IN THE SUPREME COURT OF ZAMBIA — SCZ APPEALS NO. 16 AND 21 OF 1993.

HOLDEN AT LUSAKA.

(Civil jurisdiction)

B E T W E E N :

NOOR PROPERTIES INVESTMENTS LIMITED — Appellant

Vs

SAROF MAHANT (T/A KIRTEES FASHIONS)

AND

NU FASHIONS CENTRE LIMITED — Respondents

Coram: Gardner, Sakala and Muzyamba, JJJ.S.
29th June and 5th August 1993.

Mr. E.B. Mwansa of E.B.M. Chambers, for the appellant.
Mr. E.J. Shamwana, S.C., and Hakasenke of Shamwana and Company, for the respondents.

J U D G M E N T

Sakala, J.S., delivered the judgment of the court.

Cases referred to: (1) Artemiou V. Procopiou (1965) 3 ALL ER 539.
(2) H.L.Bolton (Engineering) Co. Ltd V. T.J. Graham & Sons Ltd. (1956) 3 ALLER 624 C.A.
(3) Zimco Properties Ltd V. Dinalar Randee Enterprises (T/A Empire Cinema) SCZ Judgement No. 1 of 1989.

By consent the two appeals were consolidated to be heard together because in both appeals, the appellant was the same, the facts were similar and the decisions appealed against were the same. Above all, the advocates in each appeal for each respondent were the same and advancing the same grounds and heads of argument in each appeal. Both cases were heard by one judge of the High Court.

On 29th June, 1993 after hearing the consolidated appeal, we allowed the appeals and ordered the respondents to yield possession within three months from the date thereof. We ordered that rent be paid as follows:-

in appeal number 16 of 1993, K152,000 per month and
in appeal number 21 of 1993, K90,000 per month.

We ordered that costs follow the event. WE said then that we would give our reasons later, we now give those reasons.

In both appeals the appellant has appealed against the learned trial judge's grant of a new two year tenancy and the court's refusal to award the appellant costs. In appeal number 16 of 1993 the appellant has further appealed against the new rent of K55,000 per month when the valuation report showed that rent should have been K152,000 per month.

The brief facts in both appeals were that the respondents applied for a new tenancy at shops numbers 7, 8 and 6 respectively of Stand number 111, Cairo Road, Lusaka. The respondents proposed ten years as the duration for the new tenancy and that the rent be one to be recommended by the Government Valuation Department. It was common cause that the respondents had been tenants of the said respective shops for some time and that they paid rent without defaulting. The appellant sought to repossess the shops so that he could improve the structure of the building to create storeys on top of the shops. According to the evidence, he tried to alleviate the inconvenience to the respondents by finding alternative shops but the respondents turned down the offer. In his evidence the appellant denied that he intended to sell the shops concerned. He maintained that his decision for regaining possession was to redevelop the property. He stated that he had actually commenced restructuring the property in parts vacated by the other tenants.

On these brief facts, the court granted new tenancies to the respondents for two years from 1st January 1993 to 31st December, 1994. According to the learned trial judge, the short tenancies were intended to afford the respondents time to re-allocate or find alternative accommodation for their businesses. The court accepted that the ground given by the appellant was a good one and within the spirit

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of Section 11 of Cap 440. The court further ordered that the respondents vacate the premises on or before 31st December, 1994 to allow the owner the appellant, to retake possession of the premises and redevelop them as he wished. The court further ordered that the respondent in appeal number 16 of 1993 should pay rent for the new two years tenancy at K55,000 per month. We note from the record that the respondent's affidavits in support of their applications in both appeals exhibited valuation reports by C.M. Mulenga Property Consultants, which reports showed that for the premises the subject of appeal number 16 of 1993 the open market rental value as at 31st January, 1993 was K152,000 per month and K90,000 per month in appeal number 21 of 1993.

In both appeals, the learned trial judge held that the landlord had proved that he needed the property for a good reason. In appeal number 21 of 1993 he also dealt with a legal argument raised by Counsel for the respondent that the appellant could not repossess the property for their own use as they had owned it for a period of less than five years. This argument was based on the provisions of Section 11 (2) of Cap 440. The interpretation by the court of that section was that it meant that if the interest of the landlord was less than five years old and expired at the same time as the tenancy of the respondents then the landlord had no right to ask the tenant to move out. He concluded that the section did not apply to the appeal at hand.
In both appeals the respondents have cross appealed on similar grounds, namely, that the period of the new tenancies be for ten years as requested with an option to renew for five years. As regards appeal number 21 of 1993 the further ground of appeal is that Section 11 (1) of the Landlord and Tenant (Business Premises) Act applies.

In both appeals the landlord's notice to terminate the tenancies were couched in similar language. Paragraphs 2 and 3 of both notices read as follows:-

"2. You are required within two months after the giving of this notice to notify the landlord whether or not you will be willing to give up possession of the premises on that date.

3. The landlord will oppose an application to the court under the Act for the grant of a new tenancy on the grounds that:

(a) The tenant is in breach of its obligation connected with the use and management of the premises (S.11 (1) (c) of the Landlord and Tenant (Business Premises) Act.

(b) On the termination of the current tenancy we intend to demolish the premises and to use the same for the purposes of the business carried on by us therein (S 11 (1) (f) and (g) of the Landlord and Tenant (Business Premises) Act."

The gist of the common ground of appeal in both appeals was that the court, having found that the appellant had given a good ground for opposing the applications for new tenancies, erred in law and fact to have granted the respondents new tenancies of two years. The argument by Mr. Mwansa was that the court having accepted the appellant's reason for objecting to the applications it was not proper to grant the applications because doing so was defeating the very purpose of the law. He submitted that the period of two years was too long and that although a shorter grace period would have been fair the respondents were entitled to nothing. He cited a number of decisions of this court where upon an application for new tenancy being refused, the applicant has only been given a period of three months to give up possession.

In his reply Mr. Shamwana submitted that the arguments on behalf of the appellant assumed that the appellant was a successful party and that the arguments on the first ground were based on a misinterpretation of the court's judgment.

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We have carefully examined both judgments appealed against. We are satisfied that the court found that the appellant gave good reasons which were within the spirit of Section 11 of Cap 440. For this reason both applications should have been dismissed. It was therefore a contradiction on the part of the learned trial judge to proceed to grant new two year tenancies to afford the respondents time to find alternative accommodation. We want to make it clear that while in a number of similar cases this court has stayed the order of possession for three months that has not meant the granting of a new tenancy; indeed a period of two years cannot on the other hand be considered to be a grace period. On this ground alone these appeals were bound to succeed.

In the second ground pertinent to rent in appeal number 16 of 1993, Mr. Shamwana indicated that he was in some difficulties as he felt that the learned trial judge should not have determined an arbitrary figure contrary to what was on record. On this ground appeal number 16 of 1993 was also bound to succeed and did succeed.

Another common ground of appeal was on costs. Following our finding on ground one costs should have been awarded to the successful party, the appellant. Accordingly we ordered that costs follow the event.

In appeal number 21 of 1993 an argument in the cross appeal based on the interpretation of Section 11 (2) Cap 440 was raised. That Section reads as follows:-

"S. 11 (2) provides;

(2) The landlord shall not be entitled to oppose an application on the ground specified in paragraph (g) of subsection (1), if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be an interest of the landlord, was purchased or created after the beginning of a period of five (5) years which ends with the termination

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> of the current tenancy, and at all times since the purchase or creation thereof, the holding comprised in a tenancy or successive tenancies has been occupied wholly or mainly for the purpose of carrying on business thereon."

After considering this provision the learned trial judge held that the words in the Section "which ends with the termination of the current tenancy" mean that if the interest of the landlord is less than five years old and expires at the same time as the tenancy of the applicant then the landlord has no right to ask the tenant to move out, and that as the interest of the appellant herein did not end at the same time as the tenancy of the tenant respondent, the Section did not apply.

In arguing this ground Mr. Shamwana informed the court that he was relying on the English authorities cited in the heads of argument which discussed a similar provision. In his written heads of argument Mr. Shamwana submitted that the learned trial judge erred in his interpretation of the Section in that the words " which ends with the termination of the current tenancy" did not relate to the landlord's interest as interpreted by the learned judge but rather those words relate to the period of five years.

According to counsel a similar provision exists under Section 30 (2) of the English Landlord and Tenant Act 1954 and under that Act Section 30 (1) (2) is a similar provision to Section 11 (1) (g) of Cap 440 followed by Section 30 (2) which too is similar to Section 11 (2) of Cap 440. Counsel cited in the written heads of argument the case of **Artemiou V. Procopiou (1)** where Salmon L.J. in the Court of Appeal at 546 said:-

> "In my view, one must consider the word in its context, and also having regard to the mischief at which the Section in which it appears was aimed. The mischief surely was that of a landlord buying off the tail end of a lease and depriving the sitting tenant of the security of tenure which the Act was designed to give him. The landlord

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> might in such circumstances have only the shortest association with the premises, whilst the tenant might have been there for years. It would be manifestly unfair that such a landlord could step in and prevent the tenant from obtaining a new lease. On the other hand, the Act of 1954 recognised that, if the landlord has been the landlord for upwards of five (5) years, he should be able to gain possession if he intends to use the premises for his own business purposes, or as his residence."

Mr. Shamwana also cited the case of **H.L. Bolton (Engineering) Co. Ltd V T.J. Graham & Sons Ltd (2)** in which Lord Denning L.J. as he then was said at page 627.

> "The object of subsection 2 is to prevent an incoming landlord, within the last year or two of a tenancy, from buying up the premises over the head of the tenant and then ejecting the tenant on the ground that he requires it for his own purposes. In order to prevent this, the Act says that the landlord cannot rely on sub paragraph (g) unless he has bought the relevant interest more than five years before the end of the tenancy."

Counsel submitted that in the same way the provision of Section 11 (2) of Cap 440 (1) (g) should be interpreted to mean that a landlord cannot rely on Section 11 (1) (g) in opposing an application for a new tenancy, unless he bought the premises more than five years before the end of the tenancy. Mr. Shamwana pointed out that in the present case the landlord/appellant purchased the subject premises and acquired interest on the 1st January,1992 and gave notice to the tenant, who was a yearly tenant, dated 29th February 1992 to terminate the tenancy on the 30th September,1992 the same year as acquiring interest, a period of less than five years and therefore caught by

Section 11 (2) of Cap 440, with the result that the landlord is prevented from opposing the application on the basis of ground (g) at least until after January, 1997.

Mr. Shamwana urged us to vary the trial courts judgment to the extent of holding that Section 11 (2) of Cap 440 applies to this appeal and therefore to grant the tenant a ten year lease applied for or at the very least to grant a five year lease pursuant to the provisions of Section 11 (2) of Cap 440.

Before Mr. Mwansa abandoned his arguments on the cross-appeal he informed the court that paragraph 3 (b) of the notice to terminate the tenancy gave two grounds for opposing the grant of the new tenancy namely under Section 11 (1) (f) and (g) although the manner in which the notice was framed, they appear to be one ground. He submitted that once one of the two grounds was proved it was enough to grant possession. In reply Mr. Shamwana argued that if a landlord puts in a bad reason he is stuck with it.

We are indebted to both counsel for their learned submissions. We have carefully considered the judgment of the learned trial judge. We agree with Mr. Shamwana that the learned trial judge misinterpreted the words "which ends with the termination of the current tenancy." We also agree with the interpretation of those words by the English authorities cited by Mr. Shamwana as contained in the English Act with similar provisions as our Cap 440. Section 11 (2) of Cap 440 was considered by this court in the case of **ZIMCO PROPERTIES LTD V. DINALAR ENTERPRISES T/A EMPIRE CINEMA)** SCZ Judgment number 1 of 1989 (3) in which we said:

> "Despite Mr. Mukelabai's argument we are of the opinion that to allow a transfer to a holding company for the purpose of allowing that company to accommodate its employees in the premises before the expiration of five years from the

date of such transfer would defeat the object of Section 11 (2)."

The object of the subsection as per words of Lord Denning L.J is "to prevent an incoming landlord within the last year or two of the tenancy, from buying up the premises over the head of the tenant and then ejecting the tenant..... In order to prevent this, the Act says that the landlord cannot rely on sub paragraph (g) unless he has bought the relevant interest more than five years before the end of the tenancy." Section 11 (2) Cap 4 however, did not assist the respondents in their cross - appeals because the appellant set out a number of grounds in the notice to terminate the tenancy for opposing the grant of a new tenancy. One of those grounds succeeded.

In the case of **ZIMCO PROPERTIES LTD V. DINALAR RANDEE ENTERPRISES (T/A EMPIRE CINEMA SCZ Judgment (3)**, this court also pointed out that notice by a landlord should be liberally construed, and, provided that the notice makes clear an intention to rely on any particular paragraph of Section 11 of Cap 440 a landlord can rely on any facts falling within that paragraph or portion of it. In the present appeal the landlord relied on Section 11 (1) (f). The trial court found that this ground had been proved. The situation would certainly have been different if the Landlord had relied only on Section 11 (1) (g).

For the foregoing reasons we allowed both appeals.

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B.T. Gardner,
SUPREME COURT JUDGE.

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E.L. Sakala,
SUPREME COURT JUDGE.

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W.M.Muzyamba,
SUPREME COURT JUDGE.