IN THE HIGH COURT FOR ZAMBIA **2015/HP/0996**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

- ***In the matter of rule 3 of the Landlord and Tenant (Business Premises) Rules 1973***

- ***In the matter of section 4 (1) and section 5 (1), (2) and (3) of the Landlord and tenant (Business Premises) Act Chapter 206 of the Laws of Zambia***

- ***In the matter of an application for annulment of the purported notice issued on 16th June, 2015 for termination of tenancy Agreement dated 30th January, 2007 on Plot No. 203 Maunda Street Kabwat Estates, Lusaka***

BETWEEN:

DR GEORGE EFFORD MAMBO (Operating as New Advanced Pharmacy) **APPLICANT**

AND

MARGRET MWENYA (Operating as Katungu Enterprises) **RESPONDENT**

CORAM: **HONORABLE JUSTICE MR. MWILA CHITABO, SC**

For the Applicant:	*Mr. M. Muchende of Messrs Dindi & Company*
For the Respondent:	*Mr. D.M Chakoleka of Messrs Mulenga Mundashi Kasonde Legal Practitioners*

R U L I N G

Cases referred to:

1. *JCN Holdings Limited and 2 others vs Development Bank of Zambia SCZ/Judgment No. 22 of 2013 (Appeal No. 87/2012) (SCZ/8/132/2012 unreported)*

2. *Waterwells Limited v William Samuels Jackson (1984) ZR 121*

Legislation referred to:

(i) *Section 13 of the High Court Act chapter 27 of the Laws of Zambia*
(ii) *Order 62/2/7 Rules of the Supreme Court of England 1999 edition*
(iii) *Rule 3 landlord Tenant (Business Premises) Act, chapter 193*

The genesis of this matter is that the Applicant on 25th June, 2015 launched proceedings by originating notice of motion premised on section 3 of the landlord and Tenant (Business Premises) Rules[1] and section 4 (4), Section 5 (1), (2) and (3) of the Landlord Tenant and Business Premises Act[2].

The reliefs sought were

(1)A declaration that the termination of the Tenancy Agreement dated 16th June, 2015 is incompetent and therefore null and void.

(2)Damages for distress caused

(3)Interest and damages costs

The originating notice of motion was supported by an affidavit deposed to by one Dr. George Efford Mambo.

In a nut shell the Applicant deposed that the parties entered a Tenancy Agreement in respect of a Business Premises namely Plot No. 203 Maunda Road, Lusaka on 30th January, 2007. That the Applicant operates a pharmacy and a clinic. He has been maintaining the premises in a tenantable state of repair.

That by letter dated 16th June, 2015 the Respondent purported to give 7 days notice for the Applicant to vacate the said premises. The Respondent further threatened to send bailiffs to evict the Applicant. It was deposed that the Applicant was updated with his rental obligations.

He further deposed that he was verily informed by his Advocates that the purported termination was contrary to the Law and prayed for the injunctive relief of an interim injunction to protect him from unlawful eviction.

On the same day, the Applicant filed in

(i) Ex-parte summons for interim injunction

(ii) *Affidavit in support of ex-parte and interparte summons for an interim injunction; and*

(iii) *Certificate of urgency*

The supporting affidavit was deposed to by the Applicant who essentially reiterated the averments in his affidavit in support of notice of motion and stressed for an emergent relief of an injunction.

On 29th June, 2015 upon reading the Affidavit of the Applicant and upon sight of the certificate of urgency and upon hearing an address from the Learned Counsel for the Applicant, I formed a firm view that the application required to be dealt with on an emergent basis and to arrest the real and threatened mischief of evicting the Applicant from a business premises which provides for certain statutory protective provisions for tenants.

I was satisfied that this was a fit and proper case to grant an interim injunction restraining the Respondent from evicting the Applicant until 16th July, 2015 or until a further order of the court on the usual undertaking of an Applicant in applications of this nature, that is the Applicant by his Advocates to pay all such damages and costs that the Respondent may suffer should the court at a later stage be of the view that the interim injunction ought not to have been granted.

On 16th July, 2015 the matter was rescheduled to 28th July, 2015 at 14:30 hours. On 15th July, 2015 the Respondent filed in notice of intention to raise preliminary issue pursuant to Order 33 Rule 3

of the Supreme Court Rules of England 1999 edition as read together with Order III Rule 2 of the High Court Rules chapter 27 of the Laws of Zambia.

The preliminary issues were anchored on the following questions

(i) *Whether the mode of commencement of the matter by the Applicant is correct and*

(ii) *Whether the Court has jurisdiction over this matter in view of the mode of the commencement by the Applicant.*

The notice was not supported by an affidavit nor skeleton arguments nor submissions. On the return date Learned Counsel for the Respondent addressed the court. In a nutshell he submitted

(i) The matter before the Court was not properly commenced and on account of that the Court has no jurisdiction over the matter.

He pointed out that the originating notice was commenced pursuant to Rule 3 of the Landlord (Business Premises) Rules. he pointed out that Rule 3 of the said Act chapter 206 of the Laws of Zambia herein after referred to as the Act, shall be commenced by originating notice of motion but there is no single provision that enables the making for an application to terminate the lease nor the making of an application to seek damages for distress.

It was his argument that the proper mode of commencement of proceedings in the circumstances was a Writ of Summons supported by a statement of claim.

In support of his proposition he referred to the case of ***Appolo Refrigeration Limited v Farmers House Limited 1985 ZR 182*** he also referred to the case of ***Road Mix Limited and another v Furncraft Enterprises Limited SCJ No. 41 of 2014.*** This is a matter that involved an application which was made under Rule 3 of the Act and Applicant applied for damages. The application was made by originating notice of motion.

In dismissing the action the Supreme Court at J. 10 ruled that

"claims cannot be combined with other claims"

He thus moved the Court to dismiss the action.

The Learned Attorney for the Applicant Senior Counsel Muchende in his oral response submitted that he was magnanimously conceding to the application by the Learned Attorney for the Respondent. The position as espoused was a correct statement of the law and as such application was well grounded.

Counsel however pointed out the predicament they had found themselves in was due to failure by the Respondent to forewarn the Applicant of the arguments and authorities they were going to rely on. This was, he said, compounded by the late service of notice to raise preliminary issue which amounted to ambush.

He urged the Court to register its pleasure at Counsel's magnanimity by conceding to the Respondents application without wasting courts time.

On the issue of costs, he submitted that as a general rule costs should follow the event but there are exception to the general rule as in the case at hand. He urged the Court to make no Order as to costs or the costs to be in the cause.

In reply, the Learned Attorney for the Respondent pressed for costs. He submitted that while admitting that the Applicant was not aware of the arguments the Respondent was to advance, that was not a ground to deny the successful Respondent or litigant of his costs.

Having heard the submissions and arguments of the Learned Attorney for the Respondent, and there being no challenge to the preliminary issues raised in respect of the inappropriateness of the mode of commencement of proceedings herein, and the Learned Senior Counsel for the Applicant having magnanimously conceded to the challenge, the Respondents preliminary issues succeed.

The proceedings herein are set aside for irregularity on account that there is no provision on which the Applicants claim for nullification of termination of tenancy and claim for damages can be anchored. Rule 3 of the Landlord Tenant (Business Premises) Rules does not provided for launching of proceedings to provide for remedies or reliefs sought by the Applicant. The preliminary issues succeed.

I should take this opportunity to recognise that the option taken by Senior Counsel Mr. Muchende is right appropriate and resonant to good practice. As officers of the Court the Learned Attorneys have not only a duty to their clients but also to the Court and that is in public interest as succinctly and instructively pronounced in the

case of ***JCN Holdings Limited and 2 others vs Development Bank of Zambia SCZ Judgment No. 22/2013 (unreported)***. The Supreme Court after reviewing some case approvingly adopted Lord Dennings observations at page J50 when he said

> *"[An Advocate] has a duty to the Court which is paramount. It is a mistake to suppose that he is a mouthpiece of his client to say what he wants, or his tool to direct what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must disregard the most specific instruction of his client, if they conflict with his duty to the Court. The code which requires a barrister to do all this is not a code of law it is a code of honour. If he breaks it, he is offending against the rules of the profession and subject to its discipline".*

In the matter in casu, the Learned Senior Counsel has demonstrated his honour by conceding a point or points of law at the earliest point in time. This is as it should be. Senior Counsel indeed every Counsel should robustly keep and observe the ethics, etiquette conduct and code of honour of the noble profession jealously even when it may be uncomfortable to him or them.

In respect of the order on costs, I agree that ordinarily cots follow the event. The costs are always in the discretion of the Court, but the discretion has to be exercised judiciously as provided for by Order 62 (2) (7) of the White Book.

I am however mindful of the principle that it is no answer for the predicament of a litigant to point at the default of the opponent. This was succinctly pronounced in holding No. 5 in the case of ***Waterwells Limited v William Samuels Jackson (1984) ZR 121***

In this case the predicament of launching flawed proceedings was the making of the Applicant. The delay or failure in communicating the arguments and authorities to the Applicant by the Respondent is no answer to that party's predicament caused by that party's own default to point out at the opponent's non failings.

This said however, the facts as revealed on the record are that the dispute has arisen between the litigants arising out of a Tenancy anchored on the Landlord and Tenant (Business Premises) Act where a purported notice to terminate was granted contrary to the provisions of section 5 of the said Act.

This being a Court of equity, I cannot gloss over the facts as are on the record. Section 13 of the High Court Act cap 27 of the Laws of Zambia gives power to this Court to concurrently administer Law and Equity.

In my view the original sin was the breach of section 5 of the said Act. The justice of this case is that each party must bear its own costs.

I should also take opportunity to observe that it is prudent practice for Counsel to warn an opponent of the case he or she is supposed to meet. That is one of the roles of pleadings. In my view pleadings

extend to preliminary issues. The weapon of surprise or ambushing has no place in good and fair litigation.

It is for these reasons that I have formed a very firm view that this is not a fit and proper case to award costs to the Respondent notwithstanding that their application has succeeded on a preliminary issue.

The Respondent is informed of the right to appeal to the Supreme Court within 14 days.

Dated this 2nd day of August 2015

Mwila Chitabo, SC
Judge