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

2014/HP/0309

IN THE MATTER OF SECTIONS 4(1), 7, 10(3), 15, 16 AND 23 (1) (B) & (2), OF THE LANDLORD AND TENANT (BUSINESS PREMISES) ACT, CAP. 193 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF STAND NUMBERS 10620 KAZUNGULA

BETWEEN:

BRIDGEWAY COMMODITIES LIMITED **APPLICANT**

AND

EMVEST KALONGA LIMITED **RESPONDENT**

Before the Hon. Mrs. Justice A. M. Banda-Bobo in Chambers on the 1st day of August, 2014.

FOR THE APPLICANT: Mr. P. H. Yangailo of P. H. Yangailo & Co.

FOR THE RESPONDENT: Mr. G. S. Cornhill & Carol Zamaere of Wilson & Cornhill

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R U L I N G

Cases referred to:

1. Dar Farms v Sandy Munthali (2012) ZR 299
2. Chikuta v Chipata Rural Council (1974) ZR 241 (SC)
3. New Plast Industries v The Commissioner of Lands and Attorney General (SCZJ No. 8 of 2001)

4. Mercantile Printers v Swiza Laboratories (SCZJ App 94 of 1996)
5. Mususu Kalenga Building v Richmens Money Lenders Enterprises (SCZJ No. 4 of 1999)
6. Betty's Café Ltd v Phillips Furnishing Stores (1959) AC 20

Legislation referred to:

1. Order 14A of the Rules of the Supreme Court, (1999) Edition
2. Landlord and Tenant (Business Premises) Rules Cap 193 of the Laws of Zambia.
3. English Landlord and Tenant Act 1954

The Respondent herein, took out summons under **Order 14A of the Rules of the Supreme Court (1999) Edition** of the **White Book** to dismiss a matter on a point of law on grounds that the subject tenancy is excluded from the ambit of the **Landlord and Tenant (Business Premises) Act, Cap 193** of the Laws of Zambia.

It was contended that the subject property Stand No. 10620 is an agricultural holding, and that this fact had been stated by the Applicant in paragraph 10(ii) of its affidavit in support, that the tenancy is in respect of farming activities. Counsel contended that that being the case, the matter has been commenced under a wrong statute and ought to be dismissed on a point of law.

To buttress, the Respondent filed its list of authorities. They cited **Section 2** of the **Landlord and Tenant (Business Premises) Act, Cap 193** which is to the effect that,

> ***"2. In this Act, unless the context requires, "Business" means a trade, industry, a profession or an employment, and includes any activity carried on by a body of***

persons, whether corporate or unincorporated, but does not include farming on land."

There was also reference to **Section 3(2)(a)** of the same Act, which is couched thus:

"3(1) Subject to the provisions of Subsection (2), this Act shall apply to all tenancies in Zambia.

(2) This Act shall not apply to

(a) agricultural holdings."

The Court's attention was drawn to the case of **Dar Farms v Sandy Munthali**[1] and the holding therein as the record will show.

The Applicant opposed the application and filed an affidavit in opposition and skeleton arguments and authorities.

The Applicant in its affidavit in opposition, denied using the phrase **"agricultural holdings"** at all or that the same had been used in the manner suggested by the Respondent, and that the same phrase is not defined by the Act on which the substantive matter is premised.

It was contended that paragraph 9 of the Applicant's substantive action's affidavit in support clearly spelt out the nature of the business that led to the parties to allow the Applicant to manage the property, namely:

(a) Recovery of its debt from the Respondent in the sum of

US$500,000.00 by managing the affairs of the Respondent and not for the Applicant to farm the property.

(b) The debt of US$550,000.00 which is the main business of the parties, is not disputed by the Respondent.

(c) Therefore the correct nature of business initially agreed upon between the Applicant and the Respondent was not farming, rather it was settlement of undisputed debt by the Respondent to the Applicant.

(d) This nature of business (payment of debt) is not expressly excluded from Cap 193 contrary to the Respondent's claims.

It was contended that the parties to the transaction had intended the same to fall under the provisions of Cap 193 and that is why the Respondent rightly and out of its own free will, caused a notice to terminate tenancy pursuant to Cap 193 as appear at "ZR1". It was also contended that for the Respondent to issue the **Termination Notice** under Cap 193, they acknowledged that the tenancy fell under that statute, and so submitted themselves to its provisions. Further, that even when the Applicant resisted vacating the property and advised them accordingly, there was no attempt to withdraw the notice to terminate, as per exhibit "ZR2".

Furthermore, that the issues in this matter are contentious, as the lease arrangement between the parties was not formally reduced into writing, so that arrangement is partly verbal, partly written as can be seen from the correspondence exchanged by the parties and also their conduct.

It was contended that this matter is properly before court as the applicable law is Cap 193, and that the application is mischievous and without merit.

In their skeleton arguments, the Applicant averred that by relying on **Section 2** of Cap 193, the Respondent has completely misapprehended the facts of the matter as the nature of business upon which the same is predicated is not farming, but recovery of an undisputed debt from the Respondent, which **Section 2** of the Act does not exclude.

It was contended that **Section 2** of Cap 193 read,

> ***"... "business" means a trade, an industry, a profession or an employment and includes any activity carried on by a body of persons, whether corporate or unincorporated, but does not include farming on land."*** (emphasis provided).

It was argued that by making arrangements to collect its debt from the Respondent, the Applicant was within the business of *"any activity carried on by a body of persons"* as stated in Section 2, and so the Applicant cannot be barred from undertaking the activity of collecting its debt as happened here.

On the issue of **"agriculture holding"**, the Applicant contends that the same is not defined in terms of the Act. It was contended that the Respondent appear to assume that the property subject of these proceedings is in fact an agriculture holding, but there is

no law supporting that assumption, in the sense of attributing the meaning of an agricultural holding to the subject matter in the substantive application. The applicant contended that this phrase needed to be legally defined before the Respondent can rely on it in the manner it has in this case.

With regard to the **Dar Farm**[1] case cited by the Respondent, the Applicant distinguished the same, on the grounds that in that case, the parties actually entered into a written tenancy agreement that spelt out clearly the arrangement between the parties, but such is not the position in the matter in casu, as already alluded to above.

Further, that there has been no affidavit in opposition to the affidavit in support in the substantive matter, therefore the facts by the Applicant remain unchallenged.

It was contended that the **Dar Farm**[1] case was decided on its peculiar finding of facts, so it followed that it would be wrong to apply the peculiar finding of facts on the **Dar Farm**[1] case to the matter in casu, whose facts are not similar.

It was contended that in the current case, the commencement by way of **Originating Notice of Motion** is the correct one, unlike the **Dar Farm**[1] case where it was found to be wrong, and therefore that case does not apply to the case before this Court.

There was submissions on **Order 14A** of the **White Book 1999**

Edition to the effect that it is not every application made pursuant thereto that will be entertained by the Court as a matter of course. **Order 14A/2/3** was called to buttress the point, that an application under **Order 14A** must meet certain specific requirements, namely that "the defendant must have given notice of intention to defend."

It was contended that there was no affidavit in opposition filed which is the equivalent of the Defendant giving notice to defend. The Respondent, it was said, not having filed an affidavit in opposition to the substantive matter, has not complied with this mandatory requirement as specified under **Order 14A/2/3(a),** as the Order uses the word ***"must"*** which makes it mandatory. It was submitted that in that case, the Respondent cannot proceed with its purported application under **Order 14A,** and the application is thus irregular.

The Court's attention was called to **Order 14A/2/5** on a suitable question of law or construction which is couched thus:

> ***"where the issues of fact are interwoven with the legal issues raised, it will be undesirable for the Court to split the legal and factual determination, for to do so would in effect be to give legal ruling in vacuo or on a hypothetical ruling which the Court will not do."***

It was argued that the Applicant in its paragraph 5 to 17 of the affidavit in opposition stated that the facts of its substantive

matter are interwoven with legal issues. However, that unfortunately the Respondent had not filed an affidavit in opposition to the Applicant's substantive application. It was contended that if this affidavit had been filed by the Respondent, it would have contained facts to help the Court to see whether indeed these facts are interwoven with the law as claimed, and in its absence, the Court has to take the position as stated in the Applicant's affidavit as the correct position since those facts remain unchallenged.

It was submitted that therefore, the Respondent's application under **Order 14A** is rendered incompetent and cannot be entertained by this Court in the absence of the necessary facts to the contrary (if any) to those in the Applicant's affidavit in opposition. The Court was asked to dismiss the application with costs.

The Respondent filed a reply wherein they stated that the Applicant had not disputed that there was farming on the Respondent land, and that the prohibition of *"farming on land"* is not qualified under **Section 2** of Cap 193.

On the use of the word *"business"* it was stated that an attempt to widen its naming was dismissed in the **Dar Farm**[1] case. It was said that the Applicants had deposed that there has been growing of crops on the land and this year's crop is ready for harvest, and that this clearly constituted farming on the land.

On the non-definition of *"agricultural holding"* it was said the same was defined in the **Dar Farm**[1] case, where the Court held that:

> ***"The tenancy was being used for farming purposes, and qualified as an agricultural holding."***

It was replied that though there is no written tenancy agreement, the **applicant had conceded that there was** a verbal agreement between the parties.

On the issue of interwoven facts and law, it was contended that the Respondent being a limited company could only depose to facts through its agent, counsel, who was able to discern and depose that the application had been made under a wrong mode. It was contended that this was the point of law within the knowledge of said counsel. The Court was referred to **Order 14A/2/9** of the Rules of the Supreme Court and **14A/2/2** of the Rules of the Supreme Court on when the application can be made.

Further, that if the application to dismiss is successful, it will have the effect of finally determining the entire cause per **Order 14A/1/(1)(b)** thus negating the need for an affidavit in opposition all together. It was said that the Court has not yet determined whether the mode of commencement is correct. It was argued that statute determines the mode of commencement and that since the Applicant's action is premised on a wrong remedy of a new tenancy due to the inapplicability of the statute it cannot be granted.

On **Order 14A** of the Rules of the Supreme Court 1999 Edition, it was argued that the facts which are relevant to the Court in determining whether or not a matter should be dismissed on a point of law are the facts relevant to the point of law itself, and in the matter in casu, so it was argued, the only relevant fact is that the Applicant is farming on the land, and Cap 193 cannot be used in such a situation.

On the notice of intention to defend, counsel said this is not the same as an affidavit in opposition. To buttress, the Court was referred to **Order 13** of the Rules of the Supreme Court on failure to give notice of intention to defend, with particular reference to the editorial notes which states:

> ***"In 1979, by amendment to Order 12, the former practice of "entering an appearance" was replaced by the practice of "acknowledgment of service" and "giving notice of intention to defend" ... in Order 1 rule 4 (i) it is said that "notice of intention to defend" means an acknowledgment of service containing a statement to the effect on whose behalf it is signed intends to contest the proceedings to which the acknowledgment relates... The rules in Order 13 apply to proceedings began by writ."***

It was contended that this matter was commenced by way of **Originating Notice of Motion** and not writ. Clearly that by definition *"notice of intention to defend"* given in **Order 1**, an

acknowledgment of service is not the same as an affidavit in opposition. Counsel contended that according to our High Court Rules, the equivalent of a notice of intention to defend in the High Court remains a memorandum of appearance which only apply to proceedings begun by writ.

It was argued that what is relevant to an application under **Order 14A** is that both parties must have an opportunity of being heard on the question which seeks to determine the matter on a point of law, as per **Rule 1 (3)(a) of Order 14A** Rules of the Supreme Court and as explained in **14A/2/4** Rules of the Supreme Court.

It was also argued that **Order 14A rule 1(1)** expressly states that the application to determine any question of law can be made at any stage in the proceedings and this must include immediately after service of the **Origination Notice of Motion**.

On the argument that by issuing a **Notice to Terminate Tenancy**, the Respondent submitted itself to the provisions of Cap 193, it was argued that that notice was not a court pleading, but merely notification that the landlord intends to terminate a lease.

It was argued that the usage of a notice form under Cap 193 cannot countervail or amend express statutory provisions but that the onus was on the Applicant's counsel to ensure that the correct law is applied to commence these proceedings.

I have carefully considered the affidavit evidence, skeleton arguments and the oral submissions by counsel for parties in this matter.

The first issue to resolve is whether the preliminary issue is rightly before this Court.

The Applicant raised issue with the use of **Order 14A** of the **White Book** and said that it is not every application made there under that will be entertained by the Court as a matter of course, but rather that such an application must meet certain requirements, as per **Order 14A/2/3**. And that since the Respondent had not given notice of intention to defend, by way of an affidavit in opposition, they cannot proceed with the purported application under **Order 14A**.

The Respondent on the other hand contends that the only requirement is that both parties must be heard on the application.

Order 14A(I) of the Rules of the Supreme Court, 1999 Edition is clear that a Court can, on an application of a party or on its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings.

Order 28 of the Rules of the Supreme Court are on **Originating Summons** procedure. Of particular interest in relation to this matter is the note at **Order 28/6/2** which states the effect of the

rule. It is couched thus:

> ***"Effect of Rule – Order 13 (failure to give notice of intention to defend) is inapplicable in proceedings begun by originating summons. The practice stated in this rule applies instead."***

Further **Order 14A/2/4** of the Rules of the Supreme Court which is a notice of intention to defend clearly states that,

> ***"It precludes the court from determining any such question, unless the parties, i.e. both the plaintiff and the defendant have had an opportunity of being heard on the question, ... This requirement underscores the importance of the procedure under this order in ensuring that both parties have participated or have had the opportunity to participate in the final disposal on a point of law ..."***

I agree with counsel for the Respondent that what is relevant under **Order 14A** is that both parties must have had an opportunity to be heard on the preliminary issue which seeks to determine the matter on a point of law. In the matter in casu, it is obvious that both parties were heard as can be seen by their affidavit evidence and oral submissions on the preliminary issue.

I consider therefore that the preliminary issue is rightly before this Court.

I also want to agree that the matter for determination on a point of law is the question whether the matter was wrongly commenced using a wrong mode of action. If this is found to be the case, then **Order 14A** allows the Court to determine that question of law without the matter going further. It is the issue of forum or jurisdiction that need to be determined and can be determined under this order.

I now proceed to deal with the substantive issue, the subject of the preliminary issue.

The Respondent in this matter issued summons to dismiss this matter on a point of law pursuant to **Order 14A** of the Rules of the Supreme Court, (1999) Edition, on grounds that the subject tenancy is excluded from the ambit of the **Landlord and Tenancy (Business Premises) Act, Cap 193** of the Laws of Zambia. This was, it was said, because the Applicant was using the property in issue for agricultural purposes and as a result, the Applicant had used a wrong statute to commence the proceedings and so the matter should be dismissed on a point of law. Besides relying on **Sections 2 and 3(2)(a)** of the above cited Act, there was also reliance on the case of **Dar Farm**[1].

The Applicant opposed the application to dismiss the matter on a point of law, stating that the mode of commencement was the correct one, that the property in question was not being used as an agricultural holding but that the tenancy was entered into for the purpose of recovery of a debt owed to them by the Respondent

and so this case is distinguishable from the cited case of **Dar Farm**[1].

At the outset, I wish to state that this Court is not bound by the holding in the **Dar Farm**[1] case, adjudicated upon by my brother Mr. Justice Kondolo, as both Courts are of the same jurisdiction. It can only be of persuasive value.

It is not in dispute that the parties herein by conduct, would appear and in fact entered into a lease agreement. This is clear from exhibits "ZR5" in the Applicants affidavit which indeed has not been denied even by the Respondent herein.

The question to determine in the first instance, is whether the tenancy was entered into for agricultural purposes or otherwise, so that, if it is otherwise, then the tenancy falls within the ambit of the Act. The preamble to the Act states that this is,

> ***"An Act to provide security of tenure for tenants occupying property for business, professional and certain other purposes, to enable such tenants to obtain new tenancies in certain cases, and to provide for matters connected therewith and incidental thereto."*** (emphasis by Court)

The purpose of the Act, as evidenced by the preamble is the provision of security of tenure for tenants in the demised premises

who occupy them for business and professional purposes, as well as to enable such tenants to obtain new tenancies in certain cases.

The main matter herein was commenced under the aegis of **Rule 3** of the Act, namely by way of **Originating Notice of Motion**. The Respondent has argued that this was a wrong mode as the tenancy herein is in respect of farming activities. The issue to determine initially is whether the tenancy was for farming purposes. **Order 6 Rule 1 and 2** of the High Court Rules of the High Court Act Cap 27 of the Laws of Zambia provides modes of commencement of an action in the High Court, namely by writ of summons endorsed and accompanied by the full statement of claim, and by originating summons for those cases which may be disposed off in Chambers.

The issue of mode of commencement of an action has been the subject of a plethora of authorities and decisions by our Supreme Court, and where it has had occasion to provide interpretation of **Order 6** of the High Court Rules quoted above. Among the many cases are those of **Chikuta v Chipata Rural Council**[2] where the Supreme Court said that,

> ***"It is clear ... that there is no case where there is a choice between commencing an action by writ of summons or by an Originating Summons"***

And the case of **New Plast Industries v The Commissioner of Lands and Attorney General (SCZJ No. 8 of 2001)**[3] where, in

quoting the **Chikuta**[2] case, and in words relevant to this matter stated that,

> ***"Where any matter is brought to the High Court by means of an Originating Summons when it should have been commenced by a writ, the Court has no jurisdiction to make any declaration."***

What comes out of the consideration of the above cited authorities, it that as with forum, the mode of commencement goes to the jurisdiction, and when the wrong mode of commencement has been used, the same is so fundamental as to be incurable and renders the proceedings a nullity as the Court is divested of jurisdiction to grant the relief sought by the Plaintiff or Applicant.

In the Act under discussion, it is a fundamental rule that a tenancy that falls within the scope of the Act can only be terminated by the means prescribed in the Act, and that the same Act has prescribed the mode of commencement of an action under the Act.

Rule (3) of the said Act sets out the mode of commencement of an action. Therefore in terms of the direction by **Order 6 rule 2**, and the cited cases above, it is settled that there can be no departure to the mode of commencement of the action. However, the matter does not end there.

It has been contended that because the Applicant had mentioned in paragraph 10 of his affidavit in support of the **Notice of Motion**

that he was carrying out farming activities on the demised premises, then the tenancy fell outside the purview of the **Landlord and Tenant (Business Premises) Act**, and that that being the case, a wrong mode of commencement of the action was employed; and therefore the matter ought to be dismissed.

To determine the issue, it is prudent to examine the history of the creation of the tenancy in issue. The following are apparent, namely, that there is no formalized tenancy agreement. However, a critical look at the correspondence that passed between the parties and as agreed by both parties herein, the lease arrangement between the parties was not formerly reduced into writing, and therefore the arrangement is partly verbal and partly deduced from the correspondence exchanged between the parties and partly from the conduct of the parties in this matter.

The exhibits at "ZR5" are very illuminating as to the genesis of this tenancy, particularly the e-mail from one **Susan Payne** dated 22nd October, 2013, and the response by one **Zafar Rasool**. In the e-mail from Susan Payne, it is clear that the tenancy was born out of the debt of US$500 that the Respondent acknowledges is owed to the Applicant herein.

In the response to the e-mail dated 22nd, Zafar Rasool confirms the above position where he says that,

> ***"Under the Zambia tax laws, a tenant is supposed to deduct 15% withholding tax from gross rent and pay over to the tax authorities (...). This is a different***

situation where <u>a trade debt</u> is being converted into a tenancy fee/rental. Emvest will have to take responsibility for that."

I want to agree with the Applicant's assertion that the purpose of the tenancy was not for purposes of farming activities but rather for the recovery of the debt that they were owed by the Respondent herein, which allowed the Applicant to manage the demised property to recover its money.

In the cited case of **<u>Dar Farm</u>**[1], my brother Judge Kondolo found that the tenancy agreement was being used for farming purposes. However, I want to believe that in the matter in casu, the whole purpose of entering into this tenancy was not because the Applicant wanted to grow wheat, but rather to secure its debt owed by the Respondent. The primary purpose of the tenancy was not farming but debt recovery. I believe that indeed this case is distinguished from the **<u>Dar Farm</u>**[1] case on that basis.

Counsel for the Respondent argued that the ratio decidendi in the **<u>Dar Farm</u>**[1] case does not turn on whether or not there is a written or unwritten tenancy, but rather whether there is a tenancy or not and whether the land in question is an agricultural holding and or whether agricultural activity is being conducted on the land. Whereas I agree with the first part of his assertion, I beg to differ on the last part. It is clear from the **<u>Dar Farm</u>**[1] case that the Judge found as a fact that the tenancy's entire purpose was for carrying on agricultural or farming purposes. To my view, the deciding

factor ought to be the purpose for which the tenancy was entered into.

Further, in the **Dar Farm**[1] case the nature of business was clearly spelt out in the lease, whereas in the matter in casu, there is absolutely nothing, but by conduct of the parties, it is clear that the whole purpose of the intended lease was for the recovery of the debt. The correspondence between the parties did not for a moment suggest that the lease was entered into for farming.

The Respondent has not denied, throughout the correspondence that the reason they allowed the Applicant to be on the farm was because they had failed to pay back a debt and in order to offset that debt, the Applicant could manage the farm until the debt was paid. So, yes on the peculiar facts of this case, the same is distinguishable from the **Dar Farm**[1] case.

That being the case, I find that this aspect is covered under **Section 2** of the Act as **"any activity carried on by the body of persons."**

On the definition of agricultural holdings by my learned brother, counsel for the Respondent concedes that the Act does not define that phrase. However, I want to believe that my brother Judge defined it on the basis of the facts of the case before him, and this is discernable where he states that,

> ***"The tenancy was being used for farming purposes, and qualified as an agricultural holding."***

I agree that indeed the Act does not define what an agricultural holding is, and in the absence of a definition, it would be safe to assume that the tenancy was not being used as an agricultural holding, on the peculiar facts of this case

It is my holding therefore that the tenancy in issue was not for agricultural purposes but rather one for carrying on business for the purpose of recovery of the debt owed to the Applicants by the Respondent. Consequently, it falls within the provisions of the **Landlord and Tenant (Business Premises) Act**.

I am fortified in my holding by the fact that the Respondent himself issued, through counsel a notice to terminate in the format provided under the Act and under **Section 5** of the Act under discussion. Exhibit "ZR7B" is the notice in issue. Counsel has argued that since this was not a court pleading, but merely notification that the landlord intends to terminate a lease, and therefore the use of that format cannot countervail or amend an express statutory provision. I beg to differ for reasons I shall state shortly.

Section 4 of the Act allows a tenant to apply for a new tenancy if the landlord had given notice under **Section 5** to terminate the tenancy. **Section 5** says that 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.

In the case of **Mercantile Printers v Swiza Laboratories (SCZJ App 94 of 1996)**[4] the tenant, though protected under the **Landlord and Tenant (Business Premises) Act**, lost the right to possession since they did not oppose the Landlords notice to quit by applying for a new tenancy to court as provided by **Section 6(4)** of the Act. The effect of the issuance of a notice in the format set out by the Act under **Section 5** is to put the tenant on alert that if he wants the tenancy to continue he can take immediate action and apply to court, especially where the landlord has indicated that he would oppose any application for a new tenancy. In the case of **Mususu Kalenga Building v Richmens Money Lenders Enterprises (SCZJ No. 4 of 1999)**[5] the Supreme Court held,

> ***"it was incumbent upon the Appellants to comply with the provisions of the Act by giving the Respondent a proper notice terminating the lease and that they acted at their own peril by not doing so."***

Section 5 subsection 6 of the Act states that,

> ***"(6) A notice under this section shall not have effect unless it states whether the landlord would oppose an application to the court under this Act for the grant of a new tenancy, and if so, also states on which of the grounds mentioned in Section eleven he would do so."***

As for the reasons for the requirement in the above quoted section, that the Landlord must state in his notice on which of the grounds mentioned in Section eleven he intends to rely on, **Romer, L J** had occasion to make a pronouncement on this issue, when dealing with the **1954 English Landlord and Tenant Act** (on which the Zambian Act is largely fashioned) in the case of **Betty's Café Ltd v Phillips Furnishing Stores[6] at page 43 – 44**, when he observed that,

> ***"The matter will ultimately come before the court and it is obviously right that the tenant should know in advance that is the case that he will have to meet at the hearing .... It is, I think intended to be in the nature of a pleading and its function, as in all cases of a pleading is to prevent the other party to the issue from being taken by surprise when the matter comes before the judge."*** (emphasis by court)

Counsel's contention that because the notice was not a pleading and therefore was of no effect, can therefore not stand in the face of the above authority.

The question that one would ask is what would have happened in the matter in casu if the Applicant had not acted in the face of the notice. I would hedge that the tenancy would have terminated on ground that the tenant had not acted upon the notice. Further, the Respondent had not disputed the assertion that when the Applicant refused to vacate, they never reverted to them. Clearly,

and as far as both parties were concerned, the notice given was final. It was at this point that the Applicant, for fear of losing the opportunity to collect the debt, resorted, in the face of the notice, to act in the legally provided manner.

As already stated, the Respondent initiated the action that triggered the events that lead to the current action when he issued the notice under **Section 5** as appear at exhibit "ZR 7(b)" herein.

I do not buy the argument that because the Applicant was represented by counsel, the other party could deliberately cite a wrong provision in the issuance of a notice in the belief that the other counsel would spot the mistake. Such deliberate conduct by counsel ought to be frowned upon.

Therefore by giving notice under the provisions of **Section 5**, the Respondent herein brought himself under the provisions of the Act, and thereby recognized the nature of the tenancy they were dealing with and can therefore not go back on their word, as to do so would be prejudicial to the Applicant.

I find that the Respondent have not acted in good faith in the manner they have conducted themselves in this case. This cause of action has arisen as a result of the notice that they issued for the termination of the tenancy.

Having found that the action was correctly commenced under the **Landlord and Tenant (Business Premises) Act Cap 193,** and that

the **Notice to Terminate** brought the landlord within the provisions of the Act, the preliminary issue to dismiss the matter on a point of law is hereby dismissed with costs to be taxed in default.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 1ST DAY OF AUGUST, 2014.

MRS. JUSTICE A. M. BANDA-BOBO
HIGH COURT JUDGE