IN THE HIGH COURT FOR ZAMBIA **2017/HP/0861**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

HIGH COURT OF ZAMBIA
PRINCIPAL
10 AUG 2017
REGISTRY
P. O. BOX 50067, LUSAKA

IN THE MATTER OF: **Section 28 of the Landlord and Tenant (Business Premises) Chapter 193 Vol. 12 of the Laws of Zambia**

IN THE MATTER OF: **The Lease Agreement Realting to the Property known as La Fiesta VIP Lounge situate at the Business Centre of Fairview Hotel**

B E T W E E N :

KENNEY ILUNGA T/A LA FIESTA VIP LOUNGE **APPLICANT**

AND

HOTEL & TOURISM TRAINING INSTITUTE
TRUST T/A FAIRVIEW HOTEL **RESPONDENT**

Before Honourable Mrs Justice M. Mapani-Kawimbe in Chambers on the 10th day of August, 2017

For the Applicant: *Mr. W. Muhanga & Mrs C. Bweupe, Messrs AKM Legal Practitioners*
For the Respondent : *Mr. L. M. Chikuta, Messrs Mumba Malila & Partners*

J U D G M E N T

Cases Referred To:

1. *Carmran Catering Limited v Manda Hill Centre (2015/HPC/0529)*
2. *MFI Proprietors Ltd v BICC Group Trust Ltd ALL ER 1986 Volume 1*

Legislation Referred To:

1. *Landlord and Tenant (Business Premises) Act, Chapter 193*

Other Works Referred To:

1. *Blundell L.A and Wellings V.G. Woodfalls Law of Landlord and Tenant, 27th Edition, Volume 2*

The Applicant issued a Notice of Motion seeking the following reliefs:

(i) *The determination of monthly rent of the rented premises situated at the business centre of Fairview Hotel currently leased to and being occupied by La Fiesta VIP lounge.*
(ii) An Order to declare as invalid the increment in rent made by the Respondent and substitute it with the rent to be determined.
(iii) Costs of this application to be borne by the Respondent.
(iv) Any other Order or Relief the Court considers fit to make in the circumstances.

The Notice of the Motion is supported by an Affidavit sworn by **Suke Tshile**. He deposes that on 1st April, 2015 he entered into a lease agreement with the Respondent for the rental of office space at the business centre of Fairview Hotel. That the office space was to be operated as a VIP Lounge as shown in the exhibit marked "**ST1**".

The lease agreement provided for monthly rentals which could be reviewed annually if the need arose.

The deponent states that from the date of the lease agreement to about April 2017, the rentals were set at K5, 500.00 and payable two months in advance. That on 12th April, 2017, he received a letter of increment of rental charges from the Respondent, placing the rentals at an exorbitant figure of K15, 000.00. That the rentals were payable immediately and two months in advance as shown in the exhibit marked "**ST2**".

The deponent states that prior to the rental increment, he had a misunderstanding with the Respondent on the sound level of the music played at the Lounge alleging that it was too it loud. On several occasions, the Respondent's servants confronted the Applicant's manager and stopped them playing music and thereby disrupted the core business. Further, the Respondent through its manager threatened to terminate the lease agreement. The

deponent avers that the music played in the premises has always been moderate and commensurate to the environment.

The deponent states that he offered to sound proof the VIP Lounge to contain any loud music or alleged nuisance but the Respondent refused. The deponent states that by increasing the rentals to more than 273% the Respondent intends to frustrate the Applicant into leaving the premises. He also states that the rental increment is beyond the market value of the premises. He concludes with a prayer beseeching the Court to determine a reasonable market value of the rent payable under the lease agreement.

Dabila Chewe Kapotwe swore an Affidavit in Opposition on behalf of the Respondent. He states that the lease agreement executed by the parties was for business premises and not run a VIP Lounge. He also states that the lease agreement was not registered at the Lands and Deeds Registry in compliance with law.

The deponent states that the Respondent was of the view that the Applicant would run an executive (VIP) lounge commensurate to the dignity of its premises and the rental charge was fixed at K5, 500.00 at the beginning of the lease. That it is the understanding of the Respondent that the rent commercially chargeable for the demised premises at all material times was in excess of K 20, 000. That charging the Applicant the rentals of K15,000 below the market price was meant to assist the Applicant to settle its business. The deponent states that it was premature for the Applicant to commence this action without attempting to resolve the matter with the Respondent. He also states that the Respondent complained about the loud music which the Applicant plays in total disregard of the initial agreement and the business of the Respondent. That the loud music has caused the Respondent to lose business from some of its prominent customers who have withdrawn from the premises.

The deponent states that although the unregistered lease agreement gives the Respondent the power of termination, it restrained itself from doing so in the hope that the Applicant can

reform. That the Applicant does not only play very loud music, but conducts its business like that of an ordinary pub much to the injury of the Respondent's business.

The deponent states that the Respondent is a Government aided institution and its major income comes from the business of the training services it offers and lodging facilities. That the Applicant offered to sound proof the premises to contain the very loud music but the Respondent refused as it was never part of the lease agreement.

The deponent avers that the increase of rentals is meant to recoup the commercial value for the premises. He prays to the Court to dismiss the application and for costs.

In the Affidavit in Reply the deponent **Suke Tshile** contends that the issue of the determination of rent of La Fiesta VIP Lounge (the premises) was not addressed by the Respondent. That the Respondent has instead given a detailed narration of events which

are irrelevant to the matter before Court. The deponent avers that the determination of rent will not prejudice the Respondent but rather assist the parties on the correct value of the premises.

Both Leaned Counsels filed written submissions for which I am grateful. Learned Counsel for the Applicant submitted that according to the first tenancy agreement, which commenced on 1st April, 2015, the rentals were fixed and subject to review on a yearly basis.

Counsel stated that the rentals were recently reviewed from 1st May, 2017 and exorbitantly priced. He contended that the Applicant did not agree with the new rentals and on that basis, approached the Court to determine the rent payable. Counsel referred me to the case of **Carmran Catering Limited v Manda Hill Centre[1],** where faced with a similar application, and ordering the same relief as sought herein, the Court stated the following:

> **"In order to arrive at a fair net, it is imperative that a registered valuation surveyor is appointed to undertake a valuation of the demised premises so as to determine the prevailing market rental in the open market."**

Counsel submitted that the only way that rent could be determined was if the premises were subjected to valuation by a registered surveyor.

Counsel submitted that section 28 the Landlord and Tenant (Business Premises) Act applied to any lease or tenancy, and not only those registered under the Lands and Deeds Registry Act. He stated that it was misleading to suggest that this tenancy agreement was excluded. He prayed to the Court to grant the application to determine the rent.

In response, Learned Counsel for the Respondent submitted that according to the Learned Authors **Blundell L.A and Wellings V.G, Woodfalls Law of Landlord and Tenant, 27th Edition, Volume 2, page 1311**:

> **"The rent to be paid should be that at which the parties have agreed or, <u>in default of the agreement</u> determined by the court to be that at which, regard to the terms of the tenancy, the holding might reasonably be expected to be let in an open market."**

Counsel submitted that a landlord and tenant relationship allows for the review of rent, which may include the increment of rent thereof. He contended that the review of rent was an integral part of the creation of the lease agreement. Counsel submitted that the Applicant refused or neglected to dialogue with the Respondent so that each party could present its concerns on the increased rental charges, but rushed to Court.

Counsel argued that by its conduct the Applicant was contending that the Respondent was not entitled to increase the rent payable on the demised premises. Counsel cited section 16 of Landlord and Tenant (Business Premises) Act which provides that:

> **"The rent payable under a tenancy granted by the order of Court under this Act shall be such as may be agreed between the Landlord and Tenant or as, in default of such agreement, may be determined by the Court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might be reasonably be expected to be let in the open market by a willing lessor...."**

He also cited the case of **MFI Proprietors Ltd V BICC Group Trust Ltd[2],** where the Court held that:

" where the words of a rent review clause were reasonably capable of bearing more than one meaning the court was entitled to have regard to the context and commercial purpose of the clause when choosing one meaning in preference to the other. Since it would accord with the normal purpose and commercial reality of the rent view clause to take into account the fact that there would be future rent reviews, whereas to ignore all those terms relating to rent, including rent reviews, would be unreal, the construction which excluded from the ambit of the words ' other than those relating to rent', the provisions relating to rent reviews was to be preferred."

Counsel went on to submit that the application had no merit and that the phrase "if he is aggrieved by the rent payable thereunder" in section 28 (1) took the same meaning as the phrase "in default of the agreement" used by the Learned Authors of **The Law of Landlord and Tenant**. Counsel further submitted that in both instances, parties could only refer the question of determination of rent to Court after a disagreement.

Counsel argued in the alternative, that if the Court was to proceed to determine the commercial value of the rent, then it had to consider that the Applicant was not approaching it with clean hands and was not entitled to the reliefs sought. Counsel in the alternative submitted that the Landlord and Tenant (Business Premises) Act did not apply to the Respondent because it is run by

Government. He referred me to section 3 (2) (c) of the Landlord and Tenant (Business Premises) to support his proposition.

Counsel further submitted that the Respondent's premises are owned by the Commission for Technical Education and Vocational Training which is directly under the Ministry of Higher Education. On that basis, he contended that the matter was wrongfully before Court by virtue of the exclusion in the Landlord and Tenant (Business Premises) Act. He prayed to the Court to dismiss the action and for costs.

I have seriously considered this application, the affidavits filed herein and the skeleton arguments. The application raises question whether I can determine the rentals payable in the rental agreement.

The Applicant contends that I am clothed under section 28 of the Landlord and Tenant (Business Premises) Act with jurisdiction to deal with questions relating to the determination of rent.

On the other hand, the Respondent contends that there is no default of agreement of rent between the parties upon which the Court can make a determination. As a result, this matter is prematurely before Court. The Respondent also argues that it is a Government owned Institution and is not governed by the Land Lord and Tenant Business Premises Act.

To begin with, I agree in toto with Learned Counsel for the Applicant that I have jurisdiction to determine rent under section 28 of the Landlord and Tenant (Business Premises) Act which reads as follows:

> " **Section 28 (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 thereof (if he is aggrieved by the rent payable thereunder), apply to this 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 under the tenancy".**

In like manner I have had to consider section 3 (2) (c) of the Landlord and Tenant Business Premises Act which provides that:

"3. (1) Subject to the provisions of subsection (2), this Act shall apply to all tenancies in Zambia.

(2) This Act shall not apply to-

(c) Premises let by Government or a local authority;'"

In my view, section 3 (2) (c) of the Landlord and Tenant Business Premises Act is fundamental and goes to the root of this application. I take judicial notice that the Respondent is owned by the Commission for Technical Education and Vocational Training which falls under the Ministry of Higher Education and is not an entity that is envisaged by the Landlord and Tenant (Business Premises) Act.

Assuming that the Respondent organization qualified as a business entity under section 28, I would be disinclined to grant the application for the reason that there is no default of agreement of the rent payable herein. In other words, I find that the parties have not discussed the rentals so as to determine whether there is a dispute or not. Further, I cannot determine the rent on the basis of evidence adduced by the parties. This can only be done in the view

of a valuation report. As such, I hold that the matter is prematurely before Court and lacks merit.

Accordingly, I dismiss this action and award the Respondent costs to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 10th day of August, 2017.

M. Mapani-Kawimbe
HIGH COURT JUDGE