

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)



2014/HP/1735

B E T W E E N :

AL AZIZ GENERAL DEALERS LIMITED

PLAINTIFF

AND

LUSAKA CENTRAL MEAT PROCESSING LIMITED

DEFENDANT

Before Honorable Mrs. Justice M. Mapani-Kawimbe on 24th November, 2016

<i>For the Plaintiff</i>	:	<i>Mr. H. Mulenga, Messrs Philsong & Partners</i>
<i>For the Defendant</i>	:	<i>Mrs. I. M. Kunda, Messrs George Kunda & Company</i>

J U D G M E N T

Case Authorities Referred To:

1. *Hina Furnishing Lusaka v Mwaiseni Properties Limited* (1983) Z.R. 40
2. *Zambia Industrial and Mining Corporation Limited v Muuka* (1998) S.J. 1 (S.C)
3. *National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo*, Appeal No. 79/2001
4. *Mwamba V Nthenge, Kaing'a, Chekwe SCZ Judgment No. 5 of 2013*
5. *John Joseph Baker v The Raine Engineering Company Limited* (1971) Z.R. 23 (H.C)
6. *Jasuber R. Naik and Naik Motor V Agnes Chama* (1985) Z.R. 227 (S.C)
7. *William Jacks & Company (Z) Limited v V. O'Connor* (In his capacity as Registrar of Lands & Deeds) and Construction & Investment Holding Limited (1967) Z.R 144

6. *Union Bank Zambia Limited v Southern Province Cooperative Marketing Union Limited (1997) S.J 30 (S.C)*

Legislation And Other Works Referred To:

1. *High Court Act, Chapter 27*
2. *Lands and Deeds Registry Act, Chapter 85*

On 31st October, 2014 the Plaintiff issued a writ of summons endorsed with the following claims:

- (i) *An order for the payment of the amount of ZMW119,900.00 owed by the Defendant and due to the Plaintiff being the total amount for outstanding rental arrears.*
- (ii) *An order for the payment of the total amount of ZMW22,000.00 for service charges for water and security.*
- (iii) *Any other relief that the Court may deem fit.*
- (iv) *Costs*

The Plaintiff statement of claim discloses that it entered into a tenancy agreement with the Defendant on 1st June, 2010. The Defendant agreed to pay the Plaintiff rentals at K2,500.00 (rebased) per month in the tenancy agreement. The Plaintiff increased the rentals to K5,450.00 and informed the Defendant of the increase on 1st October, 2010. The Plaintiff states that the tenancy agreement had a term where the Plaintiff and Defendant were to share the cost

of services, for water and security. The tenancy agreement also had a term, which stated that a Mr. Abdi Qaali who invested US \$14,500.00 into the Plaintiff Company, would occupy part of its premises for a period of twenty-nine months. Mr. Qaali paid the rentals as agreed for the twenty-nine months, which elapsed sometime in October, 2012. After Mr. Qaali vacated the Plaintiff's premises, the Defendant Company regressed on its payment of rentals and service charges for water and security.

The Plaintiff also states that the Defendant accumulated rental arrears amounting to K119,900.00 from October, 2012. Further, the Defendant accumulated arrears on the unpaid water and security bills amounting to K11,000.00 from October, 2012. The Plaintiff further states that the Defendant owes it K141,900.00. The Plaintiff contends that the Defendant's actions have greatly inconvenienced it and as a result, has suffered loss and damages.

The Defendant filed a defence dated 19th November, 2014. It contends that the Plaintiff Company is non-operational and it does not have a subsisting tenancy agreement with the Plaintiff. Further, the Plaintiff's Director, Mr. Abdiaziz Farah Isse and his family occupy the larger portion of the Plaintiff Company premises as a

residence and do not pay rent. The Defendant states that Mr. Abdiaziz Farah Isse and his family must pay rentals and bear the costs of water and security. The Defendant denies that there is a security company at the premises.

The Defendant further states that Mr. Abdi Qaali operated a butchery store at the Plaintiff's premises. After the tenancy agreement between the Plaintiff and Mr. Qaali expired, Mr. Qaali vacated the premises. Thereafter the Defendant Company took occupation of the premises. The Defendant also states that it pays the Plaintiff's electricity bill. The Defendant further states that the Plaintiff has never declared profits to the detriment of the shareholders.

At the hearing of the matter on 22nd September 2016, the Plaintiff called one witness. **Abdulaziz Farah Isse**, the Managing Director of the Plaintiff Company testified as **PW1**. He told the Court that the Plaintiff Company and Defendant Company entered into a tenancy agreement on 1st June, 2010. One of the terms of agreement was that the Defendant would pay monthly rentals of K2, 500.00 for the premises as shown at page 6 of the Defendant's bundle. The Defendant Company rented two offices, the processing

yard, and the cold rooms located at the backyard of the Plaintiff's warehouse.

It was PW1's testimony that a Mr. Abdi Qaali who initially invested up to US\$20,000.00 in the Plaintiff Company, agreed to pay the Plaintiff rentals at K2,500.00 per month from the said investment. The rentals from Mr. Abdi Quaali were deducted without difficulty until the expiration of the tenancy agreement, when Mr. Qaali left the Plaintiff's premises.

PW1 told the Court that the tenancy agreement had no lifespan but had a provision on termination. PW1 also told the Court that the directors in the Plaintiff Company, that is himself and Mr. Abdinassir Osoble held a meeting sometime in October 2012, where they reviewed the tenancy agreement. The directors resolved to increase the Defendant's rentals from K2,500.00 to K5,450.00. Consequently, a letter was written to the Defendant Company signed by PW1 and Mr. Adinassir Osoble Ahmed, who happens to be a shareholder in both the Plaintiff and Defendant Companies.

PW1 further told the Court that from the time rentals were increased, the Defendant never paid rentals and accumulated

arrears amounting to K119,900.00. In addition, the Defendant had never paid its share for water and security. It had thus accumulated arrears in the sum of K22,000.00. PW1 testified that the Defendant Company owed the Plaintiff a total sum of K141,900.00. He also testified that the Defendant Company had not left the Plaintiff's premises and was still in occupation. PW1 concluded his testimony with a prayer that the Defendant pay the arrears amounting to K309,600.00, which it had accumulated from renting the Plaintiff's premises, from October, 2012 to the date of hearing. He also prayed to the Court to terminate the tenancy agreement.

In cross-examination, PW1 stated that the Defendant paid its rentals up to October, 2012. He stated that the rental amount of K6,450.00 in the Plaintiff's bundle comprised the rent amount of K5,450.00, interest, and the Defendant's contribution to security, water and garbage collection. PW1 stated that the water account at page 8 of the Plaintiff's bundle did not include the historical arrears inherited by the Plaintiff Company when it bought the premises. He told the Court that the Defendant was being asked to pay its

contribution on water from November, 2012 even though it was supposed to pay for the water bills from 1st June, 2010.

PW1 also told the Court that he was living on the Plaintiff's premises as a tenant, following a resolution passed by the Plaintiff's Board. Further, that the Board resolution exempted him from paying rentals. He denied that he was operating a butchery store at the Plaintiff's premises. He stated that the Defendant's equipment was still at the Plaintiff's premises but was not in use. PW1 insisted that FEGEB General Dealers had been providing security services at the Plaintiff premises since 1st June, 2010.

In re-examination, PW1 insisted that the Defendant was still on the Plaintiff's premises and in occupation.

The Defendant called two witnesses. **Erasumus Sakala** testified as **DW1**. He told the Court that he is a tenant at the Plaintiff Company premises, where he operates an internet Café. He has been a tenant at the said premises since May, 2012. DW1 testified that in 2012, the Defendant Company stopped operating at the Plaintiff's premises. He told the Court that he signed his tenancy agreement with the Plaintiff Company and not the

Defendant Company. The Plaintiff Company was represented by PW1 and Mr. Abdinassir Osoble Ahmed.

In cross- examination, DW1 told the Court that the Defendant in his view stopped operating at the Plaintiff's premises when it moved out. It also stopped operating the cold room and receiving meat consignments, as well as customers. In addition, the premises that were once occupied by the Defendant, had been turned into a residence. DW1 also testified that he was the only tenant on the premises while the others were the owners of the property.

The witness was not re-examined.

At 12.30 hours, Learned Counsel for the Defendant informed me that the remaining defence witness of Somalian origin required interpretation assistance. My Marshall approached the Interpretation Unit at the High Court. He was told that the Unit did not readily have an interpreter for the Somalian language. I immediately informed the Defendant's advocates of the Court's predicament. After conferring with her client, Learned Counsel after conferring with her client informed the Court that the witness would be assisted by a friend, in the delivery of his testimony.

At 14.10 hours when the trial of this matter resumed, **Dr. Abucar Nor Ali** a Somalian national, who is a medical doctor at the University Teaching Hospital was sworn in as the next friend of the said witness, in the English language. **Abdinassir Osobole Ahmed** testified as **DW2**. His testimony was that he was a director in both the Plaintiff and Defendant Companies. He has been a director in Plaintiff Company since 2008, when it was involved in the block making business.

DW2 told the Court that he and PW1 bought the premises where the Plaintiff Company is situated in Emmasdale. He testified that a Mr. Abdi Qaali invested US \$20,000.00 in the Plaintiff Company. A tenancy agreement was signed between Mr. Qaali and the Plaintiff, which allowed Mr. Qaali to operate his business on the premises under the Defendant's name.

After Mr. Qaali left the premises, the Plaintiff increased the Defendant's rentals, from K2,500.00 to K5,400.00. The new rental payments had an effective date of 1st October, 2012. The Defendant Company refused to sign the new agreement, which increased the rentals as shown at page 4 of the Defendant's bundle. The Defendant Company then opted to remove its office equipment

comprising chairs, computers and tables from the Plaintiff's premises and closed its offices. DW2 testified that after a month, he moved into the Defendant's former offices with his wife and eight children. He occupies the premises as a residence.

DW2 also testified that PW1 his wife and children live on the other side of the Plaintiff Company premises and do not pay rent. DW2 told the Court that he paid fifty percent towards the purchase of the Plaintiff Company property. Thus, as a partner in the Plaintiff Company he did not understand why he was being asked to pay rent, when the terms did not apply to PW1 the other director. DW2 further told the Court that PW1 operates a restaurant on the Plaintiff's premises, while he has rented out a store to DW1.

DW2 testified that there has never been a security company on the premises from the time that the Defendant took occupation. As a shareholder in the Plaintiff Company, DW2 testified that he had never seen the documents at pages 16 – 23 in the Plaintiff's bundle, which purported to be receipts from a security company. DW2 also told the Court that when he moved onto the premises the Defendant's equipment was still on site. Further, that after the

Defendant Company moved out in October 2012, he took over the payment of the electricity bill at the Plaintiff premises.

In cross-examination, DW2 insisted that he moved onto the premises as a resident and not as a business entity. He told the Court that the Defendant's equipment which was still on site consisted of a mincer, butcher boy, meat cutting machine and bore cutter, which were not in use. DW2 stated that he was more active in the Plaintiff Company as opposed to the Defendant Company, where his relatives are involved.

DW2 also stated that due to a personal dispute between him and PW1 dating back to 2012, he was not very active in the Plaintiff Company. He also stated that in 2008 when PW1 moved onto the premises, the Plaintiff Board never passed a resolution excluding PW1 from paying rent.

The witness was not re-examined.

Learned Counsels for the Plaintiff and Defendant were given an opportunity to file written submissions. Learned Counsel for the Plaintiff filed his submissions on 5th October, 2016, while Learned Counsel for the Defendant filed her submissions on 20th October, 2016.

The Plaintiff submissions were that even though the tenancy agreement did not expressly provide a clause on duration and thereby not registered under section 4 of the Lands and Deeds Registry Act; it created a contractual licence, which is enforceable at law. Counsel submitted that the Plaintiff provided consideration in terms of premises, which the Defendant has continued to occupy to date.

Learned Counsel referred me to the case of **Hina Furnishing Lusaka v Mwaiseni Properties Limited**¹ where a contract for lease was defined. He also referred me to the case of **Zambia Industrial and Mining Corporation Limited v Muuka**² on the measurement of damages, where he submitted that since the Defendant had continued to occupy the premises, without paying rent, the breach under contract law, attracted damages.

He further drew my attention to the case of **National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo**,³ where the Supreme Court held that parties who voluntarily and freely entered into legal contracts were bound by such contracts. Counsel also cited the case of **Mwamba v Nthenge, Kaing'a, Chekwe**⁴ where the Supreme Court stated that the Court

who was keeping the Defendant's equipment should be condemned to paying rentals, when PW1 had set a rent free precedent.

Counsel went on to cite section 216 (1) of the Companies Act, which prohibits directors of a company without the resolution the Board to sell, lease or otherwise dispose of the assets of the company. Learned Counsel argued that since the lease was subject to review after two years, it created a longer lease, which is subject to section 4 of the Lands and Deeds Registry Act.

She adverted to the case of **Jasuba R. Naik Motor v Agness Chama**⁶ where it was held *inter alia* that the prohibition against letting premises without Presidential Consent applies primarily to the landlord in the absence of any wrong doing on the part of the tenant, and it is therefore for the landlord to obtain consent and to suffer from any illegality arising from failure to obtain such consent.

Learned Counsel contended that since the Plaintiff had abrogated the condition in section 4 of the Lands and Deeds Registry Act, the lease agreement which was not registered, was therefore null and void in terms of section 6 of the said Act. Counsel drew my attention to the case of **William Jacks & Company (Z) Limited v O'Connor (In His Capacity as Registrar of Lands and**

Deeds) and Construction & Investment Holding Limited⁷ where the essential elements of a lease agreement were listed.

Counsel contended that there was no agreement on interest between the Plaintiff and Defendant on the payment of rentals and the service charges for water and security. She wondered why the rental charges were combined with the service charges. She cited the case of **Union Bank Zambia Limited v Southern Province Co-operative Marketing Union Limited**⁸ where the Supreme Court held *inter alia* that an unusual rate of interest, such as compound interest required the express agreement of the parties or in the alternative, evidence of consent or agreement to such a practice or custom.

She concluded her submissions with a prayer to the Court to dismiss the Plaintiff's case as the lease agreement lacked the essential elements and was in breach of statutory provisions.

I am highly indebted to both Learned Counsels for their industrious submissions.

I have seriously considered the pleadings, the evidence adduced before Court and the submissions. The common cause facts are that the Plaintiff and Defendant executed a tenancy

agreement on 1st June, 2012 for a period of twenty nine months. PW1 and DW2 signed the tenancy agreement on behalf of the Plaintiff and as **Landlord**. Mr. Abdullahi Osoble Ahmed and Mr. Abdisamad Qhale signed the tenancy agreement on behalf of the Defendant and as **Tenant**.

It is not in dispute that while the Tenant was in occupation, rentals were deducted from Mr. Abdi Qaali's investment of US\$14,500.00 into the Plaintiff Company. This was in line with one of the terms of the tenancy agreement, which the parties agreed to. It is also common cause that the tenancy agreement expired sometime in October, 2012. Further, after the expiry of the tenancy agreement, Mr. Abdi Qaali vacated the Plaintiff premises.

In my considered view, what falls for determination is whether the Defendant is still in occupation of the Plaintiff's premises and therefore owes the Plaintiff rental arrears and arrears on its share of utility bills.

From the common cause facts, I gather that PW1 and DW2 are directors in the Plaintiff Company, while DW2 is also a director in the Defendant Company. PW1 testified that when Mr. Abdi Qaali was in occupation of the Plaintiff's premises, rentals were paid on

time and without difficulty. The same applied to service charges. After Mr. Abdi Qaali left the Plaintiff's premises, the Plaintiff reviewed the tenancy agreement and increased the rentals from K2,500.00 to K5,450.00.

PW1 told the Court that the Defendant was informed of the increment but it refused to pay the new rental amount and also accumulated arrears on the utility bills. The evidence of DW2 was that the Defendant did not have a subsisting tenancy agreement with the Plaintiff Company. DW2 argued that the Plaintiff Company was no longer in existence. Further, that the Plaintiff premises had been turned into a residence. DW2 wondered why he was being asked to pay rent when PW1 the other director and his family members were living on the Plaintiff's property rent free.

Before I delve into the substance of this case, I wish to point out that the issue raised by the Defendant on whether the Plaintiff Company is still in existence is cardinal. From the Plaintiff's Bundle, I am unable to tell if the Plaintiff Company is still in existence. The Plaintiff did not produce evidence to show that it is still in existence and registered with the Patents and Companies Registry Agency. I am equally conscious that the Defendant

Company might be similarly circumstanced. I have nothing to allay my fear. Be that as it may, I will give the parties the benefit of doubt.

The Plaintiff's contented that if the Court took the view that it does not have a valid tenancy agreement with the Defendant, then it should find that there is a contractual licence between the parties. In response, the Defendant argued that the Plaintiff's lease agreement, had abrogated sections 4 and 6 of the Lands and Deeds Act, and is unenforceable at law. The said lease could not be converted into a contractual licence.

The **Learned Authors of Halsbury's Laws of England, 4th Edition, Volume 27, paragraph 6**, state that:

"In determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of a licensor and licensee the decisive consideration is the intention of the parties."

From the evidence, I find that whether or not the relationship between the Plaintiff and Defendant was one of Landlord and Tenant or contractual licence can only be deduced from what constitutes a lease agreement. **The Learned Authors of Halsbury's**

Laws of England, 4th Edition, Volume 27, paragraph 57, state that:

"The essential elements of an agreement for a lease are:

- (1) the identification of the lessor and lesser;**
- (2) the premises to be leased;**
- (3) the commencement and the duration of the term;**
- (4) the rent or other consideration to be paid."**

In the old case of **William Jacks & Company (Z) Limited** cited by Learned Counsel for the Defendant, it was held that:

"An alleged agreement for lease which contains no commencement date is not, in fact, an agreement for lease, nor does it resemble one sufficiently to be accepted as purporting to be an agreement for lease."

In that case, Doyle A.G. C.J (as he then was) cited the case of **Harvey V Pratt**, quoting Lord Denning stated thus: **"It has been settled law for all my time that, in order to have a valid agreement for a lease, it is essential that it should appear, either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. "It is settled beyond question that, in order for there to be a valid agreement for a lease, the essentials are that there shall be determined not only the parties, the property, the length of the term and the rent, but also the date of its commencement." "This is an agreement for a lease**

to start at some future time. The time has never been specified or agreed. There was, therefore, no concluded contract."

In my considered view, the fundamental elements of a lease can be summarized thus:

- a) a commencement date;
- b) description of the parties;
- c) description of property to be leased;
- d) length of term; and
- e) description on rent.

The tenancy agreement in *casu* was executed on 1st August, 2010. At that point the parties intended nothing less than a binding tenancy agreement that is, the Plaintiff as Landlord and the Defendant as Tenant. The Plaintiff further intended to continue the tenancy relationship and decided to review the lease with an upward adjustment of rentals.

I have seriously considered the lease agreement and find that at bullet 9, of the tenancy agreement at page 2 of the Plaintiff's Bundle, that the following words were used to describe the duration or lifespan as follows: **"the transaction will be settled after 29 months"** (that is in the year October, 2012). The lease agreement

also had terms on rent, termination and assigned the parties in equal shares the responsibility of paying the utility bills for electricity, garbage collection and security bills.

I find that the lease was certain on duration with a provision that it would be settled after twenty nine months which, coincided with the Tenant's departure, sometime in October, 2012. After that date, it is my considered view that the relationship between the Plaintiff and Defendant as Landlord and Tenant under the Tenancy Agreement came to an end. Both parties were thereafter released from their obligations.

After the expiry of the lease agreement, the Tenant vacated the Plaintiff's premises and did not stay on the premises on the terms of a contractual licence. Because the parties were released from their obligations, it was baseless for the Defendant to respond to the Plaintiff's letter that increased the rentals. It had nothing more to do with the Plaintiff. It matters less that the Defendant's equipment is still at DW2's residence. In my view, this is a matter between DW2 and the Defendant Company. The Plaintiff has no interest in the matter whatsoever.

I find that DW2 was not the proper party to bring to Court because he was not one of the persons who signed the tenancy agreement on behalf of the "**Tenant**". By that I mean to say that the fact that he has a foothold in the Defendant Company does not necessarily entitle him to represent the Defendant in this suit. He like PW1 signed the tenancy agreement on behalf of the **Landlord** and where he stood to benefit from the rental payments from the Defendant Company. Therefore, his transposition of status as one of the Defendant's witnesses remains a great wonder.

I do not understand how he gave evidence on behalf of the Defendant, when he was better poised to testify on behalf of the Plaintiff. He is certainly the wrong party in Court.

The net of my findings is that there is no enforceable tenancy agreement between the Plaintiff and Defendant. The Plaintiff is not owed any rental arrears or arrears on service charges. It has failed to prove its claim to the required standard.

I accordingly dismiss this action for lack of merit.

In obiter, I feel obliged to comment that the actions of PW1 towards DW2 are most underwhelming. PW1 has dragged his co-director DW2 to Court, where he appears to be the target of the

claim on rental arrears and arrears on utility bills. This should not be the case. In my considered view, PW1 and DW2 are directors in the Plaintiff Company. As such, they should be entitled to equal shares of reward or spoils in the Plaintiff Company.

In other words, DW2 has as much right to the use of the Plaintiff Company property as PW1. If it has been turned into a residence then PW1 and DW2 have an entitlement to both live there on terms that are equal and endearing to both directors. No director should claim a larger proportion of benefit over the other in the Plaintiff Company.

The Defendant being the successful party is awarded costs to be taxed in default of agreement.

Leave to appeal to granted.

Dated this 24th day of November, 2016.


M. Mapani-Kawimbe
HIGH COURT JUDGE