

**IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 253/2023
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

BETWEEN:

**GRADUARE PROPERTY DEVELOPMENT APPELLANT
LIMITED**

AND

A & J INTERIORS LIMITED RESPONDENT

CORAM : Siavwapa JP, Chishimba, and Patel SC, JJA

On 18th June, 2024 and 12th July 2024

For the Appellant: Mrs. S. Kalima – Banda of Messrs J&M
Advocates

For the Respondent: Mr. M. Chunga of Messrs K. Mwale &
Company.

JUDGMENT

CHISHIMBA JA, delivered the judgment of the Court.

CASES REFERRED TO:

- 1) Sundi v Ravalia (1949 - 1954) NRLR 345
- 2) Tembo v Chitambala (2009) ZR 327
- 3) Makanya Tobacco Company Limited v J & B Estates Limited SCZ Appeal No.42 of 2012
- 4) Gow v Harker (2003) EWCA CIV 1160
- 5) Zambia Telecommunications Company Limited v Aaron Mweene Mulwanda & Paul Ngandwe (2012) 1 ZR 404
- 6) Minister of Home Affairs & Attorney General v Lee Habasonda (2007) ZR 207
- 7) Chumbwe v Mukata SCZ Judgment No. 10 of 2015
- 8) Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172
- 9) Nkhata & Four Others v The Attorney General of Zambia (1966) ZR 124
- 10) The Attorney General v Marcus Kapamba Achiume (1983) ZR 1

11) Mususu Kalenga Building Limited & Others v Richman's Money

Lenders Enterprise (1999) ZR 27

12) Nevers Sekwila Mumba v Muhabi Lungu (2014) 3 ZR 351

13) Shoprite Holdings Limited & Another v Mosho & Another SCZ Appeal
200 of 2014

14) Mwale v Mtonga & Another SCZ Judgment No. 25 of 2015

15) Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa &
Others (2005) ZR 138

16) Roman Wilhelm Buchman v Attorney General (1993-1994) Z.R. 131

17) Admark Limited v Zambia Revenue Authority. (2006) ZR 43

18) Salomon v Salomon (1897) AC 22

LEGISLATION REFERRED TO:

- 1) The Lands and Deeds Registry Act Chapter 187 of the Laws of Zambia
- 2) The High Court Act Chapter 27 of the Laws of Zambia

OTHER WORKS CITED:

1. Megarry's Manual of the Law of Real Property, 5th Edition, Sweet & Maxwell.
2. Patrick Matibini, *Zambian Civil Procedure: Commentary and Cases* Volume 2

1.0 INTRODUCTION

1.1 This appeal is against the judgment of Mrs. Justice B. G. Shonga delivered on 18th May, 2023 in which she upheld the respondent's claims for payment of the sum of \$ 9,540.00 and interest.

2.0 BACKGROUND

2.1 In the year 2016, the respondent entered into a lease agreement with the appellant to rent a shop. The lease agreement required the respondent to pay a security deposit in the sum of US\$9,540.00 to be refunded once cleared to

vacate the premises at the end of the lease. The respondent paid the said security deposit to the appellant.

2.2 On or about September 2019, the tenancy agreement was terminated by the respondent. Following an inspection conducted by the appellant, the respondent was cleared to leave the premises, there being no damage to the property. In spite of numerous reminders, the appellant failed to refund the respondent the security deposit.

2.3 The appellant and Napoli Property Limited (1st defendant), averred that the lease agreement was between the appellant and the respondent. The appellant had informed the respondent that the security deposit was being applied to settle the indebtedness of its proprietors in accordance with clause 7.4 of the lease agreement. According to the appellant, the said clause provided that the landlord is entitled to retain the security deposit until such a time as the dispute is resolved, notwithstanding the termination of the lease.

2.4 The respondent subsequently commenced an action by way of amended writ of summons and statement of claim seeking payment of the sum of \$9,540.00 from either Napoli Property Limited or the appellant, damages, interest and costs.

**3.0 STATEMENT OF AGREED FACTS, FACTS IN ISSUE AND
LEGAL ISSUES FOR DETERMINATION**

- 3.1 The Parties filed a Statement of Agreed Facts, Facts in Issue and Legal Issues to be Determined by the Court. It was agreed that the respondent signed a lease agreement with the appellant on the 27th August, 2014 for the lease of a shop from the appellant for a period of five years, at a monthly rate of \$30.00 per square meter. Following the terms of the lease agreement, the respondent deposited into the appellant's account the sum of \$9,540.00 being a security deposit upon taking possession, which amount was to be refunded to the respondent once cleared to vacate the premises there being no damage to the property.
- 3.2 With respect to the facts in issue, it was stated that following the termination of the lease agreement in September, 2019, an inspection was conducted by Napoli Property Limited who was satisfied that there was no damage to the property whereas the amended defence states that any inspection ought to have been conducted by the appellant. The respondent contended that the appellant was obligated under the lease to refund the respondent the security deposit. However, it was communicated to the respondent that the security deposit was being applied to settle the

indebtedness of the respondent's proprietors in accordance with clause 7.4 of the lease agreement.

3.3 The indebtedness of the proprietors referred to is in respect of Bright Horizon Limited in which Jane Mwaba Mulenga, being the director of the respondent company is also a director in Bright Horizons Limited which owes the appellant the sum of \$41,420.75

3.4 The legal issues for determination by the Court were stated as follows:

- 1) Whether Napoli Properties Limited and the appellant are both liable to the respondent for the refund of the security deposit; and
- 2) Whether the appellant can apply the security deposit towards the settlement of the sums due to the appellant by Bright Horizon Limited.

4.0 DECISION OF THE COURT BELOW

4.1 Upon the close of trial, the Learned Judge rendered her decision *ex tempore*. She found that the respondent paid the security deposit in the sum of \$9,540.00. Clause 9.2 of the lease agreement between the appellant and respondent provided for the payment of a security deposit to be refunded upon termination of the lease. The Court found no evidence

that during the tenure of the lease, the respondent, as tenant, was liable to the appellant as landlord.

4.2 In the absence of liability under clause 9.2 of the lease agreement, the Court below was persuaded that the respondent was entitled to a refund of the security deposit. On that basis, the trial Court found, on a balance of probabilities, that the respondent had demonstrated that it was entitled to payment of the sum claimed. The lease agreement, having provided under clause 9.6 that the security deposit shall not attract interest, no interest was awarded on it.

4.3 The Court embodied its order in a "Judgment Order" awarding pre-judgment interest of 6% per annum on the Kwacha equivalent of \$9,540.00 from date of writ to date of judgment, the Conversion of the sum of \$9,540.00 shall be at the Bank of Zambia USD to Kwacha conversion rate published on 18th May, 2023. The USD denominated judgment debt shall attract interest at the rate of 1% per annum from date of judgment until full and final settlement. The respondent was awarded costs to be taxed in default of agreement.

5.0 GROUNDS OF APPEAL

5.1 The appellant has appealed against the judgment of the court below, raising the following grounds that:

- 1) *The learned Puisne Judge erred in law and fact when she failed to take into account PW1's admission that the lease agreement executed by the appellant and respondent was unregistered and the legal implications of an unregistered lease agreement; and*
- 2) *The learned Puisne Judge erred in law and in failing to ensure all issues (as contained in the Statement of Agreed Facts, facts in issue and legal issues to be determined dated 30th January, 2023) were completely determined by not reviewing or addressing in any way, the evidence led with respect to the security deposit being applied to the sums due and owing to the appellant from Bright Horizon Limited.*

6.0 APPELLANT'S HEADS OF ARGUMENT

6.1 The appellant filed heads of argument dated 8th August, 2023 and argued the two grounds separately. In ground one, the appellant submits that in terms of **sections 4(1) and 6 of the Lands and Deeds Registry Act Chapter 187 of the Laws of Zambia**, the lease agreement between the appellant and respondent is null and void for want of registration within the specified time. We were referred to the learned authors of **Megarry's Manual of the Law of Real Property**, who at page 365 state as follows:

“1. Informal lease void at law. A lease which did not satisfy the above requirements was void at law and passed no legal estate. The lease was ineffective to create any tenancy.”

- 6.2 We were further referred to the cases of **Sundi v Ravalia** ⁽¹⁾, **Tembo v Chitambala** ⁽²⁾ and **Makanya Tobacco Company Limited v J & B Estates Limited** ⁽³⁾ whose import is that a lease that is not registered within the period specified in the Lands and Deeds Registry Act is null and void, can pass no interest either in law or equity and that the transaction evidenced by the document cannot be enforced or have any effect.
- 6.3 The appellant submitted that the agreement dated 27th August, 2014, on which the respondent relies, is clearly a lease for a period of five years renewable and ought to have been registered in terms of the Act. Having not been registered within the prescribed period the lease, is null and void by virtue of **Section 6 of the Act. Lands and Deeds Registry Act**. The lease is null and void regardless of the fact that the parties intended to comply with the law when they signed the lease.
- 6.4 In ground two, the appellant contends that the Court below failed to address all the issues raised in the Statement of Agreed Facts, Facts in Issue and Legal Issues by not

reviewing or addressing in any way the evidence led in respect of the security deposit being applied to the sums due and owing to the appellant from Bright Horizons Limited.

6.5 The appellant took issue with the trial court having delivered an *ex tempore* judgment immediately at the conclusion of the trial. It was contended that as a general rule, rulings should not be delivered *ex tempore* unless in very simple and straight forward matters. Doing so, aids the court in not glossing over the evidence and issues that are subject of determination by the court. The learned authors of **Zambia Civil Procedure – Commentary and cases and Zukerman on Civil Procedure Principles of Practice** was alluded to on when an *ex tempore* ruling should be delivered, i.e in simple and straight forward cases. The case of **Gow v Harker** ⁽⁴⁾ was also cited on the giving of an oral judgment at the end of the trial without taking time to consider the evidence.

6.6 It was further submitted that even in the exceptional event that an *ex tempore* judgment be given for a fairly complex matter, it is important that the form of such a judgment must be such that the court determines completely and finally the matters in controversy between the parties as espoused in **Zambia Telecommunications Company**

Limited v Aaron Mweene Mulwanda & Paul Ngandwe ⁽⁵⁾,
Minister of Home Affairs & Attorney General v Lee
Habasonda ⁽⁶⁾ and **Chumbwe v Mukata** ⁽⁷⁾.

- 6.7 The appellant's contention is that the court below, in delivering the judgment, did not indicate its reasoning, and neither did it refer to the law or explain why the appellant's arguments were rejected while the respondent's arguments were accepted, if at all.
- 6.8 The appellant contends that a perusal of the Statement of Agreed Facts, Facts in Issue and Legal Issues to be determined at page 127 of the record of appeal, shows that the learned trial Judge did not address all the issues that were to be determined as required by **section 13 of the High Court Act Chapter 27 of the Laws of Zambia**. Despite, the guidance in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited** ⁽⁸⁾, the findings made by the trial court were arrived at without due consideration to the evidence that was before it and that the court glossed over the important legal issues that should have been considered.
- 6.9 Among the other issues identified as not having been addressed by the court below are those appearing at page 119 of the record of appeal, centered around the directors of

the respondent company being held liable for sums due to the appellant from Bright Horizons. That at page 136 of the record of appeal, the plaintiff's witness admitted that the sum of \$41,420.75 was due to the appellant by Bright Horizons. We were urged to reverse the decision of the trial court on the authority of the cases of **Nkhata & Four Others v The Attorney General of Zambia** ⁽⁹⁾ and **The Attorney General v Marcus Kapamba Achiume** ⁽¹⁰⁾.

7.0 ARGUMENTS BY THE RESPONDENT

7.1 The respondent filed heads of argument dated 11th September, 2023 and addressed the two grounds of appeal together. With respect to ground one, the respondent submitted that the issue of the lease not being registered is a new issue or matter being raised on appeal. It is an elementary rule of law that a party is bound by its pleadings in the conduct of its case. Therefore, a party cannot raise a point for the first time on appeal not raised in the court below.

7.2 Placing reliance on the learned author of **Zambian Civil Procedure Commentary and Cases Volume 2 page 1531** and the case of **Mususu Kalenga Building Limited & Others v Richman's Money Lenders Enterprise** ⁽¹¹⁾ the respondent submitted that if a party at trial deliberately

elects to rely, for instance, on one question or issue which fails, he cannot subsequently on appeal, seek to raise another question or issue, when that question or issue was at trial open to him on the pleadings and evidence.

- 7.3 For the rationale of this position of law, we were referred to the case of **Nevers Mumba v Lungu** ⁽¹²⁾ in which Malila JS as he then was stated that a party cannot raise on appeal any issue that was not raised in the lower Court, as it will not afford the opposing party an opportunity to respond. Further, that an appellate court is loath to reverse a lower court based on an issue that the trial court has not ruled upon. The respondent went on to refer to the case of **Shoprite Holdings Ltd & Another v Mosho & Another** ⁽¹³⁾ and **Mususu Kalenga** case. The said cases, also dealt with the principle that a new issue cannot be raised on appeal.
- 7.4 We were further referred to the cases of **Mwale v Mtonga & Another** ⁽¹⁴⁾ and **Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others** ⁽¹⁵⁾ on the function of pleadings which is to give fair notice of the case to be met and to define the issues on which the court will have to adjudicate in order to determine the matter in dispute between the parties; and to prevent either party from

springing up a surprise at trial, or allowing an issue to creep out of the woodwork.

7.5 The respondent went on to refer the court to pages 46 to 55 of the record of appeal, which it contends shows that the pleadings definitively framed the issues to be determined at trial. That a consideration of the appellant's amended defence shows an absence of any reference to the registration of a lease. Further, the appellant neither raised this issue through a counterclaim nor sought to amend its defence to incorporate the grounds of appeal. Even the statement of agreed facts for determination by the court at pages 126 to 127 did not encompass the issue raised in ground one.

7.6 Therefore, assuming that the trial court was guided by the statement of agreed facts and issues, an analysis of the judgment of the court below, reveals that the court diligently and comprehensively addressed the issues.

8.0 DECISION OF THE COURT

8.1 We have considered the appeal, authorities cited and the arguments advanced by Learned Counsel. It is not in dispute that the respondent and the appellant entered into a lease agreement on 27th August, 2014 for the lease of a shop for a period of five years. Pursuant to clause 9.1 of the lease

agreement, the tenant was required to pay a security deposit, in the sum of \$9,540.00, which sum was duly paid. Upon termination of the tenancy agreement, Napoli Properties Limited, inspected the premises and found no damage to the property.

- 8.2 However, the respondent refused to refund the security deposit on the basis that Bright Horizons Limited, a company in which Jane Mwamba Mulenga was also a director, was owing the appellant the sum of \$41,420.75. The appellant, in its discretion, applied the security deposit towards the settlement of the debt owed by Bright Horizons Limited.
- 8.3 According to the appellant, pursuant to clauses 7.4 and 9.2 of the lease agreement, it was entitled to hold on the security deposit.
- 8.4 It is not in issue that the parties settled the issues to be determined. The court below was called upon to determine whether Napoli Properties Limited and the appellant, were both liable to the respondent for the refund of the security deposit and whether the appellant can apply the security deposit towards the settlement of the sums due to the appellant, by Bright Horizon Limited.
- 8.5 In this appeal, the issues for determination are as follows:

- 1) Whether the issue of the registration of the lease agreement was raised in the court below; and if so whether the said lease agreement is null and void and proscribes the respondent from claiming under it.
- 2) Whether the court below determined the issues in contention as outlined in the statement of agreed facts, facts in issue and legal issues for determination.

8.6 It is trite that the purpose of statement of agreed facts, facts in issue and issues in contention is to make the decision process easier and for the court to focus on the issues that are not agreed upon. The agreed statement of facts is a useful tool in streamlining trial process, which in turn saves time and resources for all parties involved.

8.7 In ground one, the appellant has challenged the decision of the Court below, on the basis that the lease agreement appearing at pages 74 to 103 of the record of appeal was not registered as required by **section 4(1) of the Lands and Deeds Registry Act**, and is therefore null and void, and unenforceable.

8.8 A perusal of the pleadings in this case, that is the amended writ of summons and amended statement of claim at pages 45 to 47 of the record of appeal; the amended defence at pages 54 to 55 of the record of appeal and the Statement of

Agreed Facts, Facts in Issue and Legal Issues to be Determined by the Court at pages 126 to 128 of the record of appeal, shows that the issue of the non-registration of the lease agreement was not canvassed before the court below for determination. At no time during the proceedings in the court below, did the respondent challenge the validity of the lease agreement or its non-registration.

- 8.9 It is a well-established principle of law, that it is incompetent to raise an issue on appeal which was not raised during trial. In the case of **Roman Wilhelm Buchman v Attorney General** ⁽¹⁶⁾ it was held that:

“A matter that is not raised in the court below cannot be raised before a higher court as a ground of appeal.”

There are a plethora of Supreme Court decisions on this principle as cited by the Parties. The appellant, did not plead the issue of the non-registration of the lease agreement in the court below. We, however, note that the point raised is a point of law which can be raised at any time even on appeal. We refer to the Supreme Court decision in the case of **Admark Limited v Zambia Revenue Authority** ⁽¹⁷⁾ as authority.

- 8.10 It is not in dispute that the lease agreement was not registered. There are a plethora of court decisions on the

effect of non-registration of a lease agreement. Does the fact that the lease agreement in issue was not registered proscribe the respondent from claiming refund of the security deposit paid? Non- registration of any document that is supposed to be registered within the period specified in the Lands and Deeds Registry Act renders such document null and void for all purposes whatsoever.

8.11 In *casu*, the tenant took possession, rent was paid and accepted, thereby turning the tenancy at will into a yearly or periodic tenancy. Therefore, any claim in the court of law for example, refund of the security deposit, would depend not on the lease agreement, but upon the tenant's possession, payment and acceptance of rent. As authority, we refer to the case of **Makanya Tobacco Company Limited and J&B Estates Limited**⁽³⁾, where the Supreme Court stated as follows:

“As we have already said, since the lease agreement entered into between the parties on 3rd September, 2009 is null and void for want of registration, none of the covenants under the lease can be enforced. However the matter does not end here. It is common ground that the appellant took possession of the premises and paid an annual rent in advance The rent was accepted by the respondent. Therefore a yearly periodic tenancy was created between the

parties... “Supreme Court went on to state that” There existed between the parties a yearly tenancy, independent of the lease agreement, under which the respondent is entitled to anchor his claims in a court of law.”

8.12 We have addressed the issue of the effect of non-registration of the lease, because it is a point of law. We are of the firm view, that the respondent is entitled to the refund of the said security deposit, upon having been cleared after inspection of premises. For this reason, we find no merit in ground one. Security deposit was paid, accepted by the appellant and is refundable to the respondent.

8.13 In ground two, the issue for determination is whether the court below, determined the issues in contention as outlined in the Statement of Agreed Facts, Facts in Issue and Legal Issues for Determination. In particular, the appellant has argued that the court below did not address its mind to the evidence led with respect to the security deposit being applied to settling the sums due and owing to the appellant by Bright Horizon Limited, a separate entity.

8.14 The second legal issue for determination at page 127 of the record of appeal, was whether the appellant can apply the security deposit towards the settlement of the sums due to the appellant by Bright Horizon Limited. A perusal of the

amended defence filed by the appellant at pages 54 to 55 of the record of appeal, particularly paragraph 5, shows that the issue of the security deposit being applied to settle the indebtedness of the proprietors in accordance with clause 7.4 of the lease agreement, was pleaded.

8.15 However, a perusal of the *ex tempore* judgment at pages 162 to 164 of the record of appeal, shows that the learned trial Judge did not specifically address the issue raised as to whether security deposit can be applied towards the settlement of the debt owed by the proprietors of Bright Horizon Limited to the appellant. The Judge, however, held that the appellant was liable to refund the security deposit.

8.16 In **Wilson Masauso Zulu v Avondale Housing Project Limited**⁽⁸⁾ it was held that:

“The trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. A decision which, because of uncertainty or want of finality, leaves the doors open for further litigation over the same issues between the same parties can and should be avoided.”

8.17 We have considered the issue of whether the security deposit ought to have been applied to settle the indebtedness of the sum due to the appellant from Bright Horizon Limited. It is not in dispute that Bright Horizon Limited and the

respondent are separate legal entities distinct from its shareholders and directors. A registered company acquires a separate legal status. The case of **Salomon v Salomon** ⁽¹⁸⁾ established the principle of separate legal personality of a company, distinct from its members and directors. We will not belabour the point.

8.18 The appellant sought to attach liability of a debt owed by Bright Horizon Limited, a separate legal entity, as a basis for retaining the security deposit due to A&J Interiors Limited the respondent herein. The contention being that because Jane Mwamba Mulenga is shareholder/ director in both the respondent company and Bright Horizon Limited, the corporate veil ought to have been lifted.

8.19 We strongly disagree with the basis upon which the appellant sought to retain the security deposit and apply it to a debt owed by a separate entity. We will not belabour the grounds upon which the corporate veil maybe lifted, save to state that this is not one of the circumstances under which it is lifted. Therefore, we cannot fault the holding of the court that the appellant refunds the security deposit. The court below came to the correct inescapable conclusion, that the appellant is liable to refund the security deposit paid by the respondent.

CONCLUSION

8.20 In conclusion, the *ex tempore* judgment of the court below is upheld. The issues subject of determination were not complex, but straight forward issues where judgment could be given *ex tempore*. The appeal is accordingly dismissed with costs to respondent.



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M. J. Siavwapa

JUDGE PRESIDENT



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F. M. Chishimba

COURT OF APPEAL JUDGE



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A. N. Patel SC

COURT OF APPEAL JUDGE