IN THE COURT OF APPEAL **APPEAL NO. 97/ 2017**
HOLDEN AT KABWE
(Civil Jurisdiction)

BETWEEN:

BACKLOADS ZAMBIA LIMITED **APPELLANT**

AND

FREIGHT AND LINERS LIMITED **RESPONDENT**

Coram: Makungu, Chashi and Kondolo, J.J.A
On the 4th day of October, 2017 and on the 26th day of March, 2018

For the Appellant: Mr. R. Mainza of Mainza & Co
For the Respondent: Messrs Central Chambers

JUDGMENT

MAKUNGU JA, delivered the Judgment of the court.

Cases referred to:

1. *The Rating Valuation Consortium and D.W Zyambo & Associates (suing as a Firm) v. The Lusaka City Council and Zambia National Tender Board (2004) Z.R 109*
2. *Rodgers Chama Ponde and 4 Others v. Zambia State Insurance Corporation Limited No. 16 of 2004.*
3. *The Attorney General v. Marcus Achiume (1983) ZR 1*
4. *Khalid Mohammed v. The Attorney General (1982) ZR 49*
5. *Kapasa Mwanza v. Zambian Breweries PLC: Appeal No. 153 of 2014*
6. *Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172*
7. *Mususu Kalenga Building Limited and another v. Richmans Money Lenders Enterprises (1999) ZR 27*

Legislation referred to:

1. *The Companies Act, Chapter 388 of the Laws of Zambia – Sections 203 (1), 2017 (1) (b)*
2. *The Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia – Section 5*
3. *Court of Appeal Rules, Act No. 7 of 2016 - Order X rule 9 (2)*
4. *The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia*
5. *The Judgments Act, Chapter 81 of the Laws of Zambia – Section 2*
6. *The Adoption Act, Chapter 54 of the Laws of Zambia*
7. *Article 118 (e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.*

Other authorities referred to:

1. *Osborne's Concise Law Dictionary 12th edition (2013)*
2. *Halsbury's Laws of England, 4th edition, vol. 24 re – issue (1973) by Lord Hailsham of St. Marylebone, Butterworths: London*

This appeal arises from a judgment of the High Court rendered on 30th March, 2017. In the back ground of this case and the summary of the evidence and judgment appealed against, we shall refer to the appellant as the defendant and the respondent as the plaintiff as those were their designations in the lower court. On or about 1st October, 2000 the plaintiff let to the defendant the property described as stand number 5286, Mungwi Road, heavy industrial area, Lusaka for a period of one year at $1,000 per month payable in advance. The same agreement authorized the defendant to carry out repairs and renovations and to upgrade the property at its own cost. It also gave the defendant an option to purchase the property

or be reimbursed the expenses incurred on improving the property in the event that the plaintiff decided not to sell the property.

A subsequent lease dated 1st October, 2004 was executed but it was in contention because it was made between one Davies L. Shimonde as landlord and the defendant as tenant. By 30th September, 2005 the parties commenced negotiations to alter the terms and conditions of the tenancy initial tenancy but failed to agree on new rentals to commence on 1st October, 2005. In February, 2006 the respondent obtained a valuation report from B.M Valuation Surveyors who determined that the open market rental value of the property in issue was K12,000,000.00 (unrebased)per month. The said report was availed to the defendant who was advised that the rent would accordingly be increased to K12,000,000.00 (unrebased) with effect from 1st April, 2006. Subsequently, a draft lease was made and sent to the defendant who refused or neglected to sign it.

The defendant however continued paying rent at the old rate of US$1,000 per month up to 31st March, 2006. The outstanding rentals from 1st April, 2006 to 30th June, 2008 were the subject of litigation between the parties in cause number 2008/HP/588 instituted by the defendant. The claim for rent arrears in this matter is from 1st July, 2008 onwards. From 31st March, 2000 to April, 2010 the defendant without the consent of the plaintiff had sublet part of the premises to Elliots International Limited. The rentals received from the sub-tenant were not transmitted to the plaintiff. As a result, a notice to quit was issued to the defendant on 22nd June, 2010 in accordance with ***Section 5 of the Landlord***

and Tenant (Business Premises) Act [3] and served upon the defendant the same day. The defendant notified the plaintiff by letter dated 31st August, 2010 that they were totally opposed to the termination on grounds that the matter was in court and until it was settled, they had no intention of vacating the property. The plaintiff has since refused to give up possession. The plaintiff obtained another valuation report from the Government Valuation Department sometime in 2011 which determined that the current open market rental value of the property is K39,000,000.00 (unrebased) per month.

The plaintiff's claims were as follows:

i. *Possession of the premises.*
ii. *Payment of the unpaid rent from 1st July, 2008 to date of commencing these proceedings at the rate of K12,000,000.00 per month.*
iii. *Payment of the sum of US$ 140,000.00 being rentals realized from the illegal subletting of the plaintiff's property by the defendant.*
iv. *Mesne profits at the rate of K39, 000, 000. 00 per month from the date of the writ herein till possession is given.*
v. *Interest on (ii), (iii) and (iv) above.*
vi. *An order for an account to be taken on the property in relation to water and electricity and other utility bills on the property.*

vii. *An order that the defendant pays rent at a rate to be determined by the court pending the determination of this matter.*

viii. *Any other relief the court may deem just to give to the plaintiff.*

ix. *Costs of and incidental to this suit.*

The defendant counter – claimed for the sum of K524, 426, 898. 00 (unrebased) being the cost of the repairs, renovations and upgrading of the demised premises with interest in terms of the lease agreement on the ground that the plaintiff had decided not to sell the property.

The trial Judge found that it was not in dispute that PW1 was 18 years old at the time of her appointment as a director of the plaintiff company, therefore the appointment was valid. That the operative lease between the parties was the one dated 1st October, 2000 which was made between the plaintiff and the defendant and not the one dated 1st October, 2004 which was made between Davies L. Shimonde as landlord and the defendant as tenant because the plaintiff is the actual landlord. That the lease was to come to an end upon the happening of either the sale of the property to the defendant, or a refund of the renovation/upgrading costs in case the plaintiff decided not to sell the property to the defendant, or upon default on the terms or other means upon which a lease may be determined. The Judge also found that the lease had an option for the plaintiff to purchase the property, which was not a provision

incidental to the relationship of landlord and tenant but a matter collateral and independent of it.

That although the tenancy agreement of 1st October, 2000 was null and void for want of registration, there was created a year to year tenancy between the parties. The court further found that the plaintiff having given the defendant notice to terminate the tenancy on 22nd June, 2010 under Section 5 of the Landlord and Tenant (Business Premises) Act (3) there was no legal basis for the defendant to hold onto the property after the expiry of the notice period. The plaintiff was therefore granted possession of the property.

On the issue of unpaid rent by the defendant, from 1st July, 2008, to the date of the writ in the sum of K12, 000.00 per month, the judge was of the view that the plaintiff is entitled to unpaid rent from 1st July, 2008 up to the date of commencement of the action i.e. 4th February, 2011 at the agreed rate of US$1,000.00 per month or its current kwacha equivalent.

On the issue of damages in the sum of US$140, 000.00 for the alleged unlawful subletting of the property, the trial judge found that the plaintiff had proved on the balance of probabilities that the defendant had sublet part of the premises from 31st March, 2004 to 1st April, 2010 without the plaintiff's consent. The plaintiff was therefore granted damages to be assessed by the Deputy Registrar.

On the plaintiff's claim for mesne profits at the rate of K39, 000,000.00 (unrebased) per month from the date of the writ to the date of possession, it was held that there was no legal justification for the defendant to continue occupying the premises after the expiry of the notice to quit. Therefore the plaintiff was entitled to mesne profits at the current open market rental value of the premises for the period that the defendant was in unlawful possession. The same to be assessed by the Deputy Registrar from the date of the judgment with interest as per Judgments Act. (5)

The Judge further determined that the plaintiff is entitled to an account in relation to the utility bills for water and electricity and ordered the defendant to pay the outstanding bills directly to the utility companies.

As regard the counterclaim, the learned trial Judge adjudged that the plaintiff was liable for the costs incurred in respect of works carried out up to the date when the defendant was issued with the notice to terminate the tenancy on 22nd June, 2010. She further ordered that the Deputy Registrar should assess the value of the costs of repairs, renovations and upgrades. Further that the amount found due should be paid as earlier contractually agreed upon by the parties with interest at the current commercial bank lending rate from the date the plaintiff informed the defendant that it would not sell the property to the date of judgment, thereafter at the Bank of Zambia short term deposit rate until full settlement.

The parties were granted liberty to offset the amounts owing to each other and each party was ordered to pay its own costs.

Dissatisfied with the judgment, the defendant has appealed to this court on nine grounds framed as follows:

1. *The court below having found as a fact that the operating lease between the parties was and is the one dated 1st October, 2000 and further that the termination or the duration of the lease was either upon sale of the property to the defendant or upon reimbursement of the costs of repairs to the defendant, misdirected itself in law and in fact when it held that the lease terminated when the plaintiff issued notice to terminate the tenancy agreement on 22nd June, 2010.*
2. *The court below misdirected itself in law and in fact when it held that the plaintiff was entitled to possession of stand 5286, Mungwi Road in the face of an admission by PW1 that the lease dated 1st October, 2000 was to terminate either upon sale of the property to the defendant or upon reimbursement of the costs of repairs to the defendant.*
3. *The court below misdirected itself in law and in fact when it held that the plaintiff was entitled to the claim in respect of payment of unpaid rent from the defendant from 1st July, 2008 to 4th February, 2011 at US$1, 000.00 per month or its current kwacha equivalent in the face of unchallenged evidence that the defendant paid into court a sum of K187, 000.00 as rent arrears for the period 2009 to 2011.*

4. *The court below having found as a fact that the termination or the period of duration of the lease dated 1st October, 2000 was either upon sale of the property to the defendant or upon the reimbursement of the costs of repairs to the defendant, misdirected itself at law and in fact when it held that there was no lawful justification for the defendant's continued occupation of the demised premises and in awarding the plaintiff mesne profits to be determined at the current open market rental value of the premises in the face of evidence that the costs of repairs are still outstanding.*
5. *The holding by the court below that the defendant carried out repairs and renovations between 2007 and 2012 is against the weight of oral and documentary evidence adduced by the defendant.*
6. *The court below having found as a fact that the termination or the period or duration of the lease dated 1st October, 2000 was either upon sale of the property to the defendant or upon reimbursement of the costs of repairs to the defendant, misdirected itself in law and in fact when it held that the plaintiff was only liable for the costs incurred in respect of works carried out up to the date when the plaintiff issued the defendant with notice to terminate the tenancy agreement on 22nd June, 2010.*
7. *The holding by the court below that the value of the costs of repairs, renovations and upgrades undertaken by the defendant shall attract interest at the current commercial bank lending rate from the date the plaintiff informed the defendant that it would not proceed with the sale of the*

property to date of judgment, violates the intentions of the parties enshrined in the lease agreement.

8. *The court below misdirected itself in law and in fact when it held that PW1 was eligible to be appointed as Director of the plaintiff company despite having been eighteen (18) years of age on the date of appointment.*
9. *The learned trial Judge misdirected herself in law and in fact when she awarded the plaintiff damages arising from the subletting of the premises to Elliot International from 31st March, 2004 to 1st April, 2010 on the basis of unpaid invoices in the face of evidence that the tenant only paid US$6, 000.00.*

At the hearing of the appeal, learned counsel for the appellant relied on the Heads of Argument filed herein on 21st August, 2017. He argued grounds 1, 2 and 4 together. His submissions were that the terms of the lease with an option to purchase produced on page 458 of Volume two of the record of appeall4 are clear and unambiguous.

He cited the case of ***The Rating Valuation Consortium and D.W. Zyambo and Associates (suing as a firm) v. The Lusaka City Council and Zambia National Tender Board*** [1] where the Supreme Court held that:

> ***"1. What should guide the court in analyzing business relationships should be whether or not the parties conduct and communication between them amounted to an offer and acceptance. What is regarded as an***

important criterion is for the court to discern clear intention of the parties to create a legally binding agreement between themselves. This can be discerned by looking at the correspondence and the contract of the parties as a whole."

He also referred to the case of ***Rodgers Chama Ponde and 4 others v. Zambia State Insurance Corporation Limited*** [2] where the Supreme Court stated the law on parole evidence as follows:

"Parole evidence is inadmissible because it tends to add, vary or contradict the terms of a written agreement validly concluded by the parties."

In light of the aforementioned authorities, learned counsel for the appellant submitted that the language used in the lease agreement means that the respondent undertook to reimburse the appellant the costs of renovations, repairs and upgrades in the event that the property was not sold. He stated that he concurs with the learned trial judge's finding that:

".....the period or duration of the lease was upon the happening of either the sale or refund of money in the event the plaintiff declines to proceed with the sale ....."

He therefore contended that the judge seriously misdirected herself in law and in fact when she held that the lease terminated when the plaintiff issued a notice to terminate on 22nd June, 2010 because this is at variance with the express terms of the lease agreement. He therefore urged us to reverse the lower courts finding on the basis of several cases including ***The Attorney General v. Marcus Kampamba Achiume*** [3] were the Supreme Court held as follows:

> ***"The appellate court will not reverse the findings of fact made by the trial Judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make."***

Counsel therefore submitted that termination by notice was not provided for in the said lease because it was not the intention of the parties to terminate it that way. He stated that the evidence on record, indicates that on 10th September, 2007 the appellant demanded for payment of the costs of repairs, renovations and upgrading of the property and to date no payment has been made. That under the circumstances, the purported notice to terminate is of no legal consequence.

In addition, he submitted that the trial Judges holding that the plaintiff is entitled to an order of possession is contrary to her findings that the duration of the lease was dependent on the sale of

the property to the plaintiff or reimbursement of the costs of the renovations, upgrading and repairs. That had the court applied the case of ***The Rating Valuation Consortium & D.W. Zyambo & Associates (Suing as a firm) v. The Lusaka City Council*** (1) she would not have granted possession of the property to the plaintiff. He further contended that the ***Halsbury's Laws of England Volume 27*** (2) relied upon by the court below in granting possession of the property to the plaintiff is irrelevant to this case. The plaintiff was justified to continue occupying the demised premises until the costs of the improvements are paid. That therefore, the order for payment of mesne profits cannot stand.

In response, the respondent's advocate made a comment in his Heads of Argument to the effect that the 1st, 3rd, 5th, 7th and 8th grounds of appeal violate ***Order X Rule 9 (2) of the Court of Appeal Rules*** (3) as they contain narratives and arguments.

He submitted that the 1st ground is devoid of merit and must be dismissed because the court took cognizance of the fact that the lease that was operational at the time was the one dated 1st October, 2000. The court below also found on page 34 of the judgment that the lease could be determined upon either the landlord declining to sell or the tenant refusing to purchase or upon breach of its terms or other terms upon which the lease could lawfully be determined. Further that, the lease agreement came to an end when the respondent declined to sell the property to the appellant. The appellant refused to give up possession because it

was claiming for a refund of the repairs and renovation costs and it is for this reason that the respondent issued a notice to quit.

Counsel further argued that the lower court's findings were based on properly evaluated evidence on record and not perverse or made in the absence of any relevant evidence. Therefore there was no legal basis for interfering with the findings. He relied on the case of ***Kapasa Mwanza v. Zambian Breweries Plc.*** [5]

In reaction to ground two, counsel stated that the Court took cognizance of the fact that the relationship that subsisted between the plaintiff and defendant was that of Landlord and Tenant. Counsel stated that the lease came to an end when the respondent declined to sell the property to the appellant in 2006. The appellant, at the time, even asked for reimbursement of the costs of the repairs. Since the trial judge awarded the appellant a refund of the costs, the appellant cannot continue holding over the tenancy.

Counsel's response to ground four was that the relationship between the appellant and the respondent ended when the appellant issued a Notice to quit. That the case of ***Rating Valuation Consortium*** [1] referred to by the appellant is distinguishable from this case because the lease with an option to purchase ended when the respondent declined to sell its property to the appellant. Therefore, the trial court interpreted the lease between the parties correctly. That the relationship between the

parties herein was subject to the Landlord and Tenant (Business Premises) Act. That there is no legal basis to upset these findings.

We have critically perused the record of appeal and considered the submissions made by both advocates. ***Order X Rule 9 (2) of the Court of Appeal Rules*** [3] provides as follows:

"(2) *A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively."*

The aforementioned provisions are unambiguous or simply speak for themselves. In our view, ground 1 contains narratives, grounds 2, 4, 5 and 7 contain both narratives and arguments, grounds 3, 5 and 8 contain arguments. Therefore, ***Order X Rule 9 (2) of the Court of Appeal Rules*** [3] has been breached. However, the objection came late in the day and it is clear that the respondent having responded has suffered no prejudice by the said defects. Furthermore, it is of utmost importance that the matter be determined on its merits and not be defeated by undue regard to procedural technicalities. We are fortified in this regard by ***Article 118 (e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.*** [6] We cannot leave this point without warning the appellant's counsel to follow laid down procedure to the latter in future as

procedural rules are meant to be followed and Article 118 of the Constitution has not taken away that tenet of the law.

We shall therefore proceed to determine the appeal.

On grounds 1, 2 and 4 we have found it imperative to reproduce the lease agreement which reads as follows:

> *"LEASE WITH OPTION TO PURCHASE AGREEMENT*
>
> *Freight & Liners Zambia Limited agrees to lease with an option to purchase plot 5286 Mungwi Road, Lusaka to Backloads Zambia Limited.*
>
> *Repairs, renovations and upgrading of the property will be carried out at Backloads cost and to their requirement and specification in order for the premises to be operational and secure, these costs will be taken into account with interest, by freight and Liners and deducted from the agreed sale price.*
>
> *In the event of either freight and liners or Backloads declining the sale/purchase of the said property then Freight and Liners will reimburse Backloads the cost of the renovations, repairs and upgrades done to the premises plus interest at local commercial bank rates.*

Backloads will be liable to pay occupational rent US$1,000 per month or the kwacha equivalent thereof to Freight Liners quarterly in advance until the conclusion of this agreement.

Signed: .....
Honourable D. L Shimonde
O.B.O Freight & Liners

Signed: .....
Mr. Harry Kandundu
Accountant Freight & Liners ltd

Signed: ....
Mr. Alan McNAb
O.B.O Backloads Zambia Limited"

Upon scrutinizing the agreement, we take the view that grounds 1, 2 and 4 lack merit because the Tenancy Agreement does not stipulate that the tenancy shall terminate only upon sell of the demised premises or reimbursement of the costs of the improvements. The trial Court was on firm ground when it held that the tenancy fell under the ***Landlord and Tenant (Business Premises) Act*** [2] which supersedes the agreement and therefore termination was supposed to be by Notice under Section 5 of that Act.

We must point out that the tenancy ended at the end of the notice period i.e. on 22nd November, 2010 and not on 22nd June, 2010 as determined by the trial Judge. On the authority of ***Wilson Masauso Zulu v. Avondale Housing Project*** [6] the finding of the trial Court on this aspect is hereby set aside. The trial judge's other finding

that the contract could terminate upon the property being sold was in our view made on the basis of evidence on record and therefore not perverse because if the property was sold, the relationship of landlord and tenant would have ended and the relationship of vendor and purchaser would have started.

The finding to the effect that reimbursement of the costs of improvement would have ended the contract is contrary to Section 5 of the Act which makes it mandatory for 6 months notice to quit to be issued in the standard form and is therefore set aside.

The trial Judge was on firm ground to grant possession of the property to the respondent because it had complied with the requirements of the Act in issuing a Notice to Quit. The appellant is therefore not justified to continue occupying the premises as they await reimbursement of the said expenses.

On whether the respondent is entitled to mesne profits, the view we take is that the findings alluded to under ground 4 were made on firm ground and on the basis of the evidence. Contrary to the appellant's allegation, Halsbury's Laws of England 4th edition re-issue Vol. 27 paragraph 255 which was relied upon by the trial judge in reaching a decision pertaining to mesne profits, applies to this case with full force. The said paragraph states that a landlord may recover in an action for mesne profits the damages which he has suffered through being kept out of possession of the property and as rightly pointed out by the judge, this position was endorsed by the Supreme Court in ***Mususu Kalenga Building Limited and***

another v. Richmans Money Lenders Enterprises. [7] The same position has been upheld in many other Supreme Court decisions.

The trial judge had rightly directed herself when she awarded mesne profits to the respondent at the current open market rental value of the property for the period that the appellant was in unlawful possession because that is the best way of compensating the respondent for loss of use of the property. The appellant will suffer no prejudice for this because they will recover their costs for improving the property. We are of the view that the respondent is entitled to mesne profits up to the time that the appellant vacates the property and not from the date of the writ to the date of judgment. Overall we are of the view that the lower court had properly applied the rules of interpretation of business relations laid down in the ***The Rating Valuation Consortium case.*** [1] For the aforementioned reasons, we find no merit in grounds 1, 2, and 4 and dismiss them.

As for ground three, the appellant's advocate argued that in paragraph 13 of the Witness Statement appearing on pages 661 to 666 of volume two of the Record of Appeal, DW1 Alan Mcknab testified under cross – examination that the defendant paid into court the sum of K187,000.00 as arrears of rent for the period 2009 – 2011 and that this evidence was unchallenged. He submitted that for unexplained reasons, the trial judge did not take into account that evidence thereby misdirecting herself. That the holding that the defendant should pay rent arrears from 1st July, 2008 to

4th February, 2011 at US$ 1, 000.00 per month is therefore perverse and should be reversed.

In response to ground three, it was submitted that simple arithmetic demonstrates that the period from 1st July, 2008 to 4th February, 2011 is a period of 31 months 4 days at the rent of US$1, 000. 00 per month. The trial Court upheld that the sum of US$31, 133. 00 which was equivalent to K303, 858. 08 at K9. 67 per Dollar, as at the date of the Judgment was payable.

In dealing with ground 3, having found that possession of the premises by the appellant was unjustified, we have come to the conclusion that it will be in the interest of justice for the appellant to pay rent for the period from 1st July, 2008 to 22nd November, 2010 the date of the expiry of the notice to quit. We reiterate that the tenancy ended at the expiry of the notice period. Therefore, mesne profits began accruing from 23rd November, 2010. As such we hold that the same be quantified and the amount payable be determined by the Deputy Registrar who should take into account the K187,000.00 paid into court by the appellant on 20th March, 2012 in cause no. 2011/HC/0060 as rent arrears at the rate of US$1, 000 per month. We note that the Notice of payment into court was not included in the record of appeal, however, a search made on the High Court record has revealed that it was indeed filed and we take judicial notice of it. is not in dispute that K187,000.00 was paid into court. Therefore, ground 3 has partially succeeded.

The appellant argued Grounds five and six together that page 51 lines 12-14 of the Record indicate that the learned trial Judge made the following remarks regarding the defence evidence on repairs and renovations:

> ***"The evidence by the defendant as regards repairs and renovations is that he carried out repairs between 2007 and 2012 in excess of ZMW6, 356, 270.57....."***

He went on to submit that a perusal of DW1's evidence under cross examination appearing at pages 970-986 of Volume Three of the Record does not disclose that DW1 testified that he carried out repairs in excess of the said amount during that period and therefore the judge erred. On the contrary, the documentary evidence relied upon by DW1 appearing at pages 459 – 656 of the record clearly shows that the repairs, upgrades and renovations were carried out between 2000 and 2012. He therefore urged us to quash the said finding and instead order for reimbursement of the said costs for the period 2000 to 2012 to prevent unjust enrichment.

In addition, it was submitted that the trial judge having found as a fact at page 41 lines 16-21 of Volume one of the Record that the termination of the lease was either upon sale of the property to the defendant or upon reimbursement of the costs of repairs, misdirected herself in law and fact when she held that the plaintiff was only liable for costs incurred in respect of works carried out up

to the date of the notice to terminate tenancy which was 22nd June, 2010.

In response to ground five, it was submitted that the appellant was awarded costs of the repairs, renovations and upgrades from inception to 22nd June, 2012 making this ground irrelevant. He relied on the case of ***Kapasa Mwanza v. Zambia Breweries Plc.*** *(5)*

In response to ground six, it was submitted that the learned trial Judge had considered the issue of the lease agreement dated 1st October, 2000 and stated from line 3 at page 42 of the record of appeal that the lease agreement came to an end when the respondent gave notice to terminate. The fact that the appellant commenced an action, appearing on pages 207 – 245, in respect of the amounts due to it for repairs and renovations made to the premises, meant that the appellant recognized that the lease had come to an end. The appellant cannot now fault the findings of the trial court that the tenancy ended when the respondent issued the notice to terminate on 22nd June, 2010.

As regards the 5th and 6th grounds of appeal, we have observed from the judgment that the trial judge did not state that the repairs, upgrades and renovations were made from 2007 but that the respondent is liable for all the costs incurred from inception to the date when the notice to terminate the tenancy was issued.

It is clear from DW1's evidence from page 459 – 656 of the record of appeal that the property was being improved as such between the years 2000 and 2012. As stated hereinbefore, the tenancy expired at the end of the notice period. Furthermore, there was no indication in the contract or any other correspondence pertaining to it, prohibiting the appellant from continuing to improve on the property on a certain date. We therefore opine that it is only fair and equitable that the respondent pays for all the improvements made to the property that can be validated from inception up to the end of the notice period. After all, the respondent will benefit from the improvements. The erroneous findings of the trial judge in this respect are set aside.

Counsel for the appellant argued ground 7 as follows: On page 53 lines 6 –12 of Volume One of the Record of appeal, the learned trial judge awarded the defendant interest on the costs of the improvements from the date of the writ up to the date of notice to quit. It is clear from paragraph 2 of the lease agreement that the intention of the parties was that the costs of the improvements made to the property would accrue interest as and when the same occurred and not on some future date as erroneously held by the trial judge. It was submitted that it would be unjust to postpone payment of interest on amounts which were incurred as far back as 2000. The learned judge should not have varied and contradicted the terms of the written agreement.

In response to the 7th ground, the respondent contended that the trial Court gave effect to the lease agreement and that the interest became applicable when the cause of action accrued. That before the respondent informed the appellant of its refusal to sell its property, the question of a refund had not arisen. That the appellant was only entitled to the costs before the issuance of the notice.

In determining ground 7 we have considered ***Section 2 of the Judgments Act*** [5] which clearly states thus:

> ***"Every Judgment, Order or decree of the High Court or of the Subordinate Court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the court which rate shall not exceed the current lending rate as determined by the Bank of Zambia."***

We have also carefully considered paragraph 3 of the lease agreement mentioned hereinbefore. It is clear that the parties had agreed on interest at local commercial bank rates. The court below was therefore on firm ground when it determined the interest rates in accordance with the ***Judgments Act*** [5] because by doing so it properly put into effect the intentions of the parties.

In light of the 3rd paragraph of the lease, it is clear that the refund for the improvements should have been made in 2006 when the respondent declined to sell the property to the appellant as rightly

adjudged by the lower court. However, the judge erred when she held on page J45 that the interest at commercial bank rate would be paid only up to the date of judgment because it is trite law that a claimant should be paid interest for the whole period that he is deprived of his money. This can be deduced even from Section 2 of the Judgments Act which provides for interest to be paid up to the time that the judgment debt is cleared. Interest should therefore be calculated from the date of refusal to sell to the date when full refund will be made in accordance with the Judgments Act. We agree with the respondent that the debt accrued altogether when the respondent refused to sell.

The appellant's arguments in support of ground 8 were that it is trite law that a person may ascend to the position of Director of a company if he or she has been duly appointed by members/shareholders of the company by an ordinary resolution at a general meeting and is eligible to hold such office. He relied on ***Sections 203(1) and 207(1) (b) of the Companies Act*** [1] which provide thus:

> ***"203 (1) For the purposes of this Act, any person who is appointed by the members of a company to direct and administer business of the company shall be deemed to be a director of the company, whether or not he is called director."***
>
> ***"207(1) (b) A person shall not be appointed as or continue to hold office as a director of a company if the person is –***

(b) an infant or any other person under legal disability."

Counsel pointed out that PW1's evidence under cross examination appearing at page 907 lines 4-14 of Volume Three of the record of appeal was that there is no company resolution in the plaintiff's bundle of documents appointing her as a director of the respondent company and that she was eighteen (18) years old when her name was placed on the Register of Directors appearing at page 657 of Volume Two of the record. Under the circumstances, it was submitted that the trial judge misdirected herself in law when she held that PW1 was eligible to be appointed as director at the age of 18 years.

It was further submitted that ***Section 207 (1) (b) of the Companies Act*** [1] states that a person shall not be appointed as or continue to hold office as a director of a company if that person is an infant or any other person under a legal disability. He pointed out that the ***Interpretation and General Provisions Act,*** [4] does not define an infant and as such he relied on the ***Adoption Act*** [6] which defines an infant as a person who has not attained the age of twenty-one years, but does not include a person who is or has been married.

The respondent's reply to ground 8 was that the appellant does not dispute that PW1 was eighteen at the time of her appointment as director. That the appellant conveniently defined an infant under the Adoption Act which Act is intended solely for adoption matters.

Counsel referred to ***Osborne's Concise Law Dictionary*** [1] where '***minor***' has been defined as follows:

> ***"A person under the age of 18 years. He becomes of full age from the first moment of the 18th anniversary of his birth. An infant may be described as a minor."***

He also referred to ***Halsbury's Laws of England,*** [2] which defines "***infant***" as follows:

> ***Infant in English Law; a person attains full age on attaining the age of eighteen. The provision applies for the purpose of any rule of law, and in the absence of a definition or of any indication of a contrary intention, for the construction of 'full age', 'infant' 'infancy' 'minor' and similar expressions in any statutory provision whether passed or made before, or after 1st January, 1970 and in any deed, will or other instrument of whatever nature (not being statutory provision) made after that date.***

Counsel, therefore submitted that PW1 was eligible to be a director of the respondent company at the time because she was above the age of eighteen and that the law did not prohibit such appointment to be made. It was argued that since the Companies Act does not define the word 'infant', the definitions in Osbourn's Dictionary and Halsbury's Laws of England must be adopted. Further that the

lower court expressed the view that the issue of PW1 being a Director or not does not absolve either party from liability.

We find that ground 8 has no merit because as rightly argued by the respondent, the Adoption Act does not apply to the case before us. It is not in dispute that PW1 was eighteen at the time of the appointment. We therefore find in accordance with the definition of minor in ***Osborne's Concise Dictionary*** [1] and the definition of infant in ***Halsbury's Laws of England*** [2] that PW1 was of age at the time of appointment as she had attained the age of eighteen.

In addressing ground nine, reference was made to the case of ***Khalid Mohammed v. The Attorney General*** [4] where it was held that a plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to a judgment.

In light of the aforementioned authority, counsel submitted that in *casu* the trial judge erred by awarding the plaintiff damages arising from the subletting of the premises to Elliot International for the period 31st March, 2004 to 1st April, 2010 on the basis of unpaid invoices appearing on pages 388-394 of Volume Two of the record in the face of evidence that the sub-tenant only paid US$6, 000 as evidenced by the tax invoice at P.392 of the same volume of the record of appeal. The appellant stated that the respondent adduced no evidence to prove its claim for US$140, 000.00. We were finally urged to uphold all the nine grounds of appeal and quash the

judgment of the court below in its entirety with costs to the appellant.

In reaction to ground nine, it was submitted that the question as to whether the respondent proved the claim for damages for illegal subletting does not arise and the case of ***Khalid Mohammed v. The Attorney General*** [4] does not apply. The invoices appearing on pages 388 to 394 of the record show that there was a landlord and tenant relationship between the appellant and Elliot International from 31st March, 2004 to April, 2010 and that the rent payable was initially at US$1,000 per month which was increased to US$2,000.00 per month in October, 2009. This was not disputed by the appellant. In its defence on the issue, the appellant contended that the only amount that it received in terms of rent from the sub-tenant was US$6,000.00. The appellant failed to explain why it continued issuing invoices to the sub-tenant for over six years if they were not being paid. Counsel further submitted that the production of the invoices e.t.c on pages 367 – 394 of the record proves illegal subletting. In conclusion we were urged to dismiss the appeal with costs.

As regards ground 9, we take the view that that the trial judge properly directed herself because the said invoices would not have been issued if the property had been vacated earlier. It can safely be presumed that the sub lease paid or ought to pay the said invoices but the appellant conveniently revealed payment of only US$6, 000. 00. The respondent who was the plaintiff in the court below was

duty bound to prove his case on a balance of probabilities and it did so. The respondent's argument that the ***Khalid Mohammed's*** [4] case is inapplicable is therefore misplaced as the *ratio decidendi* of the Khalid Mohammed case is that in order for a plaintiff to succeed he must prove his case. For these reasons ground 9 has no merit.

This appeal has partially succeeded, therefore each party shall bear its own costs herein and in the court below.

Dated this 26th day of March, 2018.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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J. CHASHI
COURT OF APPEAL JUDGE

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M.M. KONDOLO S.C.
COURT OF APPEAL JUDGE