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IN THE HIGH COURT FOR ZAMBIA 2014/HP/1173
OF THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

IN THE MATTER OF: SECTION 26 OF THE LANDLORD AND TENANDT (BUSINESS PREMISES) ACT CAP 193 OF LAWS OF ZAMBIA

AND

IN THE MATTER OF: THE PREMISES SITUATE AT PLOT NO. 25/561-873 MUNGWI ROAD, GEORGE COMPOUND, LUSAKA

BETWEEN:

STEPHEN BANDA **1ST APPLICANT**

FUNNY CHIBUNTA NKUWA (T/A CLUB FC) **2ND APPLICANT**

AND

LEVEY BANDA (T/A SBJ SHOPPING COMPLEX **RESPONDENT**

BEFORE HON. MRS. JUSTICE M.S. MULENGA ON THE 17TH DAY OF DECEMBER 2014.

FOR THE APPLICANTS : BOTH IN PERSON
FOR THE RESPONDENT : IN PERSON

J U D G M E N T

This action was originally commenced by writ of summons and later commenced by originating notice of motion pursuant to Rule 3 of the Landlord and Tenant Business Premises Act Cap 193. The Applicants are seeking the following reliefs:

i) *A declaration that the Respondent's trespass and threatened eviction of the Applicants from premises known as Plot 25/561-873, Mungwi Road, George Compound, Lusaka and the*

harassment, embarrassment, interference with the Applicants and undermining of their business operations by the said Respondent are illegal and selling the Applicants' products;

ii) *An interlocutory injunction restraining the Respondent by himself or by his agents or servants or otherwise by whomsoever from illegally entering upon the business premises known as Plot 25/561-873 Mungwi Road, George Compound, Lusaka and from interfering with the Applicants' quiet enjoyment and operations of his business;*

iii) *Damages caused and arising from the Respondent's illegal action in (i) and (ii) above;*

iv) *Interest;*

v) *Further or other relief deemed fit; and*

vi) *Costs.*

In the affidavit in support deposed to by the 1st Applicant he stated that he is a businessman and jointly trades with his wife, the 2nd Applicant, in the business of selling liquor and other beverages. That they have been trading as Club FC and occupying the Respondent's premises known as plot No. 25/561-873 Mungwi Road from April 2012 at a monthly rent of K1,700.00 based on a verbal tenancy agreement. That the Applicants in January 2014 rented another business property from the Respondent which they operated as a night club in the name of SBJ Night Club but which they abandoned in April 2014 after incurring a loss. Further that they owe the Respondent the balance of K2,000.00 for the same premises as outstanding rentals.

That as regards the premises in issue rented under Club FC, they owe rentals of K8,500.00 for the period March 2014 to July 2014 at K1,700.00 per month. This brings the total owed to the Respondent to K10,500.00. That they verbally agreed to pay the rental arrears but to their surprise and shock the Respondent locked the premises on 21st July 2014 without lawful authority and later started selling beverages belonging to the Applicants as per daily stock sheets for 20th and 21st July 2014 exhibited as "SB2" and "SB2", respectively. That they wrote to the Respondent the letter exhibited as "SB3" on 24th July reminding him to comply with the law and also produced exhibit "SB4" as an inventory of the goods they left in the premises. That they have suffered loss and damages to their business due to the illegal occupation and selling of their products by the Respondent contrary to the provisions of the Act (Cap 193) as no proper notice was served to terminate the tenancy. The Applicants then prayed for interest and costs for the damages caused by the Respondent's illegal action.

The Respondent relied on his affidavit in opposition to the injunction application that the Applicants were owing him a total of K11,100.00 in rent arrears from March 2014 to July 2014 and could not be allowed to operate without paying rent for five (5) months. That it was, mutually agreed by the parties that on 20th July 2014 the Applicants would either pay the rent arrears in full or vacate the premises pledging their goods including beer products as security until rent arrears are settled fully. That they did not pay the arrears and as agreed he took over the premises. That at the time he took over they conducted an inventory of the Applicants' property and the

said inventory was signed by the 2nd Applicant and produced as exhibit "LB1."

At the hearing the 1st Applicant gave evidence which was basically in line with his affidavit in support. He however admitted owing a total of K10,500.00 of which K2,000.00 was for the other premises they had since abandoned. That on 3rd July 2014 the 2nd Applicant discussed with the Respondent and it was agreed that they would pay him the arrears on 20th July. That they did not agree to vacate the premises should they fail to pay on that date. That on 21st July the Respondent took an inventory of the goods with the 2nd Applicant and then locked the premises because the Applicants had failed to pay on the agreed day. That he later heard that the Respondent had re-opened the shop and put in another tenant who was using their items without permission. The items included fridges, stools, music instruments, a plasma television set and their trading licence. That because of this conduct, it meant that the Respondent has recovered his arrears and that some items were damaged or lost.

The Applicant's witness, Silvia Mukuwa, stated that she had a loan with AB Bank and had used the 2nd Applicant's property at the subject business premises as collateral. That a week after the Applicants were locked out she found the shop open and their items being used and informed the Applicants. That she was also told by some people from the bank that they went to the premises and found the property which was used as collateral being used and damaged and that they were told that the Respondent was holding on to the same property. That on 11th November she passed at the premises

and found that Applicant's property which was outside had been taken away.

The Respondent in his evidence stated that apart from the K10,500.00 admitted as owing by the Applicants, they also owed a balance of K600.00 on the other shop they rented and thus the amount outstanding is K11,100.00. That he discussed with the 2nd Applicant through his agent Samson and it was agreed that should they fail to settle the arrears in full on 20th July he would lock the shop after a stock take and they would get their items after settling the rentals. That this is what he did on 21st July when they failed to pay as agreed. That after locking the shop he removed the Applicant's items the following day apart from the counter which was fixed to the wall. And after three (3) days he put a tenant who came with his own items including the licence. He admitted that on a personal basis he would borrow small amounts of money from the 2nd Applicant which he would pay back as they were not part of the rentals.

The Respondent's witness, Samson Nyirenda testified of having discussed and agreed with the 2nd Applicant on 3rd July 2014 that should she fail to pay the arrears on 20th July, the Respondent should hold on to her items until she settled the arrears. That the Applicants had rental arrears for 5 months and in March, they had paid for January and February arrears. That this was the last agreement as the 2nd Applicant told him that on 1st July the Respondent had been indicating that he would evict them for the default. That the 2nd Applicant did not honour the agreement and on 21st July when the inventory or stock count was taken he was not present. That what he knew was that the furniture outside was removed about a month and

weeks prior to the date of hearing but he did not know when the Respondent moved the items which were inside. That when the bailiffs went to the shop asking for the Applicants, he and the others told them that the Applicants were no longer in the shop.

This is the summary of the evidence. The Applicants have brought this matter and cited section 26 of the Landlord and Tenant (Business Premises) Act Cap 193 which I will refer to as the Act. Section 26 of the Act provides for the making of rules by the Chief Justice under the Act on the procedures to be followed by parties or litigants.

It is apparent from the reliefs sought by the Applicants that they are challenging the lockup or eviction of 21st July 2014 as being unlawful and contrary to the Act. Section 2 of the Act defines tenancy as a tenancy of business premises whether written or verbal for a term of years certain created by a lease or agreement or operation of law, among others, but excluding a mortgage. In this instant case the parties had a verbal agreement for the tenancy. Both parties did not indicate the tenure of the tenancy or how many times it was renewed. The testimony of the Applicants is that they had been in the premises as tenants from April 2012 to 21st July 2014 when the Respondent took back the premises. This translates into 27 months which means they had been in occupation for slightly over two (2) years. I thus find that their tenancy was one which comes within the provisions of the Act.

The main issue for determination is whether or not the tenancy was validly terminated in line with the provisions of the Act. Section 4 of the Act provides that tenancies to which the Act applies shall not

come to an end unless terminated in accordance with the provisions of the Act. The section however goes further to provide some exceptions that tenancies may be terminated by notice to quit given by the tenant, by surrender or by forfeiture. In this case, it is apparent that there was no notice to quit given by the tenant in the prescribed form or otherwise. There is also no notice to terminate by the Respondent.

The facts as I have found them based on the evidence of the Respondent and his witness and which was not challenged by the 2nd Applicant is that the parties had agreed that due to the outstanding arrears for five (5) months, the Applicants would either settle the same on 20th July 2014 or would leave the premises and their goods in the hands of the Respondent and collect the goods after settling the arrears. That this was the agreement which was actually effected on 21st July 2014. What I have to determine is the effect of this agreement and conduct of the parties in relation to the Act. I find that this agreement by the parties and their conduct amounts to forfeiture of the tenancy and therefore falls within the exceptions in section 4 (2) of the Act on the termination of tenancy.

Paragraph 502 of the Halsbury's laws of England Fourth Edition states in part as follows:

> **"A lease may contain an express proviso for 're-entry' or forfeiture by the landlord on specified events, such as non-payment of rent, non-performance or non-observance by the tenant of the covenants of the lease, the tenant's bankruptcy, or the levy of execution on his goods. Such a proviso leaves it at the option of the landlord whether he will exercise his right of determining the lease on a cause of forfeiture arising, and the effect is the same where the proviso contains a declaration that in the events specified the term is to cease. The proviso does not by itself enable the tenant to treat the term as at an end, as the lease is not void but voidable, and only the landlord may avoid it. Hence,**

notwithstanding the cause of forfeiture, the tenancy continues until the landlord does some act which shows his intention to determine it. Even if the proviso declares that on re-entry the landlord is to have the premises again as if the deed had never been made, the landlord may sue for rent accrued due, or for breach of covenant committed, before the forfeiture."

In this instant case the Respondent exercised the right to recover possession of the premises based on forfeiture. It follows that the tenancy was lawfully terminated and the Respondent's entry on to the property was not illegal and did not amount to trespass.

It is also not in dispute that the Respondent is holding on to the property of the Applicants as a pledge by virtue of the said agreement that he would only be obliged to release the same once the Applicants settle the outstanding rent arrears. The Applicants have not settled the arrears as at the date of hearing and there is nothing to indicate that they have since done so to date.

The Applicants' contention is that the Respondent has allowed another tenant to use their property or goods and that some of the goods have been destroyed or lost. The Respondent maintained that he removed all the Applicants' goods except the counter which is fixed to the wall. I must state that as regards damaged or lost goods, the Applicants have not produced any firm evidence in support of the same or even the list of the items concerned. This does not assist their claim and the Respondent's position is that all the items listed on the inventory or stock list taken on 21st July and signed by the 2nd Applicant are intact. This issue has thus not been proved by the Applicants.

The other contention by the Applicants is that they cannot be made to pay for the full month of July 2014 as they were locked out on 21st

July and therefore did not occupy the premises for that whole month and that Respondent's evidence is that about four (4) days after the lock up, he put another tenant in the premises. This is a valid submission and I order that the rentals due for July 2014 should be pro-rated as up to 21st July 2014 and not the full K1,700.00.

The Applicants also claim for damages for trespass to goods stating that the Respondent allowed another tenant to use their items and licence. The Applicants' witness stated that she saw the Applicants' items being used by another tenant a week after and that the property outside was not there by 11th November 2014. The Respondent stated that he removed the Applicants' property from the premises a day after the handover of the premises on 21st July 2014. The Respondent's witness stated that he was not aware as to when the Applicants' items inside the premises were removed by that the ones outside were removed about a month and some weeks prior to the date of hearing that is, 17th November 2014. This means that the items outside the premises were removed sometime in September 2014 which is a month and some weeks after the locking of the shop on 21st July 2014. It is clear that parties did not agree as to what should happen to the goods in issue even in the event of inordinate delay on the part of the Applicants to pay the outstanding rentals. I find that this issue of damages for use of the goods for a month and some weeks claimed by the Applicants cannot be properly determined without considering the issue of storage charges on the part of the Respondent for keeping their goods for over five months and there is currently no indication on the Applicants' part on when they would settle the outstanding rentals. Further, in the absence of proof of

damage or loss of the goods tabulated in the inventory of 21st July by the parties, this claim is premature and cannot be sustained in the current proceedings.

The Applicants' claims have substantially failed and are accordingly dismissed. As stated above the Applicants must pay the outstanding rentals of K10,500.00 less the pro-rata rentals for the ten (10) days of July 2014 when they were not in occupation of the premises.

Costs are for the Respondent to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 17th day December 2014

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M.S. MULENGA
HIGH COURT JUDGE