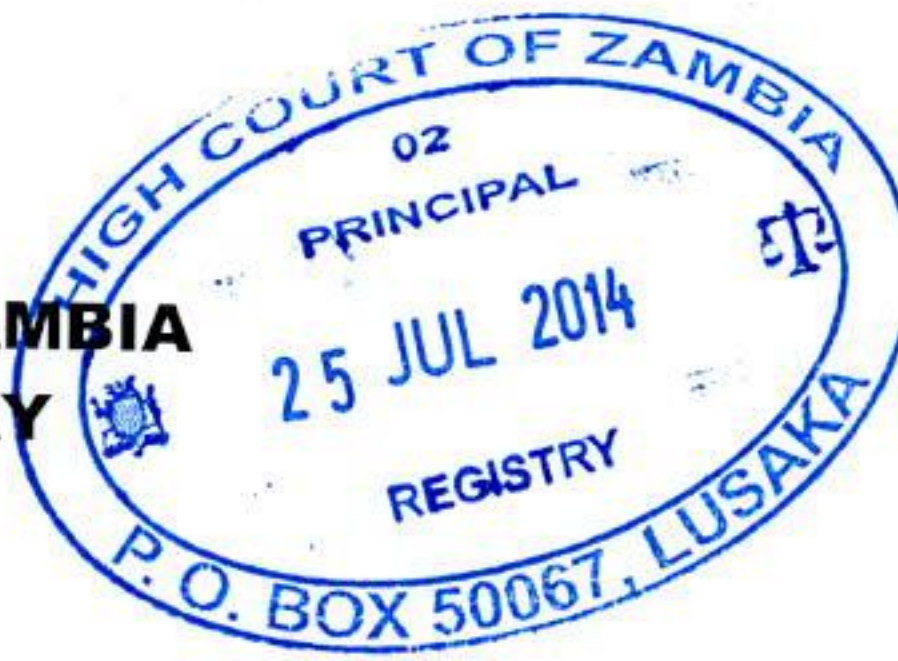


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**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)**



2013/HP/0030

IN THE MATTER OF:

THE LANDLORD AND TENANTS
BUSINESS PREMISES ACT
CHAPTER 193 VOLUME 12 OF THE
LAWS OF ZAMBIA

IN THE MATTER OF:

AN APPLICATION FOR THE
DETERMINATION OF A FAIR AND
REASONABLE RENT

IN THE MATTER OF:

A PORTION OF STAND NO. 1570
FREEDOMWAY, LUSAKA

BETWEEN:

**VALUE AUTO SPARES LIMITED
AND
SHYAMAL PATEL**

APPLICANT

RESPONDENT

BEFORE HON. MRS. JUSTICE M.S. MULENGA THIS 25TH DAY OF JULY 2014.

FOR THE APPLICANT : MR. C.P. CHULA OF MESSRS CHIBESAKUNDA AND
COMPANY

FOR THE RESPONDENT : MS. M. BANDA OF MESSRS MUSA DUDHIA & COMPANY

R U L I N G

Cases cited:

1. Jones Siasamba and 16 Others v Robinson Kaleb Zulu (2009/HP/0379) (unreported)
2. Development Bank of Zambia and KPMC v Sunvest Limited and Another (1995-97) ZR 187.

This Ruling is on the preliminary issue, raised by the Applicant pursuant to Order 3 rule 2 High Court Rules (HCRs) as read with Order 14A Rules of the Supreme Court (RSC) 1999 Edition. The Preliminary issue is:

“Whether it is appropriate for the Respondent to issue a notice to terminate the tenancy with the Applicant subject of these proceedings while the proceedings are still outstanding in Court.

The affidavit in support is sworn by Paul Raven, a Director in the Applicant company stating that the Applicant is a tenant of the Respondent for a portion of stand No. 1570 Freedom way Lusaka. That there are current pending proceedings before this Court for determination of a fair and reasonable rent payable which are yet to be determined. That the Respondent has now given the Applicant the notice to terminate the tenancy as per exhibit “PR”. That this has the potential of making any order regarding the determination of fair and reasonable rentals nugatory and a mere academic exercise and the same is prejudicial to rights of the Applicant to enjoy the Judgment if given in its favour. That the action of the Respondent borders on disrespect for proceedings herein.

The Applicant filed skeleton arguments on 23rd May 2014 in which it was submitted that it was relying on Order 3 rule 2 and the High Court decision in **Jones Siasamba and 16 Others v Robinson Kaleb Zulu (2009/HP/0379)** **(unreported)** where it is reported to have been stated that:

“on the legality of the notice to terminate, as earlier alluded to, I did indicate in my ruling of 14th of June, 2012 that the purported notice to terminate the tenancy agreement which has the effect of the Respondent unilaterally wanting to get possession of the Makeni Villas without leave of the Court and in contumelious disregard of the Court proceedings is in fact contemptuous.”

It was argued that this High Court decision was on all fours with the current case and should be followed. That it is inappropriate for the Respondent to issue a notice to terminate while the current proceedings are outstanding.

At the hearing, the Applicant's counsel submitted that apart from the Respondent's notice to terminate being prejudicial to the current proceedings, it is also indicative of multiplicity of proceedings over the same subject matter which is frowned upon by the Courts as stated in the case of **Development Bank of Zambia and KPMC v Sunvest Limited and Another (1995-97) ZR 187.** The Applicant has indicated that the real motive behind the increase in rentals was to rid him of the said premises as proved by the notice to terminate. That the Applicant did not wish to respond to the notice to terminate lest if be deemed party to the prejudicial conduct and hence seeks the Court's guidance.

The Respondent's counsel stated that the application was misguided as the Applicant had continued to fail to pay rentals on time or at all and as late as October 2013, he had only paid rentals for January to April 2013. That the notice to terminate has been issued under section 5 of the Landlord and Tenant (Business Premises) Act Cap 193 (hereinafter referred to as the Act) and the same does not amount to a proceeding in Court and so is distinguishable from the **Development Bank of Zambia (2)** case cited by the Applicant. That this Court in its ruling of 23rd March 2013 had stated that the Respondent retains all his rights as landlord to ensure that the tenancy provisions are upheld and rentals paid. The notice to terminate was issued based on the Applicant's conduct in defaulting to pay rentals. That the High Court case of **Jones Siasamba and 16 Others V Robinson Kaleb Zulu (1)** does not apply to the facts of this case as it was dealing with section 23 of the Rent Act which requires one

to obtain the Court's permission before evicting a tenant while section 23 of the Act makes provision for interim continuation of business tenancies pending the determination of any Court proceedings. That to hold otherwise would permit the Applicant to use the current action as a means of obtaining conditions only favourable to itself to the detriment of the Respondent.

The Applicant's counsel replied that the rentals were now up to date and the action was as a result of the Respondent unilaterally increasing the rentals. That the notice to terminate offends the Act as it gives a six (6) months period and should the Applicant accept the wrongful notice, it would legitimize the illegal conduct of the Respondent. Counsel urged the Court to uphold the preliminary issue.

I have considered the submissions by both parties on this application. The preliminary issue has been raised pursuant to Order 3 Rule 2 of the High Court Rules and Order 14A RSC. However, Order 14A RSC is not applicable in this case. I say so because Order 14A is clear in its construction and it is only meant for cases where the preliminary issue when determined would finally determine the entire action as between the parties. This is not the case here as the preliminary issue raised does not materially affect the main proceedings in this matter and its determination either way would not finally determine these proceedings. Order 3 rule 2 provides as follows:

"2. Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."

Therefore, this preliminary issue can only be considered under Order 3 rule 2 HCRs. This gives the Court discretion to make any order which would do greater justice between the parties.

I will not repeat the submissions which have been outlined in detail above. The preliminary issue for determination is whether it is appropriate for the Respondent to issue a notice to terminate tenancy while the current proceedings are still outstanding.

The High Court decision of **Jones Siasamba and 16 Others v Robinson Kaleb Zulu (1)** cited by the Applicant did not deal with the provisions of the Landlord and Tenant (Business premises) Act which are in issue in this instant case and therefore does not apply in these circumstances. Section 5 (1) of the Act provides:

“5(1) The landlord may terminate a tenancy to which this Act applies by a notice given to the tenant in the prescribed form specifying the date on which the tenancy is to come to an end. (hereinafter referred to as the “date of termination”):

Provided that this subsection shall have effect to the provisions of section twenty-three as to the interim continuation of tenancies pending the disposal of applications to the Court.”

This section, particularly the proviso, does not prohibit the landlord from issuing a notice to terminate when other applications are outstanding before the Courts. Indeed, I do not see any such restriction in the Act. This explains why the Applicant could not site any provision in support of its arguments that the landlord's action was illegal or prohibited.

The Applicant has sought to rely on the case of **Development Bank of Zambia and Others V Sunvest and Another (2)** that the Respondent's action amounts to multiplicity of actions.

I do not find any multiplicity of actions or procedures in light of the fact that the legislation in this case has not prohibited the course of action taken by the Respondent but has put in place an adequate provision in terms of section 23 to ensure that such a notice would not take effect until three months after either the final Judgment or an appeal to the Supreme Court has been concluded.

The fact that a party has brought an application for determination of rentals does not mean that the rights and obligations of the parties under the lease agreement and the relevant statute are suspended. Otherwise injustice will be allowed to prevail.


I further note that this matter was commenced in January 2013 but the Applicant has not diligently prosecuted it. Instead the parties have been making constant interlocutory applications resulting in the matter not being fully determined for over one and a half years after commencement.

The preliminary issue fails and is accordingly dismissed.

In view of the issues raised and the conduct of the parties, I order that the costs for this application will remain in cause.

Leave to appeal granted.

DATED THIS 25TH DAY OF JULY 2014


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**M.S. MULENGA
HIGH COURT JUDGE**