

**IN THE HIGH COURT OF ZAMBIA
2006/HPC/0401
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)**

BETWEEN:

IBRAHIM YUSUF ALIBHAI

PLAINTIFF

AND

SPRINGBOK ZAMBIA LIMITED

DEFENDANT

***Before the Hon. Mr. Justice E.E. Chulu in Open Court this
17th day of December 2009***

For the Plaintiff:

For the Defendant:

J U D G M E N T

By a Writ taken out of the Principal Registry, the Plaintiff claims the following reliefs:

1. Payment of rental arrears in the sum of US\$5,600.00
2. Possession of the property being Plot No. 85a, Mwembeshi Road, Lusaka.
3. Mesne profits at the rate of US\$700.00 per month from December 2006 to date of delivery of the property.

4. Interest on 1 and 2 above at the rate of 7 per centum per annum from the date of the writ to date of payment.
5. Costs.
6. Any other relief the Court may deem just to give to the Plaintiff.

The Plaintiff called two witnesses to prove his case. In summary, the Plaintiff's case is that, the Plaintiff owned Flat No. 85a, Mwembweshi Road, Northmead, Lusaka, which he wanted to rent out. He then delegated the responsibility of finding a tenant to his brother Alibhai Mohammed Patel (PW3). Consequently, a Property Agent by the name of Mary Sauti (PW2) was engaged with instructions to find a tenant for a residential Flat with servant quarters at the asking rent of US\$750.00 per month, payable six months in advance. According to the evidence of PW2, she advertised the Flat for residential purposes and told the Defendant's Managing Director, Kavwinka Silungwe (DW2) this information. She also told him the amount of rent per month and the terms of payment. After inspecting the Flat, DW2 negotiated the rent downward to US\$700.00 per month payable quarterly in advance which both parties agreed to. The lease was effective from 2nd December 2005, and a lease agreement was drawn to that effect and handed to the Defendant who never returned it to the Plaintiff.

In his evidence, PW3 denied that DW2 wanted to rent the Flat for offices, and that the same was previously rented as offices. The witness told the Court that, he placed extra locks on the gate to secure the property against thefts and for non-payment of rent by the Defendant, after repeated reminders to do so for a period of almost three months. He denied locking the Flat on 14th May 2006 as he was out of the Country to Malawi during that period. He supported his claim by exhibiting photocopies of the relevant pages of his Passport. The Plaintiff therefore claims a sum of US\$5,600.00 rental arrears from April to December 2006; mesne profits at the rate of US\$700.00 per month from December 2006 up to the date of delivery of property; possession of property, and interest.

In his defence to the Defendant's counter-claim, the Plaintiff testified that the property in issue was a residential Flat which was leased out to the Defendant as such, and that if the Defendant used it as a business premises, then that was illegal on its part as it did not obtain any authorization from Lusaka City Council for re-zoning its use from residential to business premises. In the circumstance, he denied that the Defendant could have suffered any loss of business or goodwill. The Plaintiff stated that it was infact himself who had suffered the loss for non-payment of rent by the Defendant.

In its defence and counter-claim, the Defendant adduced evidence from two witnesses namely, Edward Sakala (DW1) and Kavwinka Silungwe (DW2) who is a Director in the Defendant company. The evidence of DW1 is that he saw PW3 in the company of one Chisanga lock the main gate of the Flat on 14th May, 2006. DW2 testified that the lease agreement was entered into in December 2005, but commenced on 1st January 2006, at a monthly rental of US\$700.00 payable quarterly in advance. He stated that the property was advertised by PW2 whom he dealt with, and who told him that it was to be leased out as an office, since it was previously leased as such. The witness further testified that he negotiated the lease agreement with PW3, but he did not sign it although he had it. According to DW2, the advertisement in the paper did not indicate whether the property was to be let out as residential or office premises, and that PW3 did not state to him either. He told the Court that the advertisement indicated that the property was a Flat with servant's quarters.

In his continued testimony, DW2 told the Court that rent accrued from January 2006 because the Flat was not habitable in December 2005. He stated that the Defendant did not pay rentals before 2006, and also because the property was locked on 14th May, 2006. He told the Court that the Defendant did not pay the rent even after the reminder, and denied that he disappeared for a period of one year because of the rent owed to the Plaintiff.

The witness also testified that he was aware that a residential property needed to be re-zoned by the Council into business premises, but that he did not ask PW3 to show him any relevant documents; neither did he bother to check with the Council if the property had been rezoned. The other witness Allan Monze (DW3), testified that the offices were locked for about one year, but that he did not know who locked both the offices and the gates. He told the Court that he was aware that the lock-up was as a result of non-payment of rent. DW3 further stated that he only went back to the offices after one year to collect his equipment, and that the same was intact.

I have considered very carefully, the evidence before me adduced by both parties. I have equally taken into account the written submissions filed by the Defendant's learned Counsel for which I am grateful. I note on the other hand that the Plaintiff's learned Counsel has not filed any submissions. What is not in contention is the fact that there was a landlord and tenant relationship subsisting between the Plaintiff and the Defendant. What I need to determine among other issues is the nature or type of that tenancy, and date of commencement. I shall also consider the legality or illegality of the Plaintiff's conduct vis-à-vis, the Defendant's default in rental payments.

The Property Agent, Mary Sauti (PW2) stated in both her Witness Statement and under cross-examination that she advertised the

Plaintiff's property as a residential house. She also testified that she told DW2 that the Flat was being rented out for residential purposes. When DW2 asked her if the property could be used as offices, she referred him to the Landlord. Both the Plaintiff and PW3 denied in their evidence that they ever granted DW2 permission to use the property as offices. They also denied that the Flat had previously been used as offices. PW2 denied knowledge that the Flat had previously been rented out by the Plaintiff as offices. She told the Court that she had never before been involved with that property. I take note of the fact that the Defendant confessed that for a residential property to be converted for business usage, the owner of such property needs to apply to the local authority to re-zone the property from residential to business. The Plaintiff's evidence indicates that there was no such change in the usage of the property. The Defendant admitted that there was no such change, and that DW2 did not bother to check with Lusaka City Council if the property had been re-zoned. In view of the foregoing evidence, coupled with documents at pages 1 and 2 of the Plaintiff's Bundle of Documents, I am fully satisfied that the property in issue was advertised by PW2 for residential purposes as a **house**, and that the Plaintiff did not rezone the same or grant the Defendant permission to convert it into business premises.

With regard to the date of the commencement of the tenancy, there has been conflicting evidence between the Plaintiff and the

Defendant. The Plaintiff's position is that the lease was with effect from 2nd December, 2006, while the Defendant maintained that although it took possession of the keys in December 2006, the property was not habitable and that the month of December was used for maintenance works. According to the Defendant, the lease commenced in January 2006 and reference has been made to Paragraph 3 of the Plaintiff's Statement of Claim to that effect. The following evidence overwhelmingly confirms that the effective date of the lease was December 2005. The Property Agent's (PW2) letter at page 2 of the Plaintiff's Bundle of Documents reads in the second paragraph that:

"I have found a tenant, namely Springbok (Zambia) Limited. They will take the house from 2nd December, 2005. They will pay 4 months rent in advance at the rate of \$700.00 per month. The terms are standard. I will introduce them to you on 2nd December, 2007. The house is being rented from 2nd December 2005.

Yours faithfully

***Mary Sauti
Property Agent"***

Furthermore, PW3's own Witness Statement dated 5th October, 2007, states that the agreed rent was US\$700.00 per month payable initially four months in advance, and thereafter quarterly

in advance. The Statement also reads that: ***“the Defendant paid rent up to 31st March, 2006 amounting to US\$2,800.00”***. At the time DW2 was negotiating the rent on 2nd December, 2005, he had already viewed or inspected the property, and if it was true that the property was in a bad state or condition, he would have brought that to the knowledge or attention of the Plaintiff or indeed PW3 who handled this transaction. The fact that he did not raise that issue with the Plaintiff or PW3, and did not even mention it in his Witness Statement clearly proves to me that it is just an after-thought on his part to try and mislead this Court. To crown it all, DW2’s own letter to the Plaintiff at page 1 of the Defendant’s Bundle of Documents states in the middle of the second paragraph that: ***“Having paid our rent for the previous period on time without problems, that is to say, from December 2005 to April 2006, we expected you to exercise your business discretion in our favour of us.”***

The totality of the foregoing evidence by the Plaintiff and the Defendant itself leaves no shadow of doubt in my mind that the parties had agreed that the lease would commence on 2nd December, 2005. The initial quarterly payment of US\$700.00 per month was only up to 31st March, 2006. There is no dispute that the Defendant paid US\$2,800.00 rent to cover the first four months. The next quarterly rent was therefore due on 1st April, 2006. The Defendant admits its failure or inability to pay

subsequent rentals. It is for this reason that the Plaintiff's brother PW3 decided to lock up the gate to the premises in July 2006.

The issue as to when the gate was locked and by whom was in dispute. According to the evidence of DW1, it was PW3 who placed locks on the grill door of the gate on 14th May, 2006. This evidence has strongly been rebutted by PW3 who produced photocopies of pages of his Passport, shown at pages 1 to 3 of the Plaintiff's Bundle of Documents to prove that on the date alleged by the Defendant, he was in Malawi. PW3 admits instructing a messenger to lock the gate to the property, but that he did so in July 2006. There is no dispute that the Passport in issue belongs to PW3. My close examination of pages 2 and 3 of the said Passport shows that PW3 entered Malawi through Mchinji Boarder Post on 10th May 2006, and exited through the same point on 17th May, 2006. Consequently, I agree with PW3 that he could not, and did not lock the grill gate of the property in issue on 14th May, 2006 as he was out of the Country. I therefore dismiss the baseless allegation by the Defendant that it was PW3 who locked the gate on 14th May 2006.

Turning to the conduct of PW3 as authorized by the Plaintiff, there is uncontroverted evidence that the Plaintiff was prompted to place locks on the grill gate as a result of the Defendant's failure to pay the rent when it fail due, and despite several reminders. According to the Witness Statement of PW3, the Defendant,

through DW2, was reminded to pay rent for about 15 times over a period of three months, and that he became evasive and abusive in his language. The Defendant's behavior through DW2 later extended to PW3's wife and that following this conduct by DW2, he instructed a messenger to lock the gate to the house. Later in 2006, DW2 disappeared for a period of about one year and took the keys to the house with him, leaving unsettled rental arrears of US\$5,600.00. Going by the evidence on record, I am satisfied that the Defendant was in default of the verbal lease agreement for the second quarter effective 1st April, 2006. Granted that the Defendant's behavior and failure to settle the arrears of rent were unacceptable and a breach of the obligation under the verbal lease agreement, the Plaintiff should have applied to the Court for an Order for the recovery of possession of his premises or for the ejectment of the Defendant from the property under Section 13(1) (a) of the Rent Act Cap. 206 of the Laws of Zambia which provides as follows:

“13(1) No order for the recovery of possession of any premises or for the ejectment of a tenant therefrom shall be made unless -

(a) Some rent lawfully due from the tenant has not been paid or some other obligation of the tenancy (whether under a contract of tenancy or under this Act) so far as the same is consistent with the

provisions of this Act, has been broken or not performed;"

Armed with the order of the Court, the Plaintiff would then have lawfully proceeded to recover his premises or eject the Defendant therefrom, and or to distress for the recovery of rent with the leave of the Court under Section 14 of the Rent Act. The Plaintiff should at least have given notice to the Defendant to terminate the lease. I note that this was not done. In the case of **MUSUSU KALENGA BUILDING LTD AND WINNIE KALENGA VS. RICHMAN'S MONEY LENDERS ENTERPRISES (1)** to which the Court has been referred, which case fail under the **Landlord and Tenant (Business Premises) Act Cap. 193 of the Laws of Zambia**, the Court held that there was need for the appellants to comply with the Act by giving a proper notice to terminate the lease, and also the fact that the appellants acted at their own peril by locking the office for non-payment of rent and detaining the goods. Although that case involved a business premises under the said Act which specifically provides for a minimum notice period of six (6) months under **Section 5(2)** thereof, the principles involved would nonetheless be applicable to the case at hand. The termination of the lease by the Plaintiff in the manner it was done was therefore unlawful.

As a result of the above conduct by the Plaintiff, the Defendant has made a counter-claim for damages for wrongful possession,

trespass and conversion of office equipment. In addition, the Defendant claims special damages for a total sum of K826,000,000.00 particulars of which are as per the pleading. The Plaintiff's defence to the counter-claim is that the Defendant has not suffered any loss of business, goodwill or use of office equipment for one year as alleged, since the subject property was leased to the Defendant for residential purposes and not for use as offices. The Plaintiff has further stated that if the Defendant was using the property as offices, it did so illegally as there was no authorization by the Local Council to re-zone its use from residential to business premises. Furthermore, the Plaintiff claimed that since the Defendant is still in possession of the keys to the premises, it is therefore in continued occupation of the same.

In considering this counter-claim, I have take into account what I have already found as a fact that the property was leased out as a residential premises and not for business purposes. In the circumstance, the claim for loss of business, goodwill and use of office equipment cannot be sustained. If the Defendant converted the property into business premises, it did so at its own peril. I therefore dismiss the claim of K826,000,000.00 special damages as totally unfounded and baseless. For reasons stated above, I equally dismiss the Defendant's claim for conversion and detinue of office equipment. The Defendant brought its office equipment on the premises without the knowledge or permission

of the Plaintiff, and cannot be held liable for that. With regard to damages for wrongful possession of the property, I have found already, that the Plaintiff's conduct was unlawful. However, the Plaintiff's said conduct of locking the grill gate to the property is mitigated by the Defendant's misbehavior in that DW2 decided to be very uncooperative when requested by the Plaintiff to pay the rent arrears, and abandoning the premises long before PW3 placed locks on the gate. It is undisputed evidence that for a period of about one year, the Defendant's Director (DW2) was nowhere to be seen for fear of settling the rent arrears.

In considering what damages the Defendant should be awarded, I take into account the fact that the Defendant owed the Plaintiff rent for a period of three months from April to June 2006, shortly before PW3 locked out the Defendant in July 2006. On the other hand, had the Plaintiff complied with the law by giving due notice to the Defendant to terminate the lease on the grounds stated in Section 13(1)(a) of the Rent Act, and as found by this Court, a standard notice period of three months in respect of residential premises should have been given to the Defendant. In the circumstances of this case, I enter judgment for the Plaintiff for three months rent as above stated, and also enter judgment in favour of the Defendant on the Counter-claim for damages for wrongful possession without notice to terminate the lease. The

damages shall be for three months rent which constitutes three months notice period.

Since the judgments have off-set each other, I therefore order that each party bears his/its own costs.

Leave to appeal granted.

**DELIVERED IN OPEN COURT AT LUSAKA THIS 17TH DAY OF
DECEMBER 2009**

**E.E. CHULU
JUDGE**