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A CRITICAL ANALYSIS OF THE RENT ACT
AND THE LANDLORD AND TENANT
(BUSINESS PREMISES) ACT IN ZAMBIA.
AN OVERVIEW OF THE LAW, PRACTICE
AND PROSPECTS.

BY

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THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

OBLIGATORY ESSAY L410

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BY

CHANDA C. PRISCILLA

Being a final dissertation submitted to the University of Zambia, Faculty of Law in Partial fulfilment to the conditions for the award of the Bachelor of Laws (LL.B) degree.

Supervisor: Mr. L.N. Kalinde
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Date: 5th May, 2000

THE UNIVERSITY OF ZAMBIA

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DEDICATION

"To my lovely daughter, Mukuka, my
mother and my family."

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INTRODUCTION

This paper looks at the effectiveness of the Rent Act, 1972 and Landlord and Tenant (Business Premises) Act 1971 both in the second republic and the third republic. Before giving an outline of the paper, it's necessary to first of all provide the statement of the problem, which will clearly bring out the justification for this paper.

Zambia has undergone economic transformation. In the second republic it had a controlled economy while in the third republic the economy has been liberalized meaning that there is less control of the economy by the government. This change of government from one which had an upper hand in the economy to one with less control means even the legal framework has to be changed in order for the policies of the new government to be implemented. One such area where the law has been changed to suit the economic environment in the third republic is legislation on land. In the second republic, the Land (Conversion of titles) Act of 1975 mainly gave the president power to control any transaction in land. With the coming into power of the Movement for Multiparty Democracy (MMD) who liberalized the economy, government control in land transactions has been reduced to the barest minimum. This has been made possible by repealing the 1975 Land (Conversion of Titles) Act and replacing it with the 1995 Land Act.

Looking at the two periods none abolished the Rent Act and the Landlord and Tenant (Business Premises) Act. These two Acts were introduced in 1972 and

1971 respectively and they govern the relationship between Landlord and Tenant. Having moved from a commandist economy to a free market economy, we find it necessary to critically analyse the effectiveness of the two Acts regard being had to the prevailing economic ideology and land policy of the government of the day.

This paper is divided into four (4) chapters. The first chapter will focus on the history of the legislation between landlord and tenants and an in depth examination of the provisions of the two Acts viz Rent Act & Landlord and Tenant (Business Premises) Act. The second chapter will centre on how the two Acts operated in the second republic in light of the government Land policy. The third chapter consists of the discussion on how the two Acts fair in the third republic. Finally the fourth chapter of this paper attempts to draw conclusions recommendations and any proposed amendments.

CHAPTER ONE

1.1. INTRODUCTION

The legislation between landlord and tenant guards the social and economic evils that are generated by a shortage of housing and business premises. This chapter focuses on the history of legislation between landlord and tenant and an in depth examination of the relevant Acts viz. the Rent Act which apply to dwelling houses and the Landlord and Tenant (Business Premises) Act which apply to business premises.

1.2. HISTORY OF LEGISLATION BETWEEN LANDLORD AND TENANT

The legislation governing the relationship between landlords and tenants arises from an age-old fear that the tenant is in no bargaining position as to the terms viz. a viz. the landlord. This fear was first felt in Great Britain during the two world wars whose consequences were a severe diminution in the supply of housing and business premises which in turn led to soaring rents¹, but even before world war 1, the shortage of housing and business premises in Great Britain had been apparent as the normal increase in construction of houses and buildings had been checked by the imposition of land value duties and the consequent lack of confidence in house property. The war however brought about a cessation of building operations and this made the shortage more

¹ T.G Field Fisher Rent Regulation Control, Butterworths, London 1967 p1

evident. It was alleged that the rents of working class houses were being raised to alarming amounts particularly in industrial towns².

Thus it's no doubt that legislation to limit the rights of landlords to increase rents and obtain possession was first enacted during the 1914 - 1918 world war. The first Act so passed was the Increase of Rent and Mortgage Interest (War Restriction) Act 1915. This Act restricted the rights of landlords of dwelling houses to recover possession or to increase rent except by the amount of any increase in rates borne by the landlord on account of expenditure incurred by him on improvements or structural alterations³. It should be noted that the 1915 Act only applied to dwelling houses. It was in 1927 that hardships faced by tenants in business premises were addressed by passing the Landlord and Tenant Act 1927⁴.

These two Acts underwent amendments so that the relationship between landlord and tenant could be fostered in order to mainly protect the tenant because of his weak position against the landlord. This legislation eventually found its way into British colonies and protectorates and Northern Rhodesia, as Zambia was called then, was no exception. The first legislation to control rent during the colonial period was the Rent Restriction Ordinance (1940)⁵. This ordinance made provision for the restriction of increase in rent and the recovery

² Raymond Walton. Adkins Landlord and Tenant. The Estate Gazette Ltd, London, 1967, p267.

³ T.G Field Fisher Rent Regulation Control, Butterworths, London 1967, p1.

⁴ Raymond Walton. Adkins Landlord and Tenant. The Estate Gazette Ltd, London, 1967, p317

⁵ Northern Rhodesia legislative Council debates No37 7th September to 16th September 1940. n31

of possession of property. Over the years, there were a number of amendments in 1948, 1950, 1952 and 1955.

After independence, rent control was re-introduced as an attempt to arrest the situation of soaring rents in the cities of Lusaka, Kitwe and Ndola. The Rent Control Temporary Provision Act (1968) was enacted to make temporary provision for the restriction of eviction from dwelling houses and commercial premises whilst awaiting the introduction of comprehensive legislation⁶. Comprehensive legislation came when the Rent Act (1972) was enacted and the year earlier in 1971, the Landlord and Tenant (Business Premises) Act was enacted. The former Act applies to dwelling houses while the latter applies to business premises. We begin our perusal of the Acts with the Rent Act.

1.3. THE RENT ACT, 1972

The Rent Act represents a deliberate interference by the State with contracts and property rights of individuals for a specific purpose. That is to say, it is an attempt to redress the imbalance arising from a shortage of housing accommodation. Lord Scarman in Hereford Investments LTD V Lamber⁷ in general aptly stated the underlying purpose of rent legislation as follows:

“The policy of the Rent Acts was and is to protect the tenant in his name whether the threat be to extort a premium for the grant or renewal of his

⁶ Hansard Parliamentary Debate No 14 to 16 b16th September 1968, p294

⁷ (1959) 1 CHD p39

tenancy to increase the rent or to evict him. It's not a policy for protection of an entrepreneur whose interest is exclusively commercial."

This statement was reiterated by the Supreme Court of Zambia in Lily Drake V MBL Mahtani and Professional Services Ltd⁸ where the court was of the view that the true purpose of the Rent Act is to protect the tenants.

In line with the general purpose of Rent Acts, the Rent Act, 1972 has the following as its primary objectives. Firstly, it attempts to control the amount of rent, which private landlords may charge and secondly it provides security of tenure for the tenant. In order to realise these objectives, the Rent Act:

- a. Imposes a duty on a landlord to secure a standard rent from the court using the prescribed formula.
- b. Restricts increases of rent and prescribes the circumstances under which rent increases are permissible
- c. Restricts the right to possession for the premises let;
- d. Restricts premiums;
- e. Provides for repairs;
- f. Restricts the right to assign or sublet the premises; and
- g. Provides for an enforcement mechanism.

⁸ (1985) ZLR p236

a. Fixation of Standard Rent

Section 8 requires a landlord to apply to the court to have the standard rent determined either before letting the premises or within 3 months thereof, whichever is the later. Failure to comply with this requirement is an offence for which the landlord may be liable to a fine or a term of imprisonment not exceeding six months, or to both. The term of imprisonment seems to be more than adequate, if not excessive. The Rent Act has made the task of the court to determine rent easier by prescribing a formula to be applied. Where the premises are unfurnished, the rent is to be determined by the court at a monthly rate of one and one quarter per centum of the cost of construction plus the market value of the land, the landlord paying all outgoings. In addition to this rate, another one per cent of the value of the furniture has to be added in respect of furnished premises.

b. Increase of Rent

Any increase in the standard rent is prohibited except in circumstances prescribed in section 11. By operation of section 10, a landlord commits an offence if he demands rent in excess of standard rent. Apart from being sentenced to a jail term or being fined, a landlord may be ordered by the High Court to reimburse the excess amount to the tenant. However, in the circumstances prescribed in section 11, an increase in the standard rent is permissible. Where the rate payable by the landlord has increased, the landlord

may increase rent proportionately. Moreover, where the landlord has incurred expenditure on the improvement or structural alteration or improvement of a drainage or sewerage system or construction or making good of a street or road executed at the instance of a local authority, rent may be increased⁹. However, it must be noted that expenditure incurred in relation to repair or redecoration is excluded and in any case under this exception to increase rent, the amount of increase must not exceed 15% of expenditure so incurred per annum¹⁰. Such increases are binding on subsequent tenants.

c. Restriction of the right to possession or ejection

The Act confers security of tenure on the tenant mainly by providing the circumstances in which the tenant can be deprived of possession or be forcibly ejected by order of the court.

Section 13 tabulates the circumstances in which the tenant is liable to lose possession. These cover a wide range of situations, notably; default in the payment of rent or non-compliance with the terms of the lease; the creation of a nuisance or annoyance to neighbours; use of premises for illegal purposes; permitting the premises to deteriorate owing to acts of waste or neglect; the serving of notice to quit by the tenant on the landlord upon which the landlord contracts to sell or re-let the premises or takes any other step which would be prejudicial if he could not regain possession; the subletting of the premises by

⁹ Rent Act, Section 11 (1) (b)

¹⁰ *Ibid*

the tenant of the whole or part of the premises at a rental in excess of the rent payable under the provisions of the Act; the subletting or assignment of the premises without consent from the landlord; the need for the landlord to occupy the premises as a residence for himself, any member of his family or any person employed by the landlord on full-time basis; and the carrying out of any reconstruction or re-building of the premises.

Section 23 also affords security of tenure to a tenant protected by the Act. On the termination or expiry of his contractual lease, the tenancy is automatically continued by the Rent Act and unless the tenant quits voluntarily, he cannot be evicted without the order of the court. Subject to very limited exceptions, this means in practice that a statutory tenant is virtually irremovable so long as he pays his rent and observes all other covenants. Although a landlord may establish one or more of the grounds for possession set out in section 13, a judge has an overriding discretion whether or not to order possession.

It is important to note that distress for the recovery of rent cannot be levied except with the leave of court.

d. Restriction on Premiums

No premium may be charged or demanded as a condition to the grant, assignment, renewal or continuance of a tenancy, lease, sublease, subletting or occupation of the premises in addition to the standard rent unless the tenancy is for a term exceeding 21 years.

e. Repairs

The Act leaves the question of repairs to the parties of the tenancy agreement. However, where the tenancy agreement is silent, which is most unlikely, the Act provides in section 24 that the landlord shall bear to “maintain and keep the premises in a state of good repair and in a condition suitable for human habitation¹¹,” while the tenant’s obligation is to “maintain the premises in the same state as that in which the premises were at the commencement of the tenancy fair wear and damage arising from irresistible force and the repairs for which the landlord is liable excepted¹²”

f. Assignment or Subletting

The parties may agree in the tenancy agreement on the conditions on which the tenant may assign or sublet the premises. The Act Provides however, that even where the agreement contains no provision prohibiting the tenant from assigning or subletting the premises (it being an implied term at common law that the tenant is at liberty to assign or sublet) the tenant can only assign or sublet with the consent of the landlord¹³. The said consent is not to be unreasonably withheld by the landlord. The term of the sublease has been limited to 6 months subject to a further 3 months.

¹¹ Rent Act, Section 24

¹² Ibid

¹³ Ibid section 25

g. Enforcement of the Act

The Act vests the power of enforcement on two institutions, the Rent Controllers and the Judiciary. By section 30, the Minister is empowered to appoint rent controllers whose duties include the valuation, assessment or examination of any premises and elicit from the landlord or tenant such information as may be necessary to determine the extent, or lack thereof, of compliance with the provisions of the Act. The Act contains various types of offences and in all cases, non-compliance with the obligations by either the tenant or landlord amounts to a criminal offence even if there is no complaint on the part of the party to benefit by such compliance. It is therefore, the overall responsibility of rent controllers, as overseers, to keep abreast with developments in the landlord and tenant relationship.

The courts have also been vested with supervisory powers including the investigation of all kinds of complaints from either party. Not only do they determine standard rent, but they also have to make rulings as to whether consent by the landlord in order for the tenant to sublet or assign, is being withheld unreasonably. The courts have been vested with considerable discretion in making many decisions but the overall burden on the judicial system is overwhelming on the account of the wide application of the Act and the sheer enormity of the premises involved.

Finally, it should be mentioned that the Rent Act does not apply to a large sector of housing in Zambia. By operation of section 3 (2), the Act does not apply to the following;

- a. a dwelling house let or occupied by an employee by virtue of his employment
- b. premises let by government
- c. boarding houses such as hotels, hostels and motels
- d. premises held under a lease for a period exceeding twenty-one years
- e. premises let by any local authority or national housing authority.

Furthermore, section 48 of the Housing (Statutory and Improvement Areas) Act excludes the application of the Rent Act to statutory housing and improvement areas.

1.4. THE LANDLORD AND TENANT (BUSINESS PREMISES) ACT 1971

The relationship between a landlord and a tenant of business premises is governed entirely by the general contractual law. Until the contractual tenancy expires, or the landlord serves a notice to quit, then and only then do the statutory rights provided by the Landlord and Tenant Act come into operation and override the common law rules for termination. Thus the primary objectives of the Landlord and Tenant Act are to provide security of tenure for tenants occupying property for business and professional purposes and to enable such tenants to obtain new tenancies in certain cases. The Act does not apply to Agricultural holdings, residential premises, premises for a fixed term in excess of

21 years and premises occupied as an incidence of employment or office whose duration is co-existent with that of the office or employment¹⁴.

The Act permits the tenant to apply to the court for a new tenancy, prior to the landlord giving notice to terminate the tenancy. An application for a new tenancy is not permissible where the tenant has already given notice to quit or has surrendered the tenancy¹⁵. In addition, where the tenancy has been forfeited or a superior tenancy has been forfeited, no application for a new tenancy can be entertained. A tenant is permitted to make a request for a new tenancy where the tenancy under which he holds (referred to as the current tenancy) is for a term of certain years which is continued thereafter from year to year. The term of the new tenancy in the case of tenancies from year to year should not be less than six months nor more than twelve months¹⁶. Where a tenant makes a request for a new tenancy, the current tenancy is to terminate immediately before the date specified in the request for the beginning of the new tenancy. The request which must be in the prescribed form should set out the proposals as to the property to be comprised in the new tenancy¹⁷. This can be the whole or only part of the property comprised in the current tenancy. The proposals should include the rent the tenant is prepared to pay under the new tenancy and the other terms of the new tenancy. Moreover, a tenant can not make a request

¹⁴ The landlord and tenant (business premises) act 1971, section 3

¹⁵ Ibid Section 24

¹⁶ Ibid Section 6 (2)

¹⁷ The landlord and tenant (business premises) act 1971 section 6 (3)

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for a new tenancy if the landlord has already given notice to terminate the current tenancy¹⁸.

In his opposition to the tenant's application for a new tenancy, the landlord may cite any of the following grounds¹⁹:

- a. that the tenant being under an obligation to maintain and repair the premises has neglected to do so having regard to the state of repair of the premises
- b. that the tenant has persistently delayed the payment of rent,
- c. that the tenant has committed substantial breaches of his obligation under the current tenancy,
- d. that the landlord has offered and is willing to provide suitable alternative accommodation for the tenant on terms that are in all circumstances reasonable due regard being had to the terms of the current tenancy and the alternative accommodation is suitable having regard to the class and nature of the tenant's business, the extent of the holding and the facilities of the holding.
- e. that on the termination of the current tenancy, the landlord intends to demolish or reconstruct the premises or a substantial part of it which he cannot reasonably do without obtaining possession, and
- f. that on the termination of the current tenancy, the landlord intends to occupy the holding for his own business or as a residence for himself

¹⁸ Ibid

¹⁹ Ibid Section 11

If the landlord successfully opposes the application²⁰ for a new tenancy under any of the above grounds, the court should dismiss the application. The Act also provides for termination of the tenancy by the landlord by way of notice. The landlord may terminate the tenancy by giving notice in a prescribed form, but the notice aforesaid must not be shorter than six months or longer than twelve months to the date of termination specified therein²¹.

Where on an application by the tenant the court makes an order for the grant of a new tenancy, the duration of the tenancy may be such as has been agreed upon by the parties. In the absence of such an agreement, the term may be determined by the court having regard to all the circumstances but it should not exceed 21 years²². A term longer than 21 years would exclude the tenancy from the application of the Act.

The parties to the new tenancy may agree as to the new rent. In default of such agreement, the rent will be determined by the court to be that at which having regard to the other terms of the tenancy, the holding might reasonably be expected to be let in the open market by a willing lessor there being disregarded the fact that the tenant has been in occupation of the holding by reason of the carrying on of business by him and improvement carried out by the tenant otherwise than in pursuance of an obligation to his immediate landlord²³. Other terms of the tenancy may be agreed upon by both parties but in default of such

²⁰ The landlord and tenant (business premises) act 1971, section 12

²¹ Ibid, Section 5

²² The landlord and tenant (business premises) act 1971, section 15

²³ Ibid. Section 16

agreement, the court will determine those terms having regard to the terms of the current tenancy and to all relevant circumstances²⁴.

Finally, the application of the Landlord and Tenant (Business Premises) Act cannot be excluded by agreement between the parties such an agreement will be null and void²⁵.

²⁴ Ibid, Section 17

²⁵ Ibid, Section 20

CHAPTER TWO

2.1 INTRODUCTION

The first chapter centred on the history of legislation, which protects the tenant from paying unreasonable rentals and securing his tenure. The main purpose of giving the history and the provisions of the relevant Acts viz the Rent Act and the Landlord and Tenant (Business Premises) Act, was to give the reader a clear view of how Rent control and securing of the tenants tenure started and later put into effect by enacting the relevant Acts. This chapter will focus on how the Rent Act and the Landlord and Tenant (Business Premises) Act operated in the second republic. We will first discuss the land policy, which was obtaining in the second republic and then go on to discuss how the two Acts operated.

2.2 LAND POLICY IN THE SECOND REPUBLIC

It should first and foremost be mentioned that Zambia when it got independence had a capitalist economy. But when government noticed that it's awesome task of developing the economy could not be realised if it did not take part in the running of the economy, it nationalised almost all companies through the famous Mulungushi reforms of 1967. The prevailing ideology was that of humanism which preached non-exploitation of man by man. It's against this background that government introduced the first legislation to control rent in Zambia through the Rent control (temporary provision) Act of 1968. As

the name of the Act suggests, this Act was just of the temporal measure curbing the skyrocketing rentals being charged by landlords pending the introduction of comprehensive rent legislation¹. In line with government's economic policy of controlling the economy the then minister of local government Mr Sikota Wina when presenting the bill in parliament said that there should be a fair deal for both the landlord and tenant in the light of prevailing economic conditions which discouraged exploitation of man by man². In justifying government's stance to control rentals, Mr Sikota Wina said:

“ What pushed government to introduce this piece of legislation is a glaring fact which no one can run away from, that there has been since independence a tremendous amount of exploitation as far as rent and the rent structure are concerned. One could build a house costing K16, 000.00 and my ministry have known cases where people are charged K300.00 a month. At this rate one would repay the loan he got from the building society in four and half years. Meanwhile the building society insists on a period of 25 years. But if one can complete paying K16, 000.00 in four and half years then obviously some one is being exploited. The body being exploited is the body who cannot afford to build his own house. It's because of this reason that the government is not prepared to sit down and see this continue without coming to the aid of the ordinary man and woman who wants a decent accommodation. It is inconceivable that this

¹ Hansard Parliamentary Debates No. 14-16; 16th September 1968

² Ibid p. 293

government would just sit down and let a handful of people who can afford to build flats and mansions milk the country to death"³.

Government indeed came to the aid of the tenants by introducing the 1968 Rent (temporary provisions) Act and later replaced by the landlord and tenant (Business Premises) Act and the Rent Act in 1971 and 1972 respectively. These two Acts gave security of tenure to tenants and controlled the amount of rent tenants paid. As if these two acts were not enough to protect tenants, government started calling for further reforms. At the Kabwe declaration of 1972, it was echoed that in future no individual would be allocated to build houses for rent. The question of accommodation was to be left to the state with its institutions like the party, central government, local government, parastatal organisations and co-operatives. For individuals owning properties for rent, it was declared that they should phase themselves out of this business in such a way that by the end of 5 years from 1973, they will have sold their properties at reasonable prices to the state⁴. It was said that these measures were inevitable, as this was an area where the extensive exploitation of the common man was rampant.

In his watershed speech of 30th June 1975, Dr. K. Kaunda, then president of Zambia reiterated what was stated at the Kabwe declaration and to enforce what was declared further stated that:

“ All rented buildings owned by individuals whose value or cost has been realised will be taken over by local authorities. Local authorities can rent them to prevent exploitation and so that at least

³ Hansard Parliamentary Debates of September 1968 p. 316

⁴ Kabwe Declaration p. 43

the proceeds are utilised for improving the welfare of the masses. Rentals are simply exorbitant and UNIP cannot allow individuals to earn money by exploitation without effort. Even party officials and civil servants who obtained loans and built houses for rent, this form of exploitation should come to an end and such houses shall be taken over by local authorities⁵.

Further President Kaunda announced changes in land ownership and tenure in Zambia. By and large these reforms were prompted by rampant speculation in urban land. The test case was provided by the sale of a vacant plot of land opposite the city council library in Lusaka. The parties to the transaction were the Development Bank of Zambia and solar investment (Z) Ltd. By a conveyance dated 3rd April 1975, one George Louis Lipschild of Lusaka sold to Solar Investment the following properties.

- a) Subdivision 1 of subdivision A of plot No 29 size 0.100 of an acre; and
- b) The remaining extent of subdivision A of subdivision No 29, size 0.177 of an acre;
and
- c) The remaining extent of plot No 29, size 0.229 of an acre.

These three plots each less than a quarter of an acre cost Solar Investment K150,000.00. On the same day, 3rd April 1975, by a conveyance made between Solar Investments (Z) Ltd and the Development Bank of Zambia the third plot, that is the

⁵ Watershed Speech p. 47

remaining extent of plot No 29 size 0.229 of an acre was sold for a sum of K100, 000.00 to the said bank.

The President termed this transaction as not only mere profiteering but also insanity to which he was to put an immediate stop. He directed that Solar Investments must give back to the bank the already paid money to them, and that the vacant plot was immediately taken over. Further changes were announced as follows:⁶

- a) All freehold titles to land were abolished and existing interests abridged to statutory leaseholds of 100 years.
- b) All unutilised tracts of farmland were immediately taken over by the state.
- c) No individuals or groups of individuals were to be free to occupy any piece of land without the authority of the state or its lawful agency.
- d) The sale of land in urban areas was abolished save for developments on the land. These could be sold if prior consent of the President was obtained.
- e) All vacant and undeveloped land in and around urban centres was municipalised and
- f) Real estate agencies were closed down immediately as they were largely responsible for inflated prices on land and housing.

Their functions were to be taken over by the Zambian National Building Society.

⁶ The watershed Speech p. 43-45

The national council endorsed these measures. The 1975 Land (conversion of titles) Act, hereinafter referred to as the 1975 Land Act, gave legislative backing to them. The major import of the Act was to vest all land in the President absolutely and in perpetuity on behalf of the people of Zambia. All freehold interests were abolished and hitherto existing interests abridged to statutory leases of a 100 years. Bare land ceased to have commercial value and no longer changed hands for cash consideration.

From these radical land reforms, it can be deduced that the UNIP government was vigilant in turning Zambia into a socialist state. Of interest to the subject of this paper was section 13 of 1975 Land Act It provided that:

...No person shall subdivide, sell transfer, assign, sublet, mortgage, charge or in any manner whatsoever encumber or part with the possession of his land or any part thereof or interest therein without the prior consent in writing of the President.

Transactions, which violated this requirement, were null and void. In Bridget Mutale v Professional Services,⁷ respondents sublet a flat for which they held a lease from a superior landlord to the appellant at a rent of K200.00 per month. The appellant occupied the flat from December 1978 to January 1981. No rent was ever paid during the period, nor had the parties secured Presidential consents in accordance with section 13(1) of the 1975 land Act. The trial judge held that the lease was valid notwithstanding the absence of presidential consent, as section 13 did not state that any dealings in land

⁷ [1984] ZR p.72

made without the president's consent would be void and unenforceable. The Supreme Court held that the transaction was unenforceable for lack of presidential consent.

The mechanism of prior consent offered government the opportunity to monitor transactions in land to ensure compliance with state^d policies and goals. In order to curb speculation, the 1975 Land Act gave the President the discretion to fix the maximum amount that may be received under various transactions⁸. The Act further limited the value of land for purpose of sale to unexhausted improvements⁹. This meant that in determining the price of land, factors such as the forces of demand and supply, location and potential use value, which influence the price in an open market situation, were disregarded. Thus the proviso introduced the notion that bare or undeveloped land had no exchange value.

A number of criticisms were labelled on section 13 of the 1975 Land Act. Notable ones include (i) the lack of regulations governing the determination of prices, premium or rent. (ii) The absence of an appellate system, such as land tribunal to which aggrieved parties could appeal decisions of the commissioner of lands whose office had the delegated authority to exercise the powers of the president in matters pertaining to land. (iii) The absence of enforcement provisions for contravening the section and (IV) administrative delays in processing applications for consent.

⁸ 1975 Land (Conversion of Titles) Act section 13(3)

⁹ 1975 Land (Conversion of Titles) section 13(3)

It should however be mentioned that notwithstanding some of the shortcomings of the 1975 Land Act mentioned above, the land reforms were meant to give government a lot of control in transactions pertaining to land. This was so in order to achieve government socialist approach to the economy.

2.3 RENT ACT (1972) IN THE SECOND REPUBLIC

The Rent Act was enacted in 1972 to make provision for restricting the increase of rents, determining standard rents, prohibiting the payment of premiums and restricting the right to possession of dwelling houses, and for other purposes incidental to and connected with the relationship of Landlords and Tenants of a dwelling house. Theoretically, the Rent Act seemed to have achieved its objectives of protecting the tenant. But this theoretical success did not extend into the practical realm. This could have been so due to a number of reasons. Firstly no enforcement mechanism was put in place to check whether what was put in the Act was followed. The Act though provided for the appointment of rent controllers whose task included the valuation, assessment examination of any premises and eliciting, from the landlord or tenant, any information as may be necessary to determine the extent or lack thereof of compliance with the provisions of the Act. An attempt was made in the early seventies to appoint rent controllers but the exercise failed¹⁰. It's due to this lack of an enforcement mechanism

¹⁰ Zambia Law Journal, 1998 p. 98

that no litigation in the early years of its existence was ever reported. This had a bearing on the effectiveness of the Act as rentals were fixed arbitrarily.

Secondly, the 1975 land Act had a big impact on the effectiveness of the Rent Act. This Act made land valueless and the president was empowered to fix the maximum rent that a tenant could pay¹¹. As to how the president came up with the price, there were no criteria for determining such price. This defect of lack of criteria for determining prices manifested itself in two situations: one of them was when the minister reviewed the amounts fixed by the commissioner of lands (acting on behalf of the president) and the other was when valuers undertook the valuation of the property. The working party of the law development commission alleged that the absence of the principles of price determination encouraged corruption. The working party found that at the end of 1975 and in early 1976, a situation prevailed where the minister could alter prices on a massive scale. It was feared that such alterations of prices created opportunities for corruption because of the absence of regulations as to procedure to be followed in such an exercise¹².

The Rent Act, however, gave the criteria for determining rent of a dwelling house by providing a formula. This formula called the standard rent gave the landlord or the court the criteria for determining rent. According to the Rent Act, standard rent was 15% of

¹¹ 1975 Land (conversion of Titles) Act section 13(3)

¹² Law Development Commission, Report on the Land (Conversion of Titles) Act No. 20 of 1975 61(1981)

cost of construction plus the market value of the land¹³. This was rent per year. It was divided by 12 months when calculating the monthly rent.

So from the two Acts, that is the Rent Act and the 1975 Land Act, we see a very big difference on how rent was fixed. A formula, that is the standard rent, was followed under the former while the latter Act did not provide criteria for determining rent. Standard rent under the Rent Act gave value to land while the 1975 Land Act made bare land valueless. Since the Land Act of 1975 provided that no other law prevailed over it¹⁴, it meant that the provisions in the Rent Act, which gave value to land, was disregarded and outlawed by the Land (Conversion of Titles) Act. Although there was this inconsistency between the Rent Act and 1975 Land Act, the Rent Act was not expressly repealed and it continued being part of the Zambian Laws.

The 1975 Land (conversion of titles) Act actually assumed some of the objectives of the Rent act especially those pertaining to the fixation of rent¹⁵. However tenants used other provisions of the Rent Act successfully. In Lily-Drake v Mahtani¹⁶, the respondents obtained from the high court an order for possession of a flat let to the appellant on the ground that the premises were required by the landlord for occupation of the landlord's employees under section 13(1) (e) of the Rent Act. At the trial the managing director of the 2nd respondent, who was proved to be the owner of the premises, gave

¹³ Rent Act section 2

¹⁴ 1975 Land Act sections 4 and 13

¹⁵ 1975 Land Act section 13

¹⁶ [1985] ZLR 236

evidence that the premises were required for occupation by unspecified employees of unspecified companies which were members of the group of companies to which the respondent belonged. There was no evidence that the premises were required for an employee of the second respondent company itself. It was held that where a landlord for occupation requires premises by an employee, that particular landlord must employ such employee and there must be complete identity between the employer and the landlord. Further the court said that even when a landlord provides proof that his case comes within the provisions of section 13(1) (e) it is still incumbent upon him to prove that the premises are reasonably so required. The respondent did not show that he directly employed the employees who were to occupy the premises. The appeal was allowed and the tenant remained in the flat.

Apart from the effect the 1975 Land Act had on the effectiveness of the Rent Act, there are reasons, which explain why the Rent Act proved to be ineffective in the second republic. The first one relates to the inherent chronic shortage of dwelling houses, so serious was this problem that those who did not secure suitable accommodation considered themselves fortunate and were less inclined to act in a way that would endanger their "good fortune". The negative consequence of such attitudes was that even though the tenants were aware that their rights had been infringed by the landlord no follow up was initiated on the legal plane. The desperate and perhaps intimidated tenant would decide to sleep on his rights.

Secondly, a sizeable number of tenants were not aware that they had protection under the law. Thus any illegal hikes in rent charges were not challenged but rather attributed to the ever-increasing economic hardships the country was facing. Such ignorance, it is clear, did not auger well with the aims of the Act.

Finally the ineffectiveness of the Rent Act in the second republic could be attributed to its narrow scope. Amongst the dwelling houses it did not apply to, were those let or occupied by an employee by virtue of his employment and those let by the government¹⁷. A substantial number of tenants thus, fell short of the protection of the Act owing to the fact that their respective companies as employers provided them with accommodation while other tenants accommodation was provided by the government. As a result, only a small proportion of tenants were catered for under the Rent Act. Thus one can safely conclude that it's difficult to have an effective Act if in it's functioning fails to cater for large groups of people.

The above reasons, which we think, lead to the Rent Act being "buried alive" are not individually conclusive but rather have a commulative effect which serves as a pointer to the fact that the Rent Act, in it's bid to control rent and secure the tenants tenure failed lamentably in the second republic.

¹⁷ Rent Act section 3

2.4 THE LANDLORD AND TENANT (BUSINESS PREMISES) ACT (1971) IN THE SECOND REPUBLIC

The Landlord and Tenant (Business Premises) Act hereinafter referred to as Landlord and Tenant Act was enacted in 1971 and it's primary objective is to provide security of tenure to tenants occupying premises where they are carrying on business or professional pursuits. Unlike its counterpart (The Rent Act) the Landlord and Tenant Act does not concern itself with the standardisation of rent, the amount of rent payable is freely negotiable between the parties subject to revision in some instances. For example the landlord may apply to the court to determine the rent, which would be reasonable for the tenant to pay while the tenancy continues. In determining such rent, the court shall have regard to the rent payable under the terms of the current tenancy¹⁸. In another instance, a tenant may complain to the court if he feels the rent demanded is too high. The court shall then determine the rent which shall be substituted for the rent agreed to be paid having regard to the terms of the tenancy the holding might be expected to be let in the open market by a willing lessor to a willing lessee. Thus the rent may be lowered or raised and at least the tenant is protected against unreasonable demands by the landlord. Should the court determine a lesser rent than what had been agreed by the parties, the tenant is entitled to recover the amount over paid¹⁹.

¹⁸ Landlord and Tenant (Business Premises) Act section 7

¹⁹ Landlord and Tenant Act section 28

The Landlord and Tenant Act was successful in the second republic. This can be attributed to the fact that the Act gave latitude to the Landlord and the Tenant to agree on what rent was to be paid. If both parties were not comfortable with what was agreed, they could apply to the court, which determined the rent payable. This greatly worked to the advantage of the tenant who the Act specifically wanted to protect because of his weak position vis-à-vis the landlord.

The Landlord and the Tenant Act was also successful because the 1975 Land (conversion of Titles) Act did not affect it. The notion of land being valueless after 1975²⁰ did not affect the Landlord and Tenant Act because it provided that rent was to be determined using the prices being charged in the market. After 1975, rentals were calculated just on the improvement on land without including the value of the land. And this comprised the reasonable price of holdings let in the open market by willing lessor to a willing lessee. So when the court was called upon to determine rent, it used rental charges obtaining in the market and these charges were within the requirements of the Land (Conversion of Titles) Act, that is these charges did not include the value of land.

Landlords, however, were required to get presidential consent when letting their business premises. When giving consent, the President could fix the maximum rent payable. Even though presidential consent was required before letting business premises, the tenant still remained protected if he fulfilled his obligations. In Naik and

²⁰ 1975 Land Act section 13

Naik Motors v Chama²¹, the tenant applied for the granting of a new tenancy of business premises when the application was heard by a senior resident magistrate, a preliminary point was raised that no presidential consent had been obtained as required by section 13 of the 1975 Land (conversion of titles) Act when the original tenancy was granted. The magistrate ordered the landlord to validate the original lease by obtaining presidential consent before a new lease could be granted. The landlord appealed.

It was held that tenants who have the protection of the Landlord and Tenant Act may rely on such protection and may apply for new tenancies despite the default of landlords in failing to obtain presidential consent. The ratio decidendi for this decision is that the purpose of the Land (conversion of titles) Act was for the protection of the public due to the scarcity of suitably developed land or habitable premises which result in high cost of purchase of land and rentals. The respondent claimed to be a tenant entitled to renewal of a tenancy under the Landlord and Tenant Act but the appellants claimed that she had lost her rights because of the enactment of the Land (Conversion of Titles) Act and failure by the appellants themselves to comply with the provisions of the Land Act. As already alluded to, the purpose of the Act was to protect tenants and it would of course be contrary to such purpose if the protection of the tenants provided for in another Act was thereby taken away. Thus the landlord in default under the section 13 which requires presidential consent in land transactions can not plead such default in order to deprive a tenant of the protection of another Act.

²¹ [1985] ZLR 227

A tenant though could not be granted the right to renewal if he did not fulfil his obligation of paying the rent. In Hina Furnishing Lusaka Ltd v Mwaiseni Properties Ltd²², the plaintiff sought an injunction to restrain the defendant from molestation hindrance and interruption of the plaintiffs peaceful and quiet enjoyment of occupancy of the demised premises during the term of tenancy or until further notice. The premises were demised under a contract to lease, which was neither executed nor carried the requisite presidential consent. The action arose out of the defendants' effective re-entry and possession of the premises upon the plaintiff falling into several months rent arrears. It was contended for the defendant that the plaintiff could not succeed since they were seeking a discretionary remedy and equitable remedy only open to those who come to the court with clean hands. It was held, inter alia, that the court would not grant the remedy in favour of the plaintiff whose tenancy agreement was subject to a condition precedent which has not been performed, that is obtaining presidential consent or who is in breach of a term of the agreement, that is arrears of rent for he who comes to equity must come with clean hands.

The above examination of case law reveals that the court would go ahead and protect a tenant by renewing the tenancy agreement even if it did not have the requisite presidential consent. This was so on order to guard against abuse by some landlords who didn't want to get presidential consent but later used it as a ground for not

²² [1983] ZLR 40

renewing a tenant's tenancy agreement. A tenant though was not protected if he did not perform his obligation of paying rent.

The Landlord and Tenant Act at least tried to secure the interests of tenants in business premises in the second republic. The drawback of the Act was that it places a considerable burden on the courts to, for example determine rent, decide whether to permit a new tenancy and even the other terms of the tenancy. As regards determination of rent, it had to fix rent, which was to be consistent with what was obtaining in the market. This was an awesome task, which should have been placed on a different institution, such as a rent tribunal or some similar body.

CHAPTER THREE

3.1 INTRODUCTION

In this chapter, we will focus on the land policy of the third republic. We will then go on to examine how the Rent Act and the Landlord and Tenant (Business Premises) Act are operating in the third republic now that the economic ideology has ^{changed} from socialism to capitalism and the land policy has accordingly changed to suit the prevailing economic atmosphere.

3.2 LAND POLICY IN THE THIRD REPUBLIC

Land policy in the second republic was largely influenced by the socialist ideology that culminated in the African traditional conception of land ownership. In the policy document entitled Humanism in Zambia and a guide to its implementation, it was stated that:

"Land was never bought. It came to belong to individuals through usage and the passage of time..."¹

The 1975 Land (conversion of titles) Act hereinafter referred to as the 1975 Land Act, was specifically enacted to reflect this traditional perception of land thereby curbing speculation in land. The 1975 land Act also enabled government to

¹ K.D. Kaunda, Humanism In Zambia and a Guide to its Implementation (1975) p.14

control all land transactions by giving the president power to fix the maximum amount that may be charged under various land transactions. Further the 1975 Land Act abolished sales, transfer and other alienation of land for value.²

The 1975 Land act had a lot of shortcomings. Firstly, the regulation of income earned from land by giving the president discretion to fix the maximum amount that may be received from various transactions lead to underhand dealings. The minister responsible for land bemoaned this when he referred to a case of a transferor who sold property for K1 500,000.00 but officially declared K50,000.00.³ Government was defrauded of property transfer tax in such cases. Secondly, the requirement of getting prior presidential consent lead to delays in the completion of transactions. This delay resulted from understaffing and ill motivation of the cadre of government values, as well as from the fact that the system was lengthy and beset with bureaucratic requirements. Such delays lead to the comment that "the social and financial costs to the country resulting from such delays were astronomical and generally speaking far outweighed the benefits which the procedures were designed to achieve."⁴

² The 1975 Land Conversion of titles Act, section 13

³ Times Of Zambia, 13 June 1992

⁴ S.M Kasase, Land policy conducive to property development: a personal view.(surveyors institute of Zambia seminar 1991) p40

Thirdly, the notion that bare land had no value also presented its own problems. Landholders could not use title deeds to their land as security when getting loans. Another weakness of the 1975 Land Act was that it restricted alienation of land to non Zambians reached a crescendo in 1985 when the Zambian government granted 20,000 hectares to a foreign owned company⁵ This grant provoked a public outcry, eventually culminating in one member of parliament (MP) moving in the house for the government to exercise care in the allocation of land and proposing revocation of the grant.

The MP opposed the grant on three grounds: first the inconvenience to local people who were to be displaced as a result of the grant: second the possibility of illegal "export of government trophy" since the land allocated bordered a game management area: and third the threat to national security since the land bordered another country namely Zimbabwe.⁶ Other MPs thought that the amount of land granted was too vast for a new company with unproven experience in the proposed venture. Government opposed the motion and defended its earlier decision to award the grant on the ground that the proposed development would bestow certain benefits on the country including the production of wheat, the provision of foreign exchange through export of cotton, the provision of facilities to out-growers and training for local farmers. The government further claimed that the company had the necessary

⁵ Zambia Law Journal, volume 21-24 (1989-92) p65

⁶ Verbatim Reports of Parliament Debates, columns 1849-50, 20 February 1985

experience as it had similar schemes operating in Latin America and Kenya and that it organised finance on the world market. When put to a vote, the motion was carried by parliament and government later rescinded the grant possibly because of opposition by the majority of MPs.

The Land (conversion of titles) (Amendment No 2) Act No 15 followed in 1985 and in effect restricted the government from parcelling out land to foreigners.⁷

The Amendment Act however allowed some exemptions to certain non-Zambians approved ^{as} investors under the investment Act and non profit making charitable, religious or philanthropic organisations apparently because these types of organisations provided gratuitous service to people of Zambia.

The Amendment Act of 1985 contemplated large-scale investment but offered no hope for ordinary non-Zambians desirous of building themselves a dwelling house or earning a living through farming. Ordinary Non-Zambians were only permitted to negotiate a sublease from Zambian but even then such a sublease required the consent of the president. Further the term of the sublease was drastically restricted to five (5) years, a serious disincentive for investment.

When the Movement for Multi-party Democracy (MMD) came into power in 1991, they changed direction of the economy as it was thought that the socialist

⁷ The Land (conversion of titles) Act, section 13(a) (1) as amended in 1985 by the Land Act Amendment No 2 No 15 of 1985

policy. These reforms can best be discussed by an exposition of the power of alienation, conferment of value, scope of land control, the development fund and the machinery for redress of grievances through the land tribunal.

3.2.1 THE POWERS TO GRANT LAND

Under the Land Act of 1995, the president has unlimited power to make grants of land to any Zambian outside areas governed by customary tenure.¹¹ Unlike the repealed Land Act of 1975, which severely restricted the power of the president to make grants to Non-Zambians, the Land Act of 1995 has to a great extent relaxed the restriction. Non-Zambians who are residents qualify on the same plane as Zambians. This has been a great concession and relief to thousands of people who have settled in Zambia and have adopted it as their domicile. The list of eligible persons under section (3) of the 1995 Land Act includes investors, lessees for periods not exceeding five years and those who obtain land by way of right of survivorship or other operation of law. In any event any Zambian can obtain land upon securing written consent signed by the president.

The notion that bare land is valueless has been removed. Section 4 of the 1995 Land Act specifically states that "land in Zambia shall have value". The president can only alienate land without receiving consideration if the alienation is for a public purpose. The provision conferring value to bare land has brought land into

¹¹ Land Act, 1995 section 3

the property market and it can be used as security for credit. Prior to this reform, mortgages were specifically restricted in their operation to 'unexhausted improvements' and not bare or virgin land.

Another positive aspect of land reforms in the third republic has been the diminution of control of land transactions by the president to a tolerable degree. Prior to the Land Act, all dealings in land not only required the consent of the president but in the exercise of that power, the president was also conferred with additional power to determine the price (in the case of a sale), the rent (in the case of a lease) or premium (in the case of a mortgage). Such draconian power thwarted commercial transactions, which would have lead to the development of land and rapid growth for real estate. The Land Act of 1995 impose the requirement that ^{for} any person to sell, transfer or assign any land *must* secure consent. But the Act goes no further and the determination of the price, rent or premium is entirely a matter between the parties. On the basis of earlier experience when there was considerable delay in processing of these applications, this defect has been cured by a provision to the effect that where consent is not granted within 45 days of filing in the application, consent shall be deemed to have been granted. Leases have been exempted from the requirement of presidential consent.¹² Thus Landlords and Tenants can agree to the terms of the lease without the consent of the President and as long as the

¹² Land Act, 1995. section 5

lease fulfils other legal requirements, it is valid and either party can enforce their rights in courts. Previously a lease, as we saw in the case of Bridget Mutale¹³ in the previous chapter, without presidential consent was null and void.

3.2.2 DISPUTE SETTLEMENT: THE LANDS TRIBUNAL

One of the growing defects of the repealed Land (conversion of Titles) Act was the absence of any institution to deal with disputes arising from the exercise by the president of his powers under the Act. Redress only lay with the court. The 1995 Land Act under section 20 provides for the establishment of the Land tribunal whose functions include settlement of any disputes arising under the Act. Thus in the event of refusal to grant consent or where the President repossesses land from a landholder, he must give reasons and these reasons can form the basis for an aggrieved applicant to appeal to the Lands Tribunal for redress. In the case of Agripa Njungu V. Commissioner of Lands and Richard Mbobela¹⁴, Agripa Njungu appearing as appellant and the Commissioner of Lands and Richard Mbobela appearing as 1st and 2nd respondents respectively before the Lands Tribunal, the appellant testified that he was the title holder of plot No 9096 Lusaka and the title deeds were issued on 13/10/85. The 1st respondent issued certificate of re-entry and the appellant wrote back asking for an extension of time. The appellant was given an extension of time . to

¹³ [1984] ZLR 72

¹⁴ Lands Tribunal LAT/14 '98

allow him to carry out the necessary development but an inspection in May 1992 revealed that the foundation which had been dug was abandoned and there was only a heap of stones on the plot. The plot was subsequently offered to the second respondent and title deeds offered on 11 June 1996.

The issue was that the Tribunal was called upon to determine whether the 1st respondent properly repossessed plot No. 9096 from the appellant. The Tribunal found that the appellant did not comply with the devise in the lease requiring him to erect substantial building within a stipulated time frame. Even after being advised to commence developments, the appellant did not make any progress. The Tribunal found that the first respondent properly repossessed plot No. 9096 from the appellant and it did not find any anomaly in the allocation of the plot to the second respondent.

This case shows us that the tribunal provides a quick mechanism to address any disputes arising from the Land Act of 1995. It's comprised of competent members who include the Chairman who should either be a judge of the High Court or one who is qualified to be a High Court; Deputy Chairman who should be qualified for appointment as a judge of the High Court; an advocate from the Attorney General's Chambers; a registered Town Planner; land surveyor and not more than three persons from the public and private sectors.¹⁵ The Tribunal is not bound by rules of evidence and any person aggrieved with the decision of

¹⁵ Land Act, 1995. section 20(2) par. a to g

appeal
 the Tribunal can directly to the Supreme Court. The Tribunal is thus elevated to the status of High Court notwithstanding the fact that the decisions of the Tribunal are based on majority votes and that rules of evidence are not followed.

3.2.3 LAND DEVELOPMENT FUND

Among the recurrent complaints of prospective land developers was that much of the land in Zambia was not surveyed and there was inadequate infrastructure to entice developers. The Land Act of 1995 provides for the establishment of a special land development fund¹⁶ whose sources of finance are: the national assembly, monies received by the President in consideration for the alienation of land to applicants in the proportion of 75%, and the ground rent collected from all land to the tune of 50%. The fund is vested in the ministry of finance but is administered by the ministry of lands with the sole objective of opening up new areas for development. As new areas opened up for development and alienated, the resources of the fund will increase through alienation and ground rent charges and even more areas will be opened up for development.

In conclusion, we would say the Land Act of 1995 offers better prospects to land developers in various ways. The freedom of alienation of land to non-Zambians is welcome. Non-Zambians, who happen to be rich, can take advantage of

¹⁶ Ibid. section 16(1)

economic policies and acquire land were they build either business premises or houses which as we noted in the previous chapter are scarce and this has brought numerous problems, one of them being difficulties the government is facing in trying to protect tenants under the Rent Acts.

Funds from the land development fund can be used to open up areas so that investment in real property can be made easier. Urban areas are becoming heavily populated due to urbanisation. People are just concentrated in the already developed areas and this has put pressure on buildings and houses, which were meant for a smaller number of people. Opening up new areas will release the pressure on the few buildings and houses as more of these will be built on new development areas opened up by the state through the use of land development funds. Only then will some of the problems being faced by tenants be addressed. Also the establishment of the land tribunal and putting value to bare or virgin land all point towards a firm determination to encourage land development and in its wake economic development.

Land reforms in the third republic, as we have seen, have addressed most of the shortcomings recognised under the repealed Land (conversion of Titles) Act of 1975.

3.3 RENT ACT IN THE THIRD REPUBLIC

The Rent Act, hereinafter referred to as the Act, was enacted in 1972 and has only been amended once by the amendment Act number 13 of 1994. No substantial change was made by this amendment except to put penalty units as fines in place of fines in monetary terms. This change was long overdue as the fines in monetary terms did not respond to inflation and this made the fines ridiculous. Apart from this change, the law remains the same from the time it was *enacted*. We examined how the Act operated in the second republic in chapter two of this paper. Our conclusion was that the Act was not effective and this fact was acknowledged by the UNIP government way back in 1975. The government on seeing that the Act was not bearing fruit enacted the 1975 Land (conversion of Titles) Act which, *inter alia* protected the tenant against arbitrary rentals charged by Landlords under section 13 of the 1975 Land (conversion of Titles) Act, the President was empowered to determine rent between landlords and tenants.

The 1975 Land (conversion of titles) Act usurped one of the objectives of the Rent Act, which was to control the amount of rent paid by tenants. The 1975 Land Act also made the provision in the Rent Act to control rent inconsistent with the land policy of government. The formula in the Rent Act on how to charge rent gave value to land and this was contrary to the land policy of the government, which perceived land as having no value. This perception had the legal backing of the 1975 Land (conversion of titles) Act which provided that land

had no value.¹⁷ To make sure that all land transactions were in line with government policy, all land transactions including tenancy agreements required presidential consent. This way, government made sure that tenants, for example, were not exploited.

Since the 1975 Land (Conversion of titles) Act overtook the cardinal objective of the Rent Act, the Rent Act eventually just remained, as law on paper except in circumstances where the tenant could use the Rent Act to remain in possession of the dwelling house. In Lily-Drake v Mahtani,¹⁸ a tenant successfully sued the landlord who wanted to have possession for a reason not provided for in the Rent Act.

In the third republic, the Land (conversion of titles) Act has been repealed and replaced by the 1995 Land Act. This Act has reduced the control of the president in land transactions to a barest minimum. Now the president can not determine rent between landlord and tenant. The absence of this power under the current Land Act leaves a gap, which could be filled by the Rent Act.

The reality is however different. The Rent Act does not seem to fill the gap left by the 1975 Land (conversion of titles) Act as regards determination of rent. This is so because of the economic policies of the MMD. The MMD have adopted a

¹⁷ 1975 Land (conversion of titles) Act, section 13

¹⁸ (1985)ZR 236

lasserfaire approach to the economy, meaning individuals have been given freedom to execute their business plans without interference from the government. All the government does is to provide an enabling environment. Market forces of demand and supply have been left to operate thereby determining, in case of property for rent, rentals which should be charged by landlords. And this is what is obtaining now as regards rental charges. Landlords rely on the market to determine what rent a tenant is supposed to pay. A research from the government valuation department provided us with information that landlords propose rent for their dwelling houses and ask the valuation department to verify whether their proposed rent is within the normal range. The valuers then value the property and compare rentals of similar houses in the vicinity and then approve whether the proposed rent by the landlord is within the range of rentals determined by market forces. The test case is one involving the landlord of one of the houses in Ngwerere Road in Roma residential area. The landlord wanted to increase rent of her house from K480, 000.00 per month to K1, 100,000.00 per month. She never gave reasons for the increase. She requested for the valuation of her house before effecting the new rent. The valuers went to inspect the house, did their technical work and then went on to do the comparative analysis on how much similar houses were being let in the vicinity of the house under study. The valuers in this case assessed rent to be K1,100,000.00 per month inclusive of withholding tax. The rent asked by the landlord was therefore found to be within the range. This

assessment was done on 4th January 2000.¹⁹ This case shows us that rent for dwelling houses is charged by using the market despite the fact that we have the Rent Act which is supposed to be a guide as to how rent should be fixed this is so because the economy is no longer controlled. The country has advanced beyond this view to the current movement, which favours freedom of the parties to make the best bargain they can. Restricting parties to fix rent according to a formula is actually not practical looking at the economy today where prices of everything ranging from essential commodities, fuel, education just to mention a few rise almost every day. Notwithstanding the foregoing however, a tenant can still challenge the hike using the Rent Act since its still law.

Other provisions of the Act are actually used and tenants could be evicted using the Act. In NIP Limited V. Zambia State Insurance Corporation²⁰, the tenant was evicted from a flat after it was discovered that he had sublet the flat without notice to the landlord contrary to section 13(1)(g) of the Act. It was held in the High Court that the tenant was properly evicted since he contravened the provisions of the Act. On appeal, the Supreme Court held that there was no subletting as what was granted by the tenant was a licence and he was therefore entitled to possession of the dwelling house.

¹⁹ Government Valuation Department, HQAF/STN/1975/02/ORG FO15

²⁰ 1994/SCZ/1

Although the Act has been used by the courts to decide whether the tenant has been properly evicted or not, it would be safe to conclude that for all intents and purposes, the Act has failed to operate even in the third republic. A research at the principal registry of the Supreme Court revealed that very few cases involving the landlord and tenant reached the court. Out of seventy eight (78) supreme court judgements passed in 1995, only three (3) involved the landlord and tenant. Out of the three, the first one Gibson v Tembo²¹ involved parties not covered by the Rent Act as the dwelling house was situated in a statutory improvement area where the Rent Act did not apply. The second case Mercantile Printers v Swiza Laboratories²² involved landlord and tenant of business premises. The third case William Khumalo v Kabwe Municipal Council²³ was the only case which came under the Rent Act. The landlord in this case was the local authority who evicted its tenant for subletting without informing the council. The procedure as to eviction of a tenant by a local authority is under the Rent Act (as amended by Act No. 12 of 1974 section 32A). It was held that the tenant was illegally evicted. As between private individuals, no case reached the supreme court in 1995. This state of affairs lead us to conclude that either the landlords and tenants are following the provisions of the Act so that few disputes arises or landlords and tenants just do their business without resort to the Act. We are inclined to the latter view that actually, landlords and tenants enter tenancy agreements without considering the Act. This is so because the Act is ill suited

²¹ SCZ No. 16 of 1995

²² SCZ No. 7 of 1995

²³ SCZ No. 79 of 1995

to the present economic environment where everything has been decontrolled. The Act for instance provides in section 15 that no person shall, as a condition of the grant for continuance of a tenancy, lease or sublease, be required to pay or take any fine or premium or other like sum in addition to the standard rent. What we see in practice is that firstly, as we discussed earlier standard rent has been discarded in the third republic because of the economic policies. Landlords charge rent according to the market forces and are always demanding for say six months in advance or one year in advance²⁴ which is supposed to be an offence under section 15 of the Act. Thus the provision, which restricts premium, can not be effective since time and events have overtaken other conditions, which have to be satisfied, for example standard rent. It may be submitted that the Act is as ill suited to the purpose for which it was created as, perhaps an abacus would be to solve advanced calculus.

May be the reason for the ineffectiveness of the Rent Act lies in jurisprudence. We can borrow the ideas of one jurist, Eugene Erlich²⁵ who was of the view that formal law should always be in conformity with the "living law", that is norms of conduct found in society. He was of the view that you can not find living law by reading statutes but by observing how far the formal law is followed, modified, ignored and supplemented. Thus the task of formal lawmakers is to keep it as nearly abreast to the living law as possible.

²⁴ Classified advertisement sample in Times of Zambia Newspaper:

²⁵ Dias, Jurisprudence, 5th edition, p.425

Borrowing these ideas of Eugene, it is clear to us that the rent Act has not been modified to suit changes in society. While a lot of changes have been experienced both politically and economically, the Rent Act has remained stagnant and the result has been that it has little impact, if any on society.

3.4 LANDLORD AND TENANT (BUSINESS PREMISES) ACT IN THE THIRD REPUBLIC

The Landlord and Tenant (Business Premises) Act hereinafter referred to as the Act was enacted in 1971 and was amended by Act No.13 of 1994. What was amended was subsidiary legislation on rules by the Chief Justice. Also penalty units were introduced so that fines under the Act responded to inflation. Otherwise the law is just the same from the time it was introduced in 1971.

Unlike the Rent Act, the Landlord and Tenant (Business Premises) Act is concerned with protecting the tenants security of tenure than with controlling the amount of rent payable for using business premises. As a result, the requirement to get presidential consent and the fact that land was made valueless under the 1975 Land (Conversion of Titles) Act did not affect the operation of the Act. This was because the Act under section 28 provides that if aggrieved by the rent payable under the tenancy agreement, the ^{tenant} can apply to the court to determine the rent. The section goes further to provide that the rent determined by the court 'shall be that at which having regard to the terms of the tenancy, the

holding might reasonably be expected to be let in the open market by a willing lessor to a willing lessee'. So, when getting consent in the second Republic, the President fixed rent and this rent reflected in all the rental charges charged by landlords. So, if the tenant felt what he was paying was too much, the court would look at prices obtaining in the market. And what was obtaining in the market was a reflection of what the President fixed when giving consent.

When the 1975 Land (conversion of Titles) Act was repealed in 1995 and replaced by the 1995 Land act which has removed presidential consent with regard to tenancy agreements, it meant landlords and tenants of business premises entered into tenancy agreements without first getting presidential consent. They could agree as to what amount ^{OF} rent the tenant was to pay using the market. If a tenant is aggrieved with what he is paying and goes to court so that it determines rent, the court will look at rents obtaining in the market to decide whether the tenant's claim is true or not. Thus the Landlord and Tenant (Business Premises) Act has also not been affected by the current economic policies.

So even in the third republic, the Act still provide security of tenure to the tenants occupying property for business purposes and enables such tenants to obtain new tenancies in certain cases. In Mercantile Printers Limited V. Swiza

Laboratories Limited²⁶, the landlord successfully applied to the court to repossess the premises on grounds that they wanted to reconstruct and carry on business of their own. The tenant though protected under the Landlord and Tenant (Business Premises) Act lost the right to possession since they did not oppose the landlord's notice to quit by applying for a new tenancy to court as provided by section 6(4) of the Act.

The act has been effective in the third republic and its objective of securing the tenants tenure has been realised. As such, comments have been made that ^{the} Act should balance the interests of both the landlords and tenants of business premises. Landlords complain that they have limited power on their own property since they can not repossess their property unless the court so orders.

²⁶ SCZ Appeal No. 94 of 1996

CHAPTER FOUR

4.1 CONCLUSION AND RECOMMENDATIONS

This paper has examined how the legislation between the landlord and tenant started in England, imported into the Zambian legal system and how effective this legislation has been both in the second and third republic.

Chapter One delved into the history of legislation between landlord and tenant. We saw that the legislation developed due to the critical shortage of housing accommodation and business premises after the first and second world wars. As for Zambia, skyrocketing rentals in the country's cities prompted government to introduce legislation between landlords and tenants by enacting the Rent Act and the landlord and Tenant (Business Premises) Act.

In Chapter two, we discussed how the two Acts operated in the second republic. An examination of the land policy in the second republic was made. As regards the effectiveness of the two Acts, it was concluded that the Rent Act was ineffective and reasons for the failure were forwarded. As for the landlord and Tenant (Business Premises) Act, it was found to be effective in the second republic.

Chapter three centred on the effectiveness of the two Acts in the third republic. After analysing the land and economic policies of the current government we reached a conclusion that the Rent Act has failed to fit in the current economic

environment and has thus accordingly been ineffective. The landlord and Tenant (Business Premises) Act on the other hand has been effective even in the third republic.

Having found that the Rent Act, unlike the landlord and Tenant (Business Premises) Act, has not been effective since inception, the task of this paper in its final stage is to make recommendations which could be considered as useful in addressing the situation. As a starting point, we think it imperative to identify certain conditions which existed at the time the Act was passed, conditions which necessitated its creation.

First of all our currency, the Zambian Kwacha, was quite strong and stable. The formula as to the calculation of the standard rent was created with this stable economy in mind. Secondly the philosophy promulgated by the government and ruling party, humanism, demanded that man be at the centre. It was in other words, wholly aimed at making things comfortable for all people. The coming of government controls, including those on rent, were well suited to the national philosophy.

A change in the status quo, however, meant that there had to be a change in the ratio behind the mode used to calculate the standard rent. Whereas the kwacha has repeatedly been devalued and controls lifted on commodities, the rent control provisions have remained stagnant. This stagnation of the Rent Act

has actually been recognized by the Supreme Court who in NIP Limited V Zambia State Insurance Corporation Limited¹ said:

“... the present provisions for increasing the standard rent completely ignore the present rate of inflation and legislators may consider alterations in the law...”

The Act has not been subjected to any sort of review. Although the whole purpose of introducing rent controls on dwelling houses was noble (and had the tenants interests at heart) the Act has not changed to suit drastically altered social and economic conditions.

The Act, we believe, has been ineffective not only because of several faulty provisions but because of the whole idea of controlling rent which is idealistic and too theoretical. In it's state now, the Rent Act can only be effective if firstly, a control is maintained on products necessary for the putting up of the dwelling house otherwise, with no control on building products due to the instability of the Kwacha it would be unreasonable to control rent. For example, a house can be built for K10,000,000.00 this year. A similar house a year later would cost triple the amount of the house built for K10,000,000.00. Applying the standard rent formula would not make economic sense since construction cost of the former house will be less than the latter and rent would also be accordingly different for the two houses. This state of affairs explains why landlords have

¹ SCZ/1/1994 (unreported)

shunned the standard rent formula since inception of the Act. Secondly apart from having control on products necessary to build a dwelling house, the effectiveness of the Rent Act would also mean setting up an efficient and vast monitoring mechanism.

In practical terms, none of these two prerequisites are within the governments consideration, given our poor economy. The solutions really lie basically in economics. That is to say, as an alternative and viable means of ensuring that dwelling houses are in reach of tenants, market forces of supply and demand ought to be allowed to function. In other words if more houses are made available to the people, this would ensure an eventual fall in rent charges. Actually, governments move to build houses at the Benny Mwiinga Housing Complex under the Presidential Housing Initiative is welcome as such projects have the effect of lowering rent charges. Control of rentals by an "invisible force" so to speak is much more efficient. All the government has to do is to build as many houses as possible. Emphasis should be placed on low cost flats as opposed to bungalows, reason being that low cost flats can accommodate a lot of people.

Government, it is submitted, instead of attempting to control rent via standard rent, should instead utilize incentive methods. An example of the functioning of such incentives would be by the use of the tax handle. Government can offer attractive tax holidays to companies and individuals who invest in building housing facilities. By the use of the land development fund, government can

open up new areas of development by building infrastructure such as roads, hospitals and schools. Companies and individuals can then construct houses or flats in such areas. This would actually release the pressure on the few dwelling houses and once the pressure is released, rentals will just come down as a result of the market forces.

Although we are of the view that rent controlling provisions, that is the standard rent, in the Rent Act should be scrapped, other provisions in the Act such as those which attempt to guarantee the security of tenure, ought to be allowed to exist to prevent any arbitrary eviction of tenants. The Act should also be widely publicized so that tenants are aware of their secured tenure. Both broadcasting services, that is print and electronic media, and the use of pamphlets could be used to achieve this purpose. Far reaching seminars on this subject could also be employed. Mass education and sensitisation is important especially now that government has sold houses to sitting tenants. A lot of these houses have now become subject to the Rent Act, meaning more tenants have now come under the protection of the Act.

We feel the Landlord and Tenant (Business Premises) Act has been successful both in the second and third republics due to the fact that it has given latitude to the parties to agree on terms of the tenancy agreement.

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