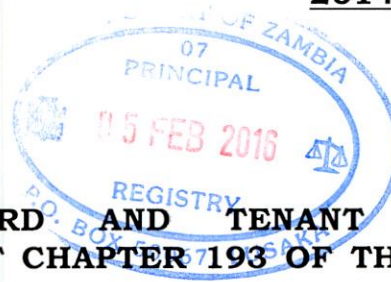


**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2014/HP/1975**



**IN THE MATTER OF: THE LANDLORD AND TENANT (BUSINESS PREMISES) ACT CHAPTER 193 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: ORDER XXVII OF THE HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA**

**BETWEEN:**

**LEONILLE KANTAMAGE**

**APPLICANT**

**AND**

**HANDSON CHAPE TALANTI**

**RESPONDENT**

**Before the Honourable Mrs. Justice M.C. Kombe this 5<sup>th</sup> day of February 2016 in Chambers.**

*For the Applicant : Mrs. A. Kapita - Messrs Kangwa Kapita -Advocates.*

*For the Respondent : Mr. J. Zimba - Messrs Makebi Zulu Advocates.*

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## **R U L I N G**

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**Cases referred to:**

- 1. Joseph Gereta Chikuta vs. Chipata Rural Council (1974) Z.R. 241.**
- 2. New Plast Industries vs. Commissioner of Lands and another (2001) Z.R. 51.**
- 3. Apollo Refrigeration Services vs. Farmers House Limited (1985) Z.R. 182.**
- 4. Bellamano vs. Ligure Lombardo Limited (1976) Z.R. 267.**

5. **B.P Zambia PLC vs. Zambia Competition Commission, Total Aviation and Export Limited and Total Zambia Limited (2011) Z.R. 222.**
6. **Costellow vs. Somerest County Council (1993) 1 ALL E.R 952.**
7. **Lily Drake vs. M.B.L Mahtani and another (1985) Z.R. 236.**

**Legislation and other work referred to:**

1. **The High Court Rules, Chapter 27 of the Laws of Zambia.**
2. **The Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia.**
3. **The Rules of the Supreme Court, 1999 Edition.**
4. **Bryan A. Garner- Black's Law Dictionary, Fourth Edition, Thomson West, 2004 at page 1584.**

This is a Ruling on two preliminary issues raised by the Respondent in a Notice filed pursuant to Order 14A of the Rules of the Supreme Court, 1999 Edition.

The Respondent formulated the preliminary issues as follows:

- i) Whether the commencement of the action herein is properly before this court in view of the provisions of Order 6 Rule 1 (1) of the High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia as well as the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia.
- ii) That the format of the Originating Notice of Motion is irregular as the Applicant did not specify the application and the specific provision under which the action was commenced.

At the hearing of the matter, learned counsel for the Respondent Mr. J. Zimba relied on the Notice to Raise Preliminary issues and the skeleton arguments filed in support of the application.

In support of the first preliminary issue, Mr. Zimba submitted that a perusal of the record of proceedings herein particularly the Originating Notice of Motion

served on the Respondent by the Applicant seeking an order to vacate the premises and an order to pay rent arrears was wrong and contrary to the provisions of Order 6 Rule 1 (1) of the High Court Rules and the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia ('the Act')

Mr. Zimba cited the provisions of Order 6 Rule 1 (1) of the High Court Rules which provides as follows:

***'Except as otherwise provided by any written law or these Rules every action in the High Court shall be commenced by Writ of Summons endorsed and accompanied by a full statement of claim.'***

***'Any matter which under any written law or these Rules may be disposed of in chambers shall be commenced by an Originating Summons.'***

Counsel further cited the case of Joseph Gereta Chikuta vs. Chipata Rural Council<sup>(1)</sup> where it was held that;

***'There is no case where there is a choice between commencing an action by a writ of summons or by originating summons. The procedure by way of originating summons only applies to those matters which may be disposed of in chambers. Where any matter is brought to the High Court by means of an Originating Summons when it should have been by writ, the Court has no jurisdiction to make a declaration.'***

In furtherance of his argument, Counsel also cited the case of New Plast Industries vs. Attorney General<sup>(2)</sup>. The Court was also referred to the case of Apollo Refrigeration Services vs. Farmers House Limited<sup>(3)</sup> where the Court held that:

***'An originating notice of motion was not the proper process for a landlord's claim for possession of business premises since all the applications which can be made by an originating notice of motion under the Landlord and Tenant (Business Premises) Act are specified in the various sections.'***

***A Landlord's action for possession was not so specified and should therefore be commenced by writ in accordance with Order 6 of the High Court Rules.'***

In support of the second preliminary issue, the court was referred to the case of ***Bellamano vs. Ligure Lombardo Limited*** <sup>(4)</sup>. In that case, the summons did not indicate under what order and rule the application was made and it was pointed out that it was always necessary, on making of the application, for summons or notice of application to contain a reference to the order and rule number or other authority under which the relief was sought.

In conclusion, Mr. Zimba submitted that non-compliance with the mandatory mode of commencement of an action in accordance with the rules of practice was fatal to these proceedings. Counsel submitted that the current proceedings were therefore incompetently before this Court and the Originating Notice of Motion herein should be dismissed on points of law and that costs be borne by the Applicant herein.

In his verbal submissions, Mr. Zimba repeated in substance the arguments contained in the skeleton arguments. In brief, he submitted that the commencement of the action by way of Originating Notice of Motion was defective and as a result the action died due to jurisdictional technicality.

The Applicant opposed the application and learned counsel for the Applicant Mrs. Kapita made *viva voce* submissions. She submitted that these proceedings were begun under the Act and Order 6 Rule 1(1) of the High Court Rules provided for proceedings to be begun by other modes other than a Writ where the particular law provided for it.

Mrs. Kapita submitted that in the instant case, the application for an order to vacate the premises was made pursuant to Sections 4(1) and 5 (1) of Act which

provided the mode for a tenant of business premises to be given notice to vacate.

Counsel further submitted that in accordance with Rule 3 of the Rules under the Act, an application made under the Act should be begun by Originating Notice of Motion. In this regard, she submitted that having begun these proceedings under the Act, the case was properly before the Court and that the Court's full jurisdiction was not affended. She therefore urged this court to dismiss the application with costs.

In her alternative argument, Mrs. Kapita drew the courts attention to Order 18 Rule 1 of the High Court Rules and Order 2 Rule 1 of the Rules of the Supreme Court 1999 edition. She submitted that both Orders gave the Court wide discretion to order the amendment of proceedings so that the issues could be considered on merit in the interest of justice.

In this regard, it was Mrs. Kapita's prayer that should the Court find the proceedings defective in the mode of commencement of proceedings and specification of the exact section under which application was made, the Court had the discretion to order amendment.

In reply, Mr. Zimba submitted that Sections 4(1) and 5(1) of the Act referred to termination of tenancy and not what the Applicant had termed an order to vacate the premises. Counsel submitted that if what the Applicant wanted was an order relating to termination of tenancy after following the laid down rules, the Respondent would not have any issue with the particular relief. Mr. Zimba reiterated his earlier position that an order to vacate the premises which was simply an order for possession was not provided for under the Act.

In reply to the alternative argument by counsel for the Applicant, Mr. Zimba submitted although the court had the discretion to order amendments, the

court could not order amendment to cure a material defect like wrong commencement of proceedings. Mr. Zimba submitted that the defect in this case went to the root of the entire case and raised the issue of jurisdiction. Counsel therefore restated his earlier prayer that the action be dismissed with costs for wrongful commencement of an action.

I have carefully considered the arguments made by both parties.

By this application, I have to determine whether or not the commencement of this action by Originating Notice of Motion is appropriate having regard to Order 6 Rule 1 (1) and the reliefs sought by the Applicant.

It is trite law that civil procedure rules are enacted to govern the methods and practices used in civil litigation. To this end, Section 44 (1) (a) of the High Court Act states that Rules of the court may be made:

***'For regulating and prescribing the procedure (including the method and pleading) and the practice to be followed in the court in all causes and matters...'***

In relation to the commencement of proceedings, Order VI rule 1 as amended by Statutory Instrument No. 69 of 1998- The High Court (Amendment) Rules 1998 provides as follows:

***'(1) Except as otherwise provided by any written law or these Rules every action in the High Court shall be commenced by Writ of Summons endorsed and accompanied by a full statement of claim.***

***'(2) Any matter which under any written law or these Rules may be disposed of in chambers shall be commenced by an originating summons.'***

From the above, it is clear that every action in the High Court is supposed to be commenced by Writ of Summons with the exception of what may be provided

for under any written law or the High Court Rules. The Supreme Court in the case of *New Plast Industries vs. Commissioner of Lands and Another* thus held inter alia that:

***‘It is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute.’***

The Supreme Court re-affirmed this position in the case of *B.P Zambia PLC vs. Zambia Competition Commission, Total Aviation and Export Limited and Total Zambia Limited*<sup>(5)</sup> when it held that:

***‘The mode of commencement of any action depends generally on the mode provided by the relevant statute...Since the dispute leading to this appeal arose from the decision of the Commission which was exercising this power under the Competition and Fair Trading Act, the applicable statute was the Act and not Order 53 of the Rules of the Supreme Court because the statute prescribes the mode of commencement.’***

What is clear from these two cases is that the mode of commencement of any action depends generally on the mode provided by the relevant statute. In my view, this is consonant with Order 6 rule 1 which recognizes that statute may provide for the mode of commencement of an action other than what Order 6 rule 1 provides that is commencement by Writ of Summons.

In the present case, the relationship between the Applicant and the Respondent is governed by the Landlord and Tenant (Business Premises) Act. Rule 3 of the Rules, provides that:

***‘An application made to the court under the Act shall be commenced by an Originating Notice of Motion.’***

The question therefore is: Is the application for an Order to vacate provided for under the Act?

Mrs. Kapita, learned counsel for the Applicant contends that the order sought to vacate is provided for under Section 5(1) of the Act. This section provides that:

***'The Landlord may terminate a tenancy to which this Act applies by Notice given to the tenant in the prescribed form specifying the date on which the tenancy is to come to an end.'***

On the other hand, Mr. Zimba, learned counsel for the Respondent contends that the order sought to vacate which is simply an order for possession is not provided for under the Act.

It is clear that the order sought has been couched as an order to vacate premises and not an order for possession.

In law, the term 'vacate' has two common usages. In respect to real property, the authors of Black's Law Dictionary define vacate to mean:

***'To surrender occupancy or possession; to move out or leave'***

Given the definition of the word 'vacate', I am of the view that the order sought by the Applicant in this matter is an order for the Respondent to surrender occupancy or possession. Simply put, the order sought is synonymous to an order for possession because the effect is that the Applicant is required to yield or surrender possession. On the other hand, Section 5 (1) cited above relates to the termination of tenancy by landlord after giving notice in the prescribed form specifying the date when the tenancy is to come to an end.

Having said so, the Supreme Court in the ***Appollo Refrigeration*** case guided that an order for possession is not one of the reliefs provided for under the Act.

In view of the foregoing, I find that since an order for possession is not envisaged under the Act, the action by the Applicant for an order to vacate was wrongly commenced by way of Originating Notice of Motion.



Having made the above finding, the question I ask myself is whether this action should be dismissed as being improperly before the court as the Respondent contends or I should use my inherent jurisdiction and amend the proceedings as the Applicant contends.

It is clear from the foregoing that the parties have taken different positions on the approach the court should take in an action wrongly commenced. Whereas the Respondent favours the principle that the rules of the court and the associated rules or practice devised in the public interest to promote the expeditious dispatch of litigation must be observed, the Applicant favours the principle that the Applicants should not in the ordinary way be denied an adjudication of their claim on its merits because of a procedural defect.

At this juncture, I should hasten to mention that I am alive to the holding of the Supreme Court in the **Chikuta** case and the **New Plast Industries** case to the effect that where a matter has been wrongly commenced, the court has no jurisdiction to make any declarations. However, I should add that depending on the circumstances of the case, the court should also consider whether to amend or to dismiss the action which has been wrongly commenced. In doing so, the court will in essence be resolving the problem that arises at the intersection of the two principles I have referred to above, each in itself salutary.

**Sir Thomas Bingham M.R.** in the case of **Costellow vs. Somerest County Council** <sup>(6)</sup> had an opportunity to consider these two principles when he stated that:

***‘Neither of these principles is absolute. If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff’s default had caused prejudice to the defendant. But the court’s practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter.’(Underline mine for emphasis only)***

The approach taken by the court in the above cited case appears to be the approach or guidance given by the Supreme Court in the case of **Lily Drake vs. M.B.L Mahtani and Another**<sup>(7)</sup>. In this case, the Applicant had commenced an action for possession using Originating Notice of Motion when the matter should have begun by Writ of Summons. Their Lordships guided as follows:

***“As we pointed out in the case of Apollo Refrigeration Services Limited Vs. Farmers House Limited none of the applications mentioned in the Landlord and Tenant (Business Premises) Act provides for an application for possession. Consequently, a claim for possession of business premises must be commenced by Writ. In the Rent Act, however, sub-sections (6) and (7) of Sections 13 both refer to landlord obtaining orders for possessions ‘under this section’. The use of these later words envisages applications for possession under section 13 despite the fact that at first sight the Section appears to be a prohibition section and not an enabling section. In view of the fact that applications for possession are envisaged under that section, Rule 3 related to such applications. Consequently, as that rule provides for the commencement of applications by originating notice of motion the exception to Order 6 Rule 1, applies and the matter is not to be started by Writ of Summons. We appreciate that these technicalities may not always be clear and for that reason it has always been the practice of this court to allow amendment of proceedings which have been incorrectly commenced so long as no injustices is done to the parties. In this case no injustice will be done to the appellant by allowing the respondents to amend their form of action to one of originating notice of motion...Accordingly we allow such an amendment...” (Underline mine for emphasis only).***

It is clear from what was stated by the Supreme Court going by the underlined portion of the above judgment that the Supreme Court appreciated the fact that occasional technicalities regarding some procedural rules which may not always be clear may arise. In this regard, notwithstanding the fact that the action had been incorrectly commenced, the Supreme Court did not dismiss

the action but allowed the amendment of proceedings as no injustice was done to the parties.

Furthermore, the Supreme Court made the same observation in the case of **Rural Development Corporation** when it stated that:

**“On the other hand even if counsel for the Plaintiff had succeeded on his Preliminary issue the court on the authority of Apollo Regulation Company limited vs. Farmers House should have only effected the necessary amendment and not dismissed the matter.”**

Similarly, the case of **Appollo Refrigeration** Services which counsel for the Respondent relied on is equally instructive on this point as the Supreme Court ordered for the proceedings to be amended in a matter which was wrongly commenced.

I have carefully considered the guidance given by the Supreme Court in the above cited cases. Although these cases were decided before the **New Plast Industries** case I am of the strong view that that notwithstanding, the courts inherent jurisdiction or power to allow amendments to proceedings wrongly commenced is still good practice for as long as no prejudice is occasioned to the other party.

Furthermore, I am persuaded by the approach taken by **Sir Thomas Bingham M.R.** in the case of **Costellow** which I have cited above and I fully subscribe to what he stated that the existence of prejudice should be the deciding factor. In ascertaining the existence of prejudice, the circumstances of the case ought to be considered.

I have considered the circumstances of this case, I am of the view that since the main matter has not been determined, and no prejudice will be occasioned to the Respondent if the action was amended as the Respondent will have an opportunity to respond to the claims.

For the foregoing reasons, I find that this is a proper case in which to exercise my inherent jurisdiction in the interest of justice under Order 3 rule 2 of the High Court Rules not to dismiss the action but to grant leave to the Applicant to amend the process from Originating Notice of Motion to that of Writ of Summons even though no formal application for leave to amend was made.

Consequently, the Applicant is granted leave to amend the originating process from Originating Notice of Motion to Writ of Summons. The amended Writ of Summons shall be filed within a period of fourteen (14) days from the date hereof.

In view of my finding and subsequent order on the first preliminary issue to amend the mode of commencement of the action, I consider it inappropriate to make any pronouncement on the second preliminary issue suffice it to say that the defect of not specifying the order and the rule is not fatal but curable by way of amendment.

However, since the Respondent's application has partially succeeded in that the wrong mode of commencement of the action was employed by the Applicant thereby necessitating this application, I order that costs of and occasioned by this application be borne by the Applicant.

Leave to appeal is granted.

**Delivered at Lusaka this 5<sup>th</sup> day of February, 2016.**



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**M.C. KOMBE**  
**JUDGE**