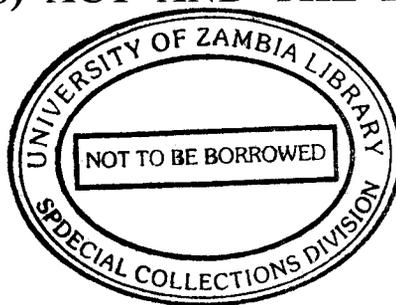


**LANDLORD AND TENANT RELATIONSHIPS IN
ZAMBIA; AN EVALUATION OF THE LANDLORD AND
TENANT (BUSINESS PREMISES) ACT AND THE RENT
ACT**

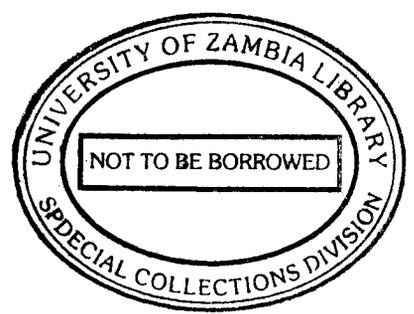


BY

HASTINGS SIAKOOLA PASI

**BEING A PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENT FOR THE AWARD OF A BACHELOR OF LAWS DEGREE
(LL.B) OF THE UNIVERSITY OF ZAMBIA**

January, 2007



The university of zambia

School of Law

I recommend that the directed research under my supervision by

Hastings Siakoola Pasi

Entitled;

LANDLORD AND TENANT RELATIONSHIPS IN ZAMBIA; AN EVALUATION OF THE LANDLORD AND TENANT (BUSINESS PREMISES) ACT AND THE RENT ACT

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down the regulations governing directed research papers.

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MR. F. S. MUDENDA
(SUPERVISOR)

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DECLARATION

I, HASTINGS SIAKOOLA PASI Computer No. 20065868 hereby declare that I am the author of this directed research paper entitled “LANDLORD AND TENANT RELATIONSHIPS IN ZAMBIA; AN EVALUATION OF THE LANDLORD AND TENANT (BUSINESS PREMISES) ACT AND THE RENT ACT” and that it is a creation of my own ingenuity, due acknowledgement has been given where other scholars’ works have been cited. I truly believe that this paper has not been previously presented in the school for academic work.

I remain accountable for the shortcomings in this work.

Student’s Name:.....Pasi, Hastings Siakoola

Signature:.....

This day...19th... of January, 2007

DEDICATION

This paper is dedicated to Freeman Umali Phiri. It has been seven years now since your tragic death that robbed me of my best friend. We dreamed of studying law together and know you are proud of me. I will always treasure the nine years I knew you.

MYSRIP

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CHAPTER ONE

1.0 HISTORICAL BACKGROUND

In the English feudal economy prior to the thirteenth century, most landholding seems to have been by estate in the fee or by estate for life in some instances. Leases or terms of years were not common, although not unknown¹. From towards the end of the twelfth century, leases for terms of years became common though they did not form part of either the feudal system which was based on military, socage or villain tenures. During this period, leases were mainly used for purposes of raising money and as devices to evade the medieval church's prohibition on usury.² For example, A being in need of some funds would make a lease for years to B for a lump sum consideration paid in advance. B would expect to recover the consideration and make a profit from the use of the land during the term. This had an advantage of devolving by will, unlike estates of freehold before the Statute of wills in 1554.³

In their legal incident, terms of years differed from other interest in land. For whatever purposes the lease was made, the lessee was at first given scant protection by the law in the enjoyment of his possession.⁴ They did not confer any freehold nor did they entitle the lessee to the ordinary possessory remedies, which were only available to freeholders. The lessee could only recover damages from the lessor in covenant if he was ejected by the lessor, or on warranty if ejected by a stranger. However, he was accorded protection against third parties in an action of trespass. In the year 1235 the new action of '*quare*

¹ Pollock & Maitland, History of English Law vol. II, 2nd ed. (1923), pp 111-113

² Barnes, M. and Dobry G., Hill and Redman's Law of Landlord and Tenant, 15th ed. p. 3

³ *ibid*

⁴ Holdsworth, Historical Introduction to the Land Law (1927), pp 71-73

ejecit infra terminum' gave the lessee of a leasehold a remedy to recover possession against any ejector who had purchased from his lessor. This was however narrowly interpreted by the courts.⁵ By the fifteenth century a variety of the writ of trespass, '*de ejection firmæ*' gave a lessee a remedy in damages against all persons and in the year 1499 it was finally decided that possession could be recovered in this action which became to be known as the action of ejectment.⁶ This action which was initially confined to leaseholders became the universal form of action for recovering possession of land.

In denying to the lessee the benefit of real actions, it was said that he had possession but not seisin which was ascribed to the lessor. The development of an ejectment into a possessory action was due to economic causes. Not only were damages an inadequate remedy for an ejectment from the viewpoint of the lessee, the lack of a remedy for the recovery of the land itself tended to aid landlords in converting arable land into pasture causing depopulation of the country, a practice the government had to end.⁷ This was due to the rapid increase of the agricultural leases for years caused by the decay of the labour service system.

After ejectment became a possessory remedy, the lessee for years was in as good a position as the owner of any other estate in land as regards ejections. In fact, his position can be said to have been even better. This is because his remedy was superior to the real actions and hence tenants of freehold interests sought, and achieved, its benefits by means of fictitious leases. Yet the lessee's interests continued to be labeled personal

⁵ Supra note 4, at 19

⁶ Pollock & Maitland, supra note 1, at 109

⁷ Holdsworth, W. A History of English Law, vol.III, 5th ed (1942), p. 216

property, a chattel real. It is probable that the reason for this lay not so much in the fact ejection began as a personal action as in the fact that leases were frequently used for security purposes.⁸ Real property interests could not be devolved by will until the Statute of Wills was passed in 1540⁹ and not completely so until the abolition of military tenure in 1660.¹⁰ One who had invested money in a premium lease or taken a lease by way of mortgage would very likely desire this power of testamentary disposition and perhaps also that the intestacy property should descend by the rational rules of rules of succession applicable to personalty.¹¹

Apart from the matter of testamentary disposition and inheritance, the lease for years had other advantages which at various times in its evolution made it popular as a method of conveyancing interest in land. The certainty and almost infinite variety in duration of the term caused it to supplant leases for life. Until the Statute of Frauds,¹² leases could be created by parole or by writing without formality and could be created to commence in the future, as freeholds could not under the common law. The non-freehold character of leases for years also resulted in their being used to avoid the consequences of the Statute of Uses, which did not execute uses limited upon non freeholds.

In the modern times, leasehold tenure is the only tenure of practical importance.¹³ The lease has been one means of filling the basic need of securing the use of land without the

⁸ Lessar Hiram, *Landlord and Tenant* (1957), p. 176

⁹ Hen. VIII, C. 1 (1540)

¹⁰ 12 Car. II, C. 24 (1636)

¹¹ *Supra* note 8, p. 177

¹² 29 Car. II, C. 3 (1676)

¹³ *Supra* note 2, p. 4

need of purchasing it, which usually requires a lot of capital. A large percentage of land used in business, housing accommodation and agriculture today is held in leasehold.¹⁴ A lease is therefore indispensable in the modern capitalist economy.

1.1 THE NATURE OF LANDLORD AND TENANT RELATIONSHIP

The relationship of landlord and tenant may be defined as the relationship that exists between parties to a lease. It usually arises when the owner of an estate grants, usually by means of contract, the right to possession of his land or part of it, to another person to hold for a specific period of time. Such a grant is what is called a lease, demise or tenancy. The grant is known as the landlord or lessor and the grantee is known as the tenant or lessee. The period granted is the term or term of years.¹⁵

This relation is one of tenure which means that it is for a period which is either subject to definite limit or can be made subject to a definite by either party. As a rule, the landlord confers on the tenant the right to exclusive possession for a period which is subject to a definite time limit, as in the case of a lease for a term of years, or which though indefinite can be made subject to a definite limit by either party as in the case of a tenancy from year to year.¹⁶

The landlord usually remains with an interest in the property called the reversion which entitles him to receive periodic payments from the tenant as consideration for the right to exclusive possession, use and enjoyment of the land and tenements which belong to the

¹⁴ Supra note 8, p. 177-179

¹⁵ Blundell, L. A. and Wellings, V. G., Woodfall's Landlord and Tenant, 27th ed. vol. I, p. 1

¹⁶ Supra note 2

landlord. This consideration is called rent and it is usually an essential element of the relationship of landlord and tenant. However, a tenancy may be created; known as a tenancy at will, by the mere occupation¹⁷ or temporary possession of the land with the landlord's consent and rent is not essential as in the case of any letting if the lease is by deed.

In essence, a lease is a contract where the tenant is granted exclusive possession of the premises, use of the property and enjoyment of tenements by the landlord in consideration of the payment of rent. The fact that a lease is a contract makes it subject to the law relating to contracts. Originally, the lessee's rights were purely contractual but from the sixteenth century onwards, his interest has been as fully protected as that of the owner of any possessory interest in land.¹⁸

A lease operates to convey possessory and other interests in land from the lessor to the lessee. Therefore, a lease is a contract as well as a conveyance by which a landlord transfers a portion of his interests in the land to a tenant for a period of years. A lease is never a conveyance of the entire interest which a landlord possesses in the land as this would amount to a sale of land. A landlord always retains a reversion to him which entitles him to receive rent to possession of the land upon expiry of a lease.¹⁹ The fact a lease is a conveyance makes certain provisions of the Statute of Frauds 1677²⁰, Conveyancing Act of 1911 the common law on conveyancing applicable to leases.

¹⁷ Walton, R. and Essayan, M., (ed) Adkin's Landlord and Tenant, 16th ed. p. 32

¹⁸ Suora note 15, p. 34

¹⁹ Suora note 17, p.32

²⁰ Section 4

1.2 VARIETIES OF TENANCIES

A. TENANCY FOR YEARS

A tenancy for years is a tenancy for any period, the commencement and duration for which are certain. Both the maximum duration and the date of commencement must either be certain at the time the tenancy is created or capable of being rendered certain before the tenancy takes effect. A tenancy for years arises by express contract although the contract may sometimes be created as a result of a statute rather than the express consent of the parties. For example, the court may grant a new tenancy of a business under section 10 of the Landlord and Tenant (Business Premises) Act.²¹

The term may commence either immediately or from a future or even a past date. Although a term may be expressed to commence from a past date, the actual interest and liability of the tenant only commences on the actual execution of the deed.²² It is sufficient if the commencement of the date ascertained with certainty at the time when the lease is to take effect. Therefore, a term may be made to commence at the death of someone, the expiry of a number of lives or upon some occurrence of a future event.²³ A term of a tenancy may be for any length of time but not exceeding perpetuity. This means that any term granted to take effect more than twenty-one years from the date of the instrument purporting to create it, is void and any contract made on or after such date to create such term is likewise void.²⁴

²¹ Chapter 193 of the Laws of Zambia

²² Supra note 3, p. 54

²³ *Cloves v. Hughes*, (1870), L.R. 5; Exch. 160

²⁴ Supra note 3, p. 55

B. TENANCY FROM YEAR TO YEAR

A tenancy from year to year is periodic tenancy which continues for a year and thereafter from year to year until determined by issuance of proper notice by either the landlord or the tenant. If no such notice is given, the tenancy will continue from year to year until either surrendered, extinguished by the Statute of Limitation or the landlord's title ceases. The death of either party will not extinguish it.²⁵

A tenancy from year to year may be created by statute, by express agreement or by implication of law. Where a person is let into possession under a mere agreement for a future lease; he becomes a tenant at will.²⁶ However, when such a tenant pays or agrees to pay rent, there is prima facie tenancy from year to year.²⁷ This presumption of a tenancy can be rebutted by either party adducing evidence to prove contrary intention of the parties. Payment of rent does not in itself create tenancy from year to year, but is only evidence from which the fact may be found.²⁸

There is a further rebuttable presumption that when an implied tenancy from year to year arises as a result of a person retaining possession after the determination of a former tenancy, the terms of the implied tenancy are the same as those of the former tenancy so far as consistent with a yearly tenancy.²⁹

²⁵ Hull v. Wood, (1845) 14 M. & W. 682

²⁶ Supra note 15, p. 270

²⁷ ibid

²⁸ Finlay v. Bristol and Exeter Ry. (1852) 7 Exch. 409

²⁹ Supra note 3, p. 44

C. PERIODIC TENANCY FOR LESS THAN A YEAR

A periodic tenancy for less than a year may be a weekly tenancy, a monthly tenancy or a tenancy for any other period chosen by the parties. Such a tenancy does not expire at the end of the week, month or period as the case may be. It can only be determined by proper notice to quit by either party.³⁰

A periodic tenancy for less than a year arises by express agreement or by implication of the law. A tenancy for weekly, monthly or other periodic rent leads to a presumption of such a periodic tenancy as the case might be. A holding over with the consent of the landlord, which prima facie gives rise to a presumption of tenancy at will, may be converted by the parties through their acts or expressly into a weekly, monthly or other periodic tenancy.³¹

D. TENANCY AT WILL

A tenancy at will is a tenancy that can be determined at the will of either party. Like other tenancies, a tenancy at will arises by contract, express or implied, binding both the landlord and the tenant. It may also arise by implication of the law. A tenancy at will must be at the will of both parties.³² It is of no effect if the agreement be expressed that it will terminate at the will of the landlord only or the tenant only; the law will imply that both the parties have the right to terminate the tenancy.

³⁰ *Mellow v. Law* (1923) 1 K. B. 522

³¹ *Cole v. Kelly* (1920) 2 K. B. 106; C.A., at p. 132

³² *Supra* note 3, p. 35

A tenant who at the end of his lease becomes a tenant at will holds under such terms of the lease in all other respects, except the duration of time; and when he pays or agrees to pay any rent therein expressed to be reserved he becomes a tenant from year to year.³³ So long as the tenancy exists, the landlord cannot recover the premise in an action for the recovery of the land without a previous demand of possession or other determination of the tenancy.³⁴

A tenancy at will is determinable by either party on his express or implied intimation to the other party that the tenancy should not come to an end. However, this is subject to applicable statutory provisions under which the tenant is given security of tenure. At the determination of such a tenancy, a tenant should be given reasonable time to remove his chattels.

E. TENANCY AT SUFFERANCE

This arises when a tenant who held a lawful title continues in possession after expiry of his title without any statutory right and without assent or dissent of the person entitled to the property. This tenancy only arises by implication of the law and cannot be created expressly by contract.³⁵

A tenant at sufferance by virtue of his possession maintains an action of trespass and can bring an action for ejectment.³⁶ He may also leave at any time without giving notice.³⁷

³³ Ridge v. Bell (1793) 5 T. R. 471

³⁴ Lewis v. Beard (1811), 31 East. 210

³⁵ Supra note 3, p. 32

³⁶ Asher v. whitlock

There is a difference between a tenant at sufferance and a tenant at will in that the former holds over by wrong doing after the expiration of a lawful lease while the latter is always by right.³⁸

1.3 LEASES DISTINGUISHED FROM OTHER AGREEMENTS

A. LEASES AND LICENCES

Whether a transaction is a lease or a licence depends primarily on the intentions of the parties. A lease differs from a licence in a number of ways. The most paramount being that a lease entitles a tenant to the exclusive possession of the property, whereas a licence does entitle the licensee to exclusive possession.³⁹

In the case of *Chilufya v. Kangunda*

Another distinguishing feature is that a lease conveys an estate in the land to the tenant but a licence passes no estate in the land to the licensee. A licence merely gives the licensee the right to use the premises for a given purpose and to do something rightfully on the land which would otherwise be a trespass.⁴⁰

A lease granted cannot be revoked but a licence may be revoked by the grantor at any time upon reasonable notice. This is so, even where a licence is granted by deed. Another distinction is that a lease can be assigned to a third party in the absence of express

³⁷ Supra note 3, p. 33

³⁸ *Cobb v. Lace* (1952) 1 All E. R. 1199

³⁹ Supra note 15, p. 287

⁴⁰ *Thomas v. Sorrel* (1673), Vaugh. 330, 351

stipulation in the agreement to the contrary, but a licence cannot be assigned unless coupled with an interest.⁴¹

A lease does not come to an end if the original landlord ceases to be the owner, for example, if he sells the property or dies. A licence on the land is determined if the grantor ceases to hold the property over which it is exercised.⁴²

B. LEASES AND AGREEMENTS FOR LEASES

A lease is a contract or agreement between the landlord and tenant with the object and effect of conveying an estate in land to the tenant and of giving the tenant possession of the property let. An agreement for the lease on the other hand is a contract between two parties to grant and take a lease at some future time. “The object of an agreement for a lease is neither to convey land nor to give possession of but merely to arrange that a lease shall be granted in accordance with the agreement that is made”⁴³

As a rule, the courts in determining whether a transaction is a lease or an agreement for a lease, where difficulty arises, will give effect to the intention of the parties as may be gathered from the document. Even if a document is drawn as a lease but contains a stipulation that it shall not operate until something further is done, the document will not be construed as a lease but merely as an agreement for a lease which will commence when such a thing is done. Similarly, even the most informal words, provided they show

⁴¹ *Musket v. Hill* (1839), 5 Bing. N. C. 694, 707

⁴² *Webb v. Paternoster* (1619), *Proph.* 151

⁴³ *Adkin, Landlord and Tenant*, *supra* note 17, p. 31

that the parties have mutually agreed that one will give and take possession, it will be construed as a lease.⁴⁴

⁴⁴ *ibid*

CHAPTER TWO

BUSINESS TENANCIES

1.0 INTRODUCTION

Zambian legislation has its roots in the English legal system and legislation governing landlord-tenant relationships is no exception. In fact much of the Zambian legislated law is either English legislation extended to Zambia or legislation mainly based on English Acts with a few modifications to suit the Zambian environment. Landlord and tenant relationships as regards business premises are regulated mainly by the Landlord and Tenant (Business Premises) Act, as well as the common law principles on which legislation is based. It is apparent that the Zambian Landlord and Tenant (Business Premises) Act has largely been based on part two of the English Landlord and Tenant Act of 1954⁴⁵. This is evident from the similarities in the provisions notwithstanding a few modifications. It is therefore prudent that events leading to the enactment of legislation to intervene in the landlord-tenant relationship in England are also examined.

1.1 PRE-1954 LEGISLATION

Legislation to limit the rights of landlords to increase rents and obtain possession was first enacted in England during the First World War, 1914-1918 to meet the situation arising from the shortage of housing accommodation and the consequent increase in rents.

⁴⁵ *Musingah v. Daka* (1974) Z. R. 37 (H. C.)

The problems of security of tenure for business tenants in England were first dealt with as early as 1889. The Select Committee on Town and Holdings recommended that the problem should be dealt with by compensating tenants for loss of goodwill and for improvements rather than by giving to tenants the right to renew their leases.⁴⁶ However, the first permanent in England was part 1 of the Landlord and Tenant Act of 1927 introduced by the Administration of Mr. Baldwin.

Part 1 of the 1927 Act entitled a tenant of business and professional premises to obtain compensation on quitting the holding for improvements *carried out by himself or his predecessors in title* which at the termination of the tenancy add to the letting value of the holding. The Act also provided that a tenant should receive compensation for goodwill and for renewal. Goodwill in this sense meant the increased rental value of the premises after the departure of the tenant.

1.2 THE 1954 LANDLORD AND TENANT ACT

The groundwork for Part II of the Landlord and Tenant Act of 1954 was laid by the final report of the Committee under the Chairmanship of Lord Justice Jenkins in June 1950.⁴⁷ Among the terms of reference of the committee was to consider whether business tenants should enjoy security of tenure and whether the rents of business premises should be controlled. The Committee recognized as justifiable many of the complaints raised against the 1927 Act. It recommended that there should be no general control of rents of business premises like that of the residential rent under the Rent Acts.

⁴⁶ Barnes, M. et al ed. Hill and Redman's Law of Landlord and Tenant. 17th ed. Vol. 1. p.685

⁴⁷ Cmd 7982

However, it did recommend that there should be a radical increase in the security of tenure given to business tenants and that the right to renew existing leases should be the primary remedy available to such tenants.

Most of the recommendations of the Committee were incorporated in the 1954 Act, such as the landlord's right to defeat, on certain grounds, the tenant's claim for a new tenancy. Another one was the recommendation that new tenancies should not exceed a term of 14 years and should be on the same terms as the existing tenancy. However, certain recommendations did not find their way into the Act prominent among them was the recommendation that a tenant should only be entitled to a new tenancy if he could show that without the renewal the value as a going concern of his business would be substantially diminished.⁴⁸

The 1954 Act substantially changed the 1927 Act by enhancing the security of tenure for tenants of business premises. Compensation for improvements, which was the creature of Part 1 of the 1927 Act, was retained. However, such rights as the right to compensation for goodwill under the 1927 Act were repealed by the 1954 legislation.

1.3 BACKGROUND TO ZAMBIAN LEGISLATION

The Landlord and Tenant (Business Premises) Bill was read for the first time in the National Assembly on November 23, 1971.⁴⁹ It was read for the second time on

⁴⁸ supra note 2. p. 686

⁴⁹ Zambia National Assembly Hansard 1971 No. 28, p. 62

November 28, 1971 by, the then Minister of State for Provincial and Local Government and Culture, Mr. J. H. Monga. It was the minister's intention to introduce at the same time a complimentary bill concerned with residential premises only. The aim of introducing two bills at once, one concerned with lettings of business premises only and the other concerned with residential premises only, was that together the two bills would supersede the Rent Control (Temporary Provisions) Act of 1968, which applied to both commercial and residential premises. This Act only applied to the cities of Lusaka, Kitwe and Ndola, and was meant to expire on 31st December, 1971 unless extended.

The 1968 Act was never intended to have a lasting but a temporary effect. This was also made clear at the time the Bill was introduced in the National Assembly. The minister stated that the 1968 Act was indeed a short-term measure, which would be replaced as soon as the landlord and tenant legislation in a comprehensive form could be introduced.

There are two main reasons that prompted the need to enact the Landlord and Tenant (Business Premises) Act. The first one is that, after seven years of independence there was a progression in building development and an increase in the use of these properties for business. The other reason was the need to tailor legislation to conform to the national economic policies as set out in the Second National Development Plan. The Act therefore, sought also to empower the indigenous Zambians who were the majority of tenants against their Landlords who were mainly either non-Zambians or non-indigenous Zambians.

2.4. THE LANDLORD AND TENANT (BUSINESS PREMISES) ACT

2.4.0 OBJECTIVES OF THE ACT

The main objectives of the Act are found in the Ministers speech when introducing the Bill as well as in the preamble of the Act. During the Second Reading of the Bill in the National Assembly, the Minister set-out the objectives of the Act as follows, “Mr. Speaker, Sir, the adoption of the principles I have mentioned means that the sum and the substance of the Bill is the security of tenure for tenants who have built-up their businesses, with the additional security from any risk of a landlord, either at the end of a tenancy or at the commencement of a first tenancy...”⁵⁰

The preamble of the Act sets out the objectives of the Act as follows, “to provide security of tenure for tenants occupying property for business, professional and certain other purposes and to enable such tenants obtain new tenancies in certain cases.

2.4.1 SCOPE OF THE ACT

The provisions of this Act only apply to certain holdings, that is, holdings where the premises are held under a lease and used wholly or partly for carrying upon them any trade. The Act applies to all business tenancies in Zambia with certain exceptions.⁵¹

The term tenancy is defined under section two of the to mean “a tenancy of business premises (whether written or verbal) for a term of years certain not exceeding twenty one years, created by a lease or under-lease, by a tenancy agreement or by operation of the

⁵⁰ *op.cit.* p. 136

⁵¹ section 3 (1), Landlord and Tenant (Business Premises) Act

law, and includes a sub-tenancy but does not include a mortgagor or a mortgagee as such and references to the granting of the a tenancy and to demised property shall not be construed accordingly.

The Act however does not shed any light on the meaning of the expression ‘term of years certain not exceeding 21 years.’ The court has relied on the common law interpretation as given by the English courts in interpreting the English Act. In the case of *Musingah v. Daka*⁵², the High Court relied on English authorities in its holding that the expression cannot be given its ordinary meaning. The meaning of the expression was defined by Doyle, C. J. to mean “a term certain not exceeding twenty one years.”⁵³ In the case of *Patel Zambia Ltd v. Bancroft Pharmaceuticals Ltd*⁵⁴ the court stated that, in effect, “a term of years certain” seem to mean a lease for any period having a fixed and certain duration as a minimum and held a monthly tenancy to be such.

The Act does not apply to some tenancies listed under section 3 (2). These are;

- (i) Agriculture holdings;
- (ii) Premises let or used exclusively for residential purposes;
- (iii) Premises let by government or District Councils;
- (iv) Premises held by a tenant by virtue of his employment;
- (v) Premises held by a tenant under a tenancy for a term of years certain exceeding 21 years;

⁵² (1974) Z. R. 37 (H. C.)

⁵³ *Musingah v. Daka*, supra note 1

⁵⁴ (1974) Z. R. 270

- (vi) Premises comprised in a tenancy granted for a term not exceeding three months from its beginning; or
- (vii) The tenant has been in occupation for a period, which together with any period or during which his predecessor in the carrying on of the business carried on by the tenant exceeds six months.

A tenancy does not qualify under this Act unless the whole or part of the demised premises is occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.⁵⁵ The Occupation and the purpose to which it is devoted are subject to the statutory definition of the word 'business.' The Act defines the word 'business' as "a trade, an industry, a profession or an employment and includes any activity carried on by a body of persons whether corporate or unincorporated, but does not include farming on land."⁵⁶

Thus, there are three basic requirements that are essential conditions if a tenancy is to be protected under this Act. The first one is that there has to be a tenancy. This means that that a mere license does not confer statutory protection. Secondly, the tenant has to occupy at least a part of the premises, which means a tenancy of an incorporeal hereditament such as a right of way is not within the protection of the Act since such use or enjoyment of such does not require occupation. Personal occupation by the tenant is not essential; occupation by an agent or management is sufficient.⁵⁷ The court of appeal by a majority decision held that the board of governors of a hospital was in such a

⁵⁵ Blundell L. A. and Wellings V. G. ed. Woodfall's Law of Landlord and Tenant, 27th ed. Vol. 2, p. 1308

⁵⁶ Section 2, Landlord and Tenant (Business Premises) Act

⁵⁷ Cafeteria (Keighley) Ltd v. Harrison (1956) 168 E. G. 668, *per* Denning L. J.

responsible position in regard to the hospital that the board would be in occupation for the purposes of the Act.⁵⁸

2.4.2 SECURITY OF TENURE

The main purpose of this Act as stated in its preamble is to give security of tenure to tenants of business premises. This is done by a number of provisions in the Act that prevent a landlord from terminating a tenancy at will, provisions that prescribe ways and means of terminating a subsisting tenancy and provisions giving courts power to order for the grant of a new tenancy.

A. CONTINUATION OF TENANCIES

Tenancies to which the Landlord and Tenant (Business Premises) Act applies are by section 4(1) continued automatically until brought to an end by statutory notice given by the Landlord or the tenant, or until the occurrence of certain other contingencies⁵⁹. This means that when a contractual tenancy comes to an end, a new tenancy may come into existence either by agreement of the Landlord and tenant⁶⁰ or by order of the court⁶¹. In the meantime section 4 provides for the old tenancy simply to continue. This is done without the need of any notice or other action taken by either party. In short, section 4 provides for the estate in the land vested by the tenant to be prolonged until brought to an end in one of the prescribed ways under the Act⁶².

⁵⁸ Hills (Patents) v. University College Hospital Board of Governors [1956] 1 Q. B. 90, *per* Denning L. J.

⁵⁹ Landlord and Tenant (Business Premises) Act

⁶⁰ Section 9, Landlord and Tenant (Business Premises) Act

⁶¹ Section 10, Landlord and Tenant (Business Premises) Act

⁶² *Supra* note 2, p 321

Thus, all terms and conditions of the contractual tenancy will continue to govern the prolonged tenancy. This is notwithstanding the Landlord's right to termination of the contractual relationship. A tenancy being continued under section 4 can be dealt with as any other tenancy, that is, it can be assigned, surrendered or forfeited in the normal ways.

There is a difference between terminating the contract and terminating the tenancy.

B. APPLICATION FOR NEW TENANCIES

(I) APPLICATION TO THE LANDLORD

A tenant may request for a new tenancy from the Landlord under section 6 of the Act. Not all tenants can make this request but those whose current tenancy, that is a tenancy which they hold for the time being⁶³, is a tenancy for a term certain and thereafter from year to year.

Section 6(1) "only enables a tenant from year to year to apply for a new tenancy where the tenancy from year to year was provided for by the new grant in addition to a term of years certain, and not where, by implied agreement, it has been grafted upon by the original term of years⁶⁴.

No request for a new a new tenancy can be made once the landlord has served a notice, under section 5, to terminate the current tenancy, or if the tenant has already given notice to quit or notice under section 8⁶⁵. A tenant who has been served with a notice by the landlord under section 5 can only exercise his right of giving notice to the landlord of his

⁶³ Section 6 (1), Landlord and Tenant (Business Premises) Act

⁶⁴ Supra note 11, p 1337

⁶⁵ Section 6 (4), Landlord and Tenant (Business Premises) Act

unwillingness to give up possession and apply under section 4 (i) (a). Once the tenant has served a request for a new tenancy the landlord cannot thereafter serve a notice under section 5 nor can the tenant serve a notice to quit or a notice under section 6 (1).

(ii) APPLICATION TO THE COURT

A tenant may apply to the court for a new tenancy and the court has jurisdiction to order the grant of a new tenancy.⁶⁶ There are only two circumstances in which such an application can be made. The first is where the landlord has terminated the current tenancy by notice served under section 5 of the Act. The Supreme Court re-affirmed this when overturning a ruling by the High Court in the case of *Minos Panel Beaters Limited v. Chapasuka*⁶⁷. The second is where the tenant himself has terminated the current tenancy by notice by a request for a new tenancy under section 6.

The Act provides for a strict timetable governing the application to the court for a new tenancy. Section 10 (3) states that, "Subject to the provisions of subsection (4), no application under subsection (1) of section four shall be entertained unless it is made not less than two nor more than four months after the giving of the landlord's notice under section five or, as the case may be, after the making of the tenant's request for a new tenancy". Subsection 2 gives a further requirement that the tenant has notified the landlord within two months that he is unwilling to give up possession.

The word court has been defined under section 2 to mean;-

⁶⁶ Section 10 (1) Landlord and Tenant (Business Premises) Act,

⁶⁷ (1986) Z. R. 1 (S.C.)

- “(a) In relation to any premises the annual rent of which exceeds three thousand six hundred kwacha, the High Court; and
- (b) In relation to any other premises, a subordinate court of the first class presided over by a senior resident magistrate or a resident magistrate”.

C. TERMINATION OF TENANCES

The fundamental rule of this Act is that a tenancy within its scope can only be terminated by means prescribed in the Act. A tenancy under this Act may be terminated either by the landlord’s notice to terminate a tenancy, notice to quit by the tenant, surrender, forfeiture or by a new tenancy granted by agreement.

(i) TERMINATION BY THE LANDLORD’S NOTICE TO QUIT

The primary method given to a landlord under the Act for determining a tenancy is by service of a notice under section 5. There are certain requirements a notice under this section must meet if it is to be effective.

The first is that the notice should be in the prescribed form and should specify the date on which the tenancy is to come to an end⁶⁸. In the case of *Mususu kalenga Building Limited v. Richmans Money Lenders enterprises*⁶⁹ the supreme Court held that it was incumbent upon the appellants to comply with the provisions of Act by giving the respondent a proper notice terminating the lease and that they acted in their own peril by

⁶⁸ Section 5 (1 Landlord and Tenant (Business Premises) Act),

⁶⁹ SCJ No. 4 of 1999

not doing so. The landlord may rely on the notice to terminate given by the previous landlord⁷⁰ and may be signed by signed on behalf of the landlord by his advocate⁷¹.

There is also an overriding rule that the date of termination must not be more than twelve and not less than six months before the date of termination. The rationale of this rule seems to be that, since the object of the Act is to enhance and not reduce the protection of business tenants, a tenancy for a term certain should not be made to come to an end earlier than the term date.

The notice must also require the tenant to notify within two months whether he will be willing to give up possession at the date of termination.⁷² The notice under this section must also state whether the landlord will oppose an application by the tenant to the court for the grant of a new tenancy and, if so, must state the grounds under section 11 he would do so.⁷³

These requirements are very important, for without them the notice given by the landlord is invalid and the tenancy carries on as continued under section 4.⁷⁴

(ii) TERMINATION BY TENANT'S NOTICE TO QUIT

Section 4 of the Act does not oblige the tenant to continue with the tenancy. A tenant's primary method under the Act of determining a new tenancy under the Act is by is by

⁷⁰ Apollo Refrigeration services Co. Ltd v. Farmers House Ltd (1985) Z.R. 182 (S. C.)

⁷¹ Afro Butcheries Limited v. Eeves Limited Appeal No. 28 of 1987

⁷² Section 5 (1), Landlord and Tenant (Business Premises) Act

⁷³ Section 5 (6), Landlord and Tenant (Business Premises) Act

⁷⁴ Supra note 11, p 1330

requesting for a new tenancy under section 6. However, the tenancy may not wish to continue with the tenant because he no longer desires to continue occupying the demised premises. Such a tenant does not require any further protection from the Act and can give to the landlord notice that he does not wish the tenancy to be continued and section 4 shall have no effect to the tenancy⁷⁵. He must give the notice at least three months before the term date.

Where a tenancy originally granted for a term certain has been continued under section 4 (1), the tenant can bring the continuation to an end by serving on his immediate landlord not less than three months notice in writing⁷⁶.

(iii) TERMINATION BY NEW TENANCY GRANTED BY AGREEMENT

Another case where the current tenancy, whether or not has been continued under section 4, comes to an end is provided for under section 9. The Act states, “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”.

Once such an agreement is made for a new tenancy to commence from a future date, the tenant cannot change his mind and claim a tenancy under the Act. This section has been worded in such a way that it will apply to an agreement for a new tenancy to commence

⁷⁵ Section 8 (1), Landlord and Tenant (Business Premises) Act

⁷⁶ Section 8 (2), Landlord and Tenant (Business Premises) Act

during the subsistence of an existing contractual term and the latter will automatically come to an end on the date agreed for the commencement of the new term⁷⁷.

(iv) TERMINATION BY FORFEITURE OR SURRENDER

These are methods of determining a tenancy under common law, which remain effective under the Act.

The law as relates to forfeiture is unaffected by the Act. The landlord can always seek to end the tenancy for breach of a covenant in accordance with the usual forfeiture clause⁷⁸. Forfeiture always operates subject to the rights of the tenant and sub-tenant to relief against forfeiture under common law. Unless the tenant can avoid the forfeiture under common law, he will lose all his tenancy rights and security of tenure. Forfeiture an estate also brings to an end all inferior tenancies such as a sub-tenancy⁷⁹

The Act under section 4 (2) also allows for determination of a tenancy under the Act by surrender, expressly or by operation of the law. Surrender by operation of the law arises where the tenant quits the premises by a mere common law notice to quit rather than a notice to quit in a prescribed form under the Act⁸⁰. Surrender also deprives the tenant of the rights to continuation of the tenancy under section 4 and the right to a new tenancy under section 6.

⁷⁷ Supra note 11, p 1328

⁷⁸ Supra note 2, Hill and Redman's Law of Landlord and Tenant, p 700

⁷⁹ Supra note 11, p 1328

⁸⁰ Bolton (H.L.) (Engineering) Co. v. T. J. Graham & Sons [1957] 1 Q.B.159

D. TERMS OF NEW TENANCIES

The Act deals with terms of new tenancies ordered by the court under headings of property, duration, rent and other terms.

(i) PROPERTY IN NEW TENANCY

The general rule is that the new tenancy is to be of the holding. This means that all the property comprised in the new tenancy but excluding any part not occupied by the tenant or employee of his. There are three exceptions to this rule. The first is that the landlord can require that the tenancy shall comprise all the premises with the current tenancy not just the holding.⁸¹

The second one is that there may be a new tenancy of an economically separable part of the holding where the landlord intends to develop its remainder⁸² under section 11 (1) (f). Thirdly is where the parties agree that the new tenancy shall comprise premises different from the holdings.

(ii) DURATION

The duration of the new tenancy ordered is such as the landlord and tenant may agree or, in default of such an agreement, it is to be 'such tenancy as the may be determined by the court to be reasonable in all the circumstances' being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding fourteen days commencing from the end of

⁸¹ Section 14 (2), Landlord and Tenant (Business Premises) Act

⁸² Supra note 2, p 705

the tenancy⁸³. The court may also take into account the length of the old lease, time the tenant has been holding over⁸⁴.

(iii) RENT

The rent to be paid should be that at which the parties have agreed or, in default of agreement, determined by the court to be that at which, regard to the terms of the tenancy, the holding might reasonably be expected to be let in an open market.⁸⁵

E. OPPOSITION TO THE APPLICATION OF NEW TENANCY

A landlord can oppose an application by the tenant, under section 4 (1) for grant of a new tenancy, on grounds specified under section 11. The landlord can only rely on specific grounds which either he or his predecessor landlord has stated in his notice under section 5 or, as the case may be in his notice of opposition to tenant's request under section 6 (6).

(i) BREACH OF REPAIRING OBLIGATIONS

The mere proof of the existence of breaches of the repairing obligations does not in itself entitle the landlord to have the tenant's application dismissed. There is a discretion in the court to consider the seriousness of the breach in relation to the state of repair of the holding generally⁸⁶.

⁸³ Section 15

⁸⁴ *London and Provincial millinery Stores v. Barclays Bank* [1962] 1 W. L. R. 510

⁸⁵ Blundell L. A. and Wellings V. G. ed. *Woodfall's Law of Landlord and Tenant*, 27th ed. Vol. 2, p. 1311

⁸⁶ *Lyons v. Commercial Properties London* [1957] 1 W. L. R. 869

(ii) PERSISTENT DELAY IN PAYING RENT

The court has the discretion of weighing up the seriousness of the tenant's conduct and to decide whether or not in view of such conduct he merits a new tenancy⁸⁷. The term 'persistent delay' indicates a course of conduct over a period⁸⁸.

(iii) BREACHES OF OTHER OBLIGATIONS

Whether the breaches under this ground are substantial or not is a question of fact and a question where the court exercises its discretion⁸⁹. Any kind of waive or acquiescence in a breach on the part of the landlord will clearly militate strongly against the refusal of a new tenancy on the ground of that breach.⁹⁰

(iv) ALTERNATIVE ACCOMMODATION

Under this ground of opposition the landlord has to show four things. The first is that he has offered alternative accommodation to the tenant. Secondly, that the landlord is willing to provide or secure the provision of the alternative accommodation to the tenant. This means that the alternative accommodation should still be available to the tenant at the time the matter is in court. Thirdly, the term of the alternative accommodation must be reasonable having regard to the terms of the current tenancy. Fourthly, that the alternative accommodation and the time at which it will be available are suitable to the tenant's requirements; such as the requirement to preserve goodwill.

⁸⁷ Supra note 11, p1358

⁸⁸ Horowitz v. ferrand. [1956] 5 C.L. 207

⁸⁹ Betty's cafes v. Philips Furnishing Stores [1957] Ch. 67, per Birket L.J at 82, 83

⁹⁰ Supra note 11, p 1359

Once the landlord satisfies all these four requirements, the court has no discretion to order a new tenancy: it must refuse the application⁹¹.

(v) POSSESSION TO DEAL WITH PROPERTY AS A WHOLE

This ground applies when the tenancy is a subletting of a part of the premises comprised in a superior tenancy and the competent landlord has a reversion expectant upon the determination of that superior tenancy.⁹²

In the case of *ZIMCO Properties Limited v. Dinalar Randee Enterprises Limited*⁹³ the Supreme Court found that in order to satisfy the provisions of this section, a landlord would have to show the existence of a superior tenancy (other than that from the state), and that the landlord is the owner of the property at the termination of such superior tenancy and that a better rental yield would be realized by letting the property as a whole. The court in this case was also of the opinion that to allow the transfer of the property to the holding company for the purposes of accommodating its employees in the premises would defeat the object section 11 (2).

(vi) LANDLORD'S INTENTION TO DEMOLISH OR RECONSTRUCT

The landlord has to show that he cannot affect the demolition or reconstruction without obtaining possession of the holding⁹⁴. If the landlord can then reasonably carry out the demolition or reconstruction of the holding without interfering to a substantial extent or

⁹¹ *Betty's Cafes v. Philips Furnishing Stores*, supra note 36

⁹² Supra note 1, p. 704

⁹³ (1985) Z. R. 182

⁹⁴ *Bolton's (House Furnishers) v. Oppenheim* [1959] 1 W. L. R. p. 913

time with the tenant's use of the holding for the purposes of his business a new tenancy must be granted⁹⁵.

(vii) LANDLORD'S INTENTION TO OCCUPY HOLDING

Section 11 (2) states that the landlord cannot rely on this ground of opposition if his interest was purchased or created in the five years prior to the determination of the current tenancy and the holding has been comprised in the a tenancy or successive tenancies within the Act ever since his interest was purchased or created. The aim of this is to prevent persons to purchase to purchase the reversion upon business tenancies just before they end and obtain possession for their own purposes.

F. COMPENSATION

The principle which underlies compensation under the Act is that a tenant is entitled to be paid compensation amounting to a rateable value of the holding, when he is precluded from obtaining a new tenancy because of the landlord's opposition on grounds (e), (f) or (g).⁹⁶

“The grounds of opposition under the said paragraphs (e), (f) and (g) of section 11(1) of the Act, [i.e more valuable as a whole, demolition or reconstruction and own occupation respectively] are similar in that they are all for the landlord's benefit.”⁹⁷

⁹⁵ supra note 39

⁹⁶ Supra note 2, p. 707

⁹⁷ Mudenda, F. Protection of Tenants of Business Premise in Zambia; Lecture notes, unpublished

The precise circumstances in which the entitlement to compensation arises are twofold. The first is where there is an application for a new tenancy and the court is precluded from ordering the grant of a new tenancy on grounds (e), (f) or (g) under section 19 (1).

The second is where the landlord obtains premises under misrepresentation. Section 22 (1) states, “Where, under this Act, an order is made for possession of the property comprised in a tenancy, or an order is refused for the grant of a new tenancy, and it is subsequently made to appear to the court that the order was obtained, or the court was induced to refuse the grant, by misrepresentation or concealment of material facts, 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 the result of the order or refusal.”

CHAPTER THREE

RESIDENTIAL PREMISES

3.1 HISTORICAL BACKGROUND

The first legislation in England dealing with landlord and tenant relationship originated as emergency legislation during the First World War.⁹⁸ Prior to that, the law of landlord and tenant, which was largely based upon the leasehold system of land tenure, was largely the creation of the common law, although statutory modifications of the common law mainly in the interest of the tenant were introduced from time to time.⁹⁹

The first Act in England was the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915. This piece of legislation was aimed at dealing with the housing shortage experienced during and caused by the First World War. This Act applied to any dwelling house, that is to say, a house or part of a house let as a separate dwelling, whose rateable value on August 3, 1914, or standard rent did not exceed 35 pounds in London or 78 pounds elsewhere in England and Wales.¹⁰⁰

The 1915 Act was repealed in 1920 by the Increase of Rent and Mortgage Interest (Restriction) Act 1920. The Act applied to a large number of houses not previously controlled and applied to any dwelling house whose rateable value on August 3, 1914, or standard rent did not exceed 105 pounds in London or 78 pounds elsewhere in England

⁹⁸ Magnus, S. W., *The Rent Act 1968*, p. 1

⁹⁹ *ibid*

¹⁰⁰ Barnes, M. and Dobry G., *Hill and Redman's Law of Landlord and Tenant*, 15th ed. p. 829

and Wales. This Act remained the foundation of the Rent Acts until its consolidation into the Rent Act 1968.¹⁰¹

In the following years, some dwelling houses were released from the ambit of the 1920 Act. The Increase of Rent and Mortgage Interest Restrictions (Continuance) Act 1923 continued the operation of the Act until 31st July 1923. In that year, in consequence of the decision in *Kerr v. Bryde*¹⁰², the Rent Restrictions (Notice of Increase) Act 1923 was passed for the purpose of enabling a notice of increase of rent to operate also as a notice to quit.¹⁰³ Later that year as a result of the recommendations of the Onslow committee (Cmd.1803), the Rent and Mortgage Restrictions Act 1923, was passed.¹⁰⁴ The effect of this Act was to provide for the automatic removal from the control of the 1920 Act when the landlord obtained possession, if he granted a lease of the dwelling house fulfilling certain conditions.

In 1933, the principle Act was further amended by the Rent and Mortgage Interest Restrictions (Amendment) Act 1933. The effect of this Act was further decontrol of certain houses in excess of certain values divided into classes A, B and C. And as a result of the report of the Ridley Committee in 1937, the Increase of Rent and Mortgage Interest (Restrictions) Act 1938 was passed. It decontrolled the higher rated houses in Class B,

¹⁰¹ Ibid

¹⁰² [1923] A. C. 16

¹⁰³ Supra note 1, Magnus, S. W., The Rent Act 1968, p. 2

¹⁰⁴ Ibid, p.3

abolished decontrol by possession for the lower-rated houses of that class and those in class C, and extended the operation of the Acts until 24th June, 1942.¹⁰⁵

The imminence of war in 1939 and the desire of the government to avoid a rise in rents during the war, like what had happened during the First World War, led to the passage of the Rent and Mortgage Interest Restriction Act 1939. This Act ended the process of decontrol and again re-imposed control over most dwellings in the country.¹⁰⁶ It also continued the Acts of 1920 and 1938. In the years that followed, minor amendments were made to these Acts that became to be referred collectively as the Rent Acts.

“By 1968 that body of legislation known as the Rent Acts could without exaggeration be described as a legislative jungle.”¹⁰⁷ This is so because the law regulating the relationship of landlord and tenant of dwelling houses in England was scattered in a plethora of pieces of legislation. For example the main substance Act was the 1920 Act which also included the definition of what sort of tenancy was within the Act. The grounds for obtaining possession were in a schedule to the 1933 Act. The system of rent restriction was partly in the Rent Act 1957 and partly in the Rent Act 1965. Other Aspects of the law were scattered among other Acts, with the provisions of earlier Acts either repealed or amended by later Acts.¹⁰⁸

¹⁰⁵ Supra note 3

¹⁰⁶ Ibid, p. 830

¹⁰⁷ Ibid, p. 831

¹⁰⁸ Ibid

The chaos in this branch of the law was brought to an end by the Rent Act 1968. This Act consolidated most of the relevant Acts into one Act. It also repealed the whole of the legislation from 1920 to 1949,¹⁰⁹ much of the Rent Act 1957 and a larger part of the Rent Act 1965. After this point the law of landlord and tenant as regards residential premises could now be found mainly with reference to one Act.

3.2 LEGISLATIVE BACKGROUND TO THE ZAMBIAN LEGISLATION

Most of British laws were exported to her colonies and this branch of the law is no exception. The first legislation to control rent in Zambia during the colonial period was the Rent Restriction Ordinance of 1940.¹¹⁰ This ordinance made provisions mainly for the restriction in rent increase and the recovery of possession. This Ordinance was amended over the years in 1948, 1950, 1952 and 1955.

The Rent Control (Temporal Provisions) Act was enacted in 1968. This Act was necessitated by the escalating rent levels obtaining in urban areas at the time. There was an urgent need to prevent rents from rising further and to provide security of tenure to the tenants of premises to which rent control would apply.¹¹¹ This Act applied particularly to the cities of Lusaka, Kitwe and Ndola, and applied to both dwellings and commercial premises. However, his Act was only meant to be a short term controlling measure which would be superseded as soon as landlord and tenant legislation, in a comprehensive form and which would apply throughout Zambia, could be devised and introduced.¹¹²

¹⁰⁹ Preamble to the Rent Act 1968

¹¹⁰ Northern Rhodesia Legislative Council Debates, No. 37, 1940, p.31

¹¹¹ Zambia National Assembly Hansard, No. 16, 2nd October-2nd November, 1968, p. 294

¹¹² Ibid

The first of such legislation was the Landlord and Tenant (Business Premises) Act which was introduced and enacted in 1972 during the First session of the second National Assembly. When introducing the Bill, the Honourable minister, Mr Monga informed the house that the business premises Bill was the first part of the promised comprehensive legislation, and that the second part would be in form of a Bill which would seek to define the respective rights and obligations of the landlords and tenants of residential premises.¹¹³

The Rent Bill was read for the first and second time in March 1972. It was passed without amendments in the same year. The enactment of this Act meant two things; first that as intended in 1968, the Rent Control (Temporal Provisions) Act 1968 would cease to have any further effect. Secondly, that for the first time since independence, according to the minister, “firm foundations will have been established for lasting, mutually satisfactory relationship between landlords and tenants of all types of rented properties throughout the Republic of Zambia.”¹¹⁴ The Rent Act 1972 remains to date the main piece of legislation regulating landlord and tenant relationships for residential premises in Zambia.

3.3 THE RENT ACT

3.3.1 SCOPE OF APPLICATION OF THE ACT

The Rent Act applies to “all dwelling-houses in Zambia, whether or not the terms of the letting of such dwelling-houses include the use in common with the landlord or other

¹¹³ Zambia National Assembly Hansard, No. 29, 12th January-9th March, 1972, pp. 1662-1681

¹¹⁴ Ibid

persons authorized by him of rooms in or amenities of or portions of the building of which the said dwelling-house forms part or the grounds or gardens immediately adjacent thereto, and whether or not the terms of the letting include a provision for services or the use of furniture.”¹¹⁵

Subsection (2) however, provides for the exceptions. The Act does not apply to a dwelling-house let or occupied by an employee by virtue and as an incident of his employment. This point was emphasised by the Supreme Court in the case of *National Housing Authority v. Anayawa Mildred Siamiase and Another*.¹¹⁶ This case related to a landlord’s right to levy for distress for the recovery of arrears in rent. The tenant occupied the house by virtue of her employment. The issue before the court was whether the provisions of Act applied to the facts at hand. After being drawn to the provisions of section 3 (2) (a) of the Rent Act, counsel for the appellant abandoned the appeal. The court stated that this was the proper course to take as the provisions of the law were clear. The respondent occupied the house as by virtue of her employment and her goods would not be subject to distress.

The Act is also precluded from applying to premises let by the government save as to the rent charged in respect of any authorized subletting of the whole or part thereof.¹¹⁷ This means that the government is bound by the Act, except where the government is the immediate landlord.¹¹⁸

¹¹⁵ Section 3 (1)

¹¹⁶ SCZ appeal No. 49 of 2007

¹¹⁷ Section 3 (2) (b)

¹¹⁸ Supra note 3, 17th ed. p. 822

Premises for which an exclusive charge is made for board and lodging and in respect of which a permit in that behalf has been issued under any written law for the time being in force¹¹⁹ are also excluded from the ambit of the Act. Also excluded are premises held by a tenant under a lease for a term certain exceeding twenty-one years.¹²⁰

Section 3 of the Rent Act was amended by the Amendment Act No. 12 of 1974 to limit the application of the Act to premises let by any local authority and the National Housing Authority. This Act gives powers to a local authority or National Housing Authority to evict tenants in arrears of rent for three months or more without any need for court proceedings.¹²¹ These institutions are also empowered to evict a tenant for assigning or subletting without written consent¹²² and to levy distress for recovery any rent due without order of court.¹²³

3.3.2 OBJECTIVES OF THE ACT

The objectives of this Act are to be found in the preamble of the Act itself. It states as follows, “an Act to make provision for restricting the increase of rents, determining the 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 landlord and tenant of a dwelling house.”¹²⁴

¹¹⁹ Section 3 (2) (c)

¹²⁰ Section 3 (2) (d)

¹²¹ Amendment Act No. 12 of 1974, Section 32A (a)

¹²² Ibid, Section 32A (b)

¹²³ Ibid, Section 32A (c)

¹²⁴ Preamble, Rent Act, Cap 206, The Laws of Zambia

Lord Scarman in the case of *Hereford Investments Ltd v. Lamber*¹²⁵, said of the English Rent Acts, “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 tenancy, to increase rent or evict him. It is not a policy for protection of the entrepreneur whose interest is exclusively commercial.” In another English case of *Curl v. Angelo*,¹²⁶ lord Green M. R. stated that ‘the real fundamental objectives of the Acts is “protecting the tenant from being turned out of his home.” The Supreme Court of Zambia agreed with this position in the case of *Lily Drake v. Mahtani and Professional Services Limited* when it took the view of the court in *Curl v. Angelo* on the true purpose of the Rent Act.

The Rent Act seeks to achieve these objectives by means of: (a) by imposing a duty on the landlord to secure a standard rent from the court using the formula prescribed; (b) by restricting increases of rent and prescribing the circumstances under which rent increases are permissible; (c) restricting the right of the landlord to possession of premises; (d) restricting premiums; (e) providing for repairs; and (f) restricting the right of the landlord to refuse consent to the tenant to assign or sublet premises.¹²⁷

A. FIXATION OF STANDARD RENT

The landlord has a duty to apply to the court to have the standard rent determined for the premises. This must be done either before letting the premises or within three months of

¹²⁵ [1959] 1 Ch. p. 39

¹²⁶ [1948]2 All E.R. 189

¹²⁷ Preamble to The Rent, Cap 206, The Laws of Zambia

letting the premises.¹²⁸ The penalty for non-compliance with this requirement is that the landlord may be liable to pay a fine or imprisonment for a term not exceeding six months, or both.¹²⁹

The Rent Act has made the task of the court to determine standard rent easier by describing a formula to be applied. Where the premises are unfurnished, the rent is to be drawn by the court at a monthly rate of one and a quarter per centum of the cost of construction, plus market value of the land, the landlord paying all outgoings. In addition to this rate, another 1 percent of the value of the furniture has to be added in respect of furnished premises.¹³⁰

B. RESTRICTION ON THE INCREASE OF RENT

The Act prohibits any increase of rent in excesses of the standard rent by the landlord except in circumstances prescribed in section 11.¹³¹ This is one of the most important protections afforded to the tenant by the Act.¹³² Furthermore, the Act makes it a criminal offence for any landlord to demand or receive any rent in excess of the standard rent or an advance of rent exceeding two months.¹³³ Any such excess is recoverable from the landlord.

¹²⁸ Section 8 (1)

¹²⁹ Section 8 (2)

¹³⁰ Mulimbwa A., 'Land policy and economic development in Zambia' Law journal; special edition 1998; pp. 95-96

¹³¹ Section a

¹³² Mudenda F. Protection of Tenants of Residential Premises in Zambia, Chapter 13 class notes, unpublished

¹³³ Section 10

An increase in rent is however permitted in circumstances prescribed in section 11. The first instance is where the rate payable by the landlord has increased. In this case the landlord may increase the rent proportionate to the increase in the rate. Another instance is where the landlord has incurred expenditure on the “improvement or structural alteration or improvement of drainage or sewerage system or the construction or making of a street or road executed at the instance of a local authority.”¹³⁴ However the landlord is not permitted in this case to increase the rent exceeding 15 percent of the expenditure per annum.¹³⁵ Such increases are binding on subsequent tenants. The Act does not permit increase by reason of the landlord carrying out any decoration or repair.¹³⁶

Section 11(3) addresses the issue of transfer of burdens. It provides that any transfer of any burden or liability from the landlord to the tenant with effect that the terms on which the tenant is holding the premises are less favourable on the overall than previously, amounts to an illegal increase of the standard rent if on the overall the position of the tenant is no less favourable than that in which he was prior to increase. There is also the provision that the standard rent shall not be deemed to be increased by reason of transfer of liability to pay rates where a corresponding reduction is made in the standard rent.¹³⁷

C. RESTRICTION ON THE RIGHT TO POSSESSION AND DISTRESS

Section 13 of the Act provides one of the most important protections accorded to the tenant. This confers security of tenure on the tenant by circumscribing the instances in

¹³⁴ Section 11(1)(b)

¹³⁵ Ibid

¹³⁶ Ibid

¹³⁷ Mulimbwa, A., ‘Land policy and economic development in Zambia’ Law journal; special edition 1998; p. 96

which the tenant can be deprived of possession or forcibly removed by order of the court.¹³⁸ Under this section, these circumstances include: default in the payment of the rent or non-compliance with the terms of the lease; the creation of a nuisance or annoyance to the neighbours; conviction for use of the 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 land upon which the landlord contracts to sell or re-let the premises or takes any other step which, in the opinion of the court, would be prejudicial if he could not regain possession; the subletting of the tenant of the whole or any part of the premises at a rental in excess of the rent payable under the provisions the Act; the subletting, assignment or parting of possession by the tenant without the written consent of the landlord; the need for the landlord to occupy the premises as a residence for himself, any member of his family residing with him or any person employed by the landlord on full-time basis; and the carrying out of any re-construction or re-building of the premises.¹³⁹

Distress for the recovery of rent cannot be recovered without leave of the court. However, the local authority or the National Housing Authority have power to levy distress upon the goods in the premises let to the tenant for recovery of any due to it from the tenant without order of court.¹⁴⁰

¹³⁸ Mudenda F., Protection of Tenants of Residential Premises in Zambia, Chapter 13 class notes, unpublished

¹³⁹ Section 13

¹⁴⁰ Amendment Act no. 12 of 1974 (Local Authorities and National Housing Authority), Section 32 (e)

D. RESTRICTION ON PREMIUMS

Another way a tenant is protected from exploitation by the landlord is by replacing a restriction on premiums. Under Section 15(1) no premium may be charged in addition to the standard rent by the landlord as a condition for granting, assigning, renewal or continuance of a tenancy, lease, sublease, subletting or occupation of any premises. The only exception is where the tenancy is for a term exceeding twenty-one years.¹⁴¹ Demanding or taking of such premiums is a criminal offence under sub-section (2).

E. REPAIRS

The Act leaves the question of repairs to the landlord and tenant to agree in the tenancy contract. However, where the tenancy agreement or contract is silent, the provisions of section 24 of the Act automatically apply. The Act provides that it is the landlord's obligation to maintain and keep the premises in a state of good repair and in conditions suitable for human habitation. The tenant is obliged by the Act to maintain the premises in the same state as that in which the premises were at the commencement of the tenancy except for fair wear and tear, damage arising from irresistible force and repairs for which the landlord is liable.

F. RESTRICTION ON ASSIGNMENT AND SUBLETTING

This is one of the few instances where the Act curtails the tenants' rights. Section 25 of the Act restricts the tenants' right to assign, sublet or part with the possession of the premises or any part thereof except with the consent in writing of the landlord. This means that the parties may agree in the tenancy agreement on conditions on which the

¹⁴¹ Section 15

tenant may assign or sublet the premises.¹⁴² Such agreement, it seems, would constitute consent by the landlord in writing. The Act also restricts the landlord's right to refuse or withhold such consent. Where, in the opinion of the court, such consent is unreasonably withheld, the tenant may sublet or withhold with consent of the court.¹⁴³ However, section 26 limits the term of the sublease to six months subject to a further three months.

3.3.3 ENFORCEMENT OF THE ACT

The act vests power of enforcement in two institutions, the courts and the Rent Controllers. Section 4 gives the court wide supervisory powers and powers to investigating all kinds of complaints from both landlord and tenant.¹⁴⁴ Under this section courts have powers of determining standard rent payable of any premises, fixing the date for the payment of rent and apportioning the payment of rent amongst tenants sharing the premises. The courts also have powers to make orders for the recovery of arrears in rent and mesne profits. It can also order the landlord to carry out repairs for which he is liable and to permit the levy of distress in default thereof under section 25, the court can also give consent for assigning or subletting were such consent is unreasonably withheld by the landlord.

The minister is empowered under section 30 to appoint rent controllers. The duties of these rent controllers include valuation, assessment and examination of any premises, and

¹⁴² Mulimbwa A. 'Land policy and economic development in Zambia' Law journal; special edition 1998 p. 98

¹⁴³ Section 25

¹⁴⁴ Section 5

elicit from the landlord or the tenant such information as may be necessary to determine the extent, or lack thereof, of compliance with provisions of the Act.¹⁴⁵

¹⁴⁵ Section 30

CHAPTER 4

EVALUATION, RECOMMENDATIONS AND CONCLUSION

4.0 AN EVALUATION OF THE ACTS

An evaluation of the two Acts reveals that they have had different degrees of success. The Landlord and Tenant (Business Premises) Act, referred to as the Business Premises Act in this chapter, has by far had a greater impact than its sister Act, the Rent Act. This is because it has achieved most of what it was set out to do as evidenced from the litigation based on it. The Rent Act on the other hand has had very little success and has not met most of its objectives, as set-out in its preamble. There are a number of reasons as to why this is so.

One of the reasons seems to be the objectives of the Acts. The Business Premises Act is relatively less ambitious than the Rent Act. The Business Premises Act mainly restricts itself to giving security of tenure to the tenant and to enable him to obtain a new tenancy in certain cases. The Rent Act on the other hand goes further in its objectives include fixing the standard rent payable, restricting the increase of rent, restricting premiums and the right of the landlord to possession or ejection.¹⁴⁶ The effect of this is that, in the case of the Business Premises Act, very limited supervision is required from the courts or any other body as compared to the Rent Act.

Whereas the Rent Act seeks to control the rent payable as one of its objectives, the Business Premises Act does not. The parties to a tenancy under the Business Premises

¹⁴⁶ Preamble, Rent Act

Act are left to agree on the amount of rent at the onset of the tenancy. Section 16 of the Act¹⁴⁷ gives the landlord and tenant freedom to agree on the amount of rent payable when a new tenancy is granted by the court. Only when this has not happened can the courts determine the rent. However, the court in determining the rent in this case must have regard to the terms of the tenancy and the terms at which the holdings might reasonably be expected to be let in an open market by a willing lessor.¹⁴⁸ This is an example of the freedom conferred on the landlord and tenant of business premises. The court only interferes, in most cases, where the parties have not or have failed to agree.

Under the Rent Act on the other hand, the landlord has a duty to apply to the court to have the standard rent determined at the onset of the tenancy or within three months of letting the premises.¹⁴⁹ Failure to comply with this requirement is a criminal offence punishable by a fine or imprisonment.¹⁵⁰ Complying with this requirement would entail thousands of applications before the courts for all the tenancies that commencement every month countrywide. It would also mean hundreds of defaulting landlords being jailed or fined every month around the country. This is not feasible by any means.

The Act vests powers of enforcement in the courts. Apart from the powers to determine the standard rent payable, the courts also have supervisory powers, such as investigating all kinds of complaints from both the landlord and the tenant. The courts also have powers of fixing the date for the payment of rent, making orders for recovery of

¹⁴⁷ Landlord and Tenant (Business Premises) Act

¹⁴⁸ Section 16, Landlord and Tenant (Business Premises) Act

¹⁴⁹ Section 8 (1), Rent Act

¹⁵⁰ Section 8 (4), *ibid*

possession of premises, arrears and mesne profits. The powers vested in the courts are vast and it is clear that all these powers give the courts a very big task of supervising the relations of landlord and tenant of residential premises. This task is too big for the already overworked courts, which they would not be able to manage due to sheer physical inability to cope.

Although the Act provides for the appointment of rent controllers, whose tasks include the valuation, assessment, examination of premises and eliciting information, there are no rent controllers to date. An attempt was made in the early seventies of appointing rent controllers but the exercise failed.¹⁵¹ This failure may be attributed to the sheer enormity of the task and the lack of resources. This exercise would require a large number of rent controllers countrywide. It would also require a lot of resources to fund the whole exercise of evaluating, assessing, examination and the soliciting of information of any premises. Resources to remunerate the rent controllers would also be required. The absence of these rent controllers makes the task of the courts impossible and this is one of the reasons the Rent Act is less effective than the Business Premises Act.

A very small percentage of residential tenants countrywide are aware of the protection accorded to them by the Rent Act¹⁵² as compared to the business tenants who are aware of the provisions of the Business Premises Act.¹⁵³ Furthermore, a very small percentage of those tenants of residential premises are willing to apply to go to court for

¹⁵¹ Mulimbwa, *supra* note, p 98

¹⁵² Information obtained from random interviews of tenants of residential premises along Kalomo Road in Chilenje and along Nangwenya Road in Longacres

¹⁵³ Information obtained from random interviews of tenants of business premises at Woodgate house along Cairo Road and Simoson Building along Lumumba Road.

determination of standard rent or to settle their disputes. It is due to this lack of awareness of the provisions of the Rent Act and the unwillingness of both tenants and landlords of dwelling houses to involve the courts in their relationship that there has not been much litigation on the Act.

There has been relatively much more litigation on the Business Premises Act. As a result most provisions of the Act have been interpreted by the courts. This has given effect to the respective rights of both tenants and landlords of business premises. This fact may also account for the different levels of awareness of the provisions of the two Acts. The difference on the number of cases that go to court between the two Acts can be attributed to two factors.

The first one is that landlords and tenants of business premises are either businessmen or incorporated companies with enough resources to afford legal advice and representation. On the other hand, many tenants of residential premises are individuals who do not have such kind of resources. In most cases, tenants of residential premises would avoid going to court because of the limited resources they have.

The second reason is that the relationship of landlord and tenant of business premises exists mainly as a result of a business venture. Usually, there is a lot of money, goodwill and investment at stake. This is another reason why the parties are more likely to go to court. Tenants of residential premises, on the other hand, have relatively less to lose other than the inconvenience of looking for alternative accommodation. They are more likely

to move on and avoid further confrontation with the landlord. Litigation is a cost they can do without.

The shortage of dwelling houses in urban areas is another contributing factor to the failure of the Rent Act. Those who can secure suitable accommodation consider themselves lucky and are mainly concerned with getting what they consider to be a fair deal. Such tenants are less inclined to act in a way that would estrange them to their landlords. The consequence of this attitude is that even where the tenant is aware of his rights under the Act, he does not desire to pursue them on a legal platform. He would rather try to settle by talking to the landlord who in most cases would make good in one way or the other. Where this fails, a tenant would rather look for alternative accommodation than “waste time” by going to court.

The ineffectiveness of the Rent Act can also be attributed to its narrow scope. The Rent Act does not apply to a wide range of dwelling houses. It does not apply to dwelling houses let or occupied by an employee by virtue and as an incident of his employment and to premises let by the government where it is not the immediate landlord. The Act also limits the application of the act to premises let by any local authority and the National Housing Authority. A substantial number of tenants occupy premises by virtue and as an incident of their employment. A large number of houses in the urban areas belonged to companies, in the first and second republic, housing employees of those companies. Other companies preferred to rent houses on behalf of their tenants as

opposed to paying them housing allowances. The local authorities also owned most houses in some urban areas. As a result of this, only a small proportion of tenants were protected under the Act. This also contributed to the lack of awareness of the provisions of the rent Act as they were not a concern of many tenants.

4.1 RECOMMENDATIONS

There is an urgent need for the amendment of the Rent Act to take into consideration the present economic policies being pursued by the country. Zambia has since 1991 been pursuing the policies of liberalizing the economy. Many laws such as the Land Act of 1995 were enacted to reflect these policies. However, nothing substantial was changed in the Rent Act since 1972 when it was enacted. This was at a time when the government regulated the economy and opposed what they termed inhuman capitalistic exploitation. The economic policies pursued since the Third Republic favour less state intervention in the private sector legislation such as the Rent Act should reflect this.

The Rent Act should be amended to give the parties more freedom to agree on such things as the amount of rent payable. The Act should only seek to enforce what the parties agree upon in a tenancy and interfere only when it is necessary to do so. Rent should be left to be determined by the open market as is the case with the Business Premises Act. Provisions that are not feasible should be repealed altogether.

The rent Act should be amended to reduce powers given to the courts. A tribunal would be better placed to deal with matters in the Act. A specialized tribunal on landlord and

tenant matters relating to both residential and business premises should be instituted. This will not only relieve the courts of the burden of dealing with these matters but will be highly specialized in this branch of the law as well.

The scope of application of the Rent Act should be extended to include premises let or occupied by an employee by virtue and as an incident of his employment. This is because there seems to be no legislation regulating such tenancies. This tends to aid tenants and landlords of such premises to take advantage of the limited scope of the Act when parties default in their obligation and later argue that the Act does not apply to their tenancy.

Other than seek to resort to rent control, the government should put up a policy that will encourage home ownership by citizens. One way of doing this is by putting up a legislative framework that should make the process for acquiring land cheaper and less complicated. There should be a home ownership scheme by the government where favourable conditions for building and buying houses will be put in place. The government should also put in place mechanisms for ensuring the reduction of bank lending rates to encourage people to acquire loans for building houses at lower interest rates.

“Until tenants can have a choice of accommodation, there can be no real or practical assessment of what rents should be. It is when a tenant can say to a landlord, I think your rents are too high, I think the standard of your accommodation is too low, I am going next door. The tenants have found that to get accommodation is almost impossible and

the rents have arisen very considerably. If the government could encourage people to buy or build houses, then they will not be complaining about high rents because they will own houses”¹⁵⁴

4.2 CONCLUSION

In conclusion it would be safe to say, as many other authors have, that the Rent Act has not in the 25 years of its existence done what it was set-out to do. Indeed it would be very difficult not to agree with late Dr Mulimbwa that it has fallen into desuetude. This is due to many factors. The need for reform of the Act cannot be over-emphasised. This has shown that there is need to for any law to take into account the political, social and economic realities of the society in which it is to operate. The law should also envisage a practical enforcement mechanism. The Rent Act did not do this and this is one of the reasons it has fallen into desuetude. There is need to for the law to provide for a workable means of enforcement if is to succeed. There is also need for not only publishing but publicising the law as well. The Rent Act also failed because of lack of awareness by the people who it intended to protect.

The law relating to the relationship of landlord and tenant of business premises has been a success in Zambia. This is evidenced by the smooth operation of the Landlord and Tenant (Business Premises) Act. This Act has so been as can be seen be from the litigation on the Act. The courts have also been consistent in interpreting the various provisions of this Act. The Rent Act however is still law as desuetude cannot make it invalid and therefore needs to be changed.

¹⁵⁴ Mr. Mitchley, MP, in his contribution to the debate on the Rent Bill, Hansard.

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