

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

APP/208/2021



BETWEEN:

WINDOWS OF OPPORTUNITY LIMITED **1ST APPELLANT**
GRANDWALK GENERAL DEALERS **2ND APPELLANT**
EMMAH BOTHA (T/A EMBOTHA TRADING) **3RD APPELLANT**
AND
CHINA HENAN ZAMBIA LIMITED **RESPONDENT**

CORAM: SIAVWAPA JP, NGULUBE AND PATEL, JJA

On 25th September and 11th October, 2023

FOR THE APPELLANT: Mrs. H.C. Musa of Milner & Paul Legal
Practitioners

FOR THE RESPONDENT: Mr. E.B. Mwansa SC with Mr. F.S.
Kachamba and Mr. A. Kiwempindi all of
E.B.M. Chambers

J U D G M E N T

SIAVWAPA J.P. delivered the Judgment of the Court.

Cases referred to:

1. *Siasamba and Others v Zulu* 2009/HP/0379

2. *Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprises (SCZ Judgment No. 4 of 1999)*
3. *Theresa Kazembe and 55 Others v China Hainan Zambia Limited 2015/HP/1971*
4. *BP Zambia PLC v Expendito Chipasha and 235 Others SCJ No 57 of 2018*
5. *Mumba and others v Council of University of Zambia, Appeal No 194 of 2020.*
6. *Crawford Mwinga and 2 others v Mwampole Brighton and Another, Appeal No 95 of 2019*
7. *Rahim Obaid v the People, Nadhim Quasmi v the People (1977) ZR 119*
8. *Mundia Sikatana v the Attorney-General, (1982) ZR 109*

Legislation referred to:

1. *Bank of Zambia (Currency) (Revocation) Order, Statutory Instrument No 27 of 2014*
2. *The Bank of Zambia (Currency) Regulations, Statutory Instrument No 33 of 2012 (Repealed)*

1.0 INTRODUCTION

- 1.1 This is an appeal against a High Court Ruling delivered by the Honorable Mr. Justice M. Chitabo on 24th January, 2019.
- 1.2 In the said Ruling, among other reliefs, the learned Judge granted a new tenancy agreement to the Appellants but refused to order that rentals under that tenancy be quoted in Kwacha.

2.0 BACKGROUND

- 2.1 The Appellants were among the tenants that had obtained Judgment from the High Court in 2015 which prohibited the

Respondent from aligning the rentals to the US \$ to Kwacha exchange rate for tenancy agreements that the parties would enter into from 2015 onwards.

- 2.2 The Judgment was premised on the Notice the Bank of Zambia had issued dated 15th September, 2015. By the said Notice, the Central Bank prohibited aligning local payments for goods and services to the US Dollar to Kwacha exchange rate.
- 2.3 Apparently, only the first Appellant executed a new lease agreement with the Respondent upon expiry of the 2014 lease agreement while the other two continued occupying the shops and paying rent.
- 2.4 The Appellants however, disputed the amounts demanded by the Respondent as rental arrears on the ground that the Respondent had aligned the rentals to the US Dollar exchange rate contrary to the Judgment of the Court.
- 2.5 On account of the ensuing dispute, the Respondent issued a warrant of distress against the Appellants on 22nd June, 2017 for the recovery of the rent arrears.

3.0 THE NOTICE OF MOTION

- 3.1 To counter the Warrant of distress, the Appellants moved the Court below by originating Notice of Motion by which they

sought the same reliefs as they had sought in the matter that was determined by the Court in 2015 except for an order to set aside the warrant of distress and an order for damages for loss of business for locking up business premises.

4.0 DECISION OF THE COURT BELOW

- 4.1 In his Judgment, the learned Judge below declined to grant the relief to restrain the Respondent from quoting or aligning the rent to the US Dollar exchange rate on the basis that Statutory Instrument No 27 of 2014 revoked Statutory Instrument No 33 of 2012 which prohibited trading in foreign currency.
- 4.2 After acknowledging that there was an earlier judgment of the High Court acknowledging the directive from the Bank of Zambia, the learned Judge found that there was no legal basis to make an order restraining the Respondent from quoting their rentals in US Dollars.
- 4.3 As regards the order for a new lease between the parties expressed in Kwacha terms, the learned Judge found that there was no evidence that a notice to terminate the leases was given by either party. The learned Judge was of the view that the application for a new tenancy was made while the tenancy agreements were still subsisting in accordance with Section 6 of the Landlord and Tenant (Business Premises) Act.

- 4.4 The learned Judge found that the Respondent did not oppose the new tenancy because it wanted the Appellants to pay the rental arrears.
- 4.5 In relation to an order for determination of standard rent of shops No G6, J2 and S1 Kamwala Shopping World, the learned Judge, after considering Section 28 of the Act, Section 16 of the Act and the High Court case of *Siasamba and Others v Zulu*¹, ordered that the premises be evaluated by an independent registered valuation surveyor agreed upon by the parties within 14 days, at the Appellants' cost.
- 4.6 On the order to set aside the warrants of distress for irregularity, the learned Judge found that the warrants were not a true reflection of the amounts indicated as owing. He accordingly set them aside for irregularity and ordered the parties to appoint an independent person to reconcile the rent arrears with 14 days.
- 4.7 As regards damages for locking the premises and loss of business, the learned Judge found that the Appellants had not come to Court with clean hands as defaulters and declined to grant the relief.
- 4.9 No order as to costs was made.

5.0 THE APPEAL

5.1 Dissatisfied with the ruling of the Court Below, the Appellants have appealed to this Court on four grounds as follows:

1. The Trial Judge erred in law and fact when he ordered that the premises in issue be evaluated by an independent registered valuation surveyor who will be agreed upon by the parties within 14 days. The Surveyor will be paid by the Applicants who moved the Court for an order for standard rent when both parties would benefit.
2. The Trial Judge erred in law and fact when he ordered that the parties appoint an independent party agreed upon by both parties who will reconcile the outstanding rental arrears when that can be assessed by the Deputy Registrar and reduce costs on the parties as an independent party would be very expensive for the parties
3. The Trial Judge erred in law when he failed to adjudicate on the issue of locking up the business premises which was the major cause of loss of business in line with the case of *Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprises*² that was cited.
4. The Trial Judge erred in law and in fact when he failed to appreciate that the issue was the Respondents aligning the rentals to the US dollar and

not quoting in Us Dollars as was ordered in the case of *Theresa Kazembe and 55 Others v China Hainan Zambia Limited*³.

6.0 ARGUMENTS IN SUPPORT

- 6.1 In support of ground one, the Appellant took issue with the learned Judge's reliance on the Siasamba case (supra) on the basis that the facts of the two cases are different.
- 6.2 The Appellants contend that in the Siasamba case, the Court ordered costs against the Landlord because he was going to derive greater benefit even though he did not move the Court to determine standard rent.
- 6.3 According to the Appellants in the appeal instant, all the parties would benefit from the valuation of the properties for the determination of standard rent. In addition, they relied on the case of *BP Zambia PLC v Expendito Chipasha and 235 Others*⁴ to the effect that even if the assessment would benefit only one party, the Court can still assign costs to all the parties.
- 6.4 In ground two, the Appellant submitted that the Court below ought to have referred the matter to be reconciled/assessed by the Registrar whose mandate it is to conduct assessments and also as to reduce on costs.

6.5 In ground three, the Appellant argues that the Court below did not evaluate the evidence before it in a balanced manner. That it focused more on the alleged default by the Appellants in paying rentals than on the effect of the locking up of the Appellants' shops as the major cause of loss of business.

6.6 In further support of the argument, the Appellants adverted to the case of *Mususu Kalenga (supra)* which requires a landlord to first give a tenant a proper notice to terminate a lease. Only if the tenant fails to comply can the landlord resort to litigation for possession of the subject property.

6.7 The Appellant therefore prays that the order for costs be set aside and that they be awarded costs here and below.

7.0 ARGUMENTS IN OPPOSITION

7.1 The Respondent did not file heads of argument in opposition.

8.0 ANALYSIS AND OPINION

8.1 The issue in ground one is that the Court below ought not to have ordered the Appellants to bear the cost of the independent valuation expert when both the Appellants and the Respondent would benefit from the valuation. The Appellants also question the Court's reliance on the Siasamba case which is said to be distinguishable.

- 8.2 The starting point would be to interrogate the basis upon which the learned Judge ordered the Appellants to meet the expenses associated with the valuation exercise for the purposes of determining standard rent.
- 8.3 The learned Judge made the order on the basis that the Appellants had moved the Court and as such, they were liable for the cost attached to the valuation exercise. The Appellants on the other hand have argued that the ultimate beneficiary of the valuation exercise should bear the cost, being both the Appellants and the Respondent in this case.
- 8.4 In our view, it is true that in a landlord and tenant relationship, an exercise that is intended to determine standard rent is intended to settle a dispute over what is a fair amount payable by the tenant. Therefore, any cost associated with it can not be imposed on a party on the rationale of benefit. Similarly, we do not accept the view that the party that moves the court should as a matter of course bear the cost.
- 8.5 In our view, costs should be based on the established principle that the same follow the event subject to the discretion of the Court.
- 8.6 We agree with the Appellants that the facts of the Siasamba case are distinguishable from the facts which were before the

Court below in this appeal in that in the former, there was an order that the landlord repairs the property before valuation.

- 8.7 In view of what we have said above, we cannot fault the learned Judge for ordering the Appellants to meet the costs of the valuation exercise. We therefore, dismiss ground one for lack of merit.
- 8.8 In ground two, the sole argument is that the order for the parties to appoint an independent party to reconcile the outstanding rent arrears is an unjustifiable expense on the parties. It is argued that assessing or reconciling accounts is an exercise that is ordinarily done by the Registrars of the Court. The Appellants relied on the case of *BP Zambia PLC v Expendito Chipasha and 235 Others* in support.
- 8.9 In the absence of any special circumstances necessitating the appointment of an independent party to do the assessment of the rental arrears owing, we accept the Appellants' reasoning that the Registrar of the Court is well positioned to do the assessment. We allow this ground and set aside that part of the Ruling ordering the appointment of an independent assessor and instead order that the Registrar of the High Court sits in assessment and reconciliation of the rental arrears due to the Respondent.

- 8.10 In ground three it is contended that the learned Judge below failed to adjudicate on the issue of the locking up of the Appellants' shops, thereby causing them to suffer damages. The issue here is whether, there was sufficient material before the learned Judge upon which he could have found that the Respondent had indeed locked up the Appellants' business premises which he however, overlooked in preference for the evidence of default.
- 8.11 The Record shows that this was a matter designed to be heard in chambers without calling witnesses. The learned Judge proceeded accordingly and accepted written submissions by the parties.
- 8.12 Our perusal of the record shows that the Appellants said very little about the locking up of their premises both in the affidavit in support of the Originating Notice of Motion and the submissions. The learned Judge, equally said very little on the issue.
- 8.13 Our view is that the learned Judge was not fully convinced that the Respondent had locked up the trading premises for the Appellants. In that regard, he cancelled out the possible locking up with the Appellants' default and refused to award damages for loss of business.

- 8.14 We do not think that it can be said that the Judge treated the evidence of the parties on the issue in an imbalanced manner as he justified his decision. We dismiss this ground for lack of merit.
- 8.15 As for ground four, the Appellants have faulted the learned Judge for allegedly failing to appreciate that the issue before him was that of aligning the rentals to the US Dollar and not quoting in US Dollars as per the decision of the High Court in the case of *Theresa Kazembe and 55 others v China Henan Zambia Limited*.
- 8.16 The thrust of the arguments by the Appellants in this ground is that following the Theresa Kazembe case (supra), which held that rentals for subsequent lease agreements after the expiry of the existing leases in December, 2014, shall not be aligned to the US Dollar, the Respondent continued to align the rentals at the exchange rate of K10 to a US Dollar, thereby, yielding a higher Kwacha equivalent.
- 8.17 The learned Judge, sought recourse to the two Statutory Instruments namely; No 33 of 2012, which prohibited quoting and pricing of local goods and services in foreign currency and No 27 of 2014 which revoked No 33 of 2012.
- 8.18 The problem is that the learned Judge below effectively, purported to overturn the Court's earlier Judgment contrary to

the position that a Judge can not overturn a decision of another Judge of co-ordinate jurisdiction. We upheld this position in the case of *Mumba and Others v Council of University of Zambia*⁵.

8.19 In the case of *Crawford Mwinga and 2 Others v Mwampole Brighton and Another*⁶, we upheld the same principle after citing several local and foreign cases. We particularly drew inspiration from two High Court Judgments which we found to be highly persuasive, namely; *Rahim Obaid v the People*, *Nadhim Quasmi v the People*⁷ and *Mundia Sikatana v the Attorney-General*⁸.

8.20 In the first case, which is criminal, Sakala J, (as he then was stated as follows;

“We have only one High Court in Zambia consisting of puisne Judges who in all respects have equal power, authority and jurisdiction. I cannot envisage a situation on this particular issue where on the same facts one High Court Judge would have power or jurisdiction to overrule another.”

8.21 In the second case, the High Court stated as follows;

“A Judge of the High Court has no jurisdiction to re-open and reconsider and interfere with and comment upon a matter already determined by another Judge of equal jurisdiction.”


8.22 From the above cited authorities, we have no doubt in our minds that the learned Judge in the Court below, ventured into forbidden territory when he purported to overrule the earlier Judgment of the High Court which had forbidden the aligning of the rentals to the US Dollar.


8.23 For the above stated reasons, we find merit in this ground and allow it. We accordingly set aside the decision of the Court below holding that the Respondent was at liberty to align the rentals to the US Dollar for the leases entered into from 2015.

8.24 We however, take note of the fact that the Appellants did not execute new contracts with the Respondent after the expiry of the leases in December 2014. They nonetheless continued paying rent as before and the Respondent continued receiving the rent. In the circumstances, we uphold the order for the Respondent to align the rent to the US Dollar but with respect to the arrears, if any, arising from the leases in force before December 2015.

9.0 CONCLUSION

9.1 The total sum of this Judgment is that the appeal has partially succeeded. We order that parties bear their own costs to be taxed by the Registrar in default of agreement.


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M. J. SIAVWAPA
JUDGE PRESIDENT


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P.C.M. NGULUBE
COURT OF APPEAL JUDGE


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A.N. PATEL, SC
COURT OF APPEAL JUDGE