives:

- (a) The continuation of leasehold and leasehold tenures;
- (b) The continuation of vesting land in the President and alienation of land by the President;
- (c) The statutory recognition and continuation of customary tenure;
- (d) To provide for the conversion of customary tenure into leasehold
- (e) To establish a Land Development Fund and a Lands Tribunal; and
- (f) To repeal the following Acts:-
 - i. The Land (conversion of Titles) Act;
 - ii. The Zambia (State Lands and Reserves) Orders 1924 to 1964;
 - iii. The Zambia (Trust Land) Orders 1947 to 1964;

- iv. The Zambia (Gwembe District) Orders 1959 to 1964; and
- v. The Western Province (Land and Miscellaneous Provisions) Act 1970.

6.1 VESTING OF ALL LAND IN THE PRESIDENT

Under the Lands Act of 1995, all land in Zambia “shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia.¹ What this means is that the President is empowered to alienate land vested in him/her to any Zambian², or indeed to a non-Zambian.³

Although all land in Zambia is vested in the President, the day-to-day administration of land is delegated to the Commissioner of Lands. The current procedure for alienation of land is still that all District Councils are responsible for and on behalf of the Commissioner of Lands, in the processing of applications, selecting of suitable candidates and making recommendations as may be decided upon by them.⁴ The procedure for alienation of land must be strictly complied with. In the case of *Masendeke V Ndola Rural District Council and Others*,⁵ the Lands Tribunal declined to grant an order for compensation against the State when the appellant effected substantial development without the prior approval of the Commissioner of Lands.

6.2 PRESIDENT NOT TO ALIENATE LAND UNDER CUSTOMARY TENURE

As previously noted, tenure in trust lands and reserves was governed by Orders-in-Council.⁶ These Orders-in-Council have since been repealed.⁷ It shall be noted, however, that

¹ The Lands Act, No. 29 Of 1995, section 3(1).

² Ibid., section 3(2).

³ Ibid. section 3(3).

⁴ Ministry of Lands and Natural Resources, *Procedure on Land Alienation*, (Circular Number 1 of 1985, Government Printer, Lusaka, 1985, P.1).

⁵ *Masendeke V Ndola Rural District Council and Others*, LAT/29/98.

⁶ Northern Rhodesia (Native Trust Land) Orders-in-Council 1948 to 1964 as amended by the Zambia (Trust Land) Order, 1964.

⁷ *Supra* note 1 section 32.

customary land is defined as the area described in the schedules to the Zambia (State Lands and Reserves) Orders.⁸ However, the restrictions in alienation of land held under the customary law have been re-enacted in the Lands Act of 1995. Thus, the President is not permitted to alienate any land situated in a district or area where land is held under customary tenure.⁹

These restrictions relating to alienation of land under customary tenure have generated litigation. In the matter between *Chenda and Another V Phiri and Others*,¹⁰ the appellant challenged the acquisition of interest in land by the respondents in total disregard of section 3(4) of the Lands Act. That is to say, the respondents acquired a certificate of title in respect of land on which the appellant's family had lived for many years and therefore had an interest in the land. It was established in evidence that the appellants were not consulted prior to the acquisition of the interest in the land, contrary to section 3(4)(c) of the Land Act. The Lands Tribunal allowed the appeal and observed that failure to consult persons who may be affected by the grant offered, contrary to section 3(4)(c) is fatal.

In another matter between *Still Water Farms V Mpongwe District Council and Others*,¹¹ the appellant appealed against the decision by the Commissioner of Lands' refusal not to issue a certificate of title and argued that the decision was discriminatory, unconstitutional and against the rules of natural justice. The refusal by the Commissioner of Lands arose out of an objection by the 3rd and 4th respondents that the land in dispute had been given to the 3rd and 4th respondents by the late Chief Lesa, the predecessor of the incumbent Chief who recommended the allocation to the appellant.

⁸ *Ibid.*, section 2

⁹ *Ibid.*, section 3(4).

¹⁰ *Chenda and Another V Phiri and Others*, LAT 80/90.

¹¹ *Still Water Farms V Mpongwe District Council and Others*, LAT 30/30/2000.

The sub-section in contention was sub-section 4(c) of the Lands Act that requires consultation to be made with any other person or body whose interest might be affected by the grant. As there was no evidence that the 3rd and 4th respondents had been consulted by the Chief, the Lands Tribunal found that the 3rd and 4th respondents had an interest in the land in dispute and therefore should have been consulted. The Lands Tribunal also found that the Commissioner of Lands was justified in his refusal to issue a certificate of title to the appellant after the 3rd and 4th respondents registered objections.

6.3 CUSTOMARY HOLDINGS TO BE RECOGNISED AND TO CONTINUE

Every piece of land in a customary area that is vested in or held by any person under customary tenure continues to be held and recognized under the Act.¹² Thus, the rights and privileges of any person to hold land under customary tenure are recognized of any of the provisions of the Act.¹³

6.4 CONVERSION OF CUSTOMARY TENURE INTO LEASEHOLD TENURE

Any person who holds land under customary tenure may convert it into leasehold tenure not exceeding ninety-nine years on application by way of:

- (a) a grant of leasehold by the President;
- (b) any other title that the President may grant;
- (c) and any other law.

However, the conversion of rights from a customary tenure to a leasehold tenure shall have effect only after the approval of the Chief and the Local Authorities in whose area the

¹² *Supra* note 1 section 7.

¹³ *Ibid.*, section 7(2).

land to be converted is situated.¹⁴ It is further provided that no title other than a right to the use and occupation of any land under customary tenure shall be valid unless it has been confirmed by the Chief and a lease granted by the President.¹⁵ The provisions of the Lands Act¹⁶ are complimented by the Land (Customary Tenure) (Conversion) Regulations,¹⁷ which outline the procedure of converting customary tenure into leasehold tenure.

As has already been pointed out in Chapter Four, the 1975 Land (Conversion of Titles) Act had far-reaching implications on land tenure in Zambia. It abolished the freehold tenure and replaced it with the leasehold tenure. It declared land, save improvements, free of commercial value. For each transaction, the Act required that the President must consent before the parties went ahead. In other words, the land market was abolished in favour of the State market. "Many people who tried to skip the presidential requirement regretted their actions because if the other party decided not to honour the agreement, courts would not enforce it".¹⁸

The Lands Act of 1995 reversed all this. First, the land market was returned. Although the freehold system still remains abolished and the 99 year leasehold estate is in place, the idea behind the Lands Act of 1995 was to push the State out of land transactions. Hansungule insists that:

"The motives behind the 1995 Land Act must be very clearly understood. This Act was motivated by the World Bank and Western countries. The Bank wanted to push for radical land reforms in Zambia as a condition for Bank support. At one time, the Bank was even withholding economic assistance to the tune of millions of dollars until the new land legislation based on the concept of land market was introduced. One of the radical measures the Bank attempted to introduce but for which there was no political will in the Zambian political establishment was the auctioning of land. In the end, the Bank managed to get the Land Act pushed through the Zambian legislature despite protests from across the country. This is why the Land Act is very market oriented."¹⁹

¹⁴ Ibid., section 8(2).

¹⁵ Ibid., section 8(3).

¹⁶ Ibid., section 8.

¹⁷ Statutory Instrument No. 89 of 1996.

¹⁸ M.K. Hansungule, *Land Law and Policy in Zambia*, (1998), Lusaka. P.5

¹⁹ *Ibid.* at 19.

It is, therefore, not in dispute that a Lands Act is a relevant piece of legislation in a liberalized market economy. The question, in Zambia's case, is whether or not the Lands Act of 1995, in its current form, is relevant to the country's liberalized market economy. Our response to this is in the negative for the reasons given here below:

(a) CONVERSION OF CUSTOMARY TENURE INTO LEASEHOLD TENURE.

(i) SHRINKAGE OF CUSTOMARY LAND

The Lands Act of 1995 provides for the conversion of land held under customary tenure into leasehold tenure.²⁰ To obtain secure title to land, an individual must first secure the written consent of the local chief and the local authority (District Council) in whose area the land to be converted is situated. It is submitted that in this provision of the Lands Act of 1995, is an unstated but crucial underlying assumption that over time the conversion of customary to leasehold tenure will open up more land for investment and diminish the amount of land held under customary law. It should be noted that once a villager or an investor is granted a lease for a piece of land, that piece of land ceases to be customary land and becomes state, essentially private land. In other words, the affected piece of land cannot be re-converted back to customary tenure. This process will reduce insidiously the extent of the area under customary tenure with the result that customary landholders will be confined to more marginal areas.

(ii) OVER-POPULATION OF CUSTOMARY AREAS

Another consequence of the non-convertibility of customary land that has become state land is the likelihood of over-population of the remainder of the customary areas. In such a situation serious social and ecological problems could arise that can only be solved by the government invoking the provisions of the Lands Acquisition Act of 1970. In this

²⁰ Supra note 1 section 8.

scenario, the target would obviously be the investor or villager who holds land on leasehold. In the case of the investor, this would certainly be contrary to the spirit of the Lands Act of 1995, which seeks to bring land into the open market.

(iii) EROSION OF TRADITIONAL AUTHORITY

An additional consequence of the conversion of customary tenure into leasehold tenure has to do with the authority and legitimacy of traditional rulers. It is a notorious fact that traditional rulers draw their authority and legitimacy from the quantity of land and the number of subjects under their jurisdiction. For each piece of customary land converted into leasehold by a subject, the traditional ruler loses both that piece of land and his authority over that subject. This prospect has not been lost on the traditional rulers. The Ministry of Lands reports that at one workshop on land policy reforms organized for traditional rulers, “the participants observed that the difficulty in the present alienation system is that the Chief allows leasehold tenure on customary land, the government assumes control over that and title holders pay allegiance to the government and not to the chief. Chiefs were therefore reluctant to give title deeds (sic) because they would lose control of their land. If they gave title deeds to their subjects (sic), their subjects would no longer fear the Chief and chiefs would have no control over their subjects.”²¹

(iii) COSTS OF OBTAINING TITLE DEEDS

In order for one to have secure title to customary land converted into leasehold, one has to obtain a certificate of title to the affected piece of land. The important point here is that these certificates of title do not come at no cost. Firstly, the piece of land earmarked for conversion to leasehold tenure must be professionally surveyed and then approved by the

²¹ Ministry of Lands, *Proceedings of the Draft Land Policy Consultative Workshop for Traditional Rulers in Lusaka Province*, 18-19 December, 2002. P.6.

Commissioner of Lands.²² Once this has been done, the lessee is under obligation to pay ground rent and “to observe or perform the covenant and to every condition of re-entry”.²³ This brings in the element of the poverty levels in the country. With about 80% of the population wallowing in abject poverty, the majority of whom are in rural areas, the above requirements of the Lands Act of 1995 make the Act itself irrelevant in present day Zambia’s liberalized market economy. Not only is the process of obtaining certificates of title cumbersome and lengthy, but the fact that deep levels of poverty prevail in rural areas and all the procedures for obtaining title have to be done in Lusaka removes the Lands Act of 1995 from reality. In addition to this, Zambia’s deteriorated condition of most rural roads and the absence of a reliable transport system militates against the rural dweller who might wish to obtain secure leasehold title to his piece of land. The Women for Change organisation aptly observes that, “Even if there were means of transport, their income levels are very low. They cannot afford transport costs. In Lusaka they have to spend days before being attended to...(as) the process does not end within a day, they would have to go back again and again”.²⁴

(iv) PRODUCTIVE LAND USAGE

The justification for bringing land on the open market by both the World Bank and the government was that customary land tenure is “insecure” and has “severe limitations” compared to leasehold tenure. By converting their customary holdings into leaseholds, the policy argues, villagers will be able to use their land as collateral to secure credit to invest in

²² *Supra* note 1 section 8(2).

²³ *Ibid.* section 11(1) and (3).

²⁴ Women for Change, *NGO Action Beyond Advocacy: The Role of NGOs in the Implementation of Reform Programmes-The Zambian Case*, Lusaka, P.2 .

farms and businesses.²⁵ This argument is presumptive and does not take account of the realities on the ground. In one study covering Monze, Mazabuka and Choma Districts in the Southern Province on the aspect of credit supply and demand under various types of collateral, Smith reports that:

“The study revealed some reasons to doubt that this will succeed in the near future... First, a large majority of respondents expressed an aversion to risking the loss of their land by using as loan security. Asked how much credit they would take (large amount, moderate, small, or zero) if required to offer land as collateral, 94% responded that they would take zero credit under those circumstances (91% on customary land, 97% on State)... On the supply side, interviews with bank officials in Monze and Mazabuka indicated that such demand (use of title as security for credit) would not be met: with one minor exception, no bank reported making current loans to small and medium-sized farmers, with or without title”.²⁶

From the above findings, it is clear that the Lands Act of 1995 is premised on defective assumptions completely detached from reality. It might also be added that liberalization, contrary to government policy as given effect by the Lands Act of 1995, does not always result in productive usage of land. For example, in the Mkushi Farming Bloc in Chief Shaibila's area, a foreigner is said to have been given land in excess of 4,000 hectares which is not utilized.²⁷ It is, therefore, clear from the goings on in the Mkushi Farming Bloc that the advent of the Lands Act of 1995 has tended to promote speculations in land rather than increase and improve land usage in Zambia. A logical conclusion from the above is that the Lands Act of 1995 has not been successful in facilitating either poverty reduction or economic growth. This state of affairs is at cross purposes with the aspirations of the Poverty Reduction Strategy Paper and all key stakeholders who are unanimous that, “agriculture is the

²⁵ Ministry of Lands, *Land Tenure Policy*, Lusaka. 2000.

²⁶ R.E. Smith, *Land Tenure, Title Deeds, and Farm Productivity in Southern Province: Preliminary Research Findings (Outline)*, Development Studies Department, School of Oriental and African Studies. London. September, 2001. P.3

²⁷ Zambia Land Alliance, *Report on Draft Land Policy Community Consultation Workshop held in village locations of Mkushi District, 17-31 January, 2003*. P. 6.

only feasible “engine” for growth²⁸ because land is Zambia’s main asset. On the basis of the foregoing, it is submitted that the Lands Act of 1995 has little or no relevancy in Zambia’s liberalized market economy.

²⁸ S.L. Jorgensen, *Integrating Land Policy Analysis in Poverty and Social Impact Analysis (PSIA) and Country Strategies*, 5 WORLD BANK REPORT (2000).

CHAPTER SEVEN

SUMMARY AND CONCLUSIONS

7.0. LAND TENURE SYSTEMS IN ZAMBIA

At the time of Zambia's independence land was categorized into Crown land, reserves and trust lands. This system of land holding continued essentially as it existed during the period of rule of the territory by the B.S.A. Co. Meaningful change only came in 1975 when the freehold system of land holding was converted into statutory leasehold under the Land (Conversion of Titles Act), 1975. This Act also introduced the concept of monitoring and controlling transactions in land. In 1985, by amendment to the Land (Conversion of Titles) Act, non-Zambian nationals were not permitted to hold land unless they were declared investors by the State. The Lands Act of 1995 provided for the continuation of leasehold and leasehold tenures; continuation of the vesting of land in the President and alienation of land by the President; statutory recognition and continuation of customary tenure; the conversion of customary tenure; establishment of a Land Development Fund and a Land Tribunal; repeal of the Land (Conversion of Titles) Act; the Zambia (State Lands and Reserves) Orders 1924 to 1964; the Zambia (Trust Land) Orders 1947 to 1964; and the Western Province (Land and Miscellaneous Provisions) Act, 1970.

7.1. LANDS ACQUISITION ACT TO CONTINUE

Prior to the enactment of the Land (Conversion of Titles) Act, 1975 and the Lands Act, 1995, the Zambian Government had in 1970 enacted the Lands Acquisition Act to enable itself take control of agricultural land under freehold tenure that was vacant and undeveloped. It is our conclusion and submission that the Lands Acquisition Act is a necessary piece of legislation whether in a liberalized or non-liberalized market economy. The Act enables the

government to facilitate its citizens' access to land, particularly in future, owing to population growth. The procedure for compulsory acquisition of land by the State is not done haphazardly and if aggrieved, the affected landholder can rely on the rules of natural justice to make his grievances known. In the case of Zambia, the continued existence of the Lands Acquisition Act is even more relevant now given that the Government coffers cannot support a "willing seller, willing buyer" approach to land acquisition. Moreover, as a country that has put agricultural development as one of the main pillars of economic revival, idle lands require to be acquired by the State for alienation to potential developers rather than promote land speculation by holders. Lastly, the Lands Acquisition Act is a necessary safeguard against the spectre of displacement and marginalisation of customary landholders in the face of the Lands Act of 1995 which provides for alienation and conversion of customary land into statutory tenure. The Lands Acquisition Act should, therefore, continue to remain on Zambia's statute books even in the light of the liberalization of the economy.

7.2 INADEQUACIES OF THE LANDS ACT, 1970

Although the Lands Act of 1995 abolished the various statutory enactments already referred to above, it still seeks to provide protection to occupants of customary land by providing that the President shall not alienate any land held under customary tenure¹:

- (a) Without taking into account the local customary law on land tenure which is not in conflict with the Lands Act;
- (b) Without consulting the chief and local authority in the area in which the land is situated;
- (c) Without consulting any other person or body whose interest might be affected by the grant; and

¹ Lands Act No. 29 of 1995, section 3(4).

- (d) If an applicant for a leasehold title has not obtained the prior approval of the chief and the local authority within whose area the land is situated.

As Matibini aptly observes, ironically it is these same provisions aimed at protecting the interests of holders of customary land, that have generated litigation. A question that may be posed, therefore, is whether or not the provisions in question provide sufficient protection to holders of land under customary law.² The weaknesses inherent in the provisions are that:

- a) The provisions repose immense discretion in the chiefs and which discretion appears to be misused or abused by some chiefs;
- (a) The right to convert customary tenure to leasehold tenure seems to favour persons who have the support of chiefs, are knowledgeable and have sufficient financial resources to apply for the conversion of customary tenure into leasehold tenure; and
- (b) The preceding provisions, together with the regulations,³ do not provide sufficient and detailed protection for holders of customary tenure.

7.3. RECOMMENDATIONS

On the basis of the above observations, in order for the Lands Act of 1995 to become relevant in Zambia's liberalized market economy, it is recommended that:

- (a) The provisions of the Lands Act of 1995 should be comprehensively and generally reviewed;
- (b) The protection of land rights under customary tenure should be reviewed and strengthened. For example, whereas the period of statutory tenure of 99 years could remain as at present, a provision could be made for land previously held

² P. Matibini, *Historical Background and Legal Analysis of The Lands Act, 1995*, (Paper presented to the Catholic Commission for Justice and Peace Workshop) at 46.

³ Statutory Instrument Number 89 of 1996.

under customary tenure to revert to the chief in the event that the title becomes vacant and not to become State land as currently practiced;

- (c) Government must not only pay attention to customary tenure right but also to land management systems when addressing tenure reform. The private plots and commons found on customary lands provide subsistence to millions of people. As Mozambique has shown, even years of civil war can fail to damage the legitimacy and relevance of customary land management systems. Local elites and foreign investors are, however, seeking to secure rights over the best land, with good soils and water, close to markets, through whatever systems exist, and eroding rights to customary lands and common property resources. Poor policy and ineffective implementation together create a lot of uncertainty and conflict in rural areas and marginalize the poor villagers who are left to survive on remnants left them by the more powerful groups;
- (d) The discretion granted to chiefs and local authorities in the administration of land require to be reviewed as a way of curtailing corrupt practices;
- (e) There is need to control the quantity of land a single person might hold. The lessons from Zimbabwe's invasion of white-owned farms by the landless poor black communities are relevant in this regard;
- (f) The potentially catastrophic impact of HIV/AIDS on land reform policies and State capacity to implement them, not only at present levels of infection, morbidity and mortality but over the next decades, is only now beginning to feature in policy-linked research and debates in the region. It is a matter for urgent attention, requiring a re-examination of many basic assumptions underpinning land policy

work. The effects of HIV/AIDS are currently unevenly distributed and fall most severely on the poorest and most marginal members of society, who are most vulnerable to losing, forfeiting or alienating their land rights as a result of sickness or death within their families or households. Many of the most marginal households (both male-and-female headed) are likely to break up and disappear altogether. The pandemic may encourage shifts to new forms of tenure, for example, rental or increased land sales, as well as patterns of cropping and land use. The pandemic is bringing the negative impact of aspects of customary law on the livelihoods of women and children into increasingly sharp focus. The land rights of women and children are becoming increasingly vulnerable to dispossession by patrilineal kin on the death of male-headed households. This, therefore requires, the application of the universal principle of equality to land ownership by women and vulnerable groups which entail the prohibition of discrimination of women and vulnerable groups in land ownership;

- (g) Considering that customary areas constitute 94% of Zambian land, with the remaining 6% being held under State land title and only 3% of this land is set aside for commercial agriculture,⁴ there is need for some land to be specifically dedicated to use for agricultural purposes; and
- (h) In light of recommendation (g) above, there is also need for the strict enforcement of covenants regarding the use of agricultural land.

⁴ S.L. Jorgensen, *Integrating Land Policy issues in Poverty and Social Impact Analysis (PSIA) (and Country Strategies*, 7 WORLD BANK REPORT (2000).

BIBLIOGRAPHY

A BOOKS

- 1 COLLINS, P.H., Dictionary of Law. (2nd ed.). Peter Collins Publishing Limited. 1986.
- 2 ELIAS, T.O., The Nature of African Customary Law. Manchester University Press. 1956.
- 3 LORD LLOYD OF HAMPSTEAD, Introduction to Jurisprudence (3rd ed.). Stevens and Sons. London. 1972.

B ARTICLES AND PAPERS

- 1 AMOO, S. *Land law and development and the expropriation laws of Zambia*, in NDULO, M. (Ed.), Law in Zambia. East African Publishing House. Nairobi. 1984.
- 2 BASTIAAN, L. (1999), *Land Tenure in Zambia*. University of Maine.
- 3 BENTSI-ENCHILL, K. (1966), *Do African Systems of Land Tenure Require a Special Terminology?* Vol. 9 No. 2.
- 4 BROWN, T. and SIAMWIZA, B. (2002), *Chiefs, Commoners and Enclosures in the Gwembe Valley, Zambia*. University of Zambia. Lusaka.
- 5 BRUCE, J.W. and DONER, P.P. (1982) *Agricultural Land Tenure in Zambia's Perspectives*. Research Paper No. 76. Land Tenure Center. Madison.
- 6 COLSON, E. (1966), *Land Law and Land Holding among the Valley Tonga*. South-West Journal of Anthropology. Vol. 22. No. 1.
- 7 HANSUNGULE, M.K. (1995), *Land and Tree Tenure Project*. Lusaka
_ (1998), *Land Law and Policy in Zambia*. Lusaka.
- 8 JORGENSEN, S.L.(2000), *Integrating Land Policy Analysis in Poverty and Social Impact Analysis (PSIA) and Country Strategies*. World Bank Report.
- 9 MATIBINI, P., *Historical Background and Legal Analysis of the Lands Act, 1995*. A paper presented to the Catholic Commission for Justice and Peace Workshop. Lusaka.

- 10 MVUNGA, M.P.(1982), *Land Law and Policy in Zambia*. Zambian Papers No. 17. University of Zambia. Lusaka.
- 11 N'GANDWE, A. (1993), *National Conference on Land and Legal Reform in Third Republic Of Zambia*. A paper presented to the National Land Conference. Lusaka. 19 – 23 July, 1993
- 12 PLATTEAU, J-P. (Ed.), *Land Reform and Structural Adjustment in sub-Saharan Africa: Controversies and Guidelines* in Food and Agricultural Organisation Economic and Social Development Paper 107.
- 13 ROTH, M. and SMITH, S.G.(Ed.) (1995), *Land Tenure, Land Markets and Institutional Transformation in Zambia*. Research Paper 124.
- 14 SMITH, R.E.(2001), *Land Tenure, Title Deeds and Farm Productivity in Southern Province: Preliminary Research Findings (Outline)*. Development Studies Department, School of Oriental and African Studies. London.
- 15 WHITE, C.M.N.(1959), *A survey of African Land Tenure Systems in Northern Rhodesia*. J.A.A. Vol. 4
- (1959), *A Survey of African Land Tenure*. J.A.A. VOL. 12. No. 1.
- 16 Women For Change, *NGO Action Beyond Advocacy: The Role of NGOs in the Implementation of Reform Programmes-The Zambian Case*. Lusaka.
- 17 Zambia Land Alliance, *Report on Draft Land Policy Community Consultation Workshop held in village locations in Mkushi District*, 17-31 December, 2003.

C THESES

- 1 MULEYA, L., The effect of the Zambian Land Tenure System on Agricultural Development. (LL.M) University of Zambia. Lusaka. 1990. (Unpublished).
- 2 MULIMBWA, A.C., Law and Agricultural Development in Zambia. (Ph.D.) University of London. 1987. (Unpublished).
- 3 MVUNGA, M.P., Land Law and Policy in Zambia: An Appraisal of the Lands Acquisition Act. (Ph.D.) University of London. 1977. (Unpublished).

D OBLIGATORY ESSAYS

- 1 HAIMBE, M., *The Effect of the Lands Act, 1995 on Customary Land Tenure and Agricultural Development. Is this the Way Forward?* (2000). University of Zambia Library. Lusaka.
- 2 NEFU MILLO, A.A., *The Development of Land Ownership in Zambia, Tanzania and Nigeria.* (1980). University of Zambia Library. Lusaka.
- 3 PATEL, K.K., *Land Tenure and Economic Development in Zambia.* (1972/1972). University of Zambia Library. Lusaka.

E OFFICIAL PUBLICATIONS

- 1 The Barotse Agreement, 1964 (London: Her Majesty's Stationery Office 1964)
- 2 Ministry of Lands, Draft Land Policy (Lusaka 200)
 - Proceedings of the draft Land Policy Consultative workshop for Traditional Rulers in Lusaka Province, (18-19th December 2002)
 - Land Tenure Policy, (Lusaka 2000)
- 3 Ministry of Lands and Natural Resources, Procedures on Land Alienation (Government Printer, Lusaka, 1985)
- 4 Movement for Multi-Party Democracy Manifesto, (MMD Secretariat, Lusaka, 1991)
- 5 Report of the Land Commission (Government Printer, Lusaka, 1967)
- 6 Report of the Northern Rhodesia Independence Conference, (London: Her Majesty's Stationery Office 1964)
- 7 Zambia Daily Parliamentary Debates, (Government Printer, Lusaka, 1969)
 - Zambia Daily Parliamentary Debates, (Government Printer, Lusaka, 1975)
- 8 Zambia's Economic Revolution, (Government Printer, Lusaka, 1968)

F STATUTES

- 1 Constitution of Zambia, (Amendment) (Number 5) Act – Number 33 of 1969 of the Laws of Zambia
- 2 Constitution of Zambia Act – Number 27 of 1973 of the Laws of Zambia
- 3 Federation of Rhodesia and Nyasaland, (Constitution) Order-in-Council, Number 1199 of 1953

- 4 Lands Acquisition Act – Cap. 296 of the Laws of Zambia
- 5 The Lands Act, 1995 – Act Number 29 of 1995 of the Laws of Zambia
- 6 Land (Conversion of Titles) (Amendment) (Number 2) Act Number 15 of 1985 of the Laws of Zambia
- 7 Land (Conversion of Titles) Act – Number 20 of 1975 of the Laws of Zambia
- 8 Land (Customary Tenure) (Conversion) Regulations, Statutory Instrument Number 89 of 1996
- 9 North-Western Rhodesia Order-in-Council of 1889
- 10 Northern Rhodesia Order-in-Council of 1924
- 11 Northern Rhodesia Order-in-Council of 1928
- 12 Northern Rhodesia (Native Trust Land), Orders-in-Council 1948 to 1964
- 13 State Land, Reserves and Trust Land Orders of 1964
- 14 Statutory Instrument Number 1652 (British) (Her Majesty’s Stationery Office 1964)
- 15 Western Province (Land and Miscellaneous Provisions) Act Number 47 of 1970 of the Laws of Zambia
- 16 Zambia Constitution (Amendment) (Number 3) Act – Number 10 of 1969 of the Laws of Zambia
- 17 Zambia Independence Constitution, 1964
- 18 Zambia (State Land and Reserves) Orders 1928 to 1964
- 19 Zambia (Trust Land) Orders 1947 to 1964

G CASES

- 1 *Amodu Tijani V Secretray, Southern Nigeria*, (1921) 2 A.C. 399
- 2 *Chenda and Another V Phiri and Others*, LAT/80/90
- 3 *G F Construction (1976) Limited V Rudnap Zambia Limited and Another*, SCZ Judgment Number 18 of 1999
- 4 *Masendeke V Ndola Rural District Council*, LAT/29/98
- 5 *Nkumbula V the Attorney General for Zambia* (1972) ZLR 204
- 6 *Sobhuza II V Miller and Others* (1926) A.C. 518
- 7 *Still Water Farms V Mpongwe District Council and Others*, LAT30/30/2000
- 8 *Re: Southern Rhodesia* (1919) A.C. 211