

**LEGAL RIGHTS OF LANDLORDS OF BUSINESS PREMISES: A
COMPARATIVE ANALYSIS BETWEEN ZAMBIA AND SOUTH
AFRICA**

BY

MWILA CHATE

SPR
LLB
CHA
2013
C-1

UNZA

2012/2013

**LEGAL RIGHTS OF LANDLORDS OF BUSINESS PREMISES: A
COMPARATIVE ANALYSIS BETWEEN ZAMBIA AND SOUTH
AFRICA**

BY

MWILA CHATE

SPR
LLB
CHA
2013
C-1

**LEGAL RIGHTS OF LANDLORDS OF BUSINESS PREMISES: A
COMPARATIVE ANALYSIS BETWEEN ZAMBIA AND SOUTH
AFRICA**

BY

MWILA CHATE

COMPUTER NO. 94012466

A dissertation submitted to the University of Zambia in partial fulfilment of the requirements of the award of Bachelor of Laws Degree (LLB).

DECLARATION

I, Mwila Chate,

do hereby declare that this Directed Research Essay is my own authentic work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorization in writing of the author.



Signature

12/08/2013

Date

RECOMMENDATION

I recommend that this Directed Research Essay under my supervision by:

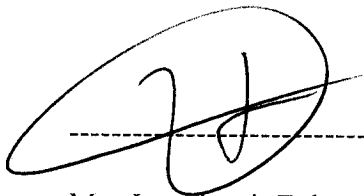
MWILA CHATE,

94012466

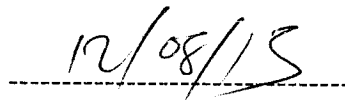
Entitled:

Legal Rights of Landlords of Business Premises: A Comparative Analysis between
Zambia and South Africa

Be accepted for examination. I have checked it carefully and I am satisfied that it
fulfills the requirements pertaining to format as laid down in the regulations
governing Directed Research Essays.

A handwritten signature in black ink, consisting of a large loop followed by a stylized 'Z' and 'L', written over a horizontal dashed line.

Mr. Lungisani. Zulu
(Supervisor)

A handwritten date '12/08/13' in black ink, written over a horizontal dashed line.

Date

DEDICATION

This research paper is dedicated to my wife Kerry-ann, my son Darrian and my daughter Dian without whose support this paper would not have been completed.



ABSTRACT

The legal system of any country has either a negative or positive impact on domestic and foreign investment that a country will attract. One area of investment where the legal system can have an impact is real estate. In both Zambia and South Africa, the real estate sector plays a very vital social and economic role.

In line with the socio-economic policies pursued by the government, a good legal system will strike a balance between property owners or landlords on one hand and tenants on the other hand. This is because property relations have the potential to cause social and economic upheavals in any country.

The purpose of this study has been to find out what lessons, if any Zambia can learn from the South African legal system, specifically on the rights of landlords of business premises.

The study starts with a general introduction through to the general conclusions and recommendations. It looks at the landlord's rights of benefit and exclusion in both Zambia and South Africa. The paper also analyses the procedures and grounds for termination of business leases in Zambia and South Africa. Then the procedure for collection of overdue rentals in both Zambia and South Africa is discussed.

The findings of this research show that the Zambian property laws are not significantly different from the South African laws governing the rights of property owners and Landlords.

After highlighting the differences in the two countries property laws, some recommendations are rendered. These include the need to amend the Landlord and Tenant (Business Premises) Act.

ACKNOWLEDGEMENTS

Firstly, I want to thank Jehovah God for the gift of life and the material and spiritual provisions that enabled me to complete this research paper.



Secondly, I would like to thank my beloved wife Kerry-ann Ng'andwe, my son Darrian and daughter Dian for their understanding, encouragement and support.

Thirdly, I want to thank Mr. Barnaby Mulenga and Mr. Chazya Silwimba for giving me time off from work to enable me finish this paper.

Fourthly, I want to thank my father and mother, Mr and Mrs Chate for the support that they rendered to me during the preparation of this paper.

Lastly, I want to thank all the lecturers who supported me especially Mr. Lungisani Zulu for the valuable advice and guidance rendered to me during the preparation of this research paper.

ZAMBIAN STATUTES

The Constitution of Zambia, Chapter 1 of the laws of Zambia (as amended by Act no. 18 of 1996)

The English Law (Extent of Application) Act, Cap 11 of the laws of Zambia

The Landlord and Tenant (Business Premises) Act, Chapter 193 of the laws of Zambia

The Town and Country Planning Act, Chapter 283 of the Laws of Zambia.

FOREIGN STATUTES

The Consumer Protection Act 68 of 2008 of the Laws of South Africa

The Constitution of the Republic of South Africa No. 108 of 1996

The Distress for Rent Act 1689 of the laws of England

The Distress for Rent Act 1737 of the laws of England

The Law of Distress Amendment Act 1888 of the laws of England

The Law of Distress Amendment Act 1908 of the laws of England

The Law of Distress Amendment Act of 1895 of the laws of England

The Magistrates' Courts Act 32 of 1944 of the Laws of South Africa

The Security by Means of Movable Properties Act (No. 57 of 1993) of the laws of South Africa

TABLE OF CASES



Adler v Blackman [1953] 1 QB 146

Bloemfontein Municipality v. Jacksons Ltd, 1929 AD 266 at 271

Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd, 2006 (2)

Eight Kaya Sands v Valley Irrigation Equipment, 2003 (2) SA 495 (T)

SA 95 (W)

Hampako v National Housing Authority, (1988/89) ZR 61

Harlequin Duck properties 204 (Pty) Ltd v Fieldgate, 2006 (3) SA 456 (C)

Javad v Aqil [1991] 1 All ER

Langlands v Francken, 1881 Kotze 256

Leigh v Dickeson (1884) 15 QBD 60

Paperex Limited v Deluk High School, Supreme Court appeal No. 141 of 1996 [SC]

Phiri t/a Shabbach Fashions and General Dealers v Chipeta and Another 2011/HB/06

Re Kamaya (1987) ZR 7

Robinson v Waddington (1849) 13 Q 733

State v Shack, 277 A.2d 369, 372b (N.J. 1971)

Virginia Tobacco Association of Zambia v Medical Clinic Centre Limited - Supreme Court Appeal No. 4 of 1990. (unreported)

ZIMCO Properties Limited v Dinalar Randee Enterprises (T/A Empire Cinema)
(1988/89) ZR 114 (SC)

GENERAL GLOSSARY OF ACRONYMS

CPA Consumer Protection Act

SA South Africa



TABLE OF CONTENTS

Dedicationi

Abstractii

Acknowledgementsiii

Zambian Statutesiv

Foreign Statutesiv

Table of Casesv

General Glossary of Acronymsvii

Table of Contentsviii

CHAPTER 1.....1

 General Introduction1

 1.0.0 Introduction1

 1.2.0 Statement of the Problem2

 1.3.0 Objectives of the Study3

 1.4.0 Research Methodology4

 1.5.0 Significance of the Study4

 1.6.0 Conclusion5

CHAPTER 26

 Types of Business Leases and Rights of Landlords6

 2.1.0 Introduction6

 2.2.0 Definition and Nature of Leases.....7

2.3.0	Types of Business Leases	8
2.3.1	Fixed Term Lease	8
2.3.2	Periodic Lease	8
2.3.3	Tenancy at Will	9
2.3.4	Tenancy at Sufferance	10
2.3.5	Tenancy by Estoppel	11
2.4.0	Rights of Landlords	11
2.4.1	Property as a 'Bundle of Rights'	11
2.4.2	Right to Exclude	14
2.4.3	Right to Transfer	14
2.4.4	Right to Possess and Use	15
2.4.5	Right of Benefit	16
2.5.0	Conclusion	17
CHAPTER 3	18
	Termination of Business Leases In Zambia and South Africa	18
3.1.0	Introduction	18
3.2.0	Termination of Business Leases in Zambia	18
3.3.0	Termination of Business Leases in South Africa	25
3.3.1	The Law of Contract	25
3.3.2	Common Law	27
3.3.3	The Consumer Protection Act	28
3.3.4	Procedure for Evicting a Tenant in South Africa	31
3.4.0	Conclusion	33

CHAPTER 434

Collection of overdue rentals in Zambia and South Africa34

4.1.0 Introduction34

4.2.0 Distress for Rent in Zambia35

4.3.0 Property Attachment in Zambia37

4.4.0 Distress for Rent in South Africa39

4.5.0 Sequence for Attachment of Property in South Africa40

4.6.0 Justification for Collecting Overdue Rentals42

4.7.0 Conclusion43

CHAPTER 544

General Conclusion and Recommendations44

5.1.0 Introduction44

5.2.0 Summary44

5.3.0 Recommendations48

5.4.0 Conclusion50

BIBLIOGRAPHY51

Chapter 1

General Introduction, Objectives and Significance of the Study

1.1.0 Introduction

How good a country's legal system is will determine the level of investment that both local and foreign investors make. This is so because the investors will genuinely be concerned about the security of their investments. One type of investment is where investors put their money in real property such as buildings. These buildings may be owner occupied or rented out. Where properties are rented out, the relationship between the landlord and the tenant is governed by an agreement; a tenancy agreement or lease agreement.¹

The right to property is the only economic right guaranteed in the current Zambian constitution. The constitution provides as follows:

Except as provided in this Article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.²

The South African constitution also guarantees the right to property by providing that no one may be deprived of property except in terms of law of general application, and that no law may permit arbitrary deprivation of property.³ This is evidence of the significance of the right to property.

Real property has a number of branches but the rights of landlords of business premises in Zambia and South Africa is of particular interest in this research.

¹ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003), 295

² Article 16(1) of the Constitution of the Republic of Zambia as amended by Act No. 18 of 1996.

³ Section 25(1) of the Constitution of South Africa No. 108 of 1996

Landlords and tenants of business premises are linked together by a tenancy agreement or lease agreement. The relationship is governed by rights that are contained in statute law⁴ and common law. This relationship has not been smooth hence the litigation both in Zambia and South Africa.

Real property investments have received global recognition as being an important tool for economic growth. Zambia may learn some lessons from South Africa, which is a subject of this research. South Africa has been selected as a subject of this research because it has generally been recognised that South Africa made efforts to bring its laws in conformity with international standards. Additionally, South Africa has a more developed economy and real estate sector hence it is a fitting model. The aim of this study is to analytically compare the rights of landlords between Zambia and South Africa with a view to discover how the law governing landlords can be used to bring about social and economic development in Zambia.

1.2.0 Statement of the Problem

The rights enjoyed by landlords may depend on whether the objective of the Act is to protect tenants from exploitation by the landlords or to favour the business sector. This further depends on whether the objective of the government is to pursue social objectives or economic objectives.

The issue therefore is to question the applicable laws by scrutinizing their efficacy in meeting their set objectives. The objectives of the statute will determine whether the laws governing the rights of landlords of business premises contribute to social stability or economic development.

⁴ For example, The Landlord and Tenant (Business Premises) Act, Chapter 193 of the laws of Zambia prescribes the rights of landlords in Zambia

Specifically, two rights will be considered in this study. These are the right of benefit and the right of exclusion from the property⁵. The right of benefit from the property entitles the owner to any profits generated from the use of the property. As for the right of exclusion, this right permits the property owner to exclude others from entering the property. These rights flow from the absolute right of ownership but the same rights can also be created by contract in case of subleases. Right to property is guaranteed by the constitutions of both Zambia and South Africa. The rights of benefit and exclusion have been selected because they are two of the most important rights for the security of any investor.

1.3.0 Objectives of the Study

The overall aim of the research is to compare and analyse the right of benefit and the right of exclusion of landlords of business premises in Zambia and South Africa with a view to establish whether the legislation governing these rights has achieved its objectives. The research will also establish whether there are any beneficial lessons Zambia can learn from the South African model. The specific objectives of this paper are:

- a) To compare the nature of the relationship existing between landlords and tenants of business premises in Zambia and South Africa.
- b) To compare and analyse the types of business leases and rights of landlords between Zambia and South Africa
- c) To compare and analyse the grounds and procedures for termination of leases between Zambia and South Africa.

⁵ Steve W. Schneider, *Types of rights of real property*, under 'Property Rights' <http://www.netplaces.com>, (accessed on September 20, 2012)

- d) To compare and analyse the procedure for collection of overdue rentals between Zambia and South Africa.

1.4.0 Research Methodology

This study will only use secondary sources of information. Primary sources will not be used. The secondary sources will include a review of literature on the subject. Published and unpublished work will be consulted. Case law and other pieces of legislation will also be consulted. The objectives of the study will be achieved with use of the foregoing methods.

1.5.0 Significance of the Study

The research is very important for Zambia especially in view of the liberalised economy where economic growth is driven by, inter alia, business activity. Before investors make a decision on where to invest their resources, they will critically look at the law regulating their intended investment. There is need therefore to compare and analyse the rights of benefit and exclusion of landlords in South Africa to find out what good practices, if any, that Zambia can learn. This study is therefore very useful as it comparatively analyses the rights of benefit and exclusion of landlords of business premises in Zambia and South Africa.

The study will be divided into five chapters. Chapter one has introduced the study by showing the relevance of a good legal system in encouraging local and foreign investment in a country.

Chapter two will consider the types of business leases and the rights of landlords of business premises in Zambia and South Africa.

Chapter three will consider in more detail the landlord's right to exclude the tenant from the property. The chapter will specifically analyse procedures and grounds for termination of business leases in Zambia and South Africa.

Chapter four will consider in more detail the landlord's right of benefit of the landlord. The chapter will analyse the procedure for collection of overdue rentals for business premises in both Zambia and South Africa.

Chapter five will give the conclusion of the study.

1.6.0 Conclusion

Chapter one has highlighted the fact that a good legal system in any particular country will determine the level of investment that local and foreign investors make. The reason for this is that the security of investments is closely tied to the legal system. Any rights attaching to property owe their existence to the legal system. An investor in real property, such as a landlord, can only exercise his rights over the property to the extent that the legal system makes possible. The landlord's rights of benefit and exclusion in both Zambia and South Africa exist by virtue of the legal systems in the two countries. The said rights flow from the real right of ownership which right is guaranteed by the constitutions of both Zambia and South Africa, countries that have liberalised their economies. This study therefore aims to analyse and compare the rights of benefit and exclusion of landlords in Zambia and South Africa with a view to find out what good practices, if any, that Zambia can learn from South Africa. Chapter two will discuss the types of business leases and the rights of the landlord.

Chapter 2

Types of Business Leases and Rights of Landlords in Zambia and South Africa

2.1.0 Introduction *

Generally, the law defines property as rights among people⁶ that concern things. That is, property is a package of legally recognised rights held by one person in relationship to others with respect to something.⁷ Legal Positivism postulates that rights, including property rights, arise only through government. This means that property rights exist only if and to the extent that they are recognised by the legal system. In short, property rights are defined by law.⁸ One proponent of legal positivism was Jeremy Bentham, who observed: 'Property and laws are born together and die together. Before laws were made there was no property, take away laws and property ceases.'⁹

Property owners or landlords both hold rights and owe duties. Property consists of legal rights or relationships among people that concern things. Thus Wesley Newcomb Hohfeld defined property as relationships among people that concern things.¹⁰ Things include real property (rights in land) and personal property (rights in things other than land)¹¹

This chapter will consider the different types of business leases and the rights of property holders or landlords in Zambia and South Africa.

⁶ People is used broadly to include business, government entities and individuals

⁷ John G. Sprankling, *Understanding Property Law*. (California: Mathew Bender & Company Inc, 1999) 2

⁸ Ibid, p2

⁹ Jeremy Bentham, *The Theory of Legislation*, Oceania Publications Inc, 1975 (1960)

¹⁰ Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* 23 Yale L.J. 16 (1913)

¹¹ John G. Sprankling, *Understanding Property Law*. (California: Mathew Bender & Company Inc, 1999) 2

2.2.0 Definition and Nature of Leases

A lease is an estate or interest in land of a defined duration. The terms lease, tenancy, demise and term of years are often used interchangeably, although a tenancy is normally of shorter duration. The terms lessee or grantee refer to the tenant while the landlord is referred to as lessor or grantor.¹²

As an agreement between two parties, a lease is a contract and, hence, is subject to the law relating to contracts.¹³ But a lease is more than a contract between two parties in that, as an interest in land, it is capable of binding a third party. A lease is thus a contract and it is also an interest in land.¹⁴ For a right to be capable of being a lease the duration of the lease must be certain and the tenant must have exclusive possession.¹⁵

Thus, a leasehold estate is an ownership of a temporary right to hold land or property in which a lessee or a tenant holds rights of real property by some form of title from a lessor or landlord. A leasehold estate is considered personal property although a tenant holds rights to real property.

Leasehold therefore is a form of land or property tenure where one party buys the right to occupy land or a building for a given length of time. As a lease is a legal estate, leasehold estate can be bought and sold on the open market. A leasehold thus differs from a freehold or fee simple where the ownership of a property is purchased outright and thereafter held for an indeterminate length of time. While paying an agreed rent to the owner, the lease holder has the right to remain in occupation as an assured tenant until the end of the lease period.

¹² Frederick S. Mudenda, *Land Law in Zambia: Cases and Materials*. (Lusaka: UNZA Press, 2006) 63

¹³ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003), 295

¹⁴ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003), 295

¹⁵ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003), 295

The common law of the landlord and tenant relation evolved in England during the middle ages where the primary economic asset was land and land ownership was the primary source of status and rank.¹⁶

2.3.0 Types of Business Leases/ Tenancies

Leases or tenancies may be categorized as fixed term leases, periodic lease, tenancy at will, tenancy at sufferance and tenancy by estoppel.

2.3.1 Fixed Term Lease

As the name implies, a fixed term tenancy has a fixed starting and ending date. This type of tenancy can be for any duration. Leases for two months, fourteen years or for ninety-nine years are examples of such a lease.¹⁷ A lease for a fixed period ends automatically when the period expires. With this kind of tenancy, the landlord can evict the tenant when the tenant is in breach of his undertaking such as non-payment of rent or when the tenant breaks the terms of the lease agreement.¹⁸

2.3.2 Periodic Lease

A periodic tenancy is a tenancy that continues indefinitely until ended by proper notice by either party.¹⁹ Examples of periodic leases are weekly, monthly, quarterly and yearly leases. Subject to agreement to the contrary or to statutory provisions, the length of notice required to terminate such a periodic lease depends on the form that a periodic lease takes. As such, monthly lease can be terminated by giving a months notice and a quarterly lease can be

¹⁶ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003), 295

¹⁷ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003), 307

¹⁸ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003), 307

¹⁹ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003), 308

terminated by giving three months notice. In each case therefore the notice will expire at the end of a completed period.

A periodic lease may be created expressly or may be implied. Where a term such as monthly lease, monthly tenant, monthly tenancy or from month to month is used, a periodic lease is created. In the absence of any other indication²⁰ as to the type of lease granted, a periodic lease is created where there is express reference to the period of notice required to terminate the lease.²¹ Thus a lease determinable on the giving of one month notice creates a monthly lease. Where there are no circumstances from which an intention to create a certain form of lease may be inferred or where there are no express words creating a particular form of lease, then by implication of law, a periodic lease arises. Thus, the form which the periodic lease created will take will depend on the period by which the rent is measured. Thus a lease to a tenant at K12,000 per annum gives rise to a yearly lease. It is immaterial that the lease may be paid at some other interval, what matters is the period by which the rent is measured. Thus a lease to a tenant at K12,000 per annum payable monthly creates a yearly and not a monthly lease.²²

2.3.3 Tenancy at Will

A tenancy at will is one where the landlord allows the tenant to occupy land such that the tenancy may be determined by the landlord or tenant at any time. Thus the tenant occupies the land as a tenant at will.²³ For example, the tenant holds as a tenant at will where the tenant remains in possession of the property with the permission of the landlord after the expiration of the lease.

²⁰ in *Javad v Aqil* [1991] 1 All ER ,243, a tenancy at will held to have been created

²¹ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003), 308.

²² *Adler v Blackman* [1953] 1 QB 146

²³ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003) 309

As regards rent, the tenant must pay compensation to the landlord for the period of the tenant's occupation, unless it is agreed that the occupation is to be rent-free. The death of either the landlord or tenant ends the tenancy. The tenancy also comes to an end if the landlord assigns his interest in the land. The tenancy would also come to an end if either the landlord or tenant does any act inconsistent with the continuation of the tenancy.²⁴

2.3.4 Tenancy at Sufferance

Tenancy at sufferance is one where the lease granted to the tenant by the landlord has expired, however, the tenant still remains in possession of the land without the landlord's permission.²⁵ The landlord may claim possession at any time. Thus, the landlord has a claim against the tenant for the use and occupation of the property during his period of possession.²⁶

If the tenant pays rent which the landlord accepts, the tenant becomes a tenant under a periodic lease. If the landlord consents to the tenant staying but no rent is agreed, the tenant becomes a tenant at will. If the landlord dissents from tenant's possession, the tenant becomes a trespasser, although at the outset the tenant was not a trespasser because his original entry was lawful, being by virtue of his lease.²⁷

Thus, a tenant at sufferance does not hold under a true tenancy. The arrangement is referred to as a 'tenancy' because the parties were originally landlord and tenant. It has been suggested that a tenant at sufferance is no more than a squatter.²⁸ The difference between a tenant at sufferance and a trespasser is that the tenant at sufferance originally had a legal lease agreement.

²⁴ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003), 309

²⁵ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003), 310

²⁶ Leigh v Dickeson (1884) 15 QBD 60

²⁷ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003) 310

²⁸ Megarry and Wade, *The Law of Real Property*, 7th ed. (London: Sweet & Maxwell Ltd, 2008), 656

2.3.5 Tenancy by Estoppel.

Tenancy by estoppel arises when the landlord purports to grant a lease at a time when he holds no estate in the land and if he later acquires the legal estate he is estopped from denying the tenancy. A tenancy²⁹ by estoppel may arise also where the landlord is merely a licensee and so has no power to grant a lease.²⁹ Such a tenancy has most of the characteristics of a true lease. For example, the tenancy may be periodic, or for a specific period, according to the circumstances in which it came into existence or the terms of the grant. The tenancy is not only enforceable between the parties, but can be assigned to another person or can pass under his will or intestacy.

2.4.0 Rights of Landlords

A right can be defined as an entitlement or a claim. This entitlement may be to do something, to attain something or not to be affected by what someone else is doing. Property rights legally involve a mixture of rights, obligations and duties. This is sometimes called a ‘bundle of rights.’

2.4.1 Property as a ‘Bundle of Rights’

Property is commonly described as a bundle of rights in relation to things.³⁰ The metaphorical bundle is made up of ‘sticks’ traditionally labeled according to the nature of the right involved. Under this approach, the sticks in the bundle, inter alia, are the right to exclude, the right to transfer and the right to possess and use.³¹

²⁹ J.G Ridall, *Land law*, 7th ed: (London: Butterworths, 2003), 311

³⁰ John G. Sprankling, *Understanding Property Law*. (California: Mathew Bender & Company Inc, 1999) 4

³¹ James Kimmons, ‘Ownership and Rights: What is the Bundle of Rights of a Real Estate Owner?’, *Real Estater*, under ‘Bundle of Rights’ [http:// realestate.about.com/od/ownershipandrights/f/bundle_of _rights.htm](http://realestate.about.com/od/ownershipandrights/f/bundle_of_rights.htm) (accessed October 15, 2012)

The rights in the bundle can be divided in other ways such as by time (that is for a term or period) and by person (for example co-owners).³² To illustrate, the right to possess and use can be subdivided based on time in that the tenant might have the right to use and possess the business premises for one year while the landlord is entitled to use and possession when the year ends.

It is important to note that property rights are not absolute. One court in the United States observed: 'Property rights serve human values. They are recognised to that end, and are limited by it.'³³ Thus property rights are inherently limited in the American legal system. Similarly, unfettered, absolute property rights do not exist in the Zambian and South African legal systems.

Although property rights are enshrined in the Bill of Rights in the constitution of Zambia, the same constitution provides instances that limit the enjoyment of property rights. While Article 16 for example provides for protection from deprivation of property, it also gives limitations of the right to property. The right to property can, inter alia, be limited by way of penalty for breach of any law, whether under civil process or after conviction of an offence, in satisfaction of any tax, rate or due, in execution of judgements or orders of court or as an incidence of contract including a lease, tenancy, mortgage, charge, pledge or bill of sale or of a title deed to land.³⁴

Additionally, while Article 17 of the Constitution of Zambia gives protection for privacy of home and other property, this right is, inter alia, limited by considerations of public safety, public order, defence, public morality, public health, for the purpose of protecting the rights and freedoms of other persons, or for a public purpose such as entering on the premises of

³² John G. Sprankling, *Understanding Property Law*. (California: Mathew Bender & Company Inc, 1999) 4

³³ *State v Shack*, 277 A.2d 369, 372 (N.J. 1971)

³⁴ Article 16 clauses (1) and (2)(a) - (z)

any person for the purpose of any tax, rate or due or to carry out work or for the purpose of enforcing the judgement or order of court in any civil proceedings, the search of any person by order of court or entry upon any premises by such order.³⁵

Similarly, while property rights are enshrined in the Bill of Rights in the constitution of South African, the same constitution has enacted limitations of property rights similar to those enacted in the Zambian constitution. Section 25(1) and (2) (a) and (b) of the South African constitution enacts that although no one may be deprived of property except in terms of law of general application and that no law may permit arbitrary deprivation of property, property may be expropriated only in terms of law of general application for a public purpose or in the public interest and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.³⁶

Further, the South African constitution enacts in section 25(8) that no provision of section 25 may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of section 25 is in accordance with the provisions of section 36 (1)(a) to (e). That section provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.³⁷

³⁵ Article 17 clauses (1) and (2)(a) - (d)

³⁶ No. 108 of 1996 of the Laws of South Africa

³⁷ No. 108 of 1996 of the Laws of South Africa

2.4.2 Right to Exclude

The right to exclude others from the use or occupation of the land is one stick in the metaphorical bundle.³⁸ The right of exclusion entitles the landlord to exclude others from the use or occupancy of the property.³⁹ For example, the holder of the right to exclude is generally entitled to prevent neighbours or strangers from trespassing on the land. However, the right to exclude is not absolute. For example, police officers may enter the land in pursuit of fleeing criminals or title may be held subject to an easement that gives others the legal right to cross or otherwise use the land. Alternatively, the land may be leased to a tenant for a term of years thus surrendering the right to exclude. Similarly, a local law might prevent the eviction of a tenant without good cause.

The right of exclusion is enjoyed by landlords of business premises in both Zambia and South Africa because it is inherent in the constitutions of both Zambia and South Africa. The right of exclusion is also contained in other statutes governing the rights of landlords. Thus, the landlord's right of exclusion from the property is contained in every business lease either expressly or implicitly. In Zambia, the statute governing the right of exclusion is the Landlord and Tenant (Business Premises) Act.⁴⁰

2.4.3 Right to Transfer

The right to transfer the holder's property rights to others is another stick in the bundle of rights.⁴¹ The right to transfer the holder's property rights to others is inherent in the right of benefit, which is explained below. The transfer may be by way of sell, donation to charity or

³⁸ John G. Sprankling, *Understanding Property Law*. (California: Mathew Bender & Company Inc, 1999) 5

³⁹ Steve W. Schneider, 'Types of Rights: Real Property' *Paralegal* under 'Property Rights' <http://www.netplaces.com/paralegal/real-property/types of rights.htm> (accessed on 20/09/2012)

⁴⁰ Cap 193 of the Laws of Zambia

⁴¹ John G. Sprankling, *Understanding Property Law*. (California: Mathew Bender & Company Inc, 1999) 5

lease all of which confer a benefit on the property holder. In both Zambia and South Africa, which are market economies, it is crucial that property owners can transfer their rights freely. The law however imposes various restrictions on this right. For example, the property owner cannot transfer title for the purpose of avoiding creditor's claims. Similarly, the property owner cannot refuse to sell his rights in the property because of the buyers' race, colour, national origin or gender.⁴²

2.4.4 Right to Possess and Use

The right to possess and use is another stick in the bundle of rights.⁴³ The property owner has broad discretion to determine how the land will be used. For example he might use the land to conduct business. Traditionally, English common law generally recognised the right of an owner to use his land in any way he wished, as long as the use was not a nuisance and no other person held an interest in the land.⁴⁴ Today, in both Zambia and South Africa, virtually all land is subject to statutes, customs, and other regulations that substantially restrict its use. For example, local statutes typically provide that only certain uses are permitted on a parcel such as residential, industrial and commercial.⁴⁵ The right to possess and use can be temporarily surrendered by way of lease for a definite term in exchange for rent. This confers a benefit on the property owner which is discussed below under right of benefit.

⁴² Discrimination is unconstitutional in both Zambia and South Africa

⁴³ John G. Sprankling, *Understanding Property Law*. (California: Mathew Bender & Company Inc, 1999) 6

⁴⁴ John G. Sprankling, *Understanding Property Law*. (California: Mathew Bender & Company Inc, 1999) 6

⁴⁵ The Zambian example is the Town and Country Planning Act, Chapter 283 of the Laws of Zambia.

2.4.5 Right of Benefit

The right of benefit entitles the property owner to any profits generated from the use of the property.⁴⁶ This right is one of the bundle of rights arising from the real right of ownership that is guaranteed by the constitutions of both Zambia⁴⁷ and South Africa.⁴⁸ Specifically, it is a personal right that arises from contract. Therefore, this right can be enjoyed not only by the property owner but can also be enjoyed by the sub lessee and the assignee.

This benefit conferred by the said right may be in form of rental income. One legal dictionary defines rent as money or other consideration paid by a tenant to a landlord in exchange for the exclusive use and enjoyment of land, a building or a part of a building.⁴⁹ The Landlord and Tenant (Business Premises) Act defines rent to include any personal sum payable by the tenant to the landlord in connection with his tenancy (whether under the lease or otherwise) in respect of lighting, heating, board, furniture or other services.⁵⁰ Where the landlord's right of benefit is interfered with, the landlord can exercise a corresponding right of exclusion of the tenant from the property.

In order to enjoy the benefits of rental income, the property owner or landlord has to transfer the property rights to the tenant or lessee. The right to transfer the holder's property rights by way of lease, inherent in the right of benefit, will be considered below under leasehold estate.

⁴⁶ James Kimmons, 'Ownership and Rights: What is the Bundle of Rights of a Real Estate Owner?,' *Real Estate*, under 'Bundle of Rights' http://realestate.about.com/od/ownershipandrights/f/bundle_of_rights.htm (accessed October 15, 2012)

⁴⁷ Articles 16 and 17 of the Constitution of the Republic of Zambia as amended by Act No. 18 of 1996.

⁴⁸ Section 25(1) of the Constitution of South Africa No. 108 of 1996

⁴⁹ Duhaime's Real Estate and Tenancy Law Dictionary, 'Rent: Legal Dictionary' under *Rent Definition* <http://www.duhaime.org/LegalDictionary/R/Rent>. (accessed on January 1, 2013)

⁵⁰ Section 2, The Landlord and Tenant (Business Premises) Act, Cap 193 of the Laws of Zambia

2.5.0 Conclusion

Chapter two has shown that in both Zambia and South Africa, one form of property holding is leasehold and that the types of business leases are, inter alia, the fixed term tenancy or tenancy for years, the periodic tenancy, the tenancy at will and the tenancy at sufferance.

Chapter two has highlighted the fact that the law of property is a branch of law which regulates the relationship between persons and things, or property. This branch of law provides rules prescribing the manner in which someone acquires rights in property, the manner in which these rights can be transferred and it provides the remedies available in the event of an infringement on such rights.

Chapter two has also shown that real estate ownership carries with it a complex set of rights and the bundle of rights concept has traditionally been the way in which those rights are assigned. The bundle of rights is a set of legal rights afforded to the real estate title holder. The bundle of rights includes the right of exclusion (the holder can deny people use or occupancy of the property) and the right of benefit (the holder is entitled to profits generated from the use of the property)

Chapter three will discuss the rights of the landlord by analysing grounds for termination of business leases in Zambia and South Africa.

Chapter 3

Termination of Business Leases in Zambia and South Africa

3.1.0 Introduction

Chapter three will further discuss the rights of property owners or landlords in Zambia and South Africa by analyzing the grounds for termination of business leases. As an investor conducting business in the real estate sector, the landlord is entitled to rents and profits of the demised premises payable under the tenancy. The rents and profits benefit the economy at large in terms of tax revenue which in turn is invested in other sectors of the economy.

In view of the above, it is important that the landlord must be able to terminate the lease when the tenant materially breaches the terms of the agreement. As explained in Chapter two, the property owner or landlord can exercise the right of exclusion by preventing other people from using or entering the property. This right is vital because the sustainability of the business depends on the ability of the landlord to generate profit and the growth of the economy depends on the profitability of a country's businesses.

The right of exclusion is enjoyed by landlords of business premises in both Zambia and South Africa. The landlord's right of exclusion from the property is contained in every business lease. It is also contained in statute and common law governing the rights of landlords.

3.2.0 Termination of Business Leases in Zambia

In Zambia, the principal Act that governs business leases is The Landlord and Tenant (Business Premises) Act.⁵¹ The objectives of the Act are stated in the preamble as follows:

⁵¹ Cap193 of the Laws of Zambia

An Act to provide security of tenure for tenants occupying property for business, professional and certain other purposes; to enable such tenants to obtain new tenancies in certain cases; and to provide for matters connected therewith and incidental thereto.

It can be seen from the preamble that the primary objectives of The Landlord and Tenant (Business Premises) Act are to provide security of tenure for tenants occupying property for business, professional and certain other purposes, to enable such tenants to obtain new tenancies in certain cases and to provide for matters connected therewith and incidental thereto.

The scope of application of the Act is such that while it applies to all tenancies in Zambia, the Act does not apply to, inter alia, agricultural holdings, residential properties, premises let by government or local authorities, premises in which a tenant is carrying on business in breach of a prohibition, premises comprised in a tenancy granted by reason that the tenant was the holder of an office, appointment or employment from the grantor of the tenancy and tenancies not exceeding three months.⁵²

The Landlord and Tenant (Business Premises) Act provides in section 4 subsection (1) that a tenancy to which the Act applies shall not come to an end unless terminated in accordance with the provisions of the Act.⁵³ Thus, security of tenure of the tenant is secured under the Act.

Security of tenure of the tenant is further secured under The Landlord and Tenant (Business Premises) Act in that the Act gives the tenant the right to apply to Court for a new tenancy. In this respect, the Act in section 4(1) further provides, subject to section ten which provides for grant of new tenancies by order of court, that the tenant may apply to court for a new tenancy

⁵² Section 3(1)(2)(a)-(g), Cap193 of the Laws of Zambia

⁵³ Cap193 of the Laws of Zambia

(a) if the landlord has given notice under section five to terminate the tenancy; or (b) if the tenant has made a request for a new tenancy in accordance with section six.⁵⁴

Thus, security of tenure is further secured as the landlord cannot evict the tenant without consent of the court. The Act also provides ways by which tenancies can come to an end without the tenant having a right to apply for a new tenancy. Section 4(2) of the Act provides that the provisions of subsection (1) shall not prevent the coming to an end of a tenancy by notice to quit given by the tenant, by surrender or forfeiture, or by the forfeiture of a superior tenancy.

In terms of section 4(2) of the Act, the provisions of section 4(1) shall not prevent the coming to an end of a tenancy by a notice to quit given by the tenant, by surrender or by the forfeiture of a superior tenancy. Further, section 9 of the Act provides another situation where the tenant does not have the right to apply for the grant of a new tenancy. The section provides that where the landlord and tenant agree upon the grant to the tenant of a future tenancy of the holding, or of the holding with other land or premises on terms and from a date specified in the agreement, the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which the provisions of this Act apply.⁵⁵

Thus, another situation where the current tenancy will come to an end without the tenant having the right to apply for the grant of a new tenancy is where the parties renew the tenancy by agreement.

Of special interest to this study, however, is the determination of the tenancy at the instance of the landlord. In Zambia, the landlord may terminate a tenancy for Business Premises by a notice given to the tenant in the prescribed form specifying the date of termination. This is provided for under section 5(1) of the Act as follows:

⁵⁴ Cap193 of the Laws of Zambia

⁵⁵ Cap193 of the Laws of Zambia

The landlord may terminate a tenancy to which this Act applies by a notice given to the tenant in the prescribed form specifying the date on which the tenancy is to come to an end (hereinafter referred to as "the date of termination")

Provided that this subsection shall have effect subject to the provisions of section twenty-three as to the interim continuation of tenancies pending the disposal of applications to the court.⁵⁶

Thus the Act provides for the termination of the tenancy by the landlord by way of notice.

Note that the provisions of section 5(1) are subject to the provisions of section twenty three.

The Act in section 23(1) and (2) provides for interim continuation of tenancies pending determination by court in any case under this Act where, inter alia, a notice to terminate a tenancy has been given, or a request for a new tenancy has been made, and an application to the court has been made.⁵⁷ Further, In order to have effect, the notice to quit must comply with a number of statutory requirements.

First, according to section 5(2), the notice to quit must be given not less than six months in advance and not more than twelve months before the date of termination specified in the notice.

Secondly, according to section 5(5), the notice will only have effect if it requires the tenant to notify the landlord in writing whether or not the tenant will be willing to give up possession of the property comprised in the tenancy at the date of termination. The tenant must notify the landlord within two months after the giving of the notice.⁵⁸

Thirdly, according to section 5(6) of the Act, in order for the notice to have effect, it must state whether the landlord would oppose an application by the tenant to the court under this

⁵⁶ Cap193 of the Laws of Zambia

⁵⁷ Cap193 of the Laws of Zambia

⁵⁸ Cap193 of the Laws of Zambia

Act for the grant of a new tenancy and, if so, also state on which of the grounds mentioned in section eleven he would do so.⁵⁹

Thus, in order for the notice to have effect, it must state whether the landlord would oppose an application to the court for the grant of a new tenancy. In the event that the landlord would oppose an application to the court for a new tenancy, the notice must state on which of the grounds he would do so. The grounds on which a landlord may oppose an application to court for a new tenancy by a tenant are provided in section eleven of the Act.

A landlord may oppose an application to court for a new tenancy by a tenant where the tenant fails to comply with obligations with respect to the repairs and maintenance of the business premises as contained in the tenancy agreement.⁶⁰

Persistent delay by the tenant in paying rent which has become due is another statutory ground on which a landlord may oppose an application to court for a new tenancy by a tenant.⁶¹

Substantial breaches by the tenant of his obligations under the tenancy, or for any other reason connected with the tenant's use or management of the holding constitutes another statutory ground on which a landlord may oppose an application to court for a new tenancy by a tenant.⁶²

An offer and willingness by the landlord to provide or secure the provision of alternative accommodation for the tenant is yet another statutory ground on which a landlord may oppose an application to court for a new tenancy by a tenant. In arranging this alternative accommodation, regard must be had to the current tenancy, the nature and class of his

⁵⁹ Cap193 of the Laws of Zambia

⁶⁰ Section 11(a), Cap193 of the Laws of Zambia

⁶¹ Section 11(b), Cap193 of the Laws of Zambia

⁶² Section 11(c), Cap193 of the Laws of Zambia

business, the situation and extent of, and facilities afforded by, the holding and to all other relevant circumstances. As such, the alternative accommodation must be available on reasonable terms and the time at which it will be available must be suitable for the tenant's requirements, including the requirement to preserve goodwill.⁶³

Another statutory ground on which a landlord may oppose an application to court for a new tenancy by a tenant is when the aggregate of the rents reasonably obtainable on separate lettings of the holding and the remainder of that property would be substantially less than the rent reasonably obtainable on a letting of that property as a whole. This would occur where the current tenancy was created by the subletting of part of the property comprised in a superior tenancy and the landlord is the owner on the termination of the superior tenancy. In this case the landlord would require possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole upon the termination of the current tenancy.⁶⁴

Another statutory ground on which a landlord may oppose an application to court for a new tenancy by a tenant is the intention by the landlord to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof provided that he could not reasonably do so without obtaining possession of the holding⁶⁵

An intention by the landlord, on termination of the current tenancy, to occupy the holding for the purposes, or partly for the purposes, of a business carried on by him therein, or as his residence constitutes another statutory ground on which a landlord may oppose an application to court for a new tenancy by a tenant.⁶⁶

⁶³ Section 11(d), Cap193 of the Laws of Zambia

⁶⁴ Section 11(e), Cap193 of the Laws of Zambia

⁶⁵ Section 11(f), Cap193 of the Laws of Zambia

⁶⁶ Section 11(g), Cap193 of the Laws of Zambia

Following an application under section 4 of the Act, grounds of opposition under paragraphs (e) (f) and (g) of section 11(1) of the Act, namely demolition, reconstruction and own occupation respectively, preclude the Court from granting a new tenancy. Demolition, reconstruction and own occupation are similar in that the grounds are all for the landlord's benefit.⁶⁷

According to section 12(1), if the landlord opposes an application under subsection (1) of section four on grounds on which he is entitled to oppose it in accordance with section eleven and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy.⁶⁸ In this respect, in the case of *Virginia Tobacco Association of Zambia v Medical Clinic Centre Limited*, it was held that the landlord will receive the Court's protection if he has in fact established a ground for opposition under the Act just as equally as a tenant will be protected under the Act⁶⁹

According to section 18(1) of the Act, where the court makes an order for the grant of a new tenancy, then unless the order is revoked under subsections (2) and (3) or the landlord and tenant agree not to act upon the order, the landlord shall be bound to execute or make in favour of the tenant a lease or agreement for a tenancy of the holding embodying the terms agreed between the landlord and the tenant or determined by the court. Similarly, the tenant will be bound to execute a lease or agreement made by the landlord for a tenancy of the holding embodying the terms agreed between the landlord and the tenant or determined by the court in accordance with the provisions of the Act.⁷⁰

In section 20 of the Landlord and Tenant (Business Premises) Act, the Act places restrictions on agreements that exclude the provisions of the Act. As such, any agreement relating to a tenancy to which the Act applies shall be void in so far as it, inter alia, purports to preclude

⁶⁷ Frederick S. Mudenda, *Land Law in Zambia: Cases and Materials*. (Lusaka: UNZA Press, 2006): 60

⁶⁸ Cap193 of the Laws of Zambia

⁶⁹ Supreme Court of Zambia Appeal No. 4 of 1990. (unreported)

⁷⁰ Cap193 of the Laws of Zambia

the tenant from making an application or request, provides for the termination or surrender of the tenancy in the event of his making such an application or request, or for the imposition of any penalty or liability on the tenant in that event.⁷¹

The Act in section 22(1) provides for compensation to the tenant where an order is made for possession of the property comprised in a tenancy, and it is subsequently proved that the order was obtained, or the court was induced to refuse the grant, by misrepresentation or concealment of material facts. As such, the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as a result of the order or refusal.⁷²

3.3.0 Termination of Business Leases in South Africa

The laws within South Africa that govern business rental agreements include the Law of Contract, common law, Consumer Protection Act (CPA) and the Constitution.⁷³ However, there are no statutes requiring landlords to allow a tenant to renew a lease in South Africa. That is normally provided by agreement in the lease.⁷⁴ The right of renewal is given subject to the lessee faithfully and timely fulfilling and performing all its obligations under and in terms of the lease. There has to be written notice by the lessee to lessor of his intention to renew the lease.⁷⁵

⁷¹ Cap193 of the Laws of Zambia

⁷² Cap193 of the Laws of Zambia

⁷³ Lauren Hastie, 'The Consumer Protection Act and lease agreements.' *Policy Brief* (October 2011) under 'Commercial Leases in South Africa,' <http://www.polity.org.za/article/> (accessed on 5/03/2013)

⁷⁴ Bobby Betrand, *Issues Relating to Commercial Leasing, South Africa*, (Lex Mundi Publications Ltd, Cape Town, 2009): 2

⁷⁵ Bobby Betrand, *Issues Relating to Commercial Leasing, South Africa*, (Lex Mundi Publications Ltd, Cape Town, 2009): 2

3.3.1 The Law of Contract

It is important to note that a lease agreement must, by its very nature, eventually come to an end. A lease agreement is an essential contract between the property owner (landlord) and the person renting the property (tenant) in which the landlord sets out certain terms and conditions regarding the property, such as duration of the lease period, the rent payable and the duties of the tenant and the landlord that must be complied with. Termination of a lease can take place in any of the ways in which obligations are normally terminated, for instance by performance, agreement, prescription and rescission after a breach of contract. In indefinite leases with periodic payments of rent, such as weekly, monthly or yearly, the obligations can be terminated by notice given by the lessor or the lessee. If there is no agreement regarding such notice reasonable notice must be given.⁷⁶

The obligations of the lessee, inter alia, are to pay rent, to take proper care of the property and use it only for the purpose for which it was let. In addition the lessee will be bound by all those obligations expressly or impliedly binding him in the contract, for example, to maintain the leased premises, to put up fences, to renovate, to carry on a particular trade or to refrain from doing so. It is important to note that the obligations of the lessee involve the essential aspects of a contract of lease.⁷⁷

The lessee's primary duty is to pay rent agreed upon for the use of the property. In most instances there will be agreement on particulars of payment, for example, agreement that the rent must be paid on a fixed date, or that it must be paid monthly, in advance.⁷⁸

Where the lessee does not pay the rent, the lessor is entitled to the normal contractual remedies of specific performance, cancellation/ repudiation and damages. It is important to

⁷⁶ A.J Kerr , *The Law of Sale and Lease*, (2004) 3 ed, (Durban: Butterworths):35

⁷⁷ A.J Kerr , *The Law of Sale and Lease*, (2004) 3 ed, (Durban: Butterworths):36

⁷⁸ A.J Kerr , *The Law of Sale and Lease*, (2004) 3 ed, (Durban: Butterworths):37

note that many contracts of lease contain a cancellation clause that gives the lessor the power to cancel the lease where the lessee is in default.⁷⁹

In a lease agreement the parties are bound by obligations which include invariable obligations (which are part of the contract whether either of the parties want to have them or not), provisions that the parties have contracted into and residual obligations (which are common law obligations, that is, what the law imposes in the absence of an agreement).⁸⁰ The main source of invariable obligations when renting out property is applied by statute law.

Residual obligations stem from common law and these would include such conditions as allowing tenants full enjoyment of the premises for the entire lease agreement, to maintain the premises and to pay all charges against the premises. Most residual obligations are imposed on the landlord, not the tenant.⁸¹

3.3.2 Common Law

Common law also has provisions governing lease agreements. In the case of *Harlequin Duck properties 204 (Pty) Ltd v Fieldgate*⁸² it was held that a renovation of leased premises entitling the lessor to terminate the lease, as provided for in the lease agreement, constitutes grounds for termination, notwithstanding the presence of other provisions in the lease which govern the lessor's rights in respect of repair, alternation and improvement to the leased premises and that an architect's determination which is final and binding on the parties is acceptable as a method of determining the lessor's right to terminate in these circumstances.

In *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd*⁸³ it was held that a tenant which effects improvements to the leased property is not entitled to exercise a right of retention to prolong its rights of occupation. The judge further stated that such a right

⁷⁹ A.J Kerr, *The Law of Sale and Lease*, (2004) 3 ed, (Durban: Butterworths):38

⁸⁰ A.J Kerr, *The Law of Sale and Lease*, (2004) 3 ed, (Durban: Butterworths):39

⁸¹ A.J Kerr, *The Law of Sale and Lease*, (2004) 3 ed, (Durban: Butterworths):40

⁸² 2006 (3) SA 456 (C)

⁸³ 2006 (2) SA 95 (W)

on the part of a tenant who effects improvements to the leased premises no longer subsisted in the law which merely entitled the tenant to remove materials added during the currency of the lease.

3.3.4 The Consumer Protection Act

Other than the Constitution which protects the right of ownership and subsequently the rights of benefit and exclusion which arise, another principal Act governing the relationship between Landlords and Tenants of business premises is the Consumer Protection Act (CPA),⁸⁴ hereinafter referred to as the CPA. According to section 3(1), the purposes of the Act are to promote and advance the social and economic welfare of consumers in South Africa by, inter alia, establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally, promoting fair business practices and protecting consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and deceptive, misleading, unfair or fraudulent conduct.⁸⁵

The CPA has been in effect in South Africa since 1 May 2011. In terms of its relevance to lease agreements, the Landlord is deemed the supplier and the tenant the consumer. According to section 1, the interpretations section of the Act, a 'supplier' means a person who markets any goods or services while a 'consumer' in respect of any particular goods and services is defined to mean, inter alia, a person to whom those particular goods and services are marketed, a person who has entered into a transaction with a supplier, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of

⁸⁴ 68 of 2008 of the Laws of South Africa

⁸⁵ 68 of 2008 of the Laws of South Africa

whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services.⁸⁶

The relevance of the CPA to lease agreements is also seen in section 1 of the Act in its definition of the terms 'goods' and 'services.'⁸⁷ The term 'goods' is defined to include a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service.' The term 'service' also incorporates the relationship between the landlord and tenant of business premises when the interpretation section of the Act enacts the term 'service' to include the provision of, inter alia, any accommodation or sustenance, any entertainment or similar intangible product or access to any such entertainment or intangible product, access, or of a right of access, to an event or to any premises, activity or facility; or access to or use of any premises or other property in terms of a rental, a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental.

Thus, the CPA defines 'goods' to include 'a legal interest in land or any other immovable property' while the term 'services' is defined to include the provision of 'access to or use of any premises or other property in terms of a rental.'⁸⁸ Therefore a lease is included in the definitions of both goods and services.

In terms of scope of application as enacted under section 5, subsections (1) and (2), the CPA applies to every transaction occurring within the Republic of South Africa including the promotion of, or supplying of premises for letting but does not apply, inter alia, to the State, premises let under an employment contract, once off leases and where both parties are juristic

⁸⁶ 68 of 2008 of the Laws of South Africa

⁸⁷ 68 of 2008 of the Laws of South Africa

⁸⁸ 68 of 2008 of the Laws of South Africa

persons, which in terms of the CPA includes a body corporate, a partnership, an association and a trust.⁸⁹

In terms of rights, the CPA in section 48(1)⁹⁰ contains negative rights such as, inter alia, a duty on landlords not to include unfair, unreasonable or unjust terms in the lease agreements, a duty on Landlords not to demand for rentals that are unfair, unreasonable or unjust, a duty on landlords not to market, negotiate, enter into or administer a transaction or an agreement for the letting of business premises in a manner that is unfair, unreasonable or unjust, a duty on landlords not to require a tenant or other person to whom any business premises are let to waive any rights, assume any obligation or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

The CPA, in section 48(2) prohibits the insertion in the lease or tenancy agreement of terms which are unfair, unreasonable or unjust.⁹¹ Such is the case if the terms in the lease or tenancy agreement are, inter alia, excessively one-sided in favour of any person other than the consumer/tenant or other person to whom goods or services are to be supplied; inclusion of the terms of the transaction or agreement that are so adverse to the consumer as to be inequitable; inclusion of false, misleading or deceptive representations, terms or conditions; or notice that is unfair, unreasonable, unjust or unconscionable.

The CPA, section 51, further prohibits certain transactions, agreements, terms or conditions whose purpose or effect is to defeat the purposes and policy of the Act; mislead or deceive the consumer/tenant; or subject the consumer/tenant to fraudulent conduct; to waive or deprive a consumer/tenant of a right; to avoid a supplier's/ landlords obligation or duty;

⁸⁹ 68 of 2008 of the Laws of South Africa

⁹⁰ 68 of 2008 of the Laws of South Africa

⁹¹ 68 of 2008 of the Laws of South Africa

limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier;

The CPA in section 54 confers on the tenant the right to demand quality service and timely performance and completion of obligations by the landlord.⁹² These obligations include the obligation to deliver the leased premises on the due date free from impediments and in a fit condition for the purpose leased, the obligation to ensure the lessee's undisturbed use and enjoyment of the premises let and the obligation to pay the rates and taxes. Where there are unavoidable delays in the landlord's performance of his obligations, the tenant has a right to timely notice.

If a supplier/landlord fails to perform a service to the required standard the consumer/tenant may require the supplier to either remedy any defect in the quality of the services performed; or refund to the consumer a reasonable portion of the price paid for the services performed, having regard to the extent of the failure.

The CPA in section 14 also has provisions concerning the duration, expiry and renewal of the lease agreement.⁹³

Thus, should the consumer/tenant materially fail to comply with the agreement, the supplier/landlord may cancel the agreement within twenty business days notice unless the consumer/tenant has rectified the failure. On cancellation, the consumer/tenant remains liable for the rent payable up to the date of cancellation and the landlord is entitled to impose a reasonable cancellation penalty.⁹⁴

3.4.0 Procedure for Evicting a Tenant in South Africa

⁹² 68 of 2008 of the Laws of South Africa

⁹³ 68 of 2008 of the Laws of South Africa

⁹⁴ Lauren Hastie, *The Consumer Protection Act and Lease Agreements, Policy Brief* (October 2011), under "Commercial Leases in South Africa," <http://www.polity.org.za/article/> (accessed on 5/03/2013)

Although most landlords would love to personally be involved in evicting their troublesome tenant, such an action is contrary to procedure. Just like in Zambia, landlords in South Africa cannot evict a tenant themselves. Eviction proceedings are actions in the Magistrate's or High Court.⁹⁵

There are many reasons for landlords to want to evict tenants, such as causing major damage to the property, staying on the property after the lease has expired and continuously breaking the terms of the lease agreement. The most common reason for wanting to evict a tenant is due to late or non payment of rent money.⁹⁶

According to Jan Myburgh of Harcourts Real Estate South Africa, when a tenant does not pay rent on time, although they are in breach of their contract and a landlord has the right to terminate the contract, this does not necessarily mean that the tenant will vacate the property or that the landlord can just put pressure on them to leave.⁹⁷

Jan Myburgh further observes that the most important thing for landlords to remember is that they cannot evict a tenant themselves. When a tenant is in breach of the contract, landlords should first ensure that the tenant is served notice to rectify the breach as stipulated in the lease agreement. If, or when nothing is done to rectify the shortcoming, a landlord can terminate the lease agreement and start the legal process to evict the tenant if they are showing no signs of leaving on their own.⁹⁸ The eviction can only be done by a court order.

⁹⁵ Bobby Betrand, *Issues Relating to Commercial Leasing, South Africa*, Lex Mundi Publications Ltd, Cape Town, 2009

⁹⁶ Jan Myburgh, 'Dos and Don'ts of Evicting a Tenant in South Africa: Renting Advice,' *Property News* (February, 2012) under "Commercial Lease in South Africa," <http://www.property24.com/articles>, accessed on 24/04/2013

⁹⁷ Jan Myburgh, 'Dos and Don'ts of Evicting a Tenant in South Africa: Renting Advice,' *Property News* (February, 2012) under "Commercial Lease in South Africa," <http://www.property24.com/articles>, accessed on 24/04/2013

⁹⁸ *ibid*

According to Jan Myburgh, although a landlord may feel that they have the right to keep a tenant from entering their property by changing the locks to the property, this is an illegal eviction. As in normal circumstances, should any locks on the property be changed, landlords are obliged to supply tenants with the new set of keys.⁹⁹

3.4.0 Conclusion

Chapter three has discussed the rights of the landlord by explaining the procedure and grounds for evicting a tenant in both Zambia and South Africa. The chapter has shown that the serving of notice by the landlord to the tenant is an essential part of the procedure in both Zambia and South Africa. The chapter has also shown that no matter how much the landlord wants to evict a tenant personally, this is not allowed by procedure as eviction proceedings are actions in the courts of law of both Zambia and South Africa.

Chapter three has also shown that there are various statutes that govern the eviction process. In Zambia, the Chapter has shown that the principal statute is the Landlord Tenant (Business Premises) Act while in South Africa there are a number of statutes that provide for lease agreements. The most important thing to note in the case of South Africa is that grounds for termination of the lease by the landlord are closely related to the common law obligations of the tenant. Further grounds are a subject of agreement between the landlord and the tenant as the legal system provides for freedom of contract. Further, if the terms in the lease are not fair, they can be challenged by, inter alia, the CPA, public policy and the constitution.

Having highlighted the right of benefit and the right of exclusion in chapter two, chapter three has analysed in more detail the practical application of the rights of landlord in both Zambia and South Africa. In this respect, chapter four will discuss the right of the landlord to collect overdue rentals in both Zambia and South Africa by analysing how overdue rentals are collected.

⁹⁹ *ibid*

Chapter 4

Collection of Overdue Rentals in Zambia and South Africa

4.1.0 Introduction

Chapter four will discuss the procedure for collection of overdue rentals of business premises in Zambia and South Africa. The enjoyment of rental income is one of the major reasons why landlords decide to put their real estate properties on rent. This income has a multiplier effect in the economies of Zambia and South Africa by way of, inter alia, contribution of tax revenue and to more investments in real estate and other economic sectors. It is therefore important to the success of the real estate business that landlords collect rent, including rent arrears from tenants. It is also important that as they go about collecting rent arrears, landlords follow the correct procedure because not following procedure can be costly in terms of, inter alia, time and court fees which in turn reduces the amount of money available for investments.

While the Landlord and Tenant (Business Premises) Act prescribes the procedure and grounds for termination of leases, it is silent on the procedure for collection of overdue rent. However, there are other statutes that prescribe how debts should be collected.

In Zambia, there are two ways in which overdue rentals can be collected. One such way is that the landlord can distrain for rent. The second method is that the landlord can use the legal process. In South Africa, the only mode of collecting overdue rentals involves the legal process. These two methods of collecting overdue rentals will be analysed using statutory and common law.

4.2.0 Distress for Rent in Zambia

Distress is a summary remedy by which a person is entitled without legal process to take into his possession the personal chattels of another person to be held as a pledge to compel the performance of a duty, the satisfaction of a debt or demand or the payment of damages for trespass by cattle¹⁰⁰. Distress for rent in arrears is a common law right. In *Lyons v Elliott*¹⁰¹ Blackburn, J observed that the right of distress is a right of the Landlord to seize movable property from the demised premises and to hold them until the rent is paid or the service performed. Since the right of a landlord to distrain for arrears of rent arises at common law, it is implied in every lease agreement in Zambia. The landlord can exercise the right of distress against the tenant only when the rent is due and in arrears.¹⁰² The meaning of rent in arrears was considered in some cases.

In *Child v Edwards*¹⁰³ it was observed that if days of grace are given, distress cannot be levied until they have expired.

In *Hampako v National Housing Authority*,¹⁰⁴ it was observed that rent payable in advance may be distrained for on the day following that fixed for payment.

In the case of *Paperex Limited v Deluk High School*,¹⁰⁵ Justice Ngulube observed that it is the Rent Act in section 14 which imposes a restriction on the levying of distress for rent of dwelling houses which can only be done with leave of the court and that there is no similar restriction under the Landlord and Tenant (Business Premises) Act. In the same case, Justice Ngulube further observed that there was nothing illegal or unlawful in the appellant's issuing

¹⁰⁰ Halsbury's Laws of England, 3rd edn, at page 87-para 124.

¹⁰¹ [1876] 1 QBD.210 at page 213

¹⁰² Halsbury Laws of England 3rd edn at page 90 para 130.

¹⁰³ [1909] 2KB 753

¹⁰⁴ (1988/89) ZR 61

¹⁰⁵ Supreme Court appeal No. 141 of 1996 [SC]

of warrants of distress to distrain for arrears of rent under the Law of Distress Amendment Act 1888 of the United Kingdom.¹⁰⁶ The said British Statute applies to Zambia by virtue of the English Law (Extent of Application) Act.¹⁰⁷

Other British statutes on the subject of distress that apply to Zambia are, inter alia, the Distress for Rent Act, 1689, Distress for Rent Act 1737, Law of Distress Amendment Act of 1888, Law of Distress Amendment Act of 1895 and the Law of Distress Amendment Act, 1908.¹⁰⁸

The Distress for Rent Act, 1689 provides for the selling of the distrained goods after five days if the distrainee does not exercise the right of replevy.¹⁰⁹ In the case of *Robinson v Waddington*, the five days are exclusive of the day of the levy.¹¹⁰ The Law of Distress Amendment Act 1888 further provides that the five day period may be extended for a period of not more than fifteen days.¹¹¹ The applicability of distress to goods belonging to third parties has been restricted by the Law of Distress Amendment Act 1908 which in general confers an absolute privilege from distress in respect of the goods of under tenants, lodgers and other persons with no beneficial interest in the tenancy.¹¹² Exceptions to this rule include goods of the tenant's spouse¹¹³ and goods held under hire purchase or other credit agreements.¹¹⁴ The said Act requires the third party to serve a notice in writing on the landlord setting out which goods he owns.

¹⁰⁶ Supreme Court appeal No. 141 of 1996 [SC]

¹⁰⁷ Chapter 11 of the Laws of Zambia.

¹⁰⁸ Halsbury's Statutes of England 3rd edn, volume 9.

¹⁰⁹ Section 1

¹¹⁰ (1849) 13 Q 733.

¹¹¹ Section 6

¹¹² Section 1

¹¹³ Section 4(1)

¹¹⁴ Section 4(A)

In addition to the landlord, who can distrain for rent in person,¹¹⁵ the Distress Amendment Act 1888 provides for distress to be levied by a certificated bailiff. Levy of distress by an uncertified bailiff would be a trespass.¹¹⁶

4.3.0 Property Attachment in Zambia

Instead of distraining for rent in person, the landlord can elect to make use of a bailiff. A certificated bailiff is fully conversant with the law of distress and the procedure to be adopted in levying a distress. Where the bailiff is used, the landlord is required to follow the legal route. This route requires the landlord to obtain a court order, which is enforced by the bailiff. A judgement for recovery of a specified sum of money such as rental arrears may be enforced by a writ of fieri facias. A writ of Fieri Facias is issued pursuant to Order 41 rule 3 of the Subordinate Court Act.¹¹⁷ A writ of fieri facias is a document that a lawyer prepares directed at the sheriff of Zambia if in Lusaka and the under sheriff if served outside Lusaka. The writ of faifa should reflect the amount of money awarded by court and the judgement sum. Where interest has been awarded the writ of faifa should indicate the rate of interest and the parties the way they appear in the summons. According to Order 41 rule 4, the fifa has a provision for the Magistrate who entered the judgement to sign and it must also be signed by the lawyer issuing the fifa¹¹⁸

Under the fifa, the sheriff may seize and sell all the personal goods and chattels belonging to the execution debtor which he can find and which can be sold, with the exception of clothes and beddings of the judgement debtor or his family, and the tools and implants of his trade¹¹⁹

¹¹⁵ Halsbury's Laws of England 3rd edn, p 129, para 223

¹¹⁶ Section 7

¹¹⁷ Subordinate Courts Act, Cap 28 of the Laws of Zambia

¹¹⁸ Subordinate Courts Act, Cap 28 of the Laws of Zambia

¹¹⁹ Order 41 Rule 5, Cap 28 of the Laws of Zambia

The *fifa* is effected by seizure of the defendant's property whose value is equivalent to the judgement sum. The bailiff may decide to seize the property by moving them from the defendant's premises to the sheriff's office. If the sheriff chooses not to move the goods, he will place the goods under walking possession. The defendant will remain in possession while the sheriff will have constructive possession. The defendant is not entitled to dispose of the goods while they are in his possession.¹²⁰ If the defendant decides to deal with the property under walking possession in a manner that is detrimental, he can be held to be in contempt of court or he can be arrested for theft.

By law the sheriff can only hold on to the seized property for five days only. Before the five day period expires he is not supposed to auction them for the purpose of selling them to members of the public. If the defendant decides to pay before the duration is concluded, the goods will be returned to the defendant, that is, the defendant is at liberty to collect them from the sheriff's office. The goods may also be collected by the defendant where an order staying execution has been granted by the court before sale.¹²¹

If unexecuted, a writ of *fieri facias* will remain valid for one year and may be renewed before it's expiration by the party issuing it for another year from the date of such renewal, and so on from time to time during the validity of the renewed writ.¹²²

The competencies of a bailiff were laid out in the case of *Re Kamaya*¹²³ where the High Court of Zambia held that a certificated bailiff must be fully conversant with the law of distress and the procedure to be adopted in levying a distress. The said certificate is issued in writing under the hand of a Judge.

¹²⁰ Order 41 Rule 6, Cap 28 of the Laws of Zambia

¹²¹ Order 41 Rules 7-9, Cap 28 of the Laws of Zambia

¹²² Order 41, Rule 12(1), Cap 28 of the Laws of Zambia

¹²³ (1987) ZR 7

4.4.0 Distress for Rent in South Africa

The legal position in South Africa was aptly summarised by Myburgh of Harcourts Real Estate Property Management Division, a company that offers real estate management services, as follows: 'As angry as landlords may be towards their tenant and seek to reclaim unpaid rent money, they are not allowed to - under any circumstances - enter the property without notifying the tenant, or take the tenant's possessions within the property as a means of compensation for rent money that is in arrears'¹²⁴ Myburgh then provides the procedure in the following observation: 'Landlords in the past have had criminal charges laid against them by tenants. A court order needs to first be obtained before actions relating to the tenant's possessions can occur.'¹²⁵

The above procedure is confirmed by Booby Betrand who set out the procedure as thus: 'Landlords in South Africa are not allowed to exercise self-help. Evictions and attachment of the tenant's movable property have to be authorized by the High or Magistrate's Court and implemented by the Sheriff.'¹²⁶

In South Africa, the requirements for third party property to be affected were set out in *Bloemfontein Municipality v. Jacksons Ltd*¹²⁷ by Curlewis JA who observed that when goods belonging to a third person are brought on to leased premises with the knowledge and consent, express or implied, of the owner of the goods, and with the intention that they shall remain there indefinitely for the use of the tenant, and the owner, being in a position to give

¹²⁴ Jan Myburgh, 'Dos and Don'ts of Evicting a Tenant in South Africa: Renting Advice,' *Property News* (February, 2012) under "Commercial Lease in South Africa," <http://www.property24.com/articles>, accessed on 24/04/2013

¹²⁵ Jan Myburgh, 'Dos and Don'ts of Evicting a Tenant in South Africa: Renting Advice,' *Property News* (February, 2012) under "Commercial Lease in South Africa," <http://www.property24.com/articles>, accessed on 24/04/2013

¹²⁶ Bobby Betrand, *Issues Relating to Commercial Leasing, South Africa*, Lex Mundi Publications Ltd, Cape Town, 2009

¹²⁷ 1929 AD 266 at 271

notice of his ownership to the landlord fails to do so, and the landlord is unaware that the goods do not belong to the tenant, the owner will thereby be taken to have consented to the goods being subject to the landlord's tacit hypothec, and liable to attachment for rent arrears. Tacit hypothec is equivalent to the English common law remedy of distress for rent arrears.¹²⁸

Exemptions to the rule include goods belonging to the third party that are not permanently on the leased premises and goods that are not for the tenant's own use. In the case of *Langlands v Francken*,¹²⁹ a piano used solely by the tenant's daughter was not liable for attachment for rent arrears. Similarly, in *Eight Kaya Sands v Valley Irrigation Equipment*¹³⁰ it was held that the hypothec cannot attach to the property of the owner who gives notice to the landlord. Moreover, there is statutory authority supporting the view that notice to the landlord excludes the hypothec. The Security by Means of Movable Properties Act (No. 57 of 1993)¹³¹ excludes third party property which is the subject of an instalment agreement (hire- purchase)

4.5.0 Sequence of Attachment of Property in South Africa

Section 66(1) (a) of the Magistrates' Courts Act¹³² provides that whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay an instalment at the time and in the manner ordered by the court, shall be enforceable by execution against movable and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then

¹²⁸ Andrew J.M Steven, The Landlords Hypothec in Comparative Perspective, *Electronic Journal of Comparative Law*, vol.12.1 (May 2008), under "Distress for rent in South Africa" <http://www.ejcl.org> (accessed at on 8/05/2013)

¹²⁹ 1881 Kotze 256

¹³⁰ 2003 (2) SA495 (T)

¹³¹ Section 2(1), Act No. 57 of 1993 of the Laws of South Africa

¹³² Act 32 of 1944 of the Laws of South Africa

against the immovable property of the party against whom such judgment has been given or such order has been made.

Consequently, unless the judgment debtor's immovable property has been specifically declared executable, it may be sold in execution only if his movable property is insufficient to satisfy the judgment.

The attachment is effected by notice in writing by the sheriff served upon the owner of the property and upon the registrar of deeds or other officer charged with the registration of such immovable property.¹³³ If a person other than the owner of the property is in occupation, the notice must also be served upon that person by means of a registered letter.¹³⁴

Once judgment has been granted and the judgment debt is not paid the creditor is entitled to execute against the debtor's property in satisfaction of the judgment.

The process of execution is initiated when the clerk of the court issues a writ of execution, which authorises the sheriff to attach and sell property of the defendant.¹³⁵ In keeping with section 66(1)(a) of the Magistrates' Court Act,¹³⁶ the writ will at first be confined to movables and only once it is shown that they are insufficient will a writ be issued for execution against immovable property.

Execution is usually made against movable property belonging to the judgment debtor. If, however, there is insufficient movable property to satisfy the judgment debt, then execution may be made against the immovable property of the judgment debtor.¹³⁷ The magistrate's

¹³³ Rule 36(1) of the Magistrates' Court Rules of Court

¹³⁴ Rule 36(1) of the Magistrates' Court Rules of Court

¹³⁵ Rule 36(1).

¹³⁶ Act 32 of 1944.

¹³⁷ Section 66(1) of the Magistrates' Courts Act 32 of 1944 of the Laws of South Africa

court may also order that judgment be enforced by immediate execution against the immovable property of the judgment debtor on good cause shown.¹³⁸

When the execution debtor declares to the sheriff, at the time attachment is made, that he has no movable property or only insufficient movable property to satisfy the warrant of execution and the sheriff is unable to find sufficient movable property to do so, the sheriff must ask the execution debtor to declare whether he has immovable property which is executable and enter the execution debtor's reply in the return of service endorsed on the warrant.¹³⁹

The magistrate's court also has the power, on application by any interested party, to review and confirm, modify or settle the conditions of sale in respect of any immovable property to be sold in execution of any judgment of a division of the High Court of South Africa.¹⁴⁰

4.6.0 Justification for Collecting Overdue Rentals

As discussed in chapter two, the right of ownership which is entrenched in the Bills of Rights the constitutions of Zambia and South Africa, confers on the property owner or landlord subsequent rights *inter alia*, of use, enjoyment and benefit. Therefore the landlord can use the property in any legal way, including putting the property on rent as a form of investment. Such an investment serves to meet the economic needs of tenants, most of who conduct their businesses in rented properties.

Further, as discussed in chapter four, attachment of property of the judgement debtor is provided for in the legal systems of both Zambia and South Africa. Such provisions show the significance of the right of property rights in maintaining the socio-economic interests of landlords and tenants.

¹³⁸ *ibid*

¹³⁹ Section 66(8) of the Magistrates' Courts Act 32 of 1944.

¹⁴⁰ Rule 43(7)(b) of the Magistrates' Courts Act 32 of 1944.

4.7.0 Conclusion

Chapter four has discussed the landlord's right to collect overdue rentals in both Zambia and South Africa by analysing how overdue rentals are collected. The chapter has shown that in Zambia, there are two ways in which overdue rentals can be collected. One such way is that the landlord can distrain for rent in person. The second method, which is also applicable in South Africa, is that the landlord can sue for rental arrears using the legal process.

The chapter has also shown that once the court finds for the landlord, the judgement will be enforced by the bailiff by way of attaching the judgement debtor's property in settlement of rental arrears. This process is important because it is recognition of the rights of the landlord. Secondly, it serves to encourage investments in the real estate sectors of both Zambia and South Africa, thereby balancing the social and economic interests of landlords and tenants.

Chapter 5

General Conclusion and Recommendations.

5.1.0 Introduction

Chapter five will conclude the discussion on the legal rights of landlords of business premises in both Zambia and South Africa. The chapter will summarise the previous chapters by highlighting their main aspects. The Chapter will also provide recommendations on the lessons Zambia can learn from the South African legal system governing the rights of landlords of business premises.

5.2.0 Summary

Chapter one indicated that the level of private investments in any particular country will be determined by the legal system of that particular country. This is because investors will take into consideration the legal regime of a country when ascertaining the security of their investments.

The chapter specifically highlighted two rights, the right of benefit and the right of exclusion as being of particular interest to the study of the legal rights of landlords of business premises in both Zambia and South Africa.

The chapter indicated that the relationship between Landlords and tenants of business premises is created by an agreement called a tenancy agreement or lease agreement. The relationship gives rise to property rights that are recognised by statute law¹⁴¹ and common law. The real right of private ownership of property is recognised by the constitutions of both

¹⁴¹ For example, the Landlord and Tenant (Business Premises) Act, Chapter 193 of the laws of Zambia prescribes the rights of landlords in Zambia

Zambia and South Africa. The constitution is the supreme law in both Zambia and South Africa.

Chapter two discussed the different types of business leases and the rights of landlords. The fixed term lease, periodic lease, tenancy at wills, tenancy at sufferance and the tenancy by estoppel were discussed.

As the name implies, a fixed term tenancy has a fixed starting and ending date. This type of tenancy can be for any duration such as two months, fourteen years or ninety-nine years. A periodic tenancy is a tenancy that continues indefinitely until ended by proper notice by either party. Examples of periodic leases are weekly, monthly, quarterly and yearly leases.

A tenancy at will is one where the landlord allows the tenant to occupy land such that the tenancy may be determined by the landlord or tenant at any time. An example is where the tenant remains in possession of the property with the permission of the landlord after the expiration of the lease.

Tenancy at sufferance is one where the lease granted to the tenant by the landlord has expired, however, the tenant still remains in possession of the land without the landlord's permission.

Tenancy by estoppel arises when the landlord purports to grant a lease at a time when he holds no estate in the land and if he later acquires the legal estate he is estopped from denying the tenancy.

The chapter also discussed the rights of the landlord. The chapter indicated that property is commonly described as a bundle of rights in relation to things. The rights in the metaphorical bundle are, inter alia, the right of benefit, the right to exclude, the right to transfer and the right to possess and use.

The right of exclusion entitles the landlord to exclude others from the use or occupancy of the property. For example, the holder of the right to exclude is generally entitled to prevent neighbours or strangers from trespassing on the land.

The right of benefit entitles the property owner to any profits generated from the use of the property. The benefits may be in form of rental income.

The rights of benefit and exclusion are enjoyed by landlords of business premises in both Zambia and South Africa because they are inherent in the right of ownership which is entrenched by the constitutions of both Zambia and South Africa.

Chapter three further discussed the right of exclusion of property owners or landlords in Zambia and South Africa by analyzing the grounds and procedures for termination of business leases.

In Zambia, business leases are governed by The Landlord and Tenant (Business Premises) Act which provides that a tenancy to which the Act applies shall not come to an end unless terminated in accordance with the provisions of the Act.¹⁴²

In Zambia, the landlord may terminate a tenancy for Business Premises by a notice given to the tenant in the prescribed form specifying the date of termination and the grounds on which he would do so.

In South Africa the laws that govern business rental agreements include the Law of Contract, common law, Consumer Protection Act (CPA) and the Constitution.

¹⁴² Section 4(1), The Landlord and Tenant (Business Premises) Act, Cap193 of the Laws of Zambia

The Consumer Protection Act (the CPA) contains both negative rights such as a duty on landlords not to include unfair, unreasonable or unjust terms in the lease agreements as well as positive rights including the right for a tenant to demand quality service from the landlord. Termination of a lease can take place in any of the ways in which obligations are normally terminated, for instance by performance, agreement, prescription and rescission after a breach of contract. The obligations can be terminated by notice given by the lessor or the lessee subject to approval by the court, which ensures that the grounds meet the fair and equitable principle.

Chapter four discussed the procedure for collection of overdue rentals of business premises in Zambia and South Africa. While a landlord can distrain for rent in person, landlords in South Africa are not allowed to exercise self help.

The chapter defined distress as a summary remedy by which a person is entitled without legal process to take into his possession the personal chattels of another person to be held as a pledge to compel the performance of a duty, the satisfaction of a debt or demand or the payment of damages for trespass by cattle. Distress for rent in arrears is a common law right in Zambia. In addition to the landlord, who can distrain for rent in person, the Distress Amendment Act 1888 provides for distress to be levied by a certificated bailiff. This route requires the landlord to obtain a court order, which is enforced by the bailiff. The Law of Distress Amendment Act 1888 of the United Kingdom applies to Zambia by virtue of the English Law (Extent of Application) Act.

The chapter also showed that in South Africa, landlords are not allowed to exercise self-help. Evictions and attachment of the tenant's movable property have to be authorized by the High or Magistrate's Court and implemented by the Sheriff.

In light of what has been discussed above, the analysis of the legal rights of landlords of business premises will end with some recommendations to strengthen the legal machinery.

5.3.0 Recommendations

The relevance and applicability of the Landlord and Tenant (Business Premises) Act in Zambia cannot be denied. On that basis, the enactment of the Landlord and Tenant (Business Premises) Act must be welcomed. However, on the strength of the comparative analysis above, more can be done to improve the efficacy of the Landlord and Tenant (Business Premises) Act. It is on the premise of making the Landlord and Tenant (Business Premises) Act more effective that the following recommendations are rendered. It is important to note that unlike the Zambian legal system, the 1996 Constitution of South Africa and other statutory provisions thereafter were made to address the past socio-economic and political discriminatory apartheid legal system. Under apartheid laws whites dominated the socio-economic and political sectors to the exclusion of the black population.

Due to the differences in the past legal regimes between Zambia and South Africa and differences in present circumstances, it may not be appropriate for Zambia to emulate everything in the South African statutes. Although the South African statutes may be addressing some circumstances that are not present in Zambia, Zambia can still learn some lessons from South Africa. In view of the above it is suggested and recommended that:

1. Under Section 4(1) (a) and (b) of the Landlord and Tenant (Business Premises) Act, the Act provides for tenants to apply to court for a new tenancy. Under South African law, there is no statute that requires tenants to apply to court for a new tenancy as the right of renewal is given to tenants subject to agreement and the tenant's observation of his obligations.

Section 4(1) (a) and (b) should therefore be reviewed in that it does not give the landlord the power to exercise his right of ownership.

2. The Landlord and Tenant (Business Premises) Act should be amended to include provisions on procedure to be followed to obtain an order for possession of the premises. This will make the procedure more certain
3. The Landlord and Tenant (Business Premises) Act should also be amended to include provisions on procedure for collection of overdue rentals. This will make the procedure more certain to the landlord.
4. Although distress is not a right given by statute, but rather a right created at common law by the relationship of landlord and tenant, there is need for Zambia to enact its own Rent Distress Act instead of relying on old British statutes. The proposed Rent Distress Act will consolidate and update the provisions on different British statutes dealing with distress.
5. Alternatively, the Landlord and Tenant (Business Premises) Act can be amended so as to provide for, inter alia, restrictions and limitations concerning goods belonging to third parties and strangers. The Act must also answer the following questions:

Against whom can the right of distress be used? How may entry to the leased premises be obtained? Against what property may the distraint be pursued? When is the right of distress available? When is the right of distress lost or brought to an end? Where can distress take place? When does distress become illegal? When does distress become excessive?
6. The Act must be broadened in scope by not restricting grounds upon which the landlord may terminate the tenancy. Section eleven of the Landlord and Tenant

(Business Premises) Act, which prescribes grounds upon which the Landlord would oppose an application to the court for grant of a new tenancy must be amended to allow for more grounds. In South Africa, the grounds for termination of business leases are not specified in any statute. Since enactment of the 1996 South African Constitution, the South African courts have entrenched the notions of justice and fairness, especially as articulated in the property-rights clause of the Constitution in determining property relations. Similarly in Zambia, courts can be guided by justice and fairness principle once the grounds for termination of business leases are no longer restricted in the Act.

5.4.0 Conclusion

Property law has played a very important function in Zambia and South Africa. The most important social function of property law in Zambia and South Africa is to manage the competing interests of those who acquire property rights and interests. Economically, property law has facilitated both domestic and foreign investment in Zambia and South Africa.

BIBLIOGRAPHY

BOOKS

Kerr A.J. *The Law of Sale and Lease*. 3 ed. Durban: Butterworths, 2004.

Megarry R.E and H.W.R Wade. *The Law of Real Property*. 7th ed. London: Sweet & Maxwell, 2008.

Mudenda, F.S. *Land Law in Zambia: Cases and Materials*. Lusaka: UNZA Press, 2006.

Ridall, J.G. *Land law*. 7th ed. London: Butterworths, 2003

Sprankling, John G. *Understanding Property Law*. California: Mathew Bender & Company Inc, 1999

OTHER REFERENCES

Betrand, Bobby. 'Issues Relating to Commercial Leasing, South Africa,' Lex Mundi Publications Ltd, Cape Town (2009) 1- 4

Halsbury's Statutes of England 3rd ed, volume 9

Hastie, Lauren. 'The Consumer Protection Act and Lease Agreements,' *Policy Brief* (October 2011) <http://www.polity.org.za/article/the-consumer-protection-act-and-lease-agreements-2011-10-> (accessed on May 15, 2013)

Myburgh, Jan. 'Dos and don'ts of evicting a tenant in South Africa: Renting Advice' *Property News* (February, 2012) <http://www.property24.com/articles/do%E2%80%99s-and-don%E2%80%99ts-of-evicting-a-tenant/14713> (accessed on May 26, 2013)

Steven, Andrew J.M. "The Landlords Hypothec in Comparative Perspective." *Electronic Journal of Comparative Law* 12, no.1 (May 2008). <http://www.ejcl.org/121/art121-24.doc> (accessed May 16, 2013).

Schneider, Steve W. 'Types of Rights: Real Property' *Being a Paralegal* (November, 2012)
<http://www.netplaces.com/paralegal/real-property/types-of-rights.htm> (accessed on
September 20, 2012)