

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

(Commercial Jurisdiction)



2016/HPC/0085

BETWEEN:

FREDDY HIRSCH GROUP LIMITED

PLAINTIFF

AND

AUTO CARE LIMITED

DEFENDANT

*Before the Honourable Mr. Justice Sunday B. Nkonde, SC at Lusaka
this 16th day of September, 2016*

For the Plaintiff : Ali M. Hamir, SC of Messrs Solly, Patel,
Hamir & Lawrence
For the Defendant : Monde M. Muyoba of Messrs Makebi Zulu
Advocates

J U D G M E N T

CASES REFERRED TO:

- 1) *Newplast Industries Limited vs Commissioner of Lands and Attorney-General SCZ Judgment No. 8 of 2001*
- 2) *Bridgeway Commodities Limited vs Emvest Kalonga Limited (2014) ZMHC 88*

- 3) *Sundi vs. Ravalia (1949) 5 NRLR 354*
- 4) *Kriege and Another vs Christian Council of Zambia (1975) ZR 152*
- 5) *Premesh Bhai Megan Patel vs Rephidim Institute Limited SCZ Judgment No. 3 of 2011*
- 6) *Makanya Tobacco Company Limited vs J & B Estates Limited Selected Judgment No. 19 of 2015*

LEGISLATION REFERRED TO:

- 1) *Supreme Court Practice Rules, 1999 Edition*
- 2) *Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia*
- 3) *Landlord and Tenant (Business Premises) Rules, 31/1973 and 13/1994*
- 4) *Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*

There are two applications before me for determination: The first is the substantive application made by the Plaintiff by way of Originating Summons with Affidavit in Support filed on 25th February, 2016 (the substantive application). The Second is the Defendant's application made by way of Summons with Affidavit in Support thereof filed on 26th May, 2016 to raise preliminary points of law (preliminary application).

On 8th July, 2016, I directed that I would consider and determine the merits of the two applications at the same time. I did so because the facts herein are not in dispute.

I will conveniently start with the Defendant's preliminary application. The application was brought pursuant to **Order 14A Rule 1** of the **Supreme Court Practice Rules** as read together with **Rule 3** of the **Landlord and Tenant (Business Premises) Act**. The body of the Summons read as follows:

“Let the parties concerned attend before the Honourable Mr. Justice Chashi in Chambers on the.....day of.....2016 at.....hours in the.....noon or soon thereafter as Counsel may be heard on application on behalf of the Plaintiff to raise preliminary points of law on grounds set out in the Affidavit in Support herein.

Dated the.....day of.....2016”

The Affidavit in Support was sworn by NITESH PATEL, Chief Executive Officer of the Defendant. It is a short Affidavit. Paragraphs 4, 5 and 6 are the material paragraphs for the purpose of the preliminary application. The deponent stated as follows:

“4. That on the 22nd day of February 2016, the Plaintiff commenced a legal action against the Defendant Company relating to issues arising from the Landlord and Tenant (Business Premises) Act against the Defendant by way of Originating Summons as the

record will show.

5. *That I have been advised by the Defendant's Advocates and verily believe the same to be true that the mode of commencement used by the Plaintiff was erroneous.*
6. *That further, the Affidavit in Support of the Originating Summons is irregular as it is not drafted in accordance with the law relating to Affidavits."*

The record shows that on the same day, 26th May 2016, the Defendant also filed Notice to raise preliminary points of law pursuant to **Order 14A Rule 2** of the **Supreme Court Practice Rules** which read as follows:

" TAKE NOTICE that Learned Counsel on behalf of the Defendant intends to raise the following preliminary questions of law for the determination of the Honourable Court at the hearing herein namely,

- i) Whether or not the mode of commencement of the matter herein is properly before this Court*
- ii) Whether or not the Affidavit in Support of the Originating Summons is properly before this Court*

AND TAKE NOTICE that the Defendant shall move that the Plaintiff's action be dismissed with costs to be borne by the Plaintiff.

Dated at Lusaka this.....day of.....2016"

The Defendant also filed the "Defendant's List of Authorities and Skeleton Arguments in Support of the Summons and Notice to raise a preliminary point of Law" which the Defendant relied on. The Defendant cited the case of **NewPlast Industries Limited vs Commissioner of Lands and Attorney-General**¹ on the principle of law that the mode of commencement of any action is generally provided by the relevant statute and that of **Bridgeway Commodities Limited vs Emvest Kalonga Limited**² on the principle that a wrong commencement renders the proceedings a nullity.

There is an Affidavit in Opposition sworn by EMMANUEL ROUKOUNIS, the Managing Director of the Plaintiff Company. The material paragraph for the purpose of the preliminary application stated as follows:

"11) That I am advised by my Learned Counsel Ali M. Hamir, SC and verily believe that on the undisputed facts this Court is called upon to give a construction of section 4 of the Land and Deeds Registry Act to declare the rights of the Plaintiff in the circumstances aforesaid and in the alternative, if the lease is held to be valid, to give the construction of section 5 of the lease to declare the rights of the Plaintiff under the lease. I am further advised and verily believe that the mode of commencement of these proceedings is the correct one and my Affidavit in Support of Originating Summons is proper. The Plaintiff is not making an

application herein under the provisions of the Landlord and Tenant (Business Premises) Act 1971.”

Learned State Counsel for the Plaintiff also filed Skeleton Arguments and List of Authorities Embodying Submissions in Opposition to the Defendant’s application to dismiss the Plaintiff’s matter which the Plaintiff relied on.

I am grateful to both Learned Counsel for the very useful Skeleton Arguments and Authorities availed to me with respect to the preliminary application. In view of the approach I intend to take, I will not reproduce the Skeleton Arguments although I have carefully considered and fully taken them into account in determining the preliminary application.

The view I take is fore-mostly to determine whether the Defendant’s preliminary application to raise points of law has been made in compliance with **Order 14A** of the **Supreme Court Practice Rules**. **Order 14A** is reproduced here below:

1. (1) *The Court may upon the application of a party or of 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 where it appears to the Court that –*
 - (a) *Such question is suitable for determination without a full trial of the action, and*
 - (b) *Such determination will finally determine (subject*

only to any possible appeal) the entire cause or matter or any claim or issue therein.

- (2) Upon such determination the Court may dismiss the cause or matter or make such order or Judgment as it thinks just.*
- (3) The Court shall not determine any question under this Order unless the parties have either –*
 - (a) Had an opportunity of being heard on the question, or*
 - (b) Consented to an order or Judgment on such determination.*
- (4) The jurisdiction of the Court under this Order may be exercised by a master.*
- (5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provision of these rules.*

(O.14A, r.2)

2. An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1) may be made orally in the course of any interlocutory application to the Court.”

I now proceed with the Defendant’s Notice filed on 26th May, 2016. As correctly submitted by Learned State Counsel for the Plaintiff, I find that the Notice filed was a mere intention to raise a preliminary issue

or to make the application at a future time. In my considered view, it is not a Notice of Motion as it does not comply with the provisions of **Order 8 Rule 2(1)** of the **Supreme Court Practice Rules** and is not consistent with **Form 38** in **Appendix A**. It is not even captioned as a Notice of Motion. A Notice of Motion must not only contain the nature of the claim or relief but must state the ground or why the matter must be dismissed. I perfectly note that the Defendant has filed Skeleton Arguments but Skeleton Arguments, how forceful they may be, are no substitute for the body of the Notice of Motion. Thus, I hold that the Notice to raise preliminary points of law dated 26th May, 2016 is no application at all. The Notice filed on 26th May, 2016 is, therefore, struck out.

Coming to the Summons on the preliminary application also filed on 26th May, 2016, the same is not in compliance with the requirements of **Order 14A Rule 2** referred to because it is not stated in the Summons the question of law which this Court is required to determine and what Order is being claimed upon the determination of the question of law. Lest it be forgotten, the editorial note under **14/2/7** states as follows:

“The Summons should state in clear and precise terms what is the question of law or construction which the Court is required to determine. If there is more than one such question, each should be stated in the same terms, and it should be made clear whether the several questions are cumulative or in the alternative.”

The Summons should also specify, with particularity if necessary, what Judgment or order is being claimed upon the determination of the question of law or construction.”

The consequence of non compliance with the aforestated **Order 14 Rule 2** is to have the Summons also struck out which I accordingly do.

The net effect of the striking out of the Notice and the Summons is that there is no application pursuant to the provisions of **Order 14A** of the Supreme Court Practice Rules before me or, to recite the words used by Learned State Counsel in the Plaintiff's submissions, *“there is de facto and de jure no (preliminary) application.”*

Now, I come to the substantive application made by the Plaintiff for determination of questions and for declarations therein as follows:

A1. That the “lease” dated 24th June 2013 purportedly made Between the Plaintiff and the Defendant for a term of 3 years Commencing on 1st March 2013 and ending on 28th February 2016 wherein the Plaintiff demised unto the Plaintiff business premises, situated at subdivision 185 of farm no. 110a Lusaka at a monthly rent therein stipulated, is null and void and of no legal effect whatsoever for want of registration of the said lease at the Lands Registry pursuant to section 4, 5 and 6 of the Lands and Deeds Registry Act Cap 185 of the Laws.

2. That in consequence thereof the Plaintiff is a Tenant of the Defendant from year to year or in the alternative from month to month until the tenancy is terminated pursuant to the sections 3 (1) and 4 of the Landlord and Tenant (Business Premises) Act 1971.

B In the alternative the Court doth declare the Plaintiff is entitled to a lease for a period of 1 year upon the like covenants and provisions as the "said lease" with the exception of the covenant for renewal in the following instance:-

1. If the Court finds the "said lease" referred to in paragraph marked A1 above is a valid lease:

- i. The Plaintiff seeks a declaration as a matter of law that Paragraph 5 of the "said lease" grants the Plaintiff the right to a new lease for a further term of 1 year from 1st March 2016 upon the same provisions and covenants as the said lease and the Defendant complies strictly with the terms of the said agreement.
- ii. Further, the Court also declare that the "like covenants and provisions" referred to in paragraph 5 of the "said lease" encompass the same covenants and provisions inclusive of the rent the Plaintiff pays the Defendant in respect of the current demise of the said premises.
- iii. Further and/or in the alternative a declaration that the demands of the Defendant, as a condition to renew the

lease for a further term of 2 years and to increase the monthly rent of K45,000.00 the Plaintiff currently pays the Defendant to about K148,500.00 per month for the period commencing 1st March 2016 to 29th February 2018 constitutes a repudiation of the said agreement for a lease (paragraph 5 aforesaid) because this was communicated to the Plaintiff before it could exercise the option to renew the lease.

- C. *That in default of the Defendant, through its Counsel, agreeing in writing to maintain the status quo that the Plaintiff continues in possession of the said premises, the Plaintiff's claim is for an injunction to restrain the Defendants, whether by themselves or by their Directors, Officers, Servants or Agents or otherwise howsoever from interfering with the Plaintiff's quiet and peaceful enjoyment of possession and occupation of the premises it occupies as a Tenant situated at subdivision 185 of farm No. 11a Luanshya Road Lusaka until after trial of this action, or further order the Plaintiff continuing to pay the rent in respect of its occupation of the premises into Court.*
- D. *That the costs of and incidental herein be the Plaintiff's.*

The Affidavit evidence of EMMANUEL ROUKOUNIS was that since about June, 2003, the Plaintiff has been a Tenant of the Defendant at

the premises situate at Subdivision 185 of Farm Number 110a Luanshya Road, Lusaka on leases of different durations none of which have been registered in the Lands and Deeds Registry. At the end of February, 2013, a 5 year lease expired by effluxion of time and a new one for 3 years (the 3 year lease) was executed. But the 3 year lease like others preceding it was also not registered

On 23rd June, 2015, the Plaintiff expressed concern at the Defendant's intentions not to continue with the tenancy relationship in 2016 but the response only came on 1st September, 2015 from one NITESH PATEL on behalf of the Defendant proposing a new lease with lease rentals of US\$13,000-00 gross plus Value Added Tax with, inter-alia, effect from 1st March, 2016. The Plaintiff's reaction was to query the basis of such an increase in the rent but no explanation was received by the Plaintiff from the Defendant.

It was the deponent's further evidence that although the Plaintiff continued to pay rent of K45,000-00 per month, the Defendant had insisted on the rent of US\$13,000-00 per month effective 1st March, 2016 failing which the Defendant demanded the Plaintiff to vacate the rented premises at the end of the 3 year lease.

The Plaintiff also filed a List of Authorities, Skeleton Arguments and Final submissions.

In the Plaintiff's Skeleton Arguments and Final submissions, Learned State counsel for the Plaintiff contended that just like the preceding leases, the 3 year lease executed in 2013 was not registered as required by **Section 4(1)** of the **Lands and Deeds Registry Act** and

therefore rendering all the leases including the 3 year lease null and void. Learned State Counsel, however, submitted that even though the 3 year lease was not registered, it did not affect the Plaintiff's rights under the law as a protected Tenant because rent was paid and accepted by the Defendant and therefore a yearly or monthly periodic tenancy arose. Learned State Counsel placed reliance on the decisions in the cases of **Sundi vs Ravalia**³, **Kriegi and Another vs Christian Council of Zambia**⁴, **Premesh Bhai Megan Patel vs Rephidim Institute Limited**⁵ and **Makanya Tobacco Company Limited vs J & B Estates Limited**⁶ in advancing this proposition. In effect, the submission was that the Plaintiff ought to enjoy the rights of a Tenant set out in the **Landlord and Tenant (Business Premises) Act**, notwithstanding the invalidity of the 3 year lease.

In the alternative, it was submitted by Learned State Counsel that in the event this Court held that the 3 year lease that expired on 28th February, 2016 was valid, then the Court should declare that the Plaintiff is entitled to a lease for a period of 1 year from 1st March, 2016 upon the like covenants and provisions as the 3 year lease with the exception of the covenant for renewal.

Lastly, Learned State Counsel submitted that the demand by the Defendant for rent of US\$13,000-00 per month from 1st March, 2016 be deemed as a repudiation of the 3 year lease by the Defendant.

The Defendant did not file any Affidavit in opposition, Skeleton Arguments and List of Authorities.

From the Affidavit evidence before me, and there being no Affidavit in opposition, it is undisputed and I find as a fact that the parties enjoyed a Tenant and Landlord relationship from 2003 to February, 2016 based on leases which were never registered in compliance with **Section 4(1)** of the **Lands and Deeds Registry Act**. Further, that the last such unregistered lease was for 3 years and expired on 28th February, 2016. Also that prior to the expiration of the 3 year lease, the Plaintiff was paying K45,000-00 monthly rent for the premises which was accepted by the Defendant (and which the Plaintiff has continued to pay into Court in compliance with the Order made by my brother Chashi, J as he then was on 16th March, 2016).

I also find that the K45,000-00 monthly rent was fixed by the Defendant.

All the above said, in my view, the two questions I am now called upon to determine are:

1. *Whether the lease subsisting between the Plaintiff and the Defendant at the commencement of this action (the 3 year lease) was a valid lease.*
2. *Whether there existed (and exists) a relationship of Tenant and Landlord between the Plaintiff and the Defendant after the expiration of the 3 year lease on 28th February, 2016.*

I will analyze the two questions in one breath as in the context of this case, the two questions are inter-linked.

Statutory law on registration of leases of more than one year duration is set out in **Sections 4, 5 and 6** of the **Lands and Deeds Registry Act**. In particular, the relevant portions of **Sections 4 and 6** provide as follows:

“4(1) Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for a lease or a permit of occupation of land for a longer term than one year...must be registered within the time hereafter specified in the Registry....

(Section 5 specifies the time for registration)

6 Any document required to be registered as aforesaid and not registered within the times specified...shall be null and void”

In the **Makanya⁶** case, the Supreme Court of Zambia revisited case law on the effect of non registration of a document that is supposed to be registered within the period specified in the **Lands and Deeds Registry Act** as follows:

“In Sundi v Ravalia, Woodman, J. held that a legal lease which is null and void for lack of registration cannot be given effect in equity. For emphasis, he put the matter as follows at page 352:

‘.... I therefore hold that by virtue of sections 4 and 6 of the Ordinance the lease dated 24th January, 1947 is null and void for want of

registration and that the lease can have no effect whatever, it can pass no title or interest either in law or equity and that the transaction evidenced by the document of the 24th January, 1947 is equally null and void and cannot be enforced or have any effect.

That being so what is the position?

The trial court found as a fact that the respondent did not enter into possession until 15th May, 1947. There was evidence upon which the trial court could so find and I see no reason to disturb that finding of fact. The respondent also paid to the appellant 120 Pounds as one year's rent in advance on the 8th May, 1947. By presumption of law a tenancy from year to year was created as from the 15th of May, 1947, by the respondent's entry into possession and payment of an annual rent. As the sum of 120 Pounds was paid as one year's rent in advance, the respondent must be taken to have agreed that the rent was to be 120 Pounds per annum and was to be paid yearly in advance.'

In *Kriege and Another v Christian Council of Zambia*,

Gardner, JS, applying *Sundi v Ravalia* held as follows at page. 157:

'The written lease and the accompanying letter constitute a valid memorandum in writing and that the memorandum in writing existed and I would hold that this memorandum in writing existed and should have been registered under the Lands and Deeds Registry Ordinance. The effect of its non-registration is that it is void for all purposes whatsoever. It is a fact that the first appellant went into possession of the premises and paid rent which was accepted by the then Landlord thereafter by the respondent. The legal effect of the occupation of premises and the payment and the acceptance of the rent was to create between the parties a periodic tenancy which was either yearly or monthly. None of the express covenants in the lease or the purported date of termination was effective because of lack of registration. Accordingly, the 1st appellant was a tenant on the premises until such time as his tenancy was terminated by a proper notice to quit. It is common cause that no notice to quit was served and therefore, the 1st appellant remained as tenant after 30th September, 1971.'

In the **Makanya**⁶ case, the Supreme Court at page J12/13 quoted with approval a passage from **Megarry's Manual of the Law of Real Property** at pages 365 to 366 which reads as follows:

“1. Informal lease void at law. A lease which did not Satisfy the above requirements was void at law and passed no legal estate. However, although at law the lease was ineffective to create any tenancy, a tenancy might arise independently of the lease; for if the tenant took possession with the landlord's consent, a tenancy at will arose, and as soon as rent was paid and accepted, the tenancy at will was converted into a yearly or other periodic tenancy, depending on the way in which the rent was paid. Thus if in 1870 a lease for 99 years was granted orally or merely in writing, the largest estate which the tenant could claim in a court of law was usually a yearly tenancy; and his claim to this depended not on the lease but upon his possession and the payment and acceptance of rent.”

Thus, in determining the dispute in the **Makanya**⁶ case, the Supreme Court held, inter-alia, as follows:

“since the lease agreement entered into between the parties on 3rd September, 2009 is null and void for want of registration, none of the covenants under the lease can be enforced. However, the matter does not end here. It is common ground that the appellant took

possession of the premises and paid an annual rent in advance, amounting to US\$66,000 at US\$5,500 per month for the period 2nd September, 2009 to 3rd September, 2010. The rent was accepted by the respondent. Therefore, a yearly periodic tenancy was created between the parties.”

Coming to this case, it is not in dispute that the Plaintiff has been a Tenant of the Defendant since 2003 but all the times on leases which were invalid for want of registration as required under the provisions of **Section 4** of the **Lands and Deeds Registry Act**. It is also not in dispute that throughout this period, the Plaintiff had been paying rent monthly to the Defendant which the Defendant had been accepting except that, the Defendant demanded that higher monthly rent to be paid from March, 2016 if the Tenant and Landlord relationship was to continue and refused to accept the previously agreed and prevailing monthly rent of K45,000-00 prior to March, 2016. Although the covenants relating to the 3 year lease that expired on 28th February, 2016 were null and void for want of registration, since the Plaintiff took occupation of the rented premises with the consent of the Defendant and paid monthly rent which the Defendant accepted, by presumption of the law, I find that a monthly periodic tenancy arose independent of the 3 year lease that expired on 28th February, 2016. This is the law as re-stated by the Supreme Court in the referred to case of **Makanya**⁶. The consequence is that the Plaintiff remains a protected Tenant under the **Landlord and Tenant (Business Premises) Act** until such time as the tenancy is terminated pursuant to the provisions of this same Act. This is the sum total of my answer to the two questions I posed.

In essence, I agree with the Plaintiff's assertion that it is entitled to the protection of the law as Tenant and may only be dispossessed of the occupation of the rented premises by the Defendant complying with the prescribed procedures under **Section 3(1)** and **4** of the **Landlord and Tenant (Business Premises) Act**, notwithstanding that the 3 year lease that expired on 28th February, 2016 is null and void for all purposes whatsoever.

The Plaintiff, therefore, succeeds on its claim for reliefs *A1 and 2* with the emphasis that a monthly periodic tenancy exists.

I must here add and dispel a misconception that any action relating to issues arising from the **Landlord and Tenant (Business Premises) Act** or a mere reference to the provisions of the **Landlord and Tenant (Business Premises) Act** in an application automatically enjoins a party to commence proceedings by way of Originating Notice of Motion. That has never been the law. The requirement to commence an action by Originating Notice of Motion under the **Landlord and Tenant (Business Premises) Act** arises if the reliefs being sought are those specified in that Act. These include the reliefs for a new tenancy or compensation for loss of tenancy or determination of rent while the tenancy continues by virtue of **Section 4**. Certainly, in the application before me, the Plaintiff is not seeking any of the reliefs pursuant to the provisions of the **Landlord and Tenant (Business Premises) Act** and, therefore, the mandatory requirement for the Plaintiff to have commenced the action by Originating Notice of Motion did not and does not arise.

Having found for the Plaintiff on the substantive application, I see no point in delving into the alternative claims put forth by the Plaintiff.

All in all, since the Defendant has not succeeded on the preliminary application and the Plaintiff has succeeded on the substantive application in this case, the Plaintiff shall have its costs, of the entire action, same to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka this.....16th..... day of.....September.....2016.



Hon. Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE