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SCZ NO. 9 OF 2008
APPEAL No. 29/2007

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE AND LUSAKA
(Civil Jurisdiction)

BETWEEN

FRALLEN INVESTMENTS LIMITED **APPELLANT**
AND
ZAMBIA RAILWAYS LIMITED **1ST RESPONDENT**
NATIONAL COLLEGE FOR MANAGEMENT DEVELOPMENT **2ND RESPONDENT**

Coram: Sakala, CJ. Chibesakunda and Mushabati JJS.
10th April, 2007 and 12th February, 2008
For the Appellant: Mr M Kabesha of Messrs Kabesha and Company.
For the Respondent: Mr A. A. Nsefu with Mr H Chlnzu of Messrs I.C. Ngonga and Company.

JUDGMENT

Chibesakunda, JS, delivered the Judgment of Court.

Cases referred to:

1. **Shell and BP Limited vs. Conidaris and Others (1975) Z.R. at 179.**
2. **Hamaundu Mudenda, Muuka Mudenda vs. Tobacco Board of Zambia Appeal No. 40 of 1998 at page 13.**
3. **Zambia Consolidated Copper Mines Limited and OK Simwiinga vs. Dr Francis Khama *Appeal No. 71 of* 2001 at page J4 to J5.**
4. **Zambia Sugar PLC vs. Wincho Gumboh Appeal No. 69 of 1996 at page J6.**

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5. ***Securities v. Vaunghan and Others and Antoniades v. Valliers 1990* 1 AL 417.**
6. **Street V. Mountford 1985 2 AER page 289.**
7. **Sharp v. McAuthor 1986 19HLR page 364**
8. **Marcraft Wagons Ltd v. Smith, 1951 2AER page 271**

Legislation referred to:

9. ***Halsbury's Laws of England Vo. 27 (14th Edition) at Page 27 -29.***

This is an appeal against a High Court Judgment which was in favour of the 1st and 2nd Respondent. The Appellant Company, who was the Plaintiff at the High Court, issued a writ of summons against the 1st Respondent claiming: -

(1) **Specific Performance that the 1st Respondent advertises the sale of the building annexed on Plots 5864/5865 and refund of K19,728,032.63**
(2) **The vacation of the 2nd Respondent from the Annex.**
(3) **Damages against the 1st Respondent for loss of business and injury to reputation.**
(4) **An injunction to restrain the Respondent from interfering with the quite enjoyment of the premises and restoration of the Appellant to occupy the premises or corrugated Building.**
(5) Costs and Interest on the damages.

Later the 2nd Respondent was joined as 2nd Defendant. The central issue in this claim was the interpretation of Clause 6 in the Caretaker agreement between the Appellant Company and the 1st Respondent.

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The facts before the High Court, on which there was no dispute, are that on 3rd December, 1998, the 1st Respondent offered the Appellant Kabwe Warriors' Motel on lease. This motel was on plots 5964/5865 encompassing the plot on which was the corrugated building, also known as the annex and (which hereinafter will be referred to as the Annex), which had 4 classrooms like rooms, which the 1st Respondent used for training telecommunications and signal technicians. The Appellant on 1st January, 1999 took occupation of this property. In February 2000, the Appellant bought this property, plot No.5864/5865 excluding the Annex. So on 24th August, 2001, the Appellant asked the 1st Respondent to lease to it this Annex. The 1st Respondent agreed to lease this Annex to them on conditions stated in the letter dated 21st September, 2001, addressed to the Managing Director, Frallen Investments Limited, which reads:

"**Reference is made to your application dated 24th August, 2001 concerning the lease of a corrugated building opposite Zambia Railways training Centre. Zambia Railways Limited has accepted your application to use the property on the following terms:**

1. **<u>Description:</u> the property on offer is the building opposite former Zambia Railways training centre and the surrounding areas situated on plot 5864 – corner of Mubanga and Luampa Mission Street-Kabwe**

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2. **<u>Status/Tenure</u> You will occupy the premises on a care taker arrangement only for an initial period of three (3) months effective 1st October, 2001 renewable after the expiry of each lease period.**

3. **<u>Consideration:</u> the Net per months is Seventy thousand Kwacha (70,000,000) payable three months in advance. This is a peppercorn rent offered in order to cushion on repairs renovation expected to be carried out by yourselves which will not be refunded by the Railways.**

   Note that the Net Rent payable by yourselves is free of all deductions such as value Added Tax (VAT) and withholding Tax both payable to Zambia Revenue Authority (ZRA).

4. **<u>Services</u>: Electricity and Water will be borne by the tenant that is by opening personal Accounts with Zambia electricity Corporation Limited (ZESCO) and Kabwe Council.**

5. **<u>Repairs/Renovations</u>: No repairs or renovations will be undertaken without the prior written consent of Zambia Railways. All costs incurred on repairs or renovations will not be refunded by the Railways or offset by rentals.**

6. **<u>Sale</u>: the property is one of those earmarked for sale by Zambia Railways. In the event of sale the Property will be advertised to the general public and you will be expected to bid.**

Further you should be prepared to vacate the premises at short notice should Zambia Railways decide to retain the property."

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When this Annex was given to the Appellant Company, it was in a vandalized state, the roof had been removed, toilets disused, electrical fittings were damaged, the entire premises ravaged by vagabonds. So they had to rehabilitate the building. The Appellant Company renovated the rooms at the cost of K19, 728,032.63n. It was also common ground that in the agreement quoted supra, there was a provision that the cost of repairs would not be refunded to the Appellant Company nor even treated as a set off against the rentals. It is equally common ground, as can be seen from the letter quoted supra that one other term included in this letter quoted supra, was that: "**The property is one of those earmarked for sale by Zambia Railways. In the event of sale, the property will be advertised to the general public and you will be expected to bid."**

The Appellant's claim before the High Court is that as per these conditions stated in this letter in particular Clause 6 quoted supra, it expected the 1st Respondent to advertise this property before it would sell to anybody. Their case before the High Court was that there was a definite promise by the 1st Respondent to advertise this property (the Annex) before selling it to anybody. So the Appellant Company as a sitting tenant and having spent that amount of money to rehabilitate that property had a legitimate expectation of the right of first refusal to buy that property. According to the Appellant Company, although the lease between them and the 1st Respondent was labelled a caretaker agreement

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and was initially for three months, this legal relationship continued with the consent of the 1st Respondent even after the 3 months period expired, since the 1st Respondent continued collecting rentals every month from it even after the expiry of the three months.

The Respondents' evidence on which there was dispute is that the Appellant applied for lease of this Annex much later after the 2nd Respondent's application for lease of the said property. Its case was that the 2nd Respondent and itself entered into a lease agreement of the main training center on the 19th May, 2000 paying rentals of K10,187,707,50n per month. The Appellant Company approached the 1st Respondent in the year 2001 whereas the 2nd Respondent had entered into a lease agreement with the 1st Respondent in the year 2000. The 2nd Respondent was paying K10,187,707.50n for the whole complex which included the annex, although it was not utilizing this Annex. This lease was on a year to year basis. So the 1st Respondent only agreed to give to the Appellant Company a caretaker arrangement of 3 months. According to DW1 the Appellant Company knew that the Annex together with the main training center had been leased to the 2nd Respondent before they applied for this caretaker agreement. This is why the 1st Respondent agreed to a loose ad hoc arrangement of a caretaker agreement with the Appellant Company.

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DW1 testified that he had informed the Appellant Company that the property in question had already been leased to the 2nd Respondent and that there was a possibility of the property being used by the 2nd Respondent, although at the time it was not being used. DW2's evidence was that the 2nd Respondent had to get into this agreement with the 1st Respondent because the Government Republic of Zambia (GRZ) made a decision to upgrade the 2nd Respondent premises to University status and that they were to look for premises for expansion. His evidence was that this lease agreement, between the 1st Respondent and the 2nd Respondent, was to pave a way for outright purchase of the property in question.

Under cross-examination, the Respondents accepted that they did not advertise but explained that, Clause 6 did not give the Appellant the right of first refusal. The 1st Respondent further testified that after selling this property to the 2nd Respondent when the Appellant Company complained, it offered to pay K10,187,707.50n to the Appellant Company, not as a sign of accepting that it was in the wrong, but as a way of trying to settle this matter by way of ex curia. The evidence of both the 1st Respondent and the 2nd Respondent is also that they entered into this lease agreement as way back as May, 2000.

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On the evidence before the lower court, the learned trial Judge ruled that the Appellants had no legal right of first refusal. He dismissed the claim with costs, hence this Appeal before us.

Before this court, the Appellant filed two grounds of appeal. These are:

1. **That the learned trial Judge erred in holding that the terms of the lease to the Plaintiff did not confer any legal right on the Plaintiff which could be enforced by him.**
2. **That the learned trial Judge erred in holding that the Plaintiff was not entitled to a refund of K19,728,023.63**

In the same memorandum of appeal, the Appellant indicted that they would file further grounds of appeal at a later stage should there be need for such. However, when the matter came before this court, both parties relied on their filed heads of argument. In their written heads of argument, the Appellant on ground 1, argued that the Learned trial Judge erred in holding that the terms of the lease between the Appellant Company and the 1st Respondent did not confer any legal right to them which were justifiable. It argued that interpreting the conditions spelt out in the letter quoted supra at J3, Clause 6 meant that the 1st Respondent was contractually bound to

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advertise the property in question and the Appellant Company as sitting tenants had a legal right of first refusal. This meant that the 1st Respondent was contractually bound to advertise the property in question and this meant that the Appellant Company as sitting tenant had to be given the first option to either purchase the property or to refuse to purchase it. It was argued that, as it was stated in ***Shell and BP Limited vs. Conidaris and Others*** (1), the question as to whether or not there is a contractual relationship between the two parties, is always a question of law and it can only be determined at law after considering all relevant provisions. The Appellant Company furthermore contended referring to the ***Halsbury's Laws of England Vo(1)***(9), that the general principle in determining whether an agreement created a lease or license was that all substantive terms of the agreement in question had to be seriously analysed. According to them, looking at Clause 6 of the said agreement, it created a legally binding relationship between the Appellant Company and the 1st Respondent. Therefore, the learned trial Judge erred in holding otherwise.

On the second ground, it argued that, the learned trial Judge erred in holding that the Plaintiff was not entitled to the refund of K19,728,023.63. It submitted that as per paragraphs 3 and 5 of the agreement as reflected at page 46-47, since the 1st Respondent was alive to the expenses

incurred by the Appellant Company and that since at page 49 of the record a refund was offered, the court ought to order a refund of this total amount of K19,728,023.63 and not a partial refund of K10,187,707,50. It was contended that, since there was this evidence on record, which evidence the lower court should not have ignored, this evidence was that the Appellant spent that amount of K19, 728,023.63, the lower court should have held that the Appellant Company was entitled to this refund.

The Respondents in response, in their written heads of argument relied on the two cases of ***Timothy Hamaundu Mudenda, Muuka Mudenda vs. Tobacco Board of Zambia Appeal No. 40 of 1998 at page 13 and Zambia Consolidated Copper Mines Limited(3) and OK Simwiinga vs. Dr Francis Khama Appeal No. 71 of 2201*****(4)*** in which the court held that a licensee was not a sitting tenant and as such had no legal right to purchase the house. It was argued that, looking at the evidence of DW1, it was clear firstly, that the Appellant had failed to establish that there was a tenancy agreement between it and the 1st Respondent. What was established, according to Counsel, was that, the Appellant Company was only a licensee and not a tenant. Secondly, that there was no provision in the caretaker agreement of selling this old training school to the Appellant Company. Thirdly, that it was common ground that there was a tenancy

agreement between the 1st and 2nd Respondent on the 19th of May, 2000 which subsequently was followed by negotiations and an outright purchase of these properties in 2002. It was also common ground that the Appellant Company only applied for lease of this Annex in August 2001. Therefore, there was no way that the 1st Respondent would have offered to lease the same property in 2004 to the Appellant Company as the property had been already sold to the 2nd Respondent.

On the second ground of appeal, the Respondent argued that there was no provision in the caretaker agreement of refunding the costs of repairs to the Appellant Company. There was one provision under clause 5 of the agreement as stated in the letter dated 21st September, 2001 on the record, which provision proscribes against refunding any expenses incurred as a result of repairs/renovations. Counsel for the Respondent submitted that, the offer of K10,187,707.50n for expenses incurred by the Appellant Company was, only a gesture made in good faith and not backed by any legal proposition. Citing the case of ***Zambia Sugar PLC Vs Wincho Gumboh***(4), Counsel further argued that the Appellant had no legal basis for claiming K19,728, 032.63n. In addition, he argued that as there was common ground that the sale offer to the 2nd Respondent was in relation to stand No. 5864/5865 and that since the 2nd

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Respondent had already paid a total price of K720,000.000.00 to the 1st Respondent concluding the deal, the Appellant Company had no claim over the property in question. On the claim for loss of business, they also argued that the Appellant Company lost no business. It was also argued that the Appellant Company lost no business as there was evidence that the building was dilapidated and as such was not in a usable state.

We have looked at the issues raised in this appeal and at the record of appeal. We agree that the central issue to this claim is the interpretation of clause 6 of this caretaker agreement between the 1st Respondent and the Appellant Company. In trying to deal with this issue, we want to refer to the term "caretaker arrangement:" firstly, we note that even the Counsel for the Appellant in his submission at page 3 was not even sure of the nature of the relationship entered between the Appellant Company and the 1st Respondent as to whether it was a lease or licence. The learned of authors in the **Halsbury's Laws of England, Vol. 27**(9), have explained these terms thus distinguishing tenancy from license. According to them, they say: "**Save in exceptional circumstances, an agreement creates the relationship of landlord and tenant and not that of licensor and licensee where there is a right of exclusive possession for a fixed period term at a stated rate. Where an agreement is made in writing, the question whether it creates a tenancy or licence is determined by the consideration of the**

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substantive terms of the agreement and not by the labels and terminology used." The learned authors further have expressed the opinion that if an agreement satisfied all these requirements of the tenancy, the agreement is a tenancy agreement and the parties cannot alter the effect of that agreement by insisting that they only created a licence. See the case of **Street v. Mountford 1985 2 AER (6).** According to the learned authors of Halsbury, in cases where the landlord enters into separate agreements with a number of persons, for them to share residential or business accommodation, there is grant of joint right to exclusive possession and thus joint tenancy where these agreements are identical and are interdependent. See the case of ***A.G. Securities v. Vaunghan and Others and Antoniades v. Valliers*.(1988) ERL**(3). In cases where there are separate agreements entered at different times and on different terms, there is no grant of exclusive possession**.**

In an English case of **Sharp v. McArthur** (7) the owner of the property wanted to sell it, he let the occupier into possession and charged him rent pending sale. The court held that the occupier was a licensee. In another English case of **Macraft Wagons Ltd. v. Smith**(8) a owner of a house allowed a daughter of a deceased tenant to remain in occupation of the house making payment for the use of the

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house. The court held that there was no tenancy. She was a licensee.

According to the Concise Oxford Dictionary, 9th Edition, the word "caretaker" denotes looking after property/ position temporarily. So, as per evidence of DW1, which was not refuted by the Appellant Company, as the Annex was on lease to the 2nd Respondent and sold to the 2nd Respondent by 2002, and that, it could be repossessed from the Appellant Company at a short notice and more also as it was common ground that, the Appellant Company was not given an offer to be sold the annex, what was promised to it was that the property in question would be advertised, therefore, we hold the view that the agreement/arrangement between the Appellant Company and the 1st Respondent was a mere license. We also hold that as it was a temporary arrangement, it falls short of the qualities of granting exclusive possession to the Appellant Company. We therefore agree with the Learned trial Judge that the Appellant did not have a legal right of first refusal. So in line with our decision in the case of **Timothy Hamaaundu and Mukuka Mudenda Vs. Tobacco board of Zambia and Zambia Consolidated copper Mines Vs. Khama**(2) we hold that specific performance cannot be granted in a deal that was not in existence. In conclusion, we hold that there is no justification to inflict injustice on the

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2nd Respondent, an innocent bonafide purchaser for value. On the second ground, we entirely agree with the Respondent that there was a provision in the caretaker agreement, that costs of repairs would not be refunded or even subtracted as a set off against the rentals and that the agreement was and is still binding on the Appellant. We therefore dismiss the appeal with costs.

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E L Sakala
JUSTICE CHIEF

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L P Chibesakunda
SUPREME COURT JUDGE

……
C S Mushabati
SUPREME COURT JUDGE