

**CHILUFYA v CITY COUNCIL OF KITWE (1967) ZR 115 (HC)**

HIGH COURT  
MALLON AG J  
22nd AUGUST 1967

**Flynote and Headnote**

**[1] Landlord and tenant - Licence distinguished from lease - Effect of licence.**

The distinction between a lease and a licence is as follows:

- (i) it is essential for the establishment of the relationship of landlord and tenant that there should be a demise, except where the relationship is created by statute;
- (ii) a demise or lease is the grant of a right to the exclusive possession of land for a determinate term less than that which the grantor has himself in the land;
- (iii) an exclusive right to do something on a property (as opposed to exclusive possession thereof) is merely a licence;
- (iv) the effect of a licence is to give the licensee an authority to use the premises, without which he would be treated as a trespasser;
- (v) a licence may be either gratuitous or for value. If the latter, the consideration may be given either once for all or by periodic payment.

**[2] Real property - Landlord and tenant - Licence distinguished from lease - Effect of licence.**

See [1] above.

**[3] Landlord and tenant - Licence - Granted for purpose of making profit - Conveys no estate or interest in land.**

The fact that a licence is granted for the purpose of making a profit on land does not imply the grant of any estate or interest in that land.

**[4] Real property - Licence - Granted for purpose of making profit - Conveys no estate or interest in land.**

See [3] above.

**[5] Landlord and tenant - Termination of licence - Time to remove must be given.**

A licensee whose licence is terminated must be given a reasonable time to remove from the premises, whether his licence is revocable by notice or at will.

**[6] Landlord and tenant - Licence distinguished from lease - Marketeer paying a consideration - A licensee.**

A trader in a market having the written authority of the city council to occupy a space, for which he pays 1s. a day, and on which he has erected his own stall, is a licensee and not a tenant.

**[7] Local government - Control of markets - Markets Ordinance, section 3 (a) - "Control and management" defined.**

The words "control and management" in section 3 (a) of the Markets Ordinance give the city council power to grant and to determine licences to trade, and to do so by resolution.

**[8] Local government - Discretionary powers of local authority - Exercise must conform with general law and principles of natural justice.**

The power of local authorities to grant and to determine licences must be exercised subject to the general law and to the principles of natural justice.

**[9] Administrative law - Discretionary powers of local authority - Exercise must conform with general law and principles of natural justice.**

See [8] above.

**[10] Local government - Discretionary powers of public authority - Power of court to investigate exercise.**

Where a public authority has discretionary powers, the court is entitled to investigate its exercise of these powers in order to determine whether:

- (a) it has taken into account matters which it ought not to have taken into account, and vice versa, and
- (b) its decision was reasonable.

**[11] Administrative law - Discretionary Powers of public authority - Power of court to investigate exercise.**

See [10] above.

**[12] Local government - Market licence - Termination by local authority - Political considerations taken into account - Ultra Vires.**

A city council which terminates a trader's licence to occupy a market stall by resolution influenced by political considerations is acting unreasonably, unfairly and contrary to the principles of natural justice and, therefore, *ultra vires*.

**[13] Administrative law - Market licence - Termination by local authority - Political considerations taken into account - Ultra Vires.**

See [12] above.

**[14] Local government - Market licence - Termination by local authority - Political considerations taken into account - Constitution of Zambia section 25 - Whether "discriminatory".**

Such a termination of a licence is "discriminatory" within the meaning of the Constitution of Zambia, section 25 (2) and 25 (3).

**[15] Constitutional law - Section 25 construed - Meaning of "discriminatory".**

See [14] above.

Cases referred to:

- (1) *Byrne v Kamueka* (1967) ZR 82.
- (2) *Frank Warr & Co, Ltd v London County Council* [1904] 1 KB 713; *sub nom. Warr & Co. v London County Council*, 73 LJKB 362.
- (3) *Wood v Leadbitter* (1845), 13 M. & W. 838; 153 ER 351.
- (4) *Kerrison v Smith*, [1897] 2 QB D. 445; [1895 - 9] All ER Rep. 215.
- (5) *Shelley v London County Council* [1949] AC 56; [1948] 2 All ER 848.
- (6) *Mehta v City of Salisbury*, 1961, R & N 911; on appeal *sub nom. City of Salisbury v Mehta*, 1961, R & N 1000.
- (7) *Re K (H) (an infant)*, [1967] 1 All ER 226; *sub nom. In re H.K. (an infant)* [1967 2 QB 617.
- (8) *Associated Provincial Picture Houses Ltd v Wednesbury Corp.*, [1947] 2 All ER 680; [1948] 1 KB 223.
- (9) *Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503; [1961] AC 636.
- (10) *Kruse v Johnson* [1898] 2 QB 91; [1895 - 9] All ER Rep. 105.

Statutes and notices construed:

Markets Ordinance (Cap. 124), ss. 3 (a) and 4 (1), as amended.  
The Kitwe Market By - Laws (Cap. 124 subsid.), By - Laws 5, 6, 7, 13 and 16.  
Constitution of Zambia (App. 3), s. 25.  
Ryan, *for the Plaintiff*  
Millward, *for the defendant*.  
\* "Excerise" should read "Exercise"

## Judgment

**Mallon AGJ:** By this originating summons the plaintiff, Adamson Chilufya, seeks a declaration against the defendants, the City Council of Kitwe, that a resolution of the health amenities and social services committee of the defendant council, passed on the 10th January, 1967, *waultra vires* the powers of the defendant council and for the declaration that the removal from Chimwemwe Market, Kitwe, of the plaintiff's shop by the defendant council in pursuance of the said resolution was unlawful and unconstitutional; and for the determination of the following questions:

1. Whether a resolution of the health amenities and social services committee of the defendant council, passed on the 10th day of January, 1967, as follows: "That Adamson Chilufya be no longer permitted to trade within the precincts of its markets", was *ultra vires* the powers of the defendant council?
2. Whether, if the said resolution was *intra vires* the powers of the defendant council, the said resolution and the removal of the plaintiff's shop from Chimwemwe Market, Kitwe, in pursuance of the said resolution, was an infringement of the plaintiff's constitutional rights under sections 13 and 18 of the Constitution?
3. Whether pursuant to the provisions of the Markets Ordinance, or at all, the defendant council has the right to exclude a trader from trading in all of the markets under the defendant council's control, save for a breach on the part of the trader of the conditions or by - laws under the Markets Ordinance?
4. Whether the defendant council has got the power to exclude a trader from trading in markets under its control on the grounds that the trader is a member of a political party?

Under Order 7, rule 1 (b) and Order 27, rule 11 (3) of the High Court Rules, the hearing of such an originating summons would normally take place in chambers, but in view of the public importance of the issues involved I adjourned the hearing from chambers into open court, under the provisions of Order 27, rule 8 of the High Court Rules. Counsel for the plaintiff also relied upon the provisions of Order 15, rule 16 of the Rules of the Supreme Court and the notes thereon in support of the form of process which he had adopted. The evidence at the hearing consisted of an affidavit by the plaintiff dated 7th April, 1967, and an affidavit, in reply, by Mr Chembe Harold - Hine Phiri, the Mayor of Kitwe, dated 18th June, 1967, I was informed by counsel that by agreement the latter affidavit contained certain legal arguments not strictly proper for inclusion in an affidavit, but that this course had been adopted by counsel in order that the issues involved could be put more fully before the court.

During the course of his argument, counsel for the plaintiff asked leave to amend his originating summons to include a reference to section 25 of the Constitution, which he submitted was particularly relevant to the subject matter of the originating summons and I allowed this amendment under Order 16, rule 1, of the High Court Rules in order that the real questions in issue between the parties would be determined. See *Byrne v Kamweka* [1].

From the affidavit evidence I make the following findings of fact.

1. The plaintiff, Adamson Chilufya, resides at No. 2281 Kamitondo Suburb, Kitwe, and is fifty - one years of age.

2. Between 1944 and 1967 the plaintiff carried on business as a trader at various municipal markets under the control of the defendants and their predecessors as follows:
  - (a) From 1944 until 1953 at Kitwe Municipal Board Market.
  - (b) From 1953 until 1955 at temporary Municipal Market at Buchi.
  - (c) From 1955 until 1958 at the Municipal Market, Kamitondo.
  - (d) From 1958 until 1961 at Kampemba Municipal Market.
  - (e) From 1961 until 1967 at the Old Market, Chimwemwe
3. During the whole of this period of approximately twenty - three years no complaint was charged or made against the plaintiff by the defendants or their predecessors for any breach of the defendant's market by - laws.
4. In 1964 the defendants permitted the plaintiff to erect a wooden stall, at a cost of £115, for the purpose of carrying on his trade.
5. There is not now in existence any document in the form of a licence or lease in respect of the plaintiff's occupation of a stall in the defendant's markets.
6. That the plaintiff paid a daily fee of 1s. to the defendants in respect of his right to trade in their markets.
7. That the plaintiff was nominated to stand as a candidate for the African National Congress in the Kitwe Municipal election which took place in September, 1966.
8. In August, 1966, during the election campaign his stall was badly damaged by a crowd of women.
9. The plaintiff repaired the damage to his stall and recommenced business, being provided with police protection through the defendants for a short period after the incident.
10. After the said incident the plaintiff continued to trade peacefully and successfully and his business increased.
11. At a meeting of the health amenities and social services committee of the defendants, held on 10th January, 1967, the following resolution was passed:

"Resolved: that (i) Mr. A. Chilufya be advised that he will no longer be permitted to trade within the precincts of any of Council's markets; and

  - (ii) the Committee notes that no evidence has been adduced indicating the cause of the unrest in the Chimwemwe Market. "

Part (ii) of the resolution referred to a report submitted to the committee by the Town Clerk, in which it was stated that the damage occasioned to the plaintiff's stall in August, 1966, was perpetrated by a group of alleged United National Independence Party supporters. This report was not accepted by the committee as proof of this contention.
12. The above resolution of the health amenities and social services committee was adopted as a resolution of the defendant and on 11th January, 1967, the Town Clerk addressed a letter to <sup>40</sup>the plaintiff, a copy of which is produced with his affidavit, advising him that the defendant had resolved that he be no longer permitted to trade within the precincts of any of its markets, but, in order to enable him to run down his stocks, he was permitted to trade in the old market at Chimwemwe up to and including Wednesday, 18th January, 1967.

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13. On 17th January, 1967, the plaintiff's stall was picketed by men who informed prospective customers not to trade with him, as a result of which no customers came to the shop,

which the plaintiff then closed. The stall was subsequently dismantled by the defendant's servants and deposited at the plaintiff's house

14. As a result of the defendant's action, the plaintiff has been deprived of the opportunity of earning his livelihood as a trader in any of the markets under the defendant's control.
15. The United National Independence Party has a majority in the defendant's council.

In paragraph 16 of his affidavit the plaintiff alleges that the real reason for the defendant's action in terminating his right to trade is the fact that he is a member of the African National Congress and that, in effect, the defendant is discriminating against him on the grounds of his political beliefs. This is strenuously denied by the defendant who claims that its action was *intra vires*, in that the resolution related to a market established in the City of Kitwe and under the control and management of the defendant by virtue of the provisions of section 3 of the Markets Ordinance. Paragraph 7 (a) of the mayor's affidavit refers to section 3 (1) of the Markets Ordinance, but I would point out that a new section 3 was inserted in the Markets Ordinance by section 115 of the Local Government Act, 1965 (No. 69 of 1965) and that the correct reference is now to section 3 (a) of the Markets Ordinance. By its long title the Markets Ordinance is "An Ordinance to provide for the establishment and management of markets", and section 3 (a) provides that:

"3. Every market established -

- (a) in the area of a local authority, shall be under the control and management of that local authority;"

By sub-section (1) of section 4 a local authority is empowered to make by - laws for, *inter alia*, the following purposes -

- "(a) regulating the use of markets and market buildings, and keeping order, preventing obstructions, and maintaining cleanliness therein or in the approaches thereto;

...

- (e) enabling the local authority from time to time to determine by resolution stallages, rents or tolls and fees for inspection of produce and providing for the collection thereof;"

Section 5 is not relevant to the present case.

The Chimwemwe Market was established by Government Notice No. 165 of 1963 and the Kitwe Market By - laws were published in Government Notice No. 346 of 1963 and apply to all markets established by the then Municipal Council of Kitwe. By - law 6 provides that "All persons using any market shall obey the reasonable directions of the Market Master for the purpose of preserving cleanliness and order in the market". It is common ground that the plaintiff has never, at any time, been in breach of those by - laws.

I will now consider the legal position of the plaintiff in relation to the defendant. In paragraphs 7 (d) and (e) of the mayor's affidavit, the plaintiff's right to trade is loosely described as "a daily tenancy or licence" and it is important first of all to decide, in law, which term is correct.

It will be noted that by - law 5 of the Kitwe Market By - laws refers to "stallages, rents or tolls and fees" and by - law 13 refers to a person "renting, holding or occupying a stall". Although it is not in evidence I was informed by counsel for the defendant that the usual practice is for the defendant to write to an applicant a letter granting him authority to occupy a stall on a day - to - day basis and drawing his attention to the by - laws and charges of 1s. per day.

[1] [2] The legal distinction between a lease and a licence is fully discussed in *Woodfall on Landlord and Tenant*, 25th Ed., at pages 2 and 8 from which it is clear that it is essential for the establishment of the relationship of landlord and tenant that there should be a demise, except where the relationship is created by statute. A demise or lease is the grant of a right to the exclusive possession of land for a determinate term less than that which the grantor has himself in the land and a lease is therefore a species of conveyance. At page 9 the learned author points out that "the question is in all cases whether the arrangement made between the parties confers upon the tenant a right to the exclusive possession of any property. It is not sufficient that the agreement confers a right, even an exclusive right, of doing something on the premises, such as fixing and exhibiting thereon an advertisement; the grant of such a right is the grant only of a licence." The effect of a

licence is discussed at paragraph 17 on page 11, and it is clear that its effect is to give the licensee an authority to use the premises, which authority prevents his being treated as a trespasser. Such a licence may be a gratuitous licence or a licence for value. In the latter case the consideration may be given either once for all or may take the form of a periodic payment, as in this case. [3] [4] The nature of a licence was also fully considered by the Court of Appeal in England in the case of *Frank Warr & Co. Ltd v London County Council* [2], from which it is clear that the fact that a licence is granted for the purpose of making a profit on land does not imply any grant of any estate or interest in the land, and I would refer, in particular, to the judgment of Romer, LJ, at page 720. The law with regard to the revocation of a licence is set out in paragraph 18, on page 11, of *Woodfall* and it is clear that [5] a gratuitous licence is revocable by notice, but time must be given to the licensee to remove from the premises, and even where a licence to occupy is revocable at will, still a reasonable time must also be given to the licensee in which to quit.

[6] In the light of the above statement of the law, I have come to the conclusion that the true nature of the relationship between the plaintiff and the defendant in this case was that of licensor and licensee. There is not in existence any writing which could be termed a lease. Without the defendant's licence to trade in the market the plaintiff would be a trespasser and the daily fee of 1s. which he paid in respect of his stall was more in the nature of a licence fee than a payment of rent. I do not consider that the fact that the defendant allowed the plaintiff to erect a wooden stall in the market altered this situation.

[7] I must now consider what powers the defendant had, under the provisions of section 3 (a) of the Markets Ordinance or otherwise, to grant a licence of the kind in question and to terminate it, and the decision on these points turns upon the interpretation to be placed upon the words "control and management" which appear in the said section. These words have been the subject of many judicial decisions in England, mainly in connection with their interpretation in the context of different English statutes, few of which are of real assistance in the present case. It is clear that at common law a licensor can terminate a licence at any time (see *Wood v Leadbitter* [3]), but such a termination can amount to a breach of contract resulting in damages (see *Kerrison v Smith* [4]). In my view, the section must confer upon the defendant power *inter alia* to grant licences or leases in respect of stalls in the markets under their control, and I would refer to the decision of the House of Lords in the case of *Shelley v London County Council* [5], and in particular to the judgment of Lord Porter at page 65, where he discussed the effect of the words "general management, regulation and control of houses provided by a local authority", in section 83 of the Housing Act of 1936 (England). At the top of page 66 His Lordship states:

[8] [9] " 'management' must in my view include a right to terminate the tenancy so far as the general law allows, i.e., after due notice. It is to my mind one of the important duties of management that the local body shall be able to pick and choose their tenants at their will. It is true that an ordinary private landlord cannot do so, but local authorities who have wider duties laid on them may well be expected to exercise their powers with discretion and in any case the wording of the Act seems to me to necessitate such construction."

It was argued for the plaintiff that if the defendant had power to terminate the licence to trade it could only do so by by - law. I do not accept this argument, and I am satisfied that the defendant could properly terminate a licence or lease by resolution. It is clear from the by - laws that it was competent for the defendant to exercise many of its powers of control over its markets by resolution and I refer in particular to by - laws 5, 7 and 16. [7] Section 3 (a) of the Markets Ordinance, in my view, gives the defendant full authority to grant or terminate the licence or lease by resolution and it is not necessary in law for it to do so by by - law (see *City of Salisbury v Mehta* [6], in particular the judgment of Briggs, F.J., at letter H on page 1017). I will consider the full effects of the decision in this case later in this judgment.

[8] [9] I am therefore satisfied in law that the defendant has power under section 3 (a) of the Markets Ordinance to terminate a licence to trade in a proper case, e.g. if a licensee had failed to pay his stallage fee or to comply with the market by - laws, in my view the defendant would clearly be entitled to terminate his licence. The exercise of this power must, however, be carried out fairly and in accordance with the principles of natural justice. In other words, it is not an arbitrary power which a local authority could exercise

regardless of the consequences and without due regard to the interests of the individual trader. I would refer to the case of *Re K.(H). (an infant)* [7], in which the Queen's Bench Division considered the question of the exercise of statutory powers by a public authority, in that case an immigration officer. In his judgment at page 233, letter B, Lord Justice Salmon said:

"What however is a quasi - judicial capacity has, so far as I know, never been exhaustively defined. It seems to me to cover at any rate a case where the circumstances in which a person who is called on to exercise a statutory power and make a decision affecting basic rights of others, are such that the law impliedly imposes on him a duty to act fairly."

Further down in the same paragraph, at letter D, His Lordship continued with reference to the powers of immigration officers:

"Their decisions are of vital importance to the immigrants since their whole future may be affected. In my judgment it is implicit in the statute that the authorities in exercising these powers and making decisions must act fairly in accordance with the principles of natural justice."

Lord Justice Salmon later discussed the effect of the court's decision in *Re K.(H.)* in an article in *The New Law Journal* of 13th July, 1967, at page 749, entitled "The Bench, The Last Bulwark of Individual Liberty" At page 750 he commented, "We laid down that whenever a statute such as the Immigration Act 1962 gave a minister or official or any body of persons power to make decisions concerning an individual's basic rights, it was implicit in the statute that in exercising those powers the principles of natural justice should be observed." Further down the same page His Lordship continued, "The importance of the case is that it re-affirmed the power and indeed the duty of the courts in certain circumstances to intervene in such cases in favour of the subject."

In *Judicial Review of Administrative Action*, by S. A. de Smith (2<sup>nd</sup> Ed.), at page 89, the learned author lays down the principle that, "Discretionary powers (vested in a public authority) must be exercised for the purposes for which they were granted; relevant considerations must be taken into account and irrelevant considerations disregarded; they must be exercised in good faith and not arbitrarily or capriciously. If the repository of the power fails to comply with these requirements it acts *ultra vires*."

[10] [11] In *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [8], it was held that the court is entitled to investigate the action of the local authority, with a view to seeing whether it has taken into account matters which it ought not to have taken into account or, conversely, has refused to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority it may still be possible to say that the local authority, nevertheless, has come to a conclusion so unreasonable that no reasonable authority could ever have come to it and, in such a case, the court can interfere. The power of a court, however, to interfere in any case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has conferred upon it. In his judgment at page 682, letter D, Lord Greene, M.R, pointed out that:

"The courts can only interfere with an act of an executive authority if it be shown that the authority have contravened the law. It is for those who assert that the local authority have contravened the law to establish that proposition. On the face of it a condition of this kind is perfectly lawful. It is not to be assumed *prima facie* that responsible bodies like local authorities will exceed their powers and the court, whenever it is alleged that the local authority has contravened the law, must not substitute itself for the local authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law."

Further down the same page, two lines below letter G, His Lordship continued:

"Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty - those, of course, stand by

themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration."

The above *dicta* of Lord Greene were applied by the *House of Lords* in *Fawcett Properties Limited v Buckingham County Council* [9], and I would refer in particular to the passage at the top of page 518 in the judgment of Lord Denning.

I have also considered the line of authority relating to the reasonableness or otherwise of by - laws made by a local authority as, in my view, the same principles which would apply in deciding whether or not a by - law is *ultra vires* should be applied in deciding whether or not a resolution of a council is also *ultra vires*, and I would refer to *Kruse v Johnson* [10], and in particular to the judgment of Lord Russell, CJ, at the bottom of page 99, where His Lordship held that the court would be entitled to find by - laws invalid as being unreasonable; "If for instance they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra - vires*.'" The above dictum of Lord Russell has been applied in many cases since.

Counsel for the plaintiff relied heavily on the case of *Mehta v City of Salisbury* [6], which was a decision of the High Court of Southern Rhodesia, which later came before the Federal Supreme Court. In this case the plaintiff, an Asian resident of Salisbury, sought a declaration that he was entitled to use a public bath in Salisbury, which the City Council had attempted by resolution to restrict for the use of Europeans. He was successful in obtaining such a declaration in the High Court and that decision was substantially upheld by the Federal Supreme Court on appeal. In essence the position in that case was that the plaintiff was clearly entitled, in terms of the city council's by - laws, to use the public bath in question and the city council without amending its by - laws had attempted to take away that right by resolution. It was held that the city council was bound by its own by - laws and could not remove the plaintiff's rights by resolution. The Kitwe Market by - laws do not provide specifically for the grant of licences to trade nor the machinery for applying for such licences, nor for their termination, and it could certainly be argued with some force that such by - laws could be made under the provisions of section 4 (1) (a) of the Markets Ordinance in the light of the remarks by Clayden, F.C.J., at letter H on page 1007, on the meaning of the word "regulating". On balance, however, I very much doubt whether it would be desirable, or indeed possible, to govern by by - law the selection by a council of suitable stallholders, and I am certainly not prepared to hold that any council is bound to do so under the provisions of the Markets Ordinance. In my view, this is clearly a matter of individual application referred to by Briggs, F.J., at page 1017, in a passage to which I have already made reference.

In the light of the legal principles which I have outlined above, I must now consider whether or not the plaintiff has succeeded in discharging the *onus* which rests upon him to establish, on a balance of probabilities, that the action of the defendant complained of was unreasonable, unfair and contrary to the principles of natural justice.

[12] [13] The defendant gives its reasons for terminating the plaintiff's licence to trade in paragraph 7 (g) of the mayor's affidavit, which is in the following terms:

"The plaintiff was so unpopular in the market that his presence therein constituted a security risk in relation to the efficient administration of the markets. The difficulties likely to have arisen if he had been permitted to continue to trade within the precincts of any of the defendant's markets would be such as to endanger the property of the defendant and also his own person.

The reason for his unpopularity at the time the decision was made was not considered by the Health, Amenities and Social Services Committee."

It is clear from the extract from the minutes of the meeting of the health, amenities and social services committee, which is produced with the mayor's affidavit, that the resolution to terminate the plaintiff's right to trade was taken after the committee had considered the Town Clerk's report on the cause of the unrest in the Chimwemwe Market in August, 1966, in which it was stated that the damage occasioned to the plaintiff's stall in August,



1966, was perpetrated by a group of alleged United National Independence Party supporters. The defendant admitted that the plaintiff's stall was badly damaged by a crowd of women during the election campaign, and after the plaintiff had been nominated to stand as a candidate for the African National Congress.

It is not unreasonable therefore to draw the inference from the evidence that the plaintiff's stall was damaged by political opponents, and it is clear that there had been no trouble in the market in connection with the plaintiff's stall prior to the announcement of his candidature. The defendant admits that, following upon the incident in August, the plaintiff recommenced business and was provided with police protection by the defendant for a short period after the incident, and I have found as a fact, which the defendants have not attempted to refute, that, after the said incident, the plaintiff continued to trade peacefully and successfully so that his business increased.

In paragraph 12 of his affidavit the plaintiff alleges that, for a short period prior to the passing of the resolution complained of, on many occasions youths shouted threats to the effect that all African National Congress supporters and Jehovah's Witnesses would no longer be allowed to trade in the market. This allegation is denied by the mayor in paragraph 9 of his affidavit, but in view of the background of unrest in the market which clearly existed after the August incident, I consider that, on a balance of probabilities, the plaintiff's allegation is based upon fact, and some support for this conclusion is contained in paragraph 7 (g) of the mayor's affidavit, when he refers to the plaintiff as being "so unpopular" in the market. In my view, the only possible inference from the evidence is that the plaintiff's "unpopularity" in the market only arose after he had announced his intention to exercise his constitutional rights to stand as a candidate for the African National Congress in the municipal elections. The defendant has freely conceded that it has no complaints about his conduct of his business, which he has carried on for almost twenty - three years.

In addition, there is no evidence that he deliberately stirred up trouble in the market through his political activities and it is clear that, on the contrary, his efforts to continue peacefully trading have been interrupted by activities on the part of other people which were probably criminal and can only have been politically inspired.

It is significant that part (ii) of the defendant's resolution of 10th January, 1967, states that, "The Committee notes that no evidence has been adduced indicating the cause of the unrest in the Chimwemwe Market." I think it is a fair comment on this part of the resolution that it shows that there was no evidence indicating that the plaintiff was the cause of the unrest in the market, yet despite this fact the defendant proceeded to terminate his licence to trade.

In paragraph 7 (g) of his affidavit, referred to above, the mayor states that the reason for the plaintiff's unpopularity at the time the decision was made was not considered by the committee, an assertion which I view with considerable reservations. If it was not considered it certainly should have been, as a material factor in deciding whether or not it would be reasonable to terminate the plaintiff's licence.

It is clearly the duty of a local authority, which is vested with wide statutory powers over the inhabitants within the area of its jurisdiction, to exercise those powers fairly and impartially in the interests of all the inhabitants regardless of their political affiliations. If the plaintiff was being subjected to actual violence or threats of violence while peacefully carrying on his trade and through no fault of his own, it was the defendant's duty to maintain law and order in the market either through their market master in terms of section 4 (1) (a) of the Markets Ordinance and By - law 6, or by calling in the police as they did following upon the incident at the plaintiff's stall in August, 1966. Instead of taking this course, the defendant decided to terminate the plaintiff's licence to trade without making any attempt to protect his interests, or his livelihood, by maintaining law and order and, in my view, in so doing it acted unreasonably, unfairly and contrary to the principles of natural justice. From the evidence the conclusion is inescapable that the plaintiff became a "security risk" in the eyes of the defendant because of his political affiliations, and that its decision was materially influenced by political considerations and was therefore a decision taken in bad faith.

[14] [15] There is one further aspect on the matter which is of considerable importance, and that is the plaintiff's rights under the Constitution of the Republic of Zambia. Counsel for the plaintiff submitted that the defendant's action constituted a breach of the plaintiff's fundamental rights under sections 13, 18 and 25 of the Constitution. Of these three sections, in my view, the one which is of particular relevance to the circumstances of this case is section 25, subsections (2) and (3), of which are in the following terms:

"(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or authority, or any public authority;

(3) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

Having carefully considered the evidence in this case, in the light of the above provisions, I am satisfied that the defendant, by terminating the plaintiff's licence to trade, treated him in a discriminatory manner because of his political opinions, in the performance of their functions as a public authority. I do not consider that section 18 of the Constitution is really relevant to the circumstances of this case.

I therefore find that, in law, the plaintiff has discharged the *onus* of proof upon him, and that the resolution of the defendant dated 10th January, 1967, terminating his licence to trade, was *ultra vires* its powers under the Markets Ordinance as being -

- (a) unreasonable, unfair and contrary to the principles of natural Justice; and
- (b) a breach of the plaintiff's constitutional rights under section of the Constitution of Zambia.

As a consequence of the above, I also find that the plaintiff has established deprivation of property within the meaning of section 13 of the Constitution to the extent of the value of the wooden hut erected by him in the market with the defendant's permission, and removed there from by its servants. I find the value of the said hut to be £115.

In terms of the originating summons I therefore declare that the resolution of the health, amenities and social services committee of the defendant council, which was adopted as a resolution of the defendant itself, was *ultra vires* its powers and that the removal from Chimwemwe Market, Kitwe, of the plaintiff's wooden stall by the defendant in pursuance of the said resolution was unlawful and unconstitutional.

In view of the terms of the above declaration and my earlier findings in law, I do not consider it necessary formally to determine the questions set out in the originating summons.

I award the costs of these proceedings to the plaintiff.