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

APPEAL NO. 127/2015
SCZ/8/093/2012

BETWEEN:

EXAMINATIONS COUNCIL OF ZAMBIA PENSION TRUST SCHEME REGISTERED TRUSTEES — 1ST APPELLANT

THE TRUSTEES OF EXAMINATIONS COUNCIL OF ZAMBIA PENSIONS TRUST SCHEME — 2ND-9TH APPELLANTS

AND

TECLA INVESTMENTS LIMITED — RESPONDENT

CORAM: Mambilima, CJ, Wood and Kaoma, JJS.
On: 10th July, 2018 and 19th September, 2018.

For the Appellants: Mr. M.Z. Mwandenga of M.Z. Mwandenga and Company

For the Respondent: Mrs. O. Chirwa of Ranchold Chungu Advocates

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J U D G M E N T

KAOMA, JS delivered the Judgment of the Court.

Cases referred to:

1. **Yabu v Nyansaland Garage Limited (1967), African Law Reports, Malawi)**
2. **Sundi v Ravalia 5 N.R.L.R. 345**
3. **Mazoka and others v Mwanawasa and others (2005) Z.R. 138**

4. **Doctor J. W. Billingsley v J. A. Mundi (1982) Z.R. 11.**
5. **Jasuber R. Naik and Naik Motors v Agness Chama (1985) Z.R. 227**
6. **Holmes Ltd v Buildwell Construction Company Ltd (1973) Z.R. 97**
7. **Krige and another v Christian Council of Zambia (1975) Z.R. 152**
8. **Makanya Tobacco Company Limited v J & B Estates Limited – SCZ Appeal No. 42 of 2012**

Legislation referred to:

1. **Lands and Deeds Registry Act, Cap 185, sections 4, 5 and 6**
2. **Land (Perpetual Succession) Act, Cap 186**
3. **Landlord and Tenant (Business Premises) Act, Cap 193, section 28**
4. **High Court Rules, Cap 27, Order 30(11)**

Works referred to:

1. **Manual of the Law of Real Property, E.R. Megarry, 5th Edition by Baker, page 320.**
2. **Commercial Law in Zambia: Cases and Materials, Mumba Malila, page 73**

This is yet another matter where we have been called upon, to determine if a lease agreement or agreement for lease for a period of over one year, which was not registered as required by **section 4 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia** is valid or null and void.

The facts that gave rise to the dispute emanated from a lease agreement that was executed in respect of Stand 3878, Olympia Park, Lusaka on 11th May, 2006 by the Trustees of the Examinations Council of Zambia Pension Trust Scheme and the respondent. The lease which was to run from occupation date was

to subsist for five years and provided for a monthly rent of K13,500.00 (rebased). The habendum clause of the lease did not disclose the actual commencement date but the occupation date was 1st March, 2007 and the respondent regularly settled the rentals through monthly instalments from that date.

The appellants were to complete renovation of the premises in terms of clause 2(u) of the lease agreement before the respondent could occupy the premises. However, on an understanding between the parties and pursuant to clause 2(s), the respondent took physical possession of the property in or about August or September, 2006 in order to carry out all external and any extra works agreed with the landlord within the first year of occupation. The works so carried out, were to be receipted, quantified and presented to the landlord with receipts. The amount so quantified was to form part of the rent and was to be recovered in equal instalments after the first year of occupation.

On the same date, 11th May, 2006 the respondent wanted to register the lease but the attempt failed because the certificate of title for the subject property was in the individual names of the

Trustees of the Examinations Council of Zambia Pension Trust Scheme, whereas the lease was in the name of the Trustees of the Examinations Council of Zambia Pensions Trust Scheme.

That notwithstanding, an endorsement was made in the memorials of the certificate of title showing that the tenancy agreement was registered. However, the respondent conceded that this endorsement was made in error and that the lease agreement was not registered as required by law.

On 4th January, 2007 prior to the occupation date, the Trustees of the Examinations Council of Zambia Pension Trust Scheme were registered as a body corporate under the name of the Examinations Council of Zambia Pension Trust Scheme Registered Trustees (1st appellants) in accordance with the **Land (Perpetual Succession) Act, Cap 186 of the Laws of Zambia**.

Shortly after, the Trustees, through the appointed Fund Manager of the Pension Trust Scheme, Professional Life Assurance Limited sought and obtained professional advice from a valuation surveyor, R.M. Fumbeshi and Company, who advised in a report dated 25th April, 2007 that the fair open market value of the land

and the un-exhausted improvements on the property would be in the region of K2,500,000.00 (rebased) and the estimated rental value was K30,000.00 per month.

Following an advertisement for expression of interest placed in the Post Newspaper by the appellants, inviting members of the public to participate in pre-qualification to lease and manage the subject premises, the respondent, on 10th September, 2007 placed a caveat on the property to restrain the respondent from leasing the premises to any bidders prior to expiration of the five year term. The caveat also had the effect of forbidding registration of any transaction against the said property. The transfer of the property into the name of the 1st appellants had not been done at the time.

By letter dated 5th August, 2008 Professional Life Assurance, on the instruction of the Trustees of the Examinations Council of Zambia Pension Trust Fund, informed the respondent that the rent for the property had been adjusted upwards from K13,500.00 to K30,000.00 with effect from 1st September, 2008.

On 29th September, 2008 the appellants' advocates wrote to the respondent's advocates requesting their client to remove the

caveat so that the transfer could be completed without further delay. There being no response, they made a follow-up by letter dated 14th October, 2008 asking the respondent's advocates if they had instructions to accept service of process regarding the removal of the caveat. Instead, on 17th October, 2008 the respondent issued originating summons seeking the following reliefs:

i. **A declaration that there exists a legal lease for a term of years certain in terms of the written tenancy agreement dated the 11th of May, 2006 and entered into by the respondent and the appellants;**
ii. **An order, on the basis of the declaration above that the appellants duly perfect the tenancy by registering the same with the Registrar of Lands and Deeds as per legal requirement; and**
iii. **A further order following the declaration under (i) above that any increase in rentals as relates to Stand 3878, Lusaka is illegal unless made in conformity with the Landlord and Tenant (Business Premises) Act.**

On 28th October, 2008 following the commencement of the matter, the respondent's advocates, in response to the letter of 29th September, 2008 withdrew the caveat.

After considering the affidavit evidence and submissions by the parties, the learned trial judge found that the Board of Trustees was agent of the Examinations Council of Zambia and that the former intended to execute and did execute a lease signed by two

representatives of the Board of Trustees and two representatives of the respondent.

The judge also took the view that whether registered or not, the Pension Fund was to be represented by the Board of Trustees; that the Registrar of Lands by entering in the memorials of the certificate of title and stamping the lease acted in pragmatic fashion, as he was satisfied that minds had met to execute the lease except, the Pension Fund had not yet been registered; and that both parties intended to comply with the law. He referred to paragraph 24 of the affidavit in opposition where the deponent recognised that despite the tenancy agreement not being registered, there was some form of landlord and tenant relationship between the parties.

The judge further found that the delay in registering the lease was caused by the Trustees' delay in registering the Pension Fund and that therefore, the appellants could not benefit from their own transgression or mistake. In the learned judge's view, the Board of Trustees did not disclose that they were acting as agents for the Examinations Council of Zambia Pension Trust Scheme, so this was "undisclosed agency" which entitled the respondent to sue either.

In that regard, the judge cited a book by Mumba Malila titled, **Commercial Law in Zambia: Cases and Materials**, where the case of **Yabu v Nyasaland Garage Limited**[1] is quoted at page 73, wherein Cram J. emphasised that point.

According to the judge, since the Board of Trustees was acting for the Pension Fund, the latter was liable and so, he held there was a contract in form of a lease, for five years at K13,500.00 signed by both sides and accepted by the Registrar of Lands. He deemed the lease to have commenced on 11th May, 2006 and terminated on 11th May, 2011. He also held that variation of the rent from K13,500.00 to K30,000.00 per month was null and void as it was not consensual, and further ordered that the respondent be credited with the money of about K100m it expended on renovations.

Unhappy with the decision the appellants filed this appeal advancing seven grounds namely:

1. **The learned Judge erred in law when he failed to take into consideration the legal implication of a lease or what appears to be a lease which has no commencement date and/or is or was incomplete.**

2. **The learned Judge erred in law when he failed to take into consideration the legal implications of the non-registration of a lease or an agreement purporting to be a lease for over one year.**

3. **The learned Judge erred in law and fact when he held inter alia that "... The five-year lease will be deemed to have commenced on 11th May, 2006 and terminated on the 11th of May, 2011.**

4. **The learned Judge erred in law when he held or concluded that "The variation of the rent from K13,500 to K30,000.00 (rebased) per month was null and void as it was not consensual but unilateral.**

5. **Further and/or alternatively, the learned Judge misdirected himself when he failed to address his mind to the provisions of Section 28 of the Landlord and Tenant (Business Premises) Act which provide for the manner in which rent may be determined in respect of tenancies for business premises commencing on or after 1st January, 1972, if and when a tenant is aggrieved by the rent proposed by the landlord.**

6. **The learned Judge misdirected himself when he held or concluded that "...The applicant be credited with the money he expended on the renovations ..." and/or when he granted the respondent reliefs that were not pleaded or asked for.**

7. **The learned Judge misdirected himself when he failed to take cognizance of the fact that at the time judgment was delivered, some of the respondent's claims had become academic or nugatory.**

In support of the appeal, counsel filed heads of argument on which they relied. They also endeavoured to clarify issues of concern to the court. Due to the position we have taken on the lease agreement, we find it unnecessary to discuss the arguments relating to ground 1 as this would be a mere academic exercise.

We shall proceed to briefly deal with the arguments relating to the rest of the grounds. The gist of the arguments in ground 2 is that since the purported tenancy agreement for a period of five

years was not registered in accordance with **section 4** of the **Lands and Deeds Registry Act,** in terms **section 6** of the said Act, the lease was void for all intents and purposes. To fortify this argument counsel cited the case of **Sundi v Ravalia**[2].

In ground 3, counsel submitted that the issue before the trial court was whether there existed a legal lease for a term of years certain between the parties regarding the written tenancy agreement. That the learned judge deemed that the lease for five years had commenced on 11th May, 2006 and terminated on 11th of May, 2011. The kernel of the arguments is that an invalid lease agreement cannot be deemed to have commenced on a certain date or terminated on any given date.

It was argued that if a lease agreement is for a period in excess of one year and is not registered as required by law, then a periodic tenancy is deemed to be in existence and the nature or duration of the tenancy will be determined by the manner in which the rent is demanded and accepted with reference to a specific period. To buttress this point, counsel cited **Megarry's Manual of the Law of**

Real Property, 5th edition at page 320 where the learned author explains how a periodic tenancy can be created.

In support of grounds 4 and 5, which were argued together, counsel for the appellants submitted that one of the issues in controversy between the parties was whether the increase of the rent by the appellants was properly done. He submitted that it is trite that in a landlord and tenant relationship, the rent is normally fixed by the landlord and it is up to the tenant to decide whether to accept or reject the landlord's proposed rent but the **Landlord and Tenant (Business Premises) Act, Cap 193 of the Laws of Zambia** provides a mechanism for determining rent if a tenant is aggrieved by the rent fixed or demanded by a landlord. In that regard, he cited **section 28(1)** of the said Act which provides that:

> **"(1) Notwithstanding anything to the contrary contained in this Act or any other written law or in any lease, a tenant whose tenancy commences on or after the 1st January, 1972, and to which tenancy this Act applies, may, within three months from the commencement of tenancy thereof (if he is aggrieved by the rent payable thereunder), apply to the court for determination of rent; and, subject to the provisions of subsection (2), the court shall determine the rent which shall be substituted for the rent agreed to be paid under the tenancy." (Emphasis supplied)**

Counsel contended that since the respondent did not make an application for the determination of the rent under this provision, the rent increase complained of was and is lawful.

Concerning ground 6, the core of the arguments by the appellants, is that the trial judge granted the respondent a relief on its own motion, which was never asked for in the Originating Summons. Reference was made to the case of **Mazoka and others v Mwanawasa and others**[3] which dealt with the issue of the function of pleadings and the case of **Doctor J. W. Billingsley v J. A. Mundi**[4] where this Court emphasised that unless the parties have specifically or clearly applied for a consent judgment, the court should only deal with a particular application before it.

As to ground 7, counsel argued that the proceedings commenced in October, 2008 and judgment was delivered in February, 2012 and that claims (i) and (ii) had become academic or nugatory because of the passage of time. Further, that since the judge made a pronouncement which could not and will not be implemented, effected or enforced, the parties most probably are at

a loss as to what was or is the resolution of the matters in controversy between them, particularly claim (i).

Counsel contended that courts of law should not make decisions that are not capable of being implemented, effected or enforced or which are superfluous. That had the judge taken cognizance of the fact that claims (i) and (ii) had become academic or nugatory because of the passage of time, most probably, he would have made a pronouncement/s that were capable of being implemented, enforced or effected, or come to the inevitable conclusion that there was no need for him to have considered the two claims and that the only claim that fell to be considered was claim (iii). We were urged to allow the appeal with costs.

In response, counsel for the respondent argued grounds 1 and 3 together. However, our perusal of the arguments shows that they relate in the main to ground 1. Again, we shall not deal with the arguments as this is irrelevant to the resolution of this appeal.

In response to ground 2, it was conceded again that the endorsement in the memorials of the certificate of title was made in error and that the lease agreement was not registered.

However, it was argued that lack of registration does not invalidate the lease or take away any protection that is due to the respondent. The case of **Jasuber R. Naik and Naik Motors v Agness Chama**[5] was relied on as authority, where it was argued, we held that where a Landlord is required by law to procure some authorization, he is obliged to do so and if he does not, it shall be the landlord to suffer from any illegality arising from the failure. On this authority, it was argued that despite non-registration, the terms of the lease must be enforceable against the appellants.

Concerning ground 4, reference was made to the case of **Holmes Limited v Buildwell Construction Company Limited**[6] where it was observed that where the parties have embodied the terms of the contract in a written document, extrinsic evidence is not generally admissible to add to, vary, subtract from or contradict the terms of the written contract. In short, counsel supported the finding by the learned judge that the variation of the rent from K13,500.00 to K30,000.00 was not consensual.

In response to ground 5, the respondent rejected the appellants' contention that the judge did not address his mind to

section 28 of the **Landlord and Tenant (Business Premises) Act**. It was argued that one of the reliefs that the respondent sought was a declaration that the increase in rent was illegal and not in conformity with the Act and that it was from this premise that the court determined that the rent payable was K13,500.00.

It was also argued that the requirement that a party asks the court to determine rent payable is elective in nature and not mandatory; that the requirement that the application be made within three months is also not mandatory as the Act itself uses the word 'may' as opposed to 'shall'; and that what is mandatory, is once the application for the determination of rent is made, the court is mandated to make a determination of the rent payable.

In response to ground 6, it was contended that the court may make any order which it deems necessary for doing justice and it had the jurisdiction and authority to make the order complained of.

The response to ground 7 was that the duty of the trial judge is to determine the issues in controversy between the parties; and the argument that the judge should have elected not to determine

claims (i) and (ii) because of the passage of time in the delivery of judgment is misconceived. We were urged to dismiss the appeal.

We have considered the record of appeal and arguments by counsel. There are four legal issues raised by this appeal: (a) was the lease agreement executed by the parties valid? (b) If not, what was the nature of the relationship that existed between the parties? (c) Based on this relationship, were the appellants entitled to increase the rent? (d) If so, how was the respondent supposed to challenge the rent change?

As we have said before, we shall not deal with ground 1. Grounds 2 and 3 are related and concern the first issue of the validity or otherwise of the lease and shall be dealt with as one. It is agreed that the lease agreement was not registered as required by **section 4(1)** of the **Lands and Deeds Registry Act**. There can be no dispute either that **section 6** of the Act provides for the consequences of failure to register any document that is required to be registered under **section 4**. Such document shall be null and void. In **Krige and another v Christian Council of Zambia**[7] and **Makanya Tobacco Company Limited v J & B Estates Limited**[8]

we dealt with the same issues and we held that the effect of non-registration of a document that is required to be registered is that it is void for all purposes whatsoever. This is well settled law.

Therefore, the subject lease agreement was void for lack of registration, notwithstanding that the minds of the parties met to execute the lease or the parties had intended to comply with the law when they signed the lease. Without registration, which was a condition precedent to its validity, the judge ought not have deemed the lease to have commenced on 11th of May, 2006 and terminated on 11th of May, 2011 or granted any of the remedies sought by the respondent which were anchored on the validity of the lease.

Furthermore, we disagree with the conclusion by the judge that the delay in registering the lease was caused by the Trustees' delay in registering the Pension Fund and that therefore, the appellants could not benefit from their own transgression or mistake. We are also not convinced that the Board of Trustees did not disclose that they were acting as agents for the Examinations Council of Zambia Pension Trust Scheme, and that this was "undisclosed agency".

The case of **Jasuber R. Naik and Naik Motors v Agness Chama**[5] relied on by the respondent is not helpful since it dealt with failure by the landlord to obtain Presidential consent to lease under the Land (Conversion of Titles) Act and application by the tenant for the granting of new tenancy of business premises.

In contrast, this case concerns non-registration of a lease. As disclosed in paragraph 16 of its affidavit in support of originating summons, the respondent was aware at the time of execution of the lease that the Trust Scheme was not registered and that the certificate of title would be rectified as soon as the Trust Scheme was registered. The Trust Scheme was registered as a body corporate on 4th January, 2007 prior to the occupation date.

It is not clear from the record, why the lease was not registered. Perhaps, it had something to do with the intended increase of the rent and the fact that the huge cost of converting a dwelling house into a lodge was not anticipated by the appellants. Whatever may be said about the lease, the truth is that since it was void for lack of registration, it could not be enforced or relied upon.

This brings us to the second issue of the kind of tenancy that existed between the parties. Again this is well settled. In **Krige and another v Christian Council of Zambia** we found that a tenancy at will was created by the possession of the premises and when the applicant paid rent and rent was accepted by the 1st respondent, a periodic tenancy from year to year was created.

In **Makanya Tobacco Company Limited v J & B Estates Limited**[8], we said that if the tenant took possession with the landlord's consent, and rent was paid and accepted, by presumption of law a monthly or yearly periodic tenancy arises, independently of the lease and that, any claim in a court of law, either by the landlord or tenant would depend not on the lease but upon the tenant's possession and the payment and acceptance of rent.

On the basis of all the foregoing, we fully agree with the appellants that there existed a monthly tenancy between the parties, as a result of the occupation of the premises by the respondent and the payment of monthly rent of K13,500.00 which was accepted by the appellants. We emphasise that this period

tenancy existed by operation of law independently of the void lease agreement. Therefore, grounds 2 and 3 have merit and succeed.

We come now to ground 4 and the question whether the appellants were estopped from increasing the monthly rent. The view we take is that since the respondent's claim that the upward rent adjustment was illegal was anchored on the validity of the lease agreement, and the lease being void, we do not see anything that could stop the appellants from adjusting the monthly rent to reflect the assessed rental value of the property.

The record shows that the property was purchased at K1,070,000 (rebased) and that the appellants spent K1,409,124.00 (rebased) on renovations. In rejecting this amount, the learned judge simply said he did not agree that the appellants spent K1,409,124.00 on renovations when they bought the building at K1,070,000.00. The judge glossed over the issue while crediting the respondent with the money it spent on its part.

Anyhow, the fact that the respondent also spent money on the renovations could not stop the appellants from increasing the rent, particularly that there was a valuation report to support the

increase. We find merit in ground 4 and set aside the finding that the upward adjustment of rent was illegal as it was not consensual.

In ground 5, we agree with the respondent that **section 28** of the **Landlord and Tenant (Business Premises) Act** is not framed in mandatory terms because of the use of the word "may". However, it could have been most appropriate to apply for determination of rent under the Act (if it applied to the tenancy), instead of issuing originating summons under **Order 30(11)** of the **High Court Rules, Cap 27** asking for declaratory orders. It is trite that originating summons may be used to commence an action where issues in dispute between parties revolve around simple questions of construction of a statute or documents or questions of pure law where it is unlikely that substantial dispute of facts may arise.

We must also state that a declaratory judgment is limited in its power. It defines the legal relationship between parties and their rights in the matter before the court but it does not provide for any order which may be enforced against the defendant.

In this case, the respondent did not demonstrate that the matter revolved entirely on the construction of a statute or the

lease. Further, the burden was on the respondent to show non-compliance by the appellants with specific provisions of the Act when it increased the rent. This was not done. Suffice to add that since the lease was void, it could not be relied on to challenge the rental increase specially that the claim was linked to the first claim, which was flawed. We find merit in ground 5.

Regarding ground 6, the respondent conceded that it did not claim for the money it expended on renovations and the intention of the parties was that the monies were to be receipted, quantified and presented to the landlord with receipts and was to form part of the rent, to be recovered in equal instalments after the first year of occupation. Despite that the lease agreement was void, the respondent remained in occupation of the property for the entire five year period of the void lease and there was no evidence that it did not recover the money from the rentals during that period.

Moreover, the main claim having been for a declaratory order, the order that the respondent be credited with the money it spent on renovations should not have been made. Ground 6 too has merit and succeeds.

Ground 7 faults the learned judge for failing to take cognizance of the fact that at the time judgment was delivered, some of the respondent's claims had become academic and nugatory. While there is some merit in this argument, the court had a duty to adjudicate on the claims before it. In any case, as we have said above, the respondent was seeking a declaratory judgment which does not involve any enforcement and no order was made under claim (ii) for registration of the void lease agreement. Therefore, this ground must collapse.

In all, the appeal substantially succeeds. We allow it and set aside the judgment of the court below with costs to the appellants here and below.

I.C. MAMBILIMA
CHIEF JUSTICE

A.M. WOOD
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE