IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.43/2016**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

23 DEC 2020

ATTORNEY GENERAL **APPELLANT**

AND

LASFORD KAYULA NKONDE & 18 OTHERS **RESPONDENT**

Coram: Hamaundu, Kabuka and Kajimanga, JJS
On 4th June, 2019 and 23rd December, 2020

For the Appellants : Mrs D. M. Shamabobo and Mrs L.S. Chibowa, Senior State Advocates
For the Respondent: Mr M. Chitambala, Messrs Lukona Chambers

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Whiteman v ALS of Trinidad and Tobago [1991] 1 L.R.C. 536,551**
2. **Edith Zewelani Nawakwi v The Attorney General (1990-1992) ZR 112**
3. **The Attorney-General v Dow [1991] BLR 119**
4. **Mmembe and Mwape v The People (1995/97) ZR 118**
5. **Faustine Mwenya Kabwe & Aaron Chungu v Justice Ernest Sakala and Justice Peter Chitengi, SCZ No.25 of 2012**
6. **Attorney-General of Gambia v Mamoudou Jobe (1984) AC 689,700**
7. **Mwape v The People (1995/97) ZR 118**

Works referred to:

Black's Law Dictionary; 10th edition; Bryan A. Garner; 2014; USA; Thomson Reuters

Introduction

1] This is an appeal from a decision of the High Court (Sitali, J, as she then was) upholding a petition filed by the respondents for a declaration that the Government of the Republic of Zambia had discriminated against them, in violation of the Constitution, when it paid them lesser amounts of compensation than those which were paid to the estate of Mr Simon Mwansa Kapwepwe.

2] Essentially, the appeal, just as was the trial of the petition in the court below, is about interpretation of a statute; in this particular case, the Constitution. At the center of the interpretation dispute is **article 23**. This provides:

> **"23 (1) subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.**
>
> **(2) subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.**
>
> **(3) In this Article the expression 'discriminatory' means affording different treatment to different persons attributable, wholly or mainly, to their**

> **respective descriptions by race, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded priviledges or advantages which are not accorded to persons of another such description".**

3] The article goes on up to **clause (8)**. However, we shall not quote the rest of the clauses as they consist entirely of permissive derogations; and this matter does not turn on any of those derogations. The dispute is on the interpretation to be given to **clause (3)** of **article 23**.

4] The respondents contend that the Government discriminated against them on account of their *"social status"*, a term or expression which is not listed in **clause (3)** as a description by which certain persons may be classified. Both sides agree that such term or expression is not included in **clause (3)**. However, the Government's contention is that the list is exhaustive, so that, in so far as the respondents claim discrimination on account of a description that is not listed in **clause (3)**, the action is incompetent.

5] The respondents, on the other hand, contend that **clause (3)**,

being a constitutional provision, should be given a general and purposive construction so that it should be taken to include all manner of discrimination, whether it is expressly provided for in that clause or not.

6] This dispute must be resolved against the background that we are about to give. The details of that background are derived from the averments by the parties, and also from our general knowledge of the political circumstances, judicial notice of which we take, that prevailed during the period that gave rise to the compensation which the respondents were given.

Background

7] Mr Simon Mwansa Kapwepwe, whose compensation the respondents are displeased with, was a veteran freedom fighter who participated in the struggle for the independence of this country. He held a very high position within his party, then, the United National Independence Party.

8] It is a fact which is well documented that on numerous occasions Mr Kapwepwe was detained by the colonial authorities for his activities. When this country attained

independence in 1964, he served in the first post-independence cabinet as a minister. He then rose to become the Vice President. At that time, the country followed a multiparty political dispensation.

9] In or around 1971, Mr Kapwepwe disagreed with the political direction which his party was taking. Consequently, he left the Government, and the party, to form his own party, the United Progressive Party (UPP). By this time, it was becoming clear that the government of the day was desirous of pursuing a one-party state political dispensation. This was achieved in 1973, with the ushering in of a new constitution which recognized only one party-the United National Independence Party.

10] This was to remain the position for the next seventeen years, until 1990. Many people opposed the idea of a one-party state. So, it was during this period that a number of people, including the respondents herein, were detained by the President, using the *Preservation of Public Security Regulations*, for expressing their opposition to the one-party state; or engaging in activities that appeared to undermine that state of affairs.

11] Mr Kapwepwe was at one time detained. The respondents were,

at some time or other, detained as well. The periods of detention also differed from person to person.

12] Many people who were detained tested the legality of their detentions through writs of *habeas corpus*. However, according to the evidence on record, none of the respondents in this case was ever awarded damages by a court of law for their detention.

13] In 1990, multi-party politics were re-introduced; the state of emergency under which the President was empowered to detain people was lifted; and those detainees that were still in custody were freed. The country went to the polls in 1991 and a new party, the Movement for Multi-party Democracy (MMD), formed the next government.

14] The issue of detentions during the one-party state was largely forgotten, at least for the next ten years. In 2001, however, the country elected a new President under the same party. This was Levy Patrick Mwanawasa, a lawyer with a distinguished track record. During his time in practice, he had championed human rights: He had previously represented many political detainees who had sought to challenge their detentions.

15] Not long after Mwanawasa was sworn in as President, the

Government, on its own volition, mooted the idea that all those who had been detained for political reasons during the one-party state political dispensation be given some compensation. This idea only came to fruition in 2005 when the Government paid the respondents some sums of money, ranging between K18 million(unrebased) and K50 million (unrebased). The respondents signed a disclaimer for receipt of their compensation. This issue was canvassed in the court below, but we think that it will fall by the wayside as we look at the main issue.

16] By this time, Mr Kapwepwe had long been deceased. His estate was paid a sum of K105 million (unrebased). When the respondents came to learn about this amount, they went into negotiations with the Government. This resulted in additional sums of money being paid to them. In the end, some of them now received as much as K131 million (unrebased). The lowest received a sum of K40 million (unrebased).

17] A number of the respondents, however, received varying sums in between the two figures. This still did not satisfy the respondents: They argued that Mr Kapwepwe had only been in

detention for a period of about five months. According to the respondents' calculation, Mr Kapwepwe's compensation could be broken down as being approximately K20 million (unrebased) for each month that he was in detention.

18] They argued that, if that rate were to be applied to everyone, their compensation ought to have been far much higher than they were paid because they had been detained for much longer periods. The parties failed to reach further agreement. Hence the respondents filed the petition herein.

19] The Government's answer was this: It acknowledged that Mr Kapwepwe was paid higher compensation, but that this was because Mr Kapwepwe and the respondents did not share the same standing in society. That response gave rise to the question by which this case was argued in the court below; whether the framers of the constitution had intended that the prohibition against discrimination should extend to *"social status"*.

20] The respondents also sought an order that they be compensated, like Mr Kapwepwe, at the rate of K20 million (unrebased) for every month served in detention.

The parties' arguments in the court below

20] The respondents' argument before the court below was that the language of the constitution should be construed, not in a narrow and legalistic way but, broadly and purposively so as to give effect to its spirit; and that this is especially so in the case of provisions which protect human rights. For this argument, reliance was placed on the decision of the Privy Council in **Whiteman v ALS of Trinidad and Tobago**[1] and a host of other authorities, within the Commonwealth and outside, which espouse the same principle.

21] The respondents then argued that, although **article 23(3)** does not include *"social status"* in its definition of the expression *"discriminatory"*, going by the broad and liberal manner in which the constitution should be interpreted, discrimination on grounds of *"social status"* is a form of discrimination that is prohibited by that **article**.

22] Mr Chitambala, who argued the case for the respondents in the court below, referred us to cases, within our jurisdiction and outside, where the court has read into a constitutional provision

a form of discrimination which is not expressly stated in that provision. One such case was **Edith Zewelani Nawakwi v The Attorney General**[2].

23] The issue in that case was this: **article 25** of the Constitution, which has since been amended, prohibited discrimination. **Clause (3)** thereof set out what was meant by the expression *"discriminatory"*. It talked about different treatment based on *race, tribe, place of origin, political opinions, colour* or *creed*. But *sex* and *marital status* were not classifications that were expressly stated in that clause.

24] In the *Nawakwi* case, it became apparent that certain practices in some offices of the civil service discriminated against women, not only in terms of their gender but also, in terms of their marital status. *Musumali, J* (as he then was) said that, although the definition of the word *'discriminatory'* in that article did not include *'sex'* or *'gender'*, it could never have been the intention of the framers of the constitution to discriminate between males and females in the manner in which those offices had been doing. Consequently, he held that the petitioner in that case

had been discriminated against. We associate ourselves with that holding.

25] It is important to note that, pursuant to that judgment, the subsequent amendment to the constitution included *'sex'* and *'marital status'* in the definition of the word *"discriminatory"*. This is now the position in **article 23** of the current Constitution.

26] Another case that we were referred to was the Botswana case of **The Attorney-General v Dow**[3] whose issues were somewhat similar to the *Nawakwi* case, and in which the court, similarly, held that discrimination on account of *'sex'* was proscribed by the constitution, even though *'sex'* as a classification was not included in the definition.

27] The Government's argument was that the classifications set out in **clause (3)** are exhaustive. The learned Solicitor-General, who argued the case for the Government in the court below, submitted that the respondents could only be said to have been discriminated against if they could demonstrate to the court that the differential treatment in this case was attributable

wholly, or mainly, to the difference between them and Mr Kapwepe on any one of the classifications set out in **clause (3)**.

28] He argued that *'social status'* was not one of those classifications in the clause; hence the respondents could not even bring a petition under **article 23**. For that argument, the Government relied mainly on two cases; the case of **Mmembe and Mwape v The People**[4] and the case of **Faustine Mwenya Kabwe & Aaron Chungu v Justice Ernest Sakala and Justice Peter Chitengi**[5].

Consideration by the High Court and decision

29] The learned trial judge found that there was no dispute that the compensation paid to Mr Kapwepwe was calculated at a much higher rate than that which was applied to the compensation paid to the respondents. The trial judge then said that the question was whether that decision, on the part of the Government, was discriminatory against the respondents.

30] In the learned judge's view, the real question for determination was whether it is permissible to discriminate on the ground of *'social status'* merely because that classification is not included

in **clause (3)**. The learned judge quoted a statement from Lord Diplock's opinion in the case of **Attorney-General of Gambia v Mamoudou Jobe**[6]. The statement reads:

> **"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction".**

31] The judge also relied on a passage from our judgment in **Faustine Mwenya Kabwe and Aaron Chungu v Mr Justice Sakala, Mr Justice Chitengi and The Attorney General**[5] where, in endorsing the principle stated in Lord Diplock's statement, we said:

> **"the rationale for this approach is clear; the provisions conferring the rights and freedoms should not be narrowly construed but stretched in favour of the individual so as to ensure that the rights and freedoms so conferred are not diluted. The individual must enjoy the full measure and benefits of the rights so conferred and in this respect, the derogations to the rights will usually be narrowly or strictly construed"**

32] On the strength of these authorities, the learned judge held that **clause (3)** must be construed in accordance with the lofty purpose for which its framers framed it; namely, to provide protection against discrimination. Consequently, she came to

the conclusion that, although *"social status"* was not one of the classifications set out in **clause (3)**, the framers of our Constitution did not intend that individuals should be discriminated against on the basis of their *"social status"* by persons performing functions in public offices. The judge, therefore, held that the respondents, in this case, had been discriminated against.

33] Having found that the respondents were discriminated against, the learned judge went on to recognize the fact that Mr Kapwepwe had made very significant contributions in terms of the liberation of this country; and that the contributions also extended to the service that he rendered through the various positions that he had held in government.

34] The judge then lamented the failure by the Government to formulate proper guidelines for the payment of compensation of former detainees; saying that, had that been done, Mr Kapwepwe's contribution would have been taken care of within the guidelines. However, the judge declined to award the respondents compensation at the same rate as that paid to Mr Kapwepwe, namely, K20 million (unrebased) per month in

detention. Instead she awarded, across board, a sum of K80,000 (rebased) for each year served in detention, less what had already been paid.

35] The Government appealed against the holding that the respondents were discriminated against and, consequently, against the award of additional compensation. The respondents cross-appealed against the learned judge's refusal to award them compensation at the rate of K20 million (unrebased) per month served in detention.

Arguments canvassed by the parties before this court

36] Before us, the parties have maintained the same arguments. The Government (appellant) has emphatically argued that the grounds set out in **clause (3)** of **article 23** are exhaustive; and that, for one to successfully challenge an action as being discriminatory under **article 23**, he must show that the different treatment was accorded to him, wholly or mainly, due to only those classifications set out in **clause (3);** namely, *race, tribe, sex, place of origin, marital status, political opinions, colour or creed.*

37] To illustrate the Government's argument, counsel submitted as follows: that Mr Kapwepwe shared the same tribe and place of origin as some of the respondents: that he was of the same sex as most, if not all, of the respondents: that he shared the same political beliefs as all of the respondents: and that he was of the same race as all the respondents.

38] According to the Government, this court in the case of **Mmembe and Mwape v The People**[4] recognized the inherent difference that results from different stations in society generally. It was therefore submitted that, because this case arose wholly from the respondents' assertion that Mr Kapwepwe received a more favourable settlement in the negotiations with the Government due to his status in society; and that, because *"social status"* is not one of the classifications set out in **clause (3)**, the respondents had failed to establish that they were treated in a *"discriminatory"* manner within the meaning of that word as defined by the clause.

39] We were urged to allow the appeal, and dismiss the cross-appeal.

40] On behalf of the respondents, Mr Chitambala submitted that it

is not correct to say that this court in **Mmembe and Mwape v The People** supported the argument now being advanced by the Government that **clause (3)** permits discrimination on the ground of *'social standing'* or *'status'* merely because the classification, *'social status'*, is not a classification that is stated in the definition.

41] In fairness to the Government, we do not think that that was the thrust of their argument on this point. They merely pointed out that, in the *Mmembe* case, we acknowledged the differences inherent in society in terms of status. And, indeed, in that case we did say that the President of the country cannot be put on the same level as an ordinary citizen.

42] Regarding the main issue, Mr Chitambala's argument was that, adopting the liberal and purposive interpretation of the constitution, as espoused by the several authorities referred to us, it cannot be said that, by its silence on *'social standing'* as a prohibited ground of discrimination, **clause (3)** permits discrimination on the ground of *'social status'* or *'standing'*.

43] To emphasize this point, he submitted that discrimination on

the ground of *"social status"* or *"standing"* is not one of the derogations permitted under any of the derogatory clauses in **article 23 (4), (5), (6), (7) or (8)**. He then argued that, in fact, any discriminatory conduct or deed that cannot be justified by the said derogatory clauses is prohibited under **article 23**.

44] With those submissions, Mr Chitambala urged us to dismiss the main appeal, but allow the respondents' cross-appeal.

Consideration by this court and decision

45] We must say that several of the authorities that have been referred to us in this case were previously referred to us when we heard the case of **Faustine Mwenya Kabwe and Aaron Chungu v The Attorney General**[5]. In that case, after much reflection on those authorities, we came up with a position that is representative of the current approach adopted across various jurisdictions with regard to interpretation of a constitution.

46] This position is reflected in several statements that we made in the course of our judgment. For instance, we had this to say:

> **"It is trite that a constitution of a country ranks higher to a legislative enactment. The Constitution thus becomes the**

Supreme Law of the Land. It creates the organs and office of the State and clothes them with their powers and functions. In most cases, it also confers on, and defines the rights that individuals and citizens will enjoy, usually through a bill of rights. It is usually framed by the people through mechanisms of choice and also adopted through a mechanism of choice. In the process towards adoption, there will inevitably be a discussion of content reflecting the will and aspirations of the people. Thus, to most constitutions, there is a background which provides a context to its provisions. Being the supreme law, which created among others, the legislature, the true intent of the provisions of a constitution may be ascertained from the background to its adoption. What would be cardinal in this instance is the intention of the framers of the constitution not the intention of Parliament, unless what is in issue is an amendment that was promulgated by Parliament. We therefore agree with observations of Mr Sangwa on this point".

47] In the passage immediately succeeding the one above, we said:

"whenever there is ambiquity in the meaning of a statute or indeed the Constitution itself, the primary principle of interpretation is that the meaning of the text should be derived from the plain meaning of the language used. In other words,

the natural and ordinary meaning of the words used should convey the true intent of the originators of the text. Other principles of interpretation should only be called in aid where there is ambiquity or where such literal interpretation will lead to absurdity. BELLO, J.S.C., made this point in the case of RAFIU RABIU vs S referred to us by Mr Sangwa...." (*we went on to quote a passage from the learned judge's judgment, as well as another passage from another judge within the same case*)

48] We continued as follows:

"**...; however the language of the constitution is construed, its ordinary grammatical meaning cannot be dissolved away. Having ascertained the text, it must be borne in mind that a constitution is not an ordinary statute. It may have several provisions touching on the same subject. Case law abounds that all provisions touching on the subject must be considered** (*we then quoted with approval the words of AMISSAH J.P in the case of Attorney-General v Dow, and continued*) **Also, while providing for the current scenario, it is expected that a constitution will stand the test of time and serve future generations and situations. Against this reality, one cannot rule out a possibility that a constitution could be construed in such a way that it assumes different meanings through different generations, each one of them being correct for its time. This is especially the case when the constitution is expressed in broad terms. It assumes a flexibility that can be stretched to cover varying situations without the need for an amendment.**

From the foregoing, it is thus trite and desirable that at any given time, provisions of a constitution are considered as a

whole, without losing sight of its language, foundational values, traditions and usages that could have influenced its language. We therefore agree entirely with the words of Sir UDOMA, in the case of RAFIU vs S, that the function of a constitution is to establish a framework and principles of government that will apply to varying conditions and should be construed in such a way that the principles of government enshrined therein are not defeated"

50] We then said:

"The various authorities cited to us and indeed a plethora of other cases show that the literal interpretation of a constitution is stretched even further when such a constitution contains a bill of rights. Cases across various jurisdictions show that when it comes to the interpretation of a constitution containing a bill of rights, courts will usually adopt a generous and purposive approach. This is aptly summarized by Lord DIPLOCK, in the case of ATTORNEY GENERAL OF GAMBIA VS MAMOUDOU JOBE, referred to above....(*here we set out the words of Lord Diplock which we have quoted earlier in this judgment. Then we continued*) **We endorsed this principle in the case of AKASHAMBATWA MBIKUSITA LEWANIKA when we held that a purposive approach should be adopted if the strict interpretation would give rise to an unreasonable and unjust situation."***(Then followed the passage which the learned trial judge quoted regarding the rationale for that approach).*

51] From those passages, the position we hold can hence be summarized in four statements, thus:

(i) *That, in interpreting a statute, including a constitution, what is cardinal for the court is to discern the intention of the originators or framers of that statute:*

(ii) *That, to achieve the above, the primary principle is that the court should look to the natural and ordinary meaning of the words used in the text:*

(iii) *That, other principles of interpretation should only be called in aid where there is ambiguity, or where such literal interpretation will lead to absurdity or give rise to an unreasonable and unjust situation: and*

(iv) *That, when it comes to the interpretation of a constitution containing a bill of rights, courts will usually adopt a generous and purposive approach.*

52] We must add that it is a cardinal principle that the court should not substitute its views for the intention of the originators of a statute.

53] In the instant case, the provision which is the subject of interpretation is an article in the constitution and, particularly, one that confers rights on individuals. Clearly, our position is that a generous and purposive approach should be adopted in interpreting it. For this reason, we do not agree with the Government's position that the discrimination that is prohibited by **article 23** should be restricted only to those classifications set out in **clause (3)** thereof.

54] However, we cannot lose sight of what we said in the *Faustine*

Kabwe and Aaron Chungu case. We said:

> **"Stretch as the court may, there must always be a realization that not all situations may be brought within the ambit of the constitutional provisions. There will be a time when even the most ardent judicial activists will not be able to sweep a situation into the umbrella of a provision without straying into judicial legislation and usurping the function of another arm of government"**

For this reason, we do not agree with the contention by the respondents that any manner of differential treatment which is not stated in any of the permissive derogations in **article 23** must be said to be discrimination prohibited by the article.

55] It should be realised that the court will seldom, if ever, be presented with a straight-forward question as to whether a particular classification of differential treatment should be read into the definition in **clause (3)** or not, the way the parties herein did in the court below.

56] Instead, in almost all cases, the differential treatment complained of will come in a factual situation: There will be a background against, and circumstances under, which the differential treatment arose. In other words, its proper context.

In certain cases, the proper context may include the values, traditions and customs of the society or sections thereof.

57] Once it is viewed in its proper context, differential treatment may or may not turn out to be discriminatory under **article 23**. The court should, therefore, not judge differential treatment merely at face value without examining the context in which it is done.

58] In order to determine whether that differential treatment is discriminatory in the sense of the word as defined by **clause 3** the court must adopt this approach: First, it must examine the differential treatment against its background, and all the circumstances surrounding it (i.e. the proper context), and determine whether it falls under the classifications set out in **clause 3**. If it does, then obviously such differential treatment will be said to be discriminatory and prohibited by **clause 3**. If it does not fall under any of those classifications, then the court should examine whether the omission of such differential treatment from the classifications in **clause 3** is absurd or unjust. If the answer is in the affirmative then the court must hold that such differential treatment can be read into **clause 3**

and is discriminatory under **article 23**. This was the position in the Nawakwi case. If the answer is in the negative, then the court must hold that it was never the intention of the framers of the constitution to include that factual situation in the discrimination that is prohibited by **article 23**, and that to read it into **clause (3)** would amount to substituting the court's view for that of the framers of the constitution-which is wrong.

59] In the instant case, the background which we have set out at the beginning of this judgment brings out the following circumstances:

(i) *That the Government decided to compensate all former political detainees, without exception.*

(ii) *That, as between the political detainees, Mr Kapwepwe had made outstanding contributions to the country which far exceeded those of the other detainees, especially the respondents herein: Mr Kapwepwe's contributions were, therefore, attributes which set him apart from the rest:*

(iii) *That in calculating the quantum of compensation to pay to Mr Kapwepwe, the Government took into account his outstanding contributions to the Country:*

(iv) *That the Government's decision to pay compensation was a gratuitous, or benevolent, gesture on its part:*

This brings in the question whether the gesture could really be said to have been made by government in pursuance of any written law or in the performance of the functions of any public office.

60] Given the background and circumstances that we have set out above, it was, in our view, bad drafting on the part of the advocate who settled the government's *"Answer"* to say that the distinction in the quantum of compensation paid to the respondent and Mr Kapwepwe was due to their difference in social status: There is nothing in the background that suggests that the government had approached the compensation in terms of social groupings of the former political detainees.

61] We can, therefore, say that the court below was called upon to resolve a question that was factually no-existent: In other words, it was moot.

62] So we pose two questions; first, given the reasons for the seemingly higher payment made to Mr Kapwepwe, did that payment amount to discrimination under **article 23**? Secondly, was it made by government in pursuance of any written law or in the performance of any function of public office, as provided

in **clause 2** of **article 23**? We have sought the meaning of the word *'discrimination'* from **Black's Law Dictionary**. One meaning assigned to the word states:

> **"Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured"**

63] We have pointed out that Mr Kapwepwe's outstanding contributions to the country were attributes which set him apart from the other former detainees. Those attributes are certainly a reasonable and real distinction between Mr Kapwepwe and the others. So, a payment that takes that distinction into account cannot, according to the meaning that we have quoted, be said to be discriminatory: even though on, the face of it, the payment will appear different from that of the others. It follows that the payment that the government made to Mr Kapwepwe did not, in the ordinary sense of the word, amount to discrimination. Can it then be said that it was the intention of the framers of **article 23(3)** of our constitution that an act which does not amount to discrimination, in the ordinary

sense of that word, should amount to discrimination under that article? We do not think so.

64] Coming to the second question posed, i.e, was it in pursuance of any written law or in the performance of any public function by government? We have set out the background leading to the payment in the earlier part of this judgment. For completeness we recap: it was following a period in which the country was led by a one-party government fraught with rampant human rights abuses.

65] The Mwanawasa government, led by a champion of human rights, before and after becoming President, sought to erase this history, or redeem the image of the country in terms of its human rights record. It therefore, acting benevolently and not in the exercise of powers vested in it by law or in the performance of public functions, decided to compensate the respondents and Mr Kapwepwe. This was a gesture of good will on the part of government acting on its own volition and under no pressure or coercion of litigation. These acts cannot in our view, be said to be acts that can be subject to **article 23** because the manner in which a government decides to make a gratuitous

payment is entirely in its discretion. Acts that amount to acting in pursuance of any law or performance of public function in terms of compensation are acts such as the compensation envisaged under **article 16** where a President decides to compulsorily acquire property belonging to an individual. In that case all persons divested of property must be compensated in a manner that is not only transparent but also non-discriminatory.

66] In conclusion, from what we have said above, we can only repeat what we said in the **Faustine Kabwe and Aaron Chungu** case that not all situations may be brought within the ambit of constitutional provisions. Certainly, the context in which this payment was made cannot be one which could bring it under **article 23**.

67] It is our view therefore that in this case the Government did not discriminate against the respondents. There is, consequently merit in the Government's appeal. It follows that the ground of appeal which attacks the learned judge's holding on the *"Disclaimers"* that the respondents signed falls away.

68] Again, going by the views that we have expressed above, the

cross-appeal against the learned judge's refusal to award the respondents exactly the same computation of compensation as that of Mr Kapwepwe must fail.

69] The judgment of the court below is hereby set aside. The costs that were awarded to the respondents in the court below are also set aside. Instead, because this petition was on an article of the constitution whose interpretation is still a matter of interest to the public at large, we order that the parties shall bear their own costs, both here and in the court below.

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E. M. Hamaundu
SUPREME COURT JUDGE

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C. Kajimanga
SUPREME COURT JUDGE

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J. J. Kabuka
SUPREME COURT JUDGE