

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)



2018/HPC/0212

**IN THE MATTER OF: LANDLORD AND TENANT (BUSINESS
PREMISES) ACT CHAPTER 193**

**IN THE MATTER OF: THE PREMISES KNOWN AS SHOP NO
F1 AND F2 LEVY BUSINESS PARK**

BETWEEN:

NATIONAL PENSION SCHEME AUTHORITY

APPLICANT

AND

HORIZON FOODS LIMITED

RESPONDENT

Before Hon. Madam Mrs. Justice Irene Zeko Mbewe

For the Applicant : *Ms C. Phiri In House Counsel, NAPSA*

For the Respondent : *N/A*

JUDGMENT

Cases Referred To:

1. *Wilson Masauso Zulu v Avondale Housing Project* [1982] ZR 172

Legislation Referred To:

1. *Landlord and Tenant (Business Premises) Act, Cap 193 Laws of Zambia*

The Applicant filed an Originating Notice of Motion on 18th May 2018 pursuant to Rule 3 of the *Landlord and Tenant's (Business Premises) Act Cap 193 of the Laws of Zambia* seeking the following reliefs:

1. Payment of the sum of ZMW1,756,551.40 being rental amounts due from the Respondent to the applicant for the period 2nd December 2013 to 18th March 2016 in respect of the premises known as Shop No. F1 and F2 Levy Business Park, Lusaka
2. Damages for use of the premises for period November 2011 to 1st December 2014.
3. Mesne profits.
4. Interest.
5. Costs
6. Any further or other relief the court may deem fit.

In the supporting affidavit dated 18th May 2018 deposed to by Butele Kaliye Head of Real Estate in the Applicant institution, the salient facts are as follows: On or about 21st January 2011 the Applicant entered into a lease agreement with the Respondent for

Park (hereinafter referred to as the "demised premises") (Exhibit "BK 1"). The said lease was not registered at Lands and Deeds Registry. The Respondent has throughout the term of its occupation and use of the demised premises been liable to pay the agreed monthly rent and other utilities of water and electricity which it has failed to do. The Applicant issued a demand letter and notice to terminate the tenancy in September 2013.

The Respondent commenced legal action against the Applicant under Cause 2013/HPC/0560 and in its Judgment dated 25th August 2014, the Court granted the Respondent and others, new tenancies. Rentals were to be negotiated and in default, the Applicant would be at liberty to advertise and offer the affected premises to the public (Exhibit "BK 2").

According to the deponent, the Respondent failed to agree on the market rentals payable resulting in the Respondent's eviction from the demised premises on 18th March 2016. That the Respondent left unpaid rent and utility bills and to avoid disruption to the other tenants at Levy Business Park, the Applicant had to pay for the said bills relating to the demised property. That the account statement

bills relating to the demised property. That the account statement shows that the Respondent is indebted to the Applicant in the total sum of ZMW1,756,551.40 for the period 2nd December 2013 to March 2016 (Exhibit BK 5). That the Respondent only paid ZMW288,287.20 towards the rental obligations during the period November 2011 to 2nd December 2013 to the time the Respondent requested for a new tenancy from the Court. Further, the Applicant claims for damages from the Respondent for use of the demised property.

The Applicant filed skeleton arguments and list of authorities on 29th June 2018. The Respondent did not file any opposing affidavit.

At the hearing, the Respondent did not appear and I was satisfied that service had been effected through substituted service, and proceeded to hear the matter. Counsel for the Applicant relied on the supporting affidavit, skeleton arguments and list of authorities.

I find from the affidavit evidence that the Respondent was a tenant of the Applicant herein and occupied Shop F1 and F2, Levy Business Park Lusaka. I have not placed any reliance on what is termed the proposed agreement dated 21st January 2011. The

even have an attestation clause, and appears to be incomplete. I caution Counsel when prosecuting their claims before Court to exercise due care and skill and ensure that exhibited documents are complete. It is not the duty of this Court to try and figure out what the contents of the missing documents are.

It is not in doubt that rental arrears accrued whilst the Respondent was in occupation and had use of the demised property. The statement of accounts shows the agreed rental and other utilities expenses (Exhibit "BK-5"). I find that the Respondent on diver dates paid a total sum of ZMW288,287.20 towards rentals leaving a balance of ZMW1,756,551.40 which is still outstanding and due to the Applicant.

The Applicant claims for *mesne* profits for the period 2nd December 2013 to 18th March 2016 being date of eviction. The Applicant as landlord may recover in an action for *mesne* profits the damages which it has suffered from being out of possession of the demised property. The action for *mesne* profits does not accrue unless either the landlord has recovered possession, or the tenant's interest has come to an end. In the present case, the Applicant herein recovered

possession on 18th March 2016. I opine that the Respondent ought to have given up possession of the demised premises immediately negotiations for a new lease failed to materialise. From the evidence before Court, the *mesne* profits shall be calculated from the date of the Court Judgment of 24th August, 2014 when the parties should have negotiated a new lease, up to 18th March 2016 when the Respondent was evicted and the Applicant took possession.

The Applicant's seek damages for use of the premises for the period November 2011 to 1st December 2013. It is trite law that he who alleges must prove as espoused in the case of *Wilson Masauso Zulu v Avondale Housing Project [1982] ZR 172 (SC)*¹. The Applicant did not categorise what damages it has suffered nor was any evidence placed before Court. Consequently, this claim fails.

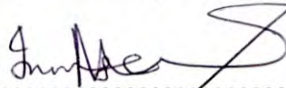
The sum total is as follows:

1. Judgment entered in favour of the Applicant in the claimed sum of ZMW1,756,551.40 for rental arrears, unpaid utility bills and other incidental expenses for the period that the Respondent requested for a new tenancy being 2nd December 2013 to 18th March 2016 when the Respondent vacated the

premises. This amount shall attract interest at the commercial lending rate from date of Originating Notice of Motion until full payment.

2. *Mesne* profits for the period from 25th August, 2014 to 18th March 2016 based on the monthly rentals inclusive of utilities and other incidentals.
3. Costs to the Applicant to be taxed in default of agreement.

Delivered at Lusaka this 28th day of August 2018.



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Hon. Irene Zeko Mbewe
HIGH COURT JUDGE