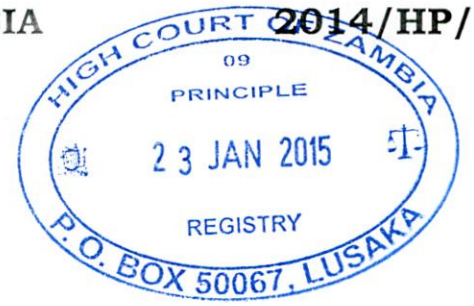
IN THE HIGH COURT FOR ZAMBIA **2014/HP/1531**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

VALUE AUTO SPARES LIMITED **APPLICANT**

AND

SHYAMAL PATEL **RESPONDENT**

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

For the Applicant: **Mr. K. Peterson of Messrs Chibesakunda & Company**

For the Respondent: **Mr. M. Ndalameta of Messrs Musa Dhudia & Company**

R U L I N G ON APPLICATION TO DISPOSE MATTER ON POINT OF LAW

Legislation referred to:

1. *Landlord and Tenant (Business Premises) Act*
2. *Order 14A (Supreme Court Rules White Book 1999 Edition)*
3. *Order 3 (5) of the High Court Rules Chapter 27 of the Laws of Zambia*

Cases referred to:

1. *BP Zambia Plc v Zambia Competition Commission (2011) 2 ZR 148*
2. *United Engineering Group Limited v Mackson Mungalu (2007) ZR 30*
3. *Newplast Industries Limited v Commissioner of Lands and Another (2001) ZR 51*
4. *Attorney General and another v Lewanika and another (1973 – 1994) ZR 5*
5. *Matilda Mutale vs Emmanuel Munaile (2007) ZR 118*

The genesis of this case is that the Applicant on 22nd September, 2014 launched an exparte originating notice of motion seeking the following reliefs:-

i. *An order for leave to extend time within which to notify the landlord whether the Tenant will be willing to give possession of property comprised in the tenancy in consequence of notice given by the Landlord pursuant to section 5 of the Landlord and Tenant (Business Premises) Act.*
ii. *An order for leave to extend time within which to apply for an new tenancy.*
iii. *Costs in the cause.*
iv. *Any other relief the court deems fit.*

The originating notice of motion was supported by an affidavit deposed to by one Paul Raven. He deposed that the Applicant has been a tenant of the Respondent in a portion of stand number 1570 Freedomway Lusaka, since July, 1998.

On or about the 26th November, 2013the Respondent proposed a new lease agreement with rental increment from K5,000 to K25,000. Upon receipt of the proposed lease agreement, the Applicant applied to the court for the determination of reasonable rent under cause No. 2013/HP/30 and these proceedings are still going on.

That during the subsistence of the proceedings under cause No. 2013/HP/30 the Respondent served a notice to quit pursuant to section 5 of the Landlord (Business Premises) Act.

That the notice required the Applicant to notify the Respondent within two months of the notice that the Applicant will not be willing to give up possession at the expiration of the notice period.

That prior to the expiration of the two months period above, the Applicant applied under cause number 2013/HP/30 for a determination on whether a response would not be contemptuous in view of the subsisting action and a decision on this issue only came after the expiration of the two months notice period.

He deposed that in the premises the applicant was seeking for extension of time within which to notify the Respondent that the Applicant will not be willing to give up possession of the property comprised in the tenancy in consequence of the notice given by the Respondent pursuant to section 5 of the Landlord and Tenant (Business Premises) Act and was also asking for extension of time within which to apply for a new Tenancy.

The Applicants application was accompanied by a certificate of urgency.

On 3rd October, 2014 I heard Mr. Peterson Learned Counsel for the Applicant. After hearing the Learned Counsel, I formed the view that this was not a fit and proper case to grant the order exparte. I premised my refusal on the ground that there is a matter before my sister Madam Justice Mulenga in cause number 2013/HP/30 as disclosed in paragraph 6 of the Applicants affidavit. The action therein relates and involves the same parties in respect of the same business premises. The issues in that case relate to a dispute in respect of the rent to be paid.

In the present case the Applicant is applying for extension of time in which to oppose an application to terminate the tenancy under the provisions of section 5 of the Landlord and Tenant (Business Tenant) Act and to apply for a new Tenancy.

The said actions are interrelated. The issue of duplicity and multiplicity of actions is real and imminently obvious. It was for those reasons that I rejected to deal with the matter exparte and ordered that the matter be heard interparte.

On 20th October, 2014 the Respondent filed in Notice of motion to dispose the Applicants case on points of law pursuant to Order 14A of the Rules of the Supreme Court (1999) Edition as read together with Order III (2) of the High Court Rules chapter 27 of the Laws of Zambia.

The motion was supported by an affidavit deposed to by one Shymal Patel. In summary the deponent deposed that the Respondent gave notice to the Applicant of intention to increase rent from K15,000 to K25,000 per month.

The Applicant reacted by commencing proceedings in cause No. HP/2013/0030 seeking a declaration that the proposed increase in rent was excessive, and unjustified and therefore null and void.

The Applicant obtained an exparte interim Order restraining the Respondent from interfering with the Applicants possession and quiet enjoyment of the property on 1st January, 2013. This injunction was discharged on 3rd December, 2013 with costs to be paid to the Respondent.

On 4th April, 2014 the Respondent gave notice to terminate Tenancy. The Applicant reacted by raising a preliminary issue challenging the appropriateness of notice to terminate on the ground that there were ongoing proceedings.

On 24th July, 2014 the court ruled that 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 relevant statutes are suspended.

That the Applicant was obligated under the notice to indicate to the Landlord (the Respondent) whether it would be willing to give up possession within 2 months. The two months expired on 4th June, 2014.

He further deposed that on the advise given to him by the Advocates failure to notify the Respondent within 2 months period means that the Applicant cannot apply for a new Tenancy.

He was further advised that the notice of termination became due on 4th October, 2014 and would take effect three months beginning with the date on which the Applicants application for determination of fair rent and reasonable rent would be disposed off.

He deposed further that he verily believed that he Applicant was using the machinery of the court in an improper and abusive manner taking into account the matter subsisting under cause number 2013/HP/0300 which the Applicant is not keenly prosecuting.

He prayed that the Applicants reliefs be denied.

The Respondent filed in Skeleton arguments in support of application to dispose of action on a point of law. In a nutshell the Learned Counsel for the Respondent premised his application under Order 14A of the White Book arguing that the Applicants application are misconceived and not provided for by law.

He made reference to the case of ***Ashmore v Corporation of Lloyd's (no.1) [1992] 2 All ER 486*** where Lord Roskill pronounced and emphasized the need to expeditiously and inexpensively identify and try crucial and relevant issues.

He called in aid the case of ***United Engineering Group Limited v Mackson Mungalu (2007) ZR 30*** where Chirwa J stated:

"The objection was rightly taken at the right time not to waste the courts time to proceed with trial".

It was argued that section 5 of the Landlord Tenant (Business Premises) Business Act was complied with by the Respondent. The Applicant (Tenant) was given notice to indicate if it was willing to give up property.

It was pointed out that under section 10 of the above Act where an application is made in consequence of notice given by the Landlord under section 5 it shall not be entertained unless the Tenant has dully notified the Landlord that he will not be willing at the date of determination to give up possession of the property comprised in the Tenancy.

It was further argued that there is no jurisdiction to extend time within which the Applicant was to notify the Respondent. Reference was made to the case of ***BP Zambia Plc v Zambia Competition (2011) ZR 148*** where it was held:

".....our firm view is that the court has no discretion to extend or abridge time where a statute provides no such discretion, in the current case, the Competition and Fair Trading Act gives no such discretion to the court. We do not therefore agree with the Appellants contention that our decision in Kumbi v Zulu ousted the provisions of statute as to time limits. Therefore as much as we agree that

cases dealt merits, instead of dismissing hem on grounds of irregularity this cannot override statutory provisions".

It was forcefully argued that though the High Court's jurisdiction is unlimited it is not limitless since the court must exercise jurisdiction in accordance with the law and that it is inadmissible to construe the word "*unlimited in Vacuo*".

It was further argued that, the practice adopted by the Applicant to launch fresh proceedings when there was a pending matter before another court was an abuse of court process and forum shopping. Reference was made to the case of ***Kelvin Hang'andu and Company (a firm) v Webby Mulubisha (2008) 2 ZR***. The Supreme Court held that

"The Jurisdiction of the High Court is unlimited but not limitless, since the court must exercise the jurisdiction in accordance with the law. Once a matter is before court in whatever place, if that process is properly before it, the court should be the sole court adjudicate on all issues involved. All interested parties have an obligation to bring all issues in the matter before that particular court. forum shopping is an abuse of court process which is unacceptable.....".

The Applicant filed its list of authorities and skeleton arguments in opposition to the Applicants application to dispose of the matter on a point of law. It was conceded that where a statute is silent on the

right of extension of time the general rule is that an extension cannot be granted.

It was argued that the cases of ***BP Zambia Plc***[1] and ***United Engineering Group Limited***[2] are distinguishable to the present case in casu. It was pointed out that under the Zambia Competition Commission Act there was no provision for extending time in which to appeal. Whereas under section 10 (2) of the (Landlord Tenant Business Premises) Act there was such a provision.

It was argued that Rule 11 of the Act allows for an application for extension of time to apply for a new Tenancy. It was argued that section 5 (5) of the Act be strictly be interpreted as it would result in absurdity since it would result in a Tenant being barred for applying for a new Tenancy.

To this end he called in aid the case of ***Attorney General and Another v Lewanika and others (1993 – 1994) ZR 164*** where the Supreme Court observed

> *"..... the present trend is to move away from the rule of literal interpretation to purposeful approach in order to promote the general legislative purpose underlying the provisions, it therefore follows therefore that whenever the strict interpretation of a statute to unreasonable situation and unjust situation, it is our view that judges can and should use common sense to remedy it, that is by reading words in it if necessary so*

as to do what parliament would have done had the situation been ....".

With regard to the case of ***United Engineering Group Limited***[2] it was argued that section 28 of the Landlord Tenant (Business Premises) Act does not envisage a situation where an extension will be necessary quite differently from section 10 of the said Act.

In respect of the challenge on abuse of court process, it was argued that the Applicant had to commence fresh action it was argued that Rule 11 (eleven) of Principal Act provided for commencement of process by originating motion.

He finally called in aid Order 3 Rule 5 of the High Court Rules which provides for consolidation of the matter.

On 11th December, 2014 I heard oral submissions from the Learned Counsel for both parties.

Mr. Ndalameta submitted that he was relying on the notice of motion filed by the Respondents affidavit and Skeleton arguments filed into court.

In a nutshell he submitted that

(1) The Applicants application is essentially barred by section 5 (5) of the Landlord (Tenant Business Premises) Act which shall be referred to as the Act in this Ruling.

He submitted that as read together with section 10(2) of the Act the Legislation operate as a statute of limitation and the basis of the objection.

(2) He submitted that the provision to extend time only relate to a Tenant who has notified the Landlord in accordance with the Act.

He submitted that there are 2 reasons why time within which Tenant can notify a Landlord cannot be extended. The first one is that the Act has specific instances for time to be extended, this means that where it is stated that the time cannot be extended it was deliberate because legislature clearly addressed their rising to issues of extension when drafting the Act.

Secondly that in a piece of legislation which is so heavily tilted in favor of Tenants the few instances where a Landlord is given certainly must surely be upheld in favor of the Tenant.

In this particular case the Respondent not having received written notice from the Applicant that would oppose the Tenancy has relied on the only certainty that Act has given him.

He pointed out that the Applicant was at all material times legally represented, and there was no reason why the Applicant failed to notify the Landlord of his intention to oppose termination notice.

He cited the case of ***George Balamoan v Aidan Gaffiney 1971 ZR 29*** where it is said to have been said that "*a party that receives even*

irregular court process must still safeguard its interests. It is to sit back and ignore the allegedly irregular or illegal process, as one does so at their peril".

He submitted that even assuming the extension could be granted, that would not amount to the Tenant duly notifying the Landlord so as to enable the Tenant bring an application for grant of a new Tenancy. He concluded by stating that there must be an end to litigation. That all matter in a cause of action must be dealt with by one judge.

Mr. Peterson Learned Counsel for the Applicant indicated that in opposing the Respondents Application, he was relying on the heads of arguments and he would not make any oral submissions.

I am indebted on the researchful industry of Learned Counsel for both parties. Their arguments and submissions were of great assistance.

The facts of this case which are not in dispute are that

(1) *There existed a Tenancy between the Applicant and the Respondent under the act in respect of stand No. 1570 Freedom Way, Lusaka.*

(2) *On 26th November, 2013 the Respondent notified the Applicant of its intention to increase the rent from K15, 000 per month to K20, 000 per month.*

(3) Upon receipt of the said notice the Applicant on 14th January, 2013 applied to the High Court under cause No. 2013/HP/0030 and these proceedings are still going on. Applicant also obtained an injunction restraining the Respondent from possession of the property.

(4) During the subsistence of the proceedings aforesaid, the Respondent on 4th April, 2014 served a notice to terminate Tenancy under section 5 of the Act. The notice required the Applicant to notify the Respondent within 2 months of the notice if the Applicant would not be willing to give up possession at the expiration of the notice period.

(5) Before the expiration of the 2 months alluded to above, the Applicant under cause No. 2013/HP/0030 applied to the court for determination on whether it was appropriate or the Respondent to issue a notice to terminate the Tenancy in the face of the subsisting proceedings as aforesaid.

(6) On 25th July, 2014 the court under cause No. 2013/HP/0030 above dismissed the Applicants application holding that an application for determination of rentals did not mean the suspension of rights and obligations of the parties under the lease nor relevant statutes.

(7) The two months mandating the Applicant to oppose termination of the Tenancy expired on 4th April, 2014.

(8) On 25th September, 2014 the Applicant launched proceedings in this case before me exparte by originating summons asking for

(i) An order to extend time in which to notify the Landlord whether the Tenant would be willing to give up possession of the property under lease.

(ii) An order for extension of time in which to apply for new Tenancy.

It was this application which prompted the Respondent to move the court to dispose of the case on points of law by way of preliminary issue.

The Respondent in support of his application had filed an affidavit. The Applicant had not filed an opposing affidavit. It is on this point I wish to say something.

It is generally accepted that where a litigant has made an application supported by an affidavit, it is imperative on the part of the opponent to file an opposing affidavit. In this absence of an opposing affidavit the litigant who has not filed in an opposing affidavit will be deemed to have admitted the facts deposed to therein.

I now deal with the substantive application.

Notice to Terminate Tenancy

The application by the Respondent is firstly grounded on the provisions of section 5 (5) of the Act. The section states as follows:

Section 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 called "the date of termination") provided that the subsection shall have effect subject to the provision section twenty three as to the interim continuation of tenancy pending the disposal of applications to the court".

Section 5 (5)

"A notice under this section shall not have effect unless it requires the tenant within two months after giving of the notice to notify the Landlord in writing whether or not at the date of termination the tenant will be willing to give up possession of the property".

It is quite plain and clear on the facts of this case the Applicant having been served with the notice to terminate by the Respondent under the provision of section 5(1) and section 5 (5) of the act did not give notice to the Landlord that he will be willing on or not willing to give up possession of the property.

The Applicant was clearly in breach of the said mandatory provisions. The Supreme Court had occasion to consider the provisions of section 28 (1) of the Act.

Their Lordship held in as follows *Ruling (1) "section 28 (1) is not a mere rule stipulating time. The Act is a statute and limitations of*

actions are not only those specifically mentioned in the limitation Act of 1939".

Ruling 2 "An Act of Parliament can provide limitation and a plea of statute bar can be as a defence or preliminary point".

Ruling 3 "Where a Tenant does not apply within time limit, it is Inherent jurisdiction the court to strike out a statement of claim where there has been no kind of evincing by the claimant of any grant whereby he could seek to get around the obvious time barrier".

Ruling (4) The conduct of the Appellant in this case cannot in any way be said to have provided a waiver and therefore the proceedings were statute barred".

Their Lordship went on to say *"For the reasons given we agree with the objection taken by the Appellant to the proceedings that they were statute barred. The objection was rightly taken at the right time not to waste the courts time to proceed with trial....."*

Though the court made these Rulings and remarks in respect of section 28 (1) of the Act those instructions aptly apply to the provisions under section 5 (5) and sections 10 (2) of the Act.

Order 3 Rule 5 (1) of the White Book is instructive. It states that a court has no discretion to extend time where the statute does not provide for such discretion. This has been conceded by the Applicant in its skeleton arguments.

My sister, Madam Justice Mulenga had occasion to consider and pronounce herself on the provisions of section 5, section 10 and section 4 of the Act in the case of ***Edward Phiri T/A shabbarch Fashions and General Dealers v Joseph Chipeta 2 (2011) ZR 100*** as follows:

Ruling number (1) *"A tenant cannot request for a new tenancy where the Landlord has already given notice to terminate under section 5 of the Act. The only available course in such cases is to apply to the court for grant of a new tenancy".*

Ruling 2 *"Subsection 3 and 4 of section 10 provides that no application under section 4 (1) shall be entertained unless it is made within not less than 2 months and no more than 4 months after giving of the Landlord notice except with permission of the court".*

Ruling 3 *"even assuming the court granted permission under section 10 (4) the application could not be entertained because since the Applicant did not notify the Landlord of his unwillingness to give up possession on the date of termination".*

I agree and adopt the reasoning of my sister. The Applicant has submitted that it was not the intention of parliament to legislative

law which on literal interpretation would result in absurdity or injustice.

The Supreme Court had occasion to deal with such argument in the case of ***Matilda Mutale v Emmanuel Munaile (2007) ZR 118***. It was held as follows:-

In Ruling number 2

> *"The fundamental rule of construction of Acts of Parliament is that they must be construed according to the words expressed in the Acts themselves. If the words of a statute are precise and ambiguous then no more can be necessary than to expand on those words in the ordinary and natural sense".*

Ruling number 3

> *"Whenever a strict interpretation of a statute gives rise to an absurdity and an unjust situation, judges should use their good sense to remedy it by reading words in it to if necessary so as to do what have done if they had the situation".*

Ruling 3

> *"In the context of section 96(3) of the words used therein do not carry ay technical meaning to require for elaboration as to the true intention of the legislate".*

In that case an otherwise meritorious Petition collapsed on the Appellants not having complied with a mandatory provision.

I am bound by the instructive pronouncement of the Supreme Court. In my view the wording of section 5 and section 10 (2) of the Act do not carry any technical meaning to require further elaboration as to the true intention of the legislature.

In the case in casu, the issue is not infact that of interpretation but purely that of the Applicant electing or ignoring to comply with statutory provisions mandating and commanding the Applicant to give notice to the Respondent of notice to challenge the termination even wherein their Advocates were aware of the legal requirements to do so.

The predicament the Applicant finds himself in, is self inflicting. There is no provision under section 5 of the act that gives discretion to the court to extend time to the Applicant in which to give notice to the Respondent to challenge the termination outside allowable 2 months.

The further application to extend time in which to apply for new tenancy is absolutely untenable. Section 10 of the Act states:-

> *"Subject to the provisions of the Act on an application under subsection (1) of section 4 a new tenancy comprising such property at such rent and on such other terms as herein after provided.*

Section (2) when such an application is made in consequence of a notice given by the Landlord, it shall not be entitled unless the tenant has duly notified the Landlord that he will not be willing at the date of termination to give up possession of the property comprised of the tenancy".

In my view the Applicant is shackled by his failure to give the necessary notice. He has definitely not only complied with a statutory provision but he has over slept on his rights.

"Equity assists the vigilant and not the indolent".

On the foregoing the preliminary application on the limb of objection on a point of law under Order 14 (a) of the White Book succeeds.

In respect of the second limb of the preliminary issue that it is an abuse of court process for the Applicant to launch fresh proceedings when there is a subsisting action pending before another court on the same subject matter relating to the same property, suffice it that this attack has not been challenged.

It has infact been conceded. There was a feeble attempt to argue that Rule 11 (eleven) under the act provides for an application for extension of time by way of originating motion exparte.

The Applicant does not explain why the same motion was not made before the court under cause number 1993/HN/0030. He called in aid Order 3 Rule 5 of the High Court rules which relate to consolidation of actions.

To say the least this was a wasteful approach and unrealistic; it is an abuse of court process and entirely without merit.

The preliminary issue also succeeds on this limb.

All in all both preliminary issues succeed. The proceedings herein are set aside.

The Respondent shall have his costs which costs are to be taxed in default of agreement.

Leave to appeal to the Supreme Court is denied.

Dated this 23rd day of January, 2015

Mwila Chitabo, SC
Judge