IN THE HIGH COURT FOR ZAMBIA **2012/HP/0379**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

JONES SIASAMBA AND 16 OTHERS *APPLICANTS*

(stated in the schedule attached to the Originating Notice of Motion)

and

ROBINSON KALEB ZULU
RESPONDENT

Before the Hon. Mr. Justice Justin Chashi in Chambers on the 14th day of June, 2012.

For the Applicants: ***C. Sikazwe, Messrs Chanza Sikazwe Advocates***
For the Respondent: ***JB Malama, Messrs Kalokoni & Co.***

RULING

Cases referred to:

1. Lily Drake v MBL Mahtani and Professional Services Limited (1985) ZR 236

2. Turnkey Properties Limited v Lusaka West Development Company Limited (1984) ZR 85

3. Zesco Limited v Bakewell Bakeries- Appeal No. 20 of 2005

4. Fajema Catering Services v Evelyn Hone College of Applied Arts and Commerce Management Board – 2011/HP/904

5. Shell and BP Zambia Limited v Conidaris and Others (1975) ZR

6. Chrispin Lwali, Savour Chishimba, Stephen Mubanga Chitalu & 26 Others v Edward

Mumbi, Michael Chilufya Sata and The Attorney General-SCZ No. 07 of 2009.

Legislation referred to:

7. The Supreme Court Practice, 1999
8. The Rent Act, Chapter 206 of the Laws of Zambia
9. The High court Act, Chapter 27 of the Laws of Zambia

Other authorities referred to:

10. Black's Law Dictionary-eight edition, Brian A. Garner-Thomson West.

This is an application for an Order to restrain the Respondent from evicting the Applicants pursuant to Sections 13 (a) and Section 23 (1) of the **Rent Act[8]** and **Order 27 Rule 4 of the High Court Act[9].**

The application was commenced by Summons filed on the 11th day of April, 2012 supported by a combined affidavit deposed to by Jones Siasamba, one of the Applicants, who also filed an affidavit in reply on the 24th day of May, 2012.

The Respondent Robinson Kaleb Zulu equally responded by way of a combined affidavit in opposition filed on the 11th day of May, 2012 which was filed together with the Skeleton Arguments.

At the hearing of the application on 30th day of May, 2012, the parties augmented their affidavits and the Skeleton arguments with oral submissions which were for the most part in tandem with the aforestated respective affidavits and Skeleton arguments.

In the combined affidavit in support of the application the Applicants avered that they are seventeen in number and they are Tenants at S/D1 of S/D2 of Farm 397 a Lusaka (hereinafter called “Makeni Villas”). Previously, on the 8th day of May 2008, the Applicants had entered into a lease agreement with the previous Landlord, Workcom Pension Registered Trustees.

That on the 11th day of August 2011, the Applicants received an introductory letter stating the Respondent as the new Landlord, having purchased Makeni Villas with effect from the 1st day of August, 2011 and that all rental payments were with effect from the 11th day of August, 2011 to be made to the Respondent.

The Respondent’s agent, the Senior Legal Officer Mr. Max Chilinda vide letter dated 14th day of November, 2011 wrote to all the Applicants giving notice of the improvements to be undertaken on the property and notice of new tenancy agreements reflecting a 90% rental increment effective 14th February, 2012. That subsequently on the 15th day of February, 2012 the Respondent sent new tenancy agreements reflecting a 90% increment to the rentals, which led to the Applicants requesting the Landlord and Tenant Information and Referral Centre (LTIRC) to write to the Respondent to request for a meeting with the Respondent in order to address the issues of the rental increment and general maintenance of the Makeni Villas.

According to the Applicants, they refused to sign the new leases and opted to meet the Respondent to discuss the way forward.

However, the Respondent was adamant and made it clear that failure to sign the new lease agreements would lead to evictions.

The Applicants have averred that the Respondent has not carried out any of the promised structural improvements and therefore the purported rental increments are unreasonable, unwarranted and illegal. That the Respondent has consistently threatened the Applicants with eviction for refusing to sign the new tenancy agreements which the Applicants are contesting as they feel the rental increment is unconscionable and unreasonable as it is without any corresponding improvement to the property.

Counsel for the Applicants submitted that this is a unique and peculiar application as it is made pursuant to the **Rent Act**[8], an Act of Parliament, that is set to protect Tenants.

Counsel relied on the case of **Lily Drake v. MBL Mahtani, and Professional Services Limited**[1] where the Supreme Court held inter alia that the true purpose of the **Rent Act**[8] is to protect Tenants.

Counsel for the Applicants submitted that most of the Applicants are up to date with rental payments and there is a firm

undertaking that payments from those who have not paid will be made.

That the applicants therefore qualify to have their status as Statutory Tenants pursuant to Section 23 of the **Rent Act**[8] and should therefore be protected by an order restraining the Respondent from evicting them before the substantive matter is resolved.

It is Counsel's contention that the breach of a statutory matter in itself will spell irreparable injury to the Applicants. He urged this Court to grant the application.

In response, Counsel for the Respondent in the Skeleton arguments began by giving a brief background which gave rise to issues herein.

According to Counsel, the Respondent purchased Makeni Villas from Workcom Pension Registered Trustees in August, 2011 and as such the Applicants Tenancy Agreements with the previous owner expired on July, 2011.

In November 2011, the Respondent informed the Applicants of the changes that were to take place and emphasized on the need for all the Tenants to be up to date with the rental payments and also proposed that the parties do enter into new lease agreements which agreements among other things, proposed an increase in rentals. That despite being given up to the 30th day of December, 2011 to indicate in writing whether or not they wished

to enter into new leases, most of the Applicants never respondend and consequently refused to sign the new lease agreements.

According to Counsel, most of the Applicants only paid outstanding rentals after commencement of the Court proceedings herein whilst others still remain in rental arrears.

It is Counsels' argument that it is clear from exhibits "RKZ1" and "RKZ2" in the Respondents Combined Affidavit in Opposition that the Applicants have not been up to date on rental payments, as a large number of them still remain owing up to date.

Counsel submits that an Injunction is an equitable remedy and he who comes to equity must come with clean hands. That as defaulting Tenants, the Applicants have not come to Court with clean hands.

Further, that the Applicants cannot insist on quite enjoyment when the lease agreements under which they are holding over have expired and that they have in fact abrogated the terms of the monthly tenancy agreement by failing to pay rent.

Counsel, in that respect relied on the case of **Turnkey Properties Limited v Lusaka West Development Company Limited**[2] where the Supreme Court stated that an Injunction should not be used as a device by which an Applicant can attain or create new conditions favourable only to himself.

It is Counsels' contention that the Applicants want to obtain an Injunction to stop the Respondent from evicting them when the intervening event leading to the threatened eviction of one of the applicants was consistent failure to pay rentals on time.

In furtherance on this point, Counsel relied on the Supreme Court case of **Zesco Limited v. Bakewell Bakeries**[3].

It is Counsels' further submission that the Applicants as defaulting parties do not have a clear right to the relief being sought to warrant the protection of the Court by way of an Injunction. They have not also exhibited a current lease agreement to show the basis on which the action is premised. In that respect Counsel relied on the High Court authority **of Fajema Catering Services and Evelyn Hone College of Applied Arts and Science Management Board**[4].

Counsel for the Respondent further argues that the Applicants have not disclosed what irreparable injury if any they are likely to suffer if the interim injunction is not granted in accordance with the principles laid out in the Supreme Court case of **Shell and BP Zambia Limited v. Conidaris**[5] on the granting of injunctions.

Counsel for the Respondent also drew the attention of the Court to Order 29 Rule 1A, Sub rule 24 of the **Supreme Court Practice**[7] which states as follows:

> ***"On any ex parte application the applicant must proceed "with the highest good faith" (Schmitten v Faulkes (1893) WN 64 per***

Chitty [3]). The fact that the Court is asked to grant relief without the person against whom the relief is sought having an opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all material facts……otherwise the order may be set aside without regard to the merits."

According to Counsel, the Applicants did not make a full and frank disclosure on the real reason why the Respondent threatened one of the Applicants with eviction. That the threatened eviction had nothing to do with the failure to sign the new agreement but was due to the failure by one of the Applicants to pay outstanding rentals.

In conclusion, Counsel stated that it is also the Respondent's position that he has applied for change of use of the subject property and shall in any event require vacant possession.

Counsel urged this Court not to grant the Interim Injunction as the Applicants have not satisfied the requirements for granting of an Injunction.

I have carefully taken into consideration the respective affidavits by the Applicants and the Respondent, Skeleton arguments by Counsel for the Respondent and the oral submissions by both Counsel.

A recapitulation of the affidavit evidence and the submissions by both Counsel indeed shows that the Respondent having bought Makeni Villa, did not enter into fresh tenancy

agreements with the Applicants. He therefore carried over the tenancy agreements the Applicants had with the previous Landlord. The Tenants therefore fell under Section 23 (1) of the **Rent Act**[8] as Statutory Tenants.

Further, it was the intention of the Respondent as could be seen from the letter dated 14th November, 2011 exhibited as "JS5" in the Applicants combined affidavit in support of the Originating Summons to carry out major structural improvements with effect from December, 2011 and thereafter enter into new tenancy agreements with revised rentals.

The relevant portion of the aforestated letter reads as follows:

> "**Improvements to rented premises**
>
> ***It is inevitable that a substantial investment has to be made to the property in view of the deplorable condition in which the property is at the moment. In this regard, it is envisaged that refurbishment of the premises shall commence during the month of December, 2011. The improvements to be undertaken shall involve:***
>
> ***(a) Rehabilitation of the water and sewer system***
> ***(b) Electricals***
> ***(c) Painting***
> ***(d) Replacement of some fixtures and fittings***
> ***(e) Works on roofing***
> ***(f) Construction of additional bedrooms to some units and***

(g) General external works on drive way, parking gardens etc.

The Landlord wishes to upgrade the dilapidated property to a prime property particularly that it is in a prime location.

<u>New Tenancy Agreements</u>

The Landlord wishes to formally inform the Tenants that all existing leases shall terminate on 14th February, 2012 representing a Notice period of ninety (90) days from the date of this notice.

The new tenancy agreements will reflect a revised rental adjustment of ninety percent (90) above the current rentals. Tenants have up to the 30th December, 2011 to indicate in writing whether or not they wish to enter new leases effective 12th February, 2012."

There is no evidence that any of the Applicants reverted to the Respondent by the 30th day of December, 2011 to indicate in writing whether or not they wished to enter into new leases. However, the Applicants did later through LTIRC vide letters dated 24th February and 28th March, 2012 try to seek audience with the Respondent over the issues of property maintenance, the tenancy agreements and the proposed rental increments, which audience was never granted. There is also no documentary evidence that the Respondent threatened to evict the Applicants herein. However, the Applicants apprehension can be justified and in fact can be inferred from the tone of the Respondents letter of 20th April, 2012 in which the Respondent

unilaterally wants to have possession of the Makeni Villas without leave of the Court and in fact in total disregard of these court proceedings which action is in fact contemptuous.

As earlier alluded to the Applicants are Statutory Tenants, who are seeking the Courts determination of a standard rent after structural improvements and/or repairs are carried out on Makeni Villas.

It is in that view that they now seek this injunction to protect them from eviction until the determination of the main cause herein.

In the view that I take, there is no doubt, all things being equal that the Applicants have established a clear right to the relief they are seeking and meets one of the requisites of an Injunction being granted.

As regards the issue of irreparable of irreparable loss and damage, I have noted and taken into consideration the arguments by Counsel for the Respondent and the authority cited.

However, I agree with Counsel for the Applicants that this is a unique application for an Injunction as it has been brought under the **Rent Act**[8], an Act of Parliament which provides for restrictions in the increase of rentals, determination of Standard rents, prohibition of payment of premiums and restricting the right to possession of dwelling houses and for other purposes

incidental to and connected with the relationship of Landlord and tenant of a dwelling house.

Therefore, this being an action governed by a statutory law, rather than equitable, civil or common law, it moves away from being a purely contractual action and becomes a matter of public interest and therefore the consideration of irreparable injury or loss becomes irrelevant.

Blacks Law Dictionary[10] defines Public interest as:

> **"1. The general welfare of the public that warrants recognition and protection.**
>
> **2. Something in which the public as a whole has a stable especially an interest that justifies governmental regulation."**

The **Rent Act**[8] is a regulation for the good and protection of the tenants under the provisions of the Act and therefore Injunctions under the **Rent Act**[8] should be exempted from the consideration of irreparable damage or loss. For that, I can confidently assume that was what Parliament intended.

I am fortified on this finding of law by the Supreme Court case of **Chrispin Lwali, Saviour Chishimba, Stephen Mubanga Chitalu & 26 Others v Edward Mumbi, Michael Chilufya Sata and The Attorney General**[6]**.** In the said case Chirwa JS, stated that the matter in issue was about a question of obeying the law. His Lordship went further to state as follows:

"There is no need to consider injury when it comes to obeying the law nor need of consideration of balance of convenience. The nature of this case was such that the learned trial judge should have allowed the interim injunction to remain until the main action is tried because it involves the obedience or non obedience of the law……..it took the case out of the ordinary consideration of interim injunctions."

This therefore is a good case for maintenance of the status quo, having granted an ex-parte Order for an injunction on the 11th of April, 2012.

It should however, be noted that this being a group action there are likely to be Applicants who may take undue advantage of these proceedings as alleged by the Respondent and not pay rent or remain in rent arrears.

Indeed the maxim of he who comes to equity must come with clean hands must be applied.

It is not in dispute that some of the Applicants are not up to date with the rentals.

In view of the powers conferred on this Court by Section 13, subsection 11 of the **Rent Act**[8] as read with subsection 9 and 10, **I HEREBY ORDER** that all the Applicants in arrears should by the 30th of June, 2012 pay rentals in arrears and in advance up to the end of July, 2012 in line with the Original tenancy agreement.

In the event of any of the Applicants being **in default as Ordered,** they shall fall away from the Interim Injunction granted

herein and the Respondent shall be at liberty to apply for leave for distress and possession to this Court for distress and possession under this cause upon production of the Rent Book as provided for under Section 19 (1) of the **Rent Act**[8], showing such default.

At this stage I will make no orders as to costs.

Delivered at Lusaka on the 14th day of June, 2012.

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Justin Chashi
HIGH COURT JUDGE