IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

Appeal No. 160 of 2014
SCZ/8/123/ 2014

(Civil Jurisdiction)

BETWEEN:

MPIKA DISTRICT COUNCIL **APPELLANT**

AND

JAMESON MUSONGO T/A DURBAN BAR AND RESTAURANT **1ST RESPONDENT**

ATTORNEY-GENERAL **2ND RESPONDENT**

Coram: **Wood, Malila and Mutuna, JJS**
on the 6th December, 2016 and 9th December, 2016

For the Appellant: Mr. S. Mambwe of Messrs Mambwe Siwila & Lisimba Advocates.

For the 1st Respondent: Mr. K. Kamfwa of Messrs Wilson & Cornhill.

For the 2nd Respondent: Major F. Chidakwa, Assistant Senior State Advocate with Mr. Mwenda Hamanyati, Assistant Senior State Advocate

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JUDGMENT

MALILA, JS, delivered the judgment of the Court

Cases referred to:

1. *Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172.*
2. *Re Sentor Motors and 3 Others (1995 – 1997) ZR 163.*
3. *Amalgamated Investments and Property Co. (in liquidation) v. Texas Commerce International Bank Limited (1981) ALLER 923.*
4. *Minister of Home Affairs, the Attorney-General v. Lee Habasonda, SCJ No. 27 of 2007.*
5. *Attorney-General v. Marcus Achiume (1983) ZR 1.*

6. *Nkongolo Farms Limited v. Zambia National Commercial Bank Limited, Kent Choice Limited (in receivership) and Charles Haruperi (2007) ZR 149.*

Legislation referred to:

1. *Landlord and Tenant Business Premises Act, chapter 193.*

The dispute that animated this appeal has its origins in a seemingly benevolent, yet legally contestable presidential directive issued to a District Council by the late fifth Republican President, Mr. Michael C. Sata, on the 27th November, 2011.

The appellant is a local authority in Muchinga Province and owned a property known as Mpandafishala Rest House at Mpika. President Michael Sata was a known Catholic. Following his election as Republican President in the general elections held in September, 2011, a thanks giving service was organized in his honour by the Mpika Diocese of the Catholic brethren at Chilonga Mission Catholic Church in Mpika. While attending the said mass at Chilonga, the late President, motivated by considerations not readily apparent from the record of appeal, issued a directive in terms of which the appellant was divested of its ownership of Mpandafishala Rest House which was under the

same directive given to the Catholic Diocese of Mpika to be used as a home for retired priests.

Prior to that eventful church service, the appellant had entered into a ten-year lease agreement with the first respondent effective 1st January, 2011 in respect of Mpandafishala Rest House. The said Rest House was at the time of the lease agreement in a state of general disrepair. After discussions with representatives of the appellant, the first respondent, labouring under the belief that he had been allowed by the appellant to do so, at his expense, undertook some renovations to the property trustful that the renovation costs would be recovered from the appellant. The appellant for its part maintained that the first respondent was not authorised to carry out the renovations.

After effecting the renovations, the first respondent opened the Rest House to business in September, 2011. About two months later in November, 2011, the Presidential edict in the manner described earlier, was issued. Following this development, the appellant invited the first respondent to a meeting at which he was informed that the appellant had every intention to respect the Presidential order in respect of the Rest

House and, accordingly, that the ten-year lease agreement had to terminate. The first respondent was furthermore urged to prepare a bill of quantities depicting the costs incurred in renovating the property for onward transmission to the President though the Ministry of Local Government and Housing for settlement. The first respondent complied. The appellant, however, failed, neglected or refused to reimburse the first respondent despite not having contested the bill.

It is on account of the foregoing that the first respondent commenced proceedings against the appellant and the second respondent in the High Court claiming:

1. damages for loss of business arising from breach of the tenancy agreement;

2. special damages in the sum of K101,000.00 (rebased) being the cost of renovations;

3. interest, and

4. costs.

The appellant, in its defence, claimed that under the agreement the first respondent was to pay K1,000.00 (rebased) per month in six monthly installments which the first

respondent failed to pay. In consequence, the appellant, as landlord, was at liberty to re-enter the premises. Furthermore, that the first respondent should not have undertaken the repairs or renovations without the written consent of the appellant and that the leased premises were, in any case, let out on an as-is-basis. The appellant counter-claimed rent unpaid as at the time of the appellant's re-entry of the leased premises and interest.

The principal issue before the trial court was whether or not there was breach by the appellant of the lease agreement entitling the first respondent to damages as claimed.

The learned trial judge held that there was indeed a breach of the lease agreement. She entered judgment in favour of the first respondent for damages for loss of business arising from the breach of the tenancy agreement. She also awarded the first appellant special damages in the sum of K101,000.00 as claimed plus interest at the current lending rate and costs.

The appellant has appealed on two grounds namely, first that the trial court erred in law when it failed to consider the appellant's counter-claim, and second, that it was erroneous to

hold that the first respondent had been authorised to undertake renovations.

Mr. Mambwe, learned counsel for the appellant, relied on the written heads of argument filed in court on the 6th October, 2014. In regard to ground one, it was submitted that the failure by the trial judge to deal specifically with the appellant's counter-claim was against the well established position taken by this court that trial courts ought to adjudicate on all issues brought before them in any particular cause. The case of **Wilson Masauso Zulu v. Avondale Housing Project Limited**[1] was cited as authority for this submission. To the same intent, the learned counsel for the appellant cited the case of **Re Sentor Motors and 3 Others**[2] where we stated that to leave undetermined aspects of a suit between the parties amounts to abdication of responsibility on the part of the trial court and consequently a denial of justice. We were urged to uphold this ground of appeal.

Under ground two of the appeal, the appellant raised what appears to us to be essentially a factual matter. It was contended that the trial court fell into error when it found on the facts that the first respondent had been authorised to undertake

renovations to Mpandafishala Rest House on the understanding that the costs of such renovations were to be recovered through deductions from future rentals.

The learned counsel for the appellant referred us to the record of appeal where resolutions of a meeting of the appellant's counsel regarding the signing of the lease agreement and the way forward, are recorded. Our attention was also drawn to clause 3 of the lease agreement in the record of appeal which, according to the learned counsel, evinces a clear intention of the parties that the tenant was to undertake renovations at his own expense.

The learned counsel submitted that against the weight of the evidence on record on the intention of the parties, the learned trial judge held that the parties to the lease agreement were to be engaged in continuous dialogue concerning the state of the premises and that renovations/repair costs were to be deducted from future rentals. According to the learned counsel, the trial court erroneously rejected the appellant's claim that the minutes of the Council Meeting held on 7th June, 2011 which resolved that *"Mr. Musongo the tenant to do the renovations at his*

own costs, and then submit costs incurred which shall be deducted as rentals" were not an official record of any valid Council Meeting.

The final point made by Mr. Mambwe related to clause 2 of the lease agreement concluded between the parties. It provided that *"The Tenant shall not without the consent in writing of the Landlord ..... repair or add to ....."*

According to the learned counsel for the appellant, this provision clearly stipulated that the first respondent as tenant was not to undertake repairs without the prior written consent of the appellant. He submitted that although there was a letter from the Council Secretary requesting the first respondent to submit quantified costs of renovations undertaken for onward transmission to the President through the Local Government Minister, this did not amount to consent in writing to undertake renovations. Counsel implored us to reconsider the testimony of the first respondent in cross-examination and his admission that he was to bear the costs of renovations, and his further admission that the Minutes, which purportedly authorised him

to undertake repairs, were not that of the Council but those of a Council Committee.

At the hearing of the appeal, Mr. Mambwe orally supplemented the appellant's written submissions. He referred us to the lease agreement, in particular clause 2 the substance of which we have already referred to. Asked whether the provisions of the Landlord and Tenant Business Premises Act chapter 193 of the Laws of Zambia applied to the lease between the parties, Mr. Mambwe answered in the affirmative. Asked further what notice period is required to determine a tenancy to which the Landlord and Tenant Business Premises Act applies, Mr. Mambwe mentioned six months. Finally, on what prevails between a provision in a lease agreement and one in a statute where there is apparent contradiction, he answered that the statutory provision prevails.

Regarding the question whether even where a landlord is in breach of the lease agreement, he is entitled to demand rental arrears, Mr. Mambwe explained that in the present situation the rent arrears had accrued over a period of eight months preceding the alleged breach of the lease agreement by the appellant. The

appellant was, therefore, entitled to those rental arrears subject to the first respondent's right of set-off for any claim the first respondent could prove against the appellant.

We asked Mr. Mambwe whether the Presidential directive could not amount to a frustrating event for the lease agreement. He gracefully indicated that he could not take the argument that further.

As we shall explain later, we find Mr. Mambwe's responses to some of our questions rather disconcerting. We think, however that Mr. Mambwe was as forthright as one could be in the circumstances he found himself in.

Mr. Kamfwa, learned counsel for the first respondent, equally indicated that he was relying on the heads of argument submitted on the 4th November, 2014. In those heads of argument, the learned counsel stoutly defended the findings of the trial judge. He maintained that a review of the trial court's judgment, now being assailed, shows quite clearly that the trial court did in fact consider and address the appellant's counter-claim. He referred us to portions of the trial court's judgment where the trial judge preferred the first respondent's version,

rather than that of the appellant, on what precipitated the appellant's termination of the lease agreement. In this sense, according to the learned counsel for the first respondent, the appellant's claim, which was based on the non-payment of rent and the right of re-entry, was evidently considered by the court.

As regards ground two of the appeal, Mr. Kamfwa submitted that the trial judge was right in holding that on the facts the first respondent was authorised to undertake renovations with costs for such renovations being recoverable from future rentals. He pointed to the documents in the record of appeal as confirming the revisiting of the terms of the initial lease. There is a copy of the letter in the record of appeal authored by the first respondent to the appellant requesting the appellant to revisit some of the resolutions regarding rentals for Mpandafishala Rest House, reached at the meeting of 14th December, 2010. The appellant, through its Council Secretary, responded on the 9th April, 2011 indicating that an appropriate date for a meeting to revisit the lease would be communicated. A meeting was subsequently convened on the 7th June, 2011 at which the Council Chairman, Chief's representative, the Area

Councilor, the Council Secretary, Council Treasurer and the Committee Clerk attended on behalf of the appellant. The first respondent, Mrs. Musongo, M. Musongo and C. Musongo, are recorded in the Minutes of that meeting, as having attended on the side of the Tenant. The first resolution recorded in the Minutes was that the first respondent was to undertake the renovations at his own cost and then submit those costs which would be deducted as rentals.

According to Mr. Kamfwa, the changed position was confirmed by the appellant through its letter of 6th December, 2011 which is on the record of appeal. In that letter the first respondent was invited to attend yet another meeting whose essence was to *"chart the way forward in terms of costs related aspects."* On the 9th December, 2011 the first respondent was written to asking him to compile his bill of quantities reflecting the costs incurred on renovating the leased property.

According to Mr. Kamfwa the judge's finding of fact was adequately supported by the evidence before her and should not, therefore, be interfered with since it does not meet the reasons

identified by this court in the **Wilson Masauso Zulu**[1] case as justifying interference with findings of fact.

Mr. Kamfwa finally raised the issue of estoppel and cited the case of **Amalgamated Investments and Property Co. (in liquidation) v. Texas Commerce International Bank Limited**[3]. This, according to Mr. Kamfwa, is authority for the submission that when parties to a transaction proceed on the basis of an underlying assumption, either of fact or law, whether due to misrepresentation or mistake, on which they have conducted the dealings between them, neither of them will be allowed to go back on the assumption where it would be unfair or unjust to allow him to do so.

In his oral augmentation, Mr. Kamfwa clarified that there was no question that the first respondent had not paid rent to the appellant but that such outstanding rent was supposed to be netted off what was due to the first respondent from the costs incurred in renovating the leased property. He admitted that the first appellant did not specifically plead set-off but that, that was the spirit in which a just result to the dispute could be arrived at.

Major Chidakwa, learned counsel for the second respondent, also relied on the second respondent's heads of argument. In those submissions, the second respondent essentially repeated the arguments of the first respondent regarding ground one. The learned counsel, however, added the submission that failure by the trial judge to address the appellant's counter-claim took the judgment of the trial court outside the parameters of a good judgment as this court set them out in **Minister of Home Affairs, the Attorney-General v. Lee Habasonda[4].**

With respect to ground two of the appeal the only new point the learned counsel brought up was one of privity of contract. He argued that the second respondent was not party to the lease agreement between the appellant and the first respondent and did not make any commitment expressly or impliedly, to pay any money or settle any claim arising from the relationship between the appellant and the first respondent.

We are grateful to the learned counsel for the parties for their pointed and candid submissions.

We are of the view that the issues for determination in this appeal are fairly straight forward.

In respect of the first ground of appeal the issue is whether the failure by the learned trial judge to specifically address the appellant's counter-claim amounted to a misdirection. Regarding the second ground the question is whether the first respondent had in fact been allowed by the appellant to undertake renovations to the leased property.

We find it rather odd, though not unusual, that the appellant has not taken issue with the substantive finding of the trial court that there was breach by the appellant of the lease agreement and, therefore, that the first respondent is entitled to damages for loss of business arising from that breach. There is also equally no grievance raised by the appellant regarding the quantum of damages awarded, provided of course that it is confirmed that the appellant authorised the first respondent to undertake renovations at its cost, to be recovered from the appellant later.

We propose to deal with the second ground of appeal first. Was the first respondent authorised to undertake renovations whose cost was to be recovered from future rentals?

We have already intimated that we perceive the appellant's grievance in respect of ground two of the appeal as consisting principally of an attack on findings of fact. It is a factual point to be discerned from the evidence whether the first respondent was or was not allowed by the appellant to undertake the renovations.

It is now settled that an appellate court will not interfere with findings of fact of a lower court unless it is persuaded that the findings complained of are so outrageous in their defiance of logic that no sensible person properly applying his mind to the question to be decided could come to that conclusion. We have stated in a number of case authorities that as an appellate court, we are loath to interfere with findings of fact of a lower court unless it can be demonstrated that the trial court fell into error or failed to take into account proper considerations. In this connection we can do no better than repeat what we stated in **Attorney-General v. Marcus Achiume**[5] namely that:

> **"The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts, or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make ... An unbalanced evaluation of the evidence, where only the flaws of our side but not of the other are considered, is a misdirection which no trial court should reasonably make, and entitles the appeal court to interfere."**

We carried similar sentiments in **Nkongolo Farms Limited v. Zambia National Commercial Bank Limited, Kent Choice Limited (in receivership) and Charles Haruperi[6].**

For the appellant to succeed on ground two therefore, the appellant should demonstrate one of the factors referred to in the quotation above justifying such interference.

We have closely considered the chronology of events as they unfolded and as they were presented to the trial court. It is incontestable that the lease agreement was negotiated and concluded initially on terms which provided that the leased premises were let on an as-is-basis, and which also precluded the first respondent from undertaking repairs without the appellant's consent. Further, those terms also stated quite clearly that the *"Council cannot refund any renovations/maintenance works but done at tenant's expense"*

(sic!). These terms of the lease are set out in the Minutes of the appellant's Council meeting held on the 14th December, 2010. Those terms were consequently reduced into a lease agreement bearing the same date and to which we have already alluded. That lease agreement was no doubt binding on the parties. Yet, the matter did not end there. On 19th March, 2011 the first respondent wrote to the appellant Council suggesting a revisitation of the terms of the lease. The appellant granted the first respondent's wishes for a review and reduced the revisited terms in the Minutes of the meeting held on 7th June, 2011. These included a term that the first respondent could undertake the renovations and submit a claim for the costs incurred. In our view, the original lease agreement was by mutual consent of the parties revised and varied. Under the new terms of the lease, the first respondent was entitled to undertake renovations to the leased property and to claim reimbursement.

We readily note that Mr. Mambwe was doing the best in the circumstances, but we do not accept the argument that he has ventilated that the Minutes evidencing the appellant's concurrence to the amended terms of the lease agreement were invalid for failure to satisfy internal procedures. We equally do

not accept the suggestion that the subsequent request by the appellant to the first respondent to submit the quantified costs were without legal consequence. Under Section 63 of the Local Government Act Chapter 281 of the laws of Zambia, a council may enter into contracts necessary for the discharge of any of the functions under the second Schedule of the Act. A contract by a council will be entered into or negotiated in accordance with standing orders made by the council. Section 63 (3) states that:

> **"A person entering into a contract with a council shall not be bound to inquire whether the standing orders of the council which apply to the contract have been complied with, and all contacts entered into by a council, if otherwise valid, shall have full force and effect notwithstanding that the standing orders applicable thereto have not been complied with."**

Therefore, even assuming that the appellant's internal procedure was not followed, the variation of the lease terms remain valid, for all intents and purposes. With utmost respect to the learned counsel for the appellant, we find the arguments he makes in this respect to be rather fanciful.

In our judgment, the learned trial judge's finding that the first respondent was allowed to renovate the leased premises and claim reimbursement from the appellant was fully supported by the evidence. It follows that the findings by the trial judge on

this issue were borne out of the evidence available to her and could not, by any stretch of imagination, be said to have been perverse. We hold, therefore, that on the evidence available on the record, the first respondent was allowed by the appellant to undertake renovations to the leased property and to pass on the cost of those repairs to the appellant for reimbursement.

It has already been stated that the costs of renovations in the sum of K101,000.00 were claimed as special damages and were so awarded by the trial court. We also pointed out already that the appellant did not dispute the quantum of those damages. We have no basis for interfering with that award. Ground two of the appeal fails, and we dismiss it accordingly.

We now revert to ground one whether it was a reversible error on the part of the trial judge when she did not make specific findings on the appellant's counter-claim.

It was pointed out at the outset that before the High Court, the appellant counter-claimed rent accrued and unpaid as at the time of the termination of the lease agreement. There is agreement that such rent was for a period of about eight months and was pegged at K1,000.00 per month. It is also common

cause that rent was not paid by the first respondent. Mr. Mambwe's argument, as we understand it, is that even if the appellant may have been in breach of the lease agreement, it was still entitled to the rent arrears accrued which could be set off any damages that the court could award against the appellant. For this reason, the appellant was perfectly entitled to raise the counter-claim in the manner it did and the court was obliged to address and adjudicate on the issues raised in the counter claim.

Mr. Kamfwa equally did not dispute that the appellant was entitled to the rent arrears outstanding as at the date of termination of the lease and that such rent could be netted off the damages due to the first respondent.

We have examined the judgment of the court. It does not refer to the appellant's counter-claim at all. The order in the said judgment confines itself to awards to the plaintiff (first respondent) and is completely mute on whether the counter-claim succeeds or fails.

We have stated in numerous case authorities including that referred to by both Mr. Mambwe and Major Chidakwa in

their submissions, namely **Wilson Masauso Zulu v. Avondale Housing Project**[1], that it is desirable for a trial court to adjudicate all issues in controversy. The trial judge was duty bound to consider the appellant's counter-claim and reveal her mind on the merits or otherwise of the counter-claim. Mr. Kamfwa makes an interesting observation that the appellant's counter-claim was based on the non-payment of rent and the right to re-enter the leased property on that account. According to Mr. Kamfwa, the court found that the real reason for re-entry was not non-payment of rent but rather, the Presidential pronouncement.

We agree with the finding of the trial court as has been reiterated by Mr. Kamfwa that the first respondent was allowed to remain in occupation of the property and that the costs of renovation to the property were to be deducted from future rentals.

Both parties had anticipated the lease to run for ten years. This remained so until the Presidential edict was issued. The future rentals within that ten years from which the rentals for the lease property were deductable was not specified by the parties; it could be in any year before the end of the ten-year

lease period, which period was interrupted by the re-entry prompted by the Presidential directive. This in turn made the parties' agreement on the payment of rent unattainable.

In our estimation, although the determination by the trial court of the question under what conditions rentals were to be paid, also effectively dealt, by logical and necessary implication, with the appellant's counter-claim, the trial judge should nonetheless have specified her findings on the counter-claim. Her failure to do so was a misdirection. Ground one, in our view, is bound to succeed.

The net result is that the appeal partially fails. We uphold the part of the judgment of the trial court which held that there was breach of the lease agreement. For the avoidance of doubt we make the following clarifications, namely, first, that the damages awarded for loss of business shall be assessed by the Deputy Registrar. Second, the special damages in the sum of K101,000.00 whose quantum remains uncontested, shall be paid by the appellant to the first respondent. Third, we award interest at the short term deposit interest rate from the date of the writ of summons till the date of judgment and thereafter at

average lending rate as determined by the Bank of Zambia up to date of payment. Fourth, the rentals due to the appellant shall be netted off the sum found due to the first respondent. Finally, the appellant shall bear the costs of this appeal.

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A. M. WOOD
SUPREME COURT JUDGE

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M. MALILA, SC
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE