IN THE HIGH COURT FOR ZAMBIA **2017/HP/0539**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

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

IN THE MATTER OF **LEASE AGREEMENT OF PROPERTY KNOWN AS STAND NO. 2395/M/F CORNER TWIN PALMS ROAD AND SIMON MWANSA KAPWEPWE DRIVE, AVONDALE LUSAKA**

BETWEEN:

CITIZEN UNIVERSITY ZAMBIA **APPLICANT**

VS

TIMOTHY KAFA NYIRENDA **RESPONDENT**

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Applicant: *Mr. M. Nzonzo of Messrs ICN Legal Practioners*

For the Respondent: *Mr. B. Mosho of Messrs Mosho and Company*

RULING

Cases Referred to:

1. *Communication Authority of Zambia v Vodacom Zambia Limited (2009) ZR 196*
2. *Hondling Xing Xing Building Company Limited v ZamCapital Enterprise Limited*
3. *Shell BP Zambia Limited v Conidaris and Others (1975) Z.R. 174.*
4. *Turnkey Properties Limited v Lusaka West Development Limited and Others (1985) ZR 85.*

Legislation Referred to:

1. *The Land and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia*

The Applicant applied for an Order of injunction to restrain the Respondent from evicting the Applicant from the demised property pending the determination of the main matter. The application was supported by an affidavit filed on 24th April, 2017 and deposed to by one Mubanga Kafula, the Board Chairman of the Applicant. He swore that the Applicant occupied the premises known as No. 2395/M/F, Avondale Lusaka.

He averred that on 12th March, 2017 the Respondents served the Applicant with a demand notice for the payment of K131, 000 being rental arrears accrued as at the date without considering the cost of the Applicant's repairs that were mutually agreed to be

carried out and were to be borne by the Respondents as per clauses 6(g) and 7(c) of the lease agreement for the business premises. The said Lease Agreement was exhibited and marked **"MK1"**.

He further swore that on 20th March, 2017 the Respondent served the Applicant with a Notice to Terminate the tenancy of the said Business Premises. A copy of this Notice was exhibited and marked **"MK2"**.

It was contended that despite the various attempts by the Applicant thereafter to try and resolve the issue amicably, the Respondent had refused to withdraw or reconsider its Notice to Terminate the Lease Agreement for the said premises. He further contended that the Applicant then proceeded to commence the action against the Respondent for, inter alia, quashing of the notice to terminate the lease agreement dated 12th March, 2017 which came into effect on 20th March, 2017.

The deponent further averred that since the notice became effective on 20th March, 2017, the Respondent would be at liberty to enter into the premises and evict the Applicant or prevent the Applicant from entering the premises. Further that the said eviction would render the Applicant's main action to nullify the notice purely an academic exercise as there was a high likelihood of another tenant occupying the premises before this Court rendered its judgment.

He deposed that the Applicant's action had a very high degree of merit and success because it would be proven at trial that the

reasons given for the termination of the lease were frivolous and not true. He further swore that an eviction of the Applicant from the premises would greatly jeopardize the Applicant's income and business name that it had worked had to establish over several years.

He stated that the likelihood of finding an alternative and appropriate trading place in the shortest possible time would be extremely difficult and this could result in the loss of long term valued customers, thus leading to a loss of business and goodwill in general.

It was the deponent's contention that the eviction and loss of business could not be quantified or adequately atoned for in damages. It was due to the foregoing that the Applicant sought an interlocutory injunction restraining the Respondent from entering the premises for the purposes of evicting the Applicant due to the Notice to terminate the lease agreement which came into effect on 20th March, 2017 was justifiably necessary pending the determination of the main matter in order to maintain the status quo and for justice to prevail.

He stated that the Respondent would not be negatively affected by such a restraining order as the Plaintiff was still liable to pay rentals for occupation of the premises in question and would continue to do so until determination of the matter.

In opposing this application, the Respondent filed in an affidavit in opposition on 26th April 2017 deposed to by one Timothy Kafa Nyirenda. He averred that he was the Landlord to the Applicant

and confirmed that the agreed monthly rentals were K55,000 (exclusive of withholding tax) which were payable two months in advance, a copy of the Lease Agreement was exhibited and marked **"TN1"**.

He denied that the sum of K130, 000 being alleged to be the amount. He stated that the Applicant only paid the sum of K289, 000 for the period between May 2016 and April 2017 leaving a balance of K261, 000 unpaid after excluding the K110,000 meant for repair works. A cop of the statement of how much the Applicant had paid so far was exhibited and marked **"TN2"**.

He deposed that he admitted that the Applicant undertook to do repairs per clause (7)(c) and not clause 6(g). He further denied the sum alleged to have been spent by the Applicant as the same was never brought to his attention nor was there proof that the said amount was actually spent. He stated that some of the repairs were renovations that should be carried out at the Tenant's own cost as per clause 6(j).

He averred that it was expressly agreed under clauses 3 and 7(c) of the lease that the repair works would be limited to K110,000 which was equivalent to the waiver of rentals for a period of two months. He admitted that the repairs were done with his consent. However, he stated that according to clauses 3 and 7 (c), the repairs were supposed to be done prior to taking possession of the property but the Applicant had been carrying on repairs in perpetuity and seemed to be carrying out repairs even after being in possession of the said premises.

He addressed clause 3 of the Lease Agreement and that a maximum amount of K110,000 was expressly agreed to covered the repair works. He averred that the demand later dated December, 2016 was demanding for the payment of the sum of K131,000 being rental arrears as at that date. He produced a copy of the said demand letter and marked it exhibit **"TN2"** which letter was sent after the Applicant persistently failed to pay rentals.

It was his contention that the notice to terminate the lease agreement was given to the Applicant in accordance with the law and contrary to the Applicant's assertion, clause 6(g) of the same lease did not apply to a tenant that defaults in payment of rentals or breaches of other terms of the lease.

He averred that the provisions of the Landlord Tenant (Business Premises) Act do not protect a tenant who had breached the terms of the Lease by non-payment of rentals or other terms of the lease. He produced copies of a validly issued notice of termination of the Lease and a letter from the Applicant's Legal Counsel asking for leniency and further indulgence from the Respondent after the lease had already been terminated. The same were marked **"TN4"** and **"TN5"**.

It was contended that the Applicant had persistently defaulted in paying rentals to him but instead desired to continue enjoying occupation of his premises, a situation which was not only unjust but also very shocking to him as a Landlord. He stated that it was clear that the Applicant owed him K261,000 in arrears as at 30th April, 2017 and ought to be paid this money forthwith.

He asked this Court to dismiss this application with costs and asked this Court to order that he be paid the sum of K261,000 being the rental arrears as at 30th April, 2017 with interest.

The Respondent filed in skeleton arguments in opposition to the application on the 7th of June 2017. It was the Plaintiff's argument that the principles on which the Court may grant an injunction were clearly laid down in the case of **Shell and B.P. V Conidaris and Others (1975) ZR 174**. He highlighted that the applicant ought to have a clear right to relief which according to the Respondent the Affidavit of the Applicant shows that he is a defaulting tenant. It was argued that this was evidence of the pure lack of respect of the terms of the Lease.

Counsel for the Respondent drew the Court's attention to clause 6(j) of the Lease agreement which stated as follows:

> *"Renovations will be at the Tenant's expense whether the property is bought (by the Tenant) or not."*

It was Counsel's argument that if for instance the Applicant improved the classrooms by affixing desks, tables, laboratory equipment or similar fixtures, these could not be the Landlord's expenses as per the above clause.

He strongly argued that in view of this, the Applicant had no clear right to relief. He further argued that an interlocutory injunction was meant to maintain the status quo in the period between the issue of proceedings and the trial action. He submitted that the actions by the Applicant in failing to pay rentals whilst in

occupation of the demised premises did not entitle them to continued occupation of the leased property.

It was submitted that there was no injustice that would ensue if the Applicant was not granted an injunction because the Applicant was a bad tenant who did not deserve any equitable protection. He stated that the Respondent who actually needed protection from the Applicant who was perpetuating an injustice by failing to pay rent to a Landlord.

With respect to irreparable Injury it was submitted that irreparable injury was injury that could not be remedied by damages. The Applicant was claiming liquidated damages of K722, 000 from the Respondent for the renovations made to the demised property. It was argued that in the event of injury occasioned by termination of the lease, the Applicant's damages would easily be quantifiable to a maximum value of K722, 000 and claimed in the main action. Counsel cited the case of **Vangelatos v Vangelatos and Others (2005) ZR 132** where it was held that the very first principle of injunction law is that you do not obtain injunction to restrain actionable wrongs for which damages are a proper remedy.

It was submitted that in the present case rental income and damages for breach of the Lease Agreement were clearly measurable in monetary form.

He further submitted that the balance of convenience lies in denying to grant this injunction as opposed to granting it. Counsel argued that should this injunction not be granted there would be

adequate compensation in the sum of K722, 000 to be paid by the Respondent to the Applicant.

It was the Respondent's further submission that the Applicant's claim had a very low likelihood of success and cited the case of **Harton Ndove v National Educational Company of Zambia Ltd. (1980) Z.R 184** to support this argument.

Counsel further submitted that the Applicant in this matter was a defaulting tenant who did not come to equity with clean hands. It was argued that a tenant who was in breach of a Lease Agreement is not entitled to equitable relief because he had not come to equity with clean hands and cited the case of **Hina Furnishing Lusaka Ltd. v Mwaiseni Properties Ltd (1983) ZR 40** to support this argument.

It was further submitted that the Applicant if granted this injunction would be placed in an advantageous position as against the Respondent as the Applicant had admitted to owing the Respondent K131, 000 in rental arrears. He cited the case of **Turnkey Properties V Lusaka West Development Co. Ltd., BSK Chiti (Sued as Receiver) ad Zambia State Insurance Corporation (1985) ZR 85** to support this argument.

I have considered the affidavits in support of and in opposition to this application. I have also considered the skeleton arguments filed by Counsel for the Respondent.

The starting point in injunctions is clearly espoused in the case of **Hondling Xing Xing Building Company Limited v Zamcapital Zambia Limited (2010) ZR 30** where Justice Matibini stated that

irreparable injury is said to be the first and primary element in injunctions.

Irreparable injury was clearly defined in the case of **Shell BP Zambia Limited v Conidaris and Others (1975) Z.R. 174** which case has been rightly referred to by the Respondents. The Court in that case defined irreparable to mean *injury which is substantial and can never be adequately remedied, or atoned for by damages. It is not injury which cannot be possibly be repaired.*

Thus, an injunction will not be granted were damages would be an alternative adequate remedy to the injury complained of, if the applicant succeeds in the main action.

Another consideration in granting an injunction is whether the Applicant has a clear right to relief. This was stated in the case of **Shell BP Zambia Limited v Conidaris and Others** where it was held that *the court will not generally grant an interlocutory injunction unless the right to relief is clear.*

Justice Matibini in the case of Hondling Xing Xing stated that *in an application for an injunction the overriding requirement is that the applicant must have a cause of action in law entitling him to relief.*

Similarly in the case of **Communications Authority v Vodacom Zambia Limited (2009) ZR 196**, the Supreme Court stated that as regards the right to relief, it is for the party seeking an injunction to establish clearly that he is entitled to the right which he seeks to protect by an injunction.

Another consideration in injunction is the status quo. Whilst it is generally accepted or acknowledged that an interim injunction is appropriate for the preservation or restoration of a particular situation pending trial, it cannot be regarded as a device by which the applicant can attain, or create new conditions favourable only to himself, and which tip the balance of the contending interests in such a way that he is able, or more likely to influence the final outcome, by bringing about an alteration to the prevailing situation which may weaken the opponents case, and strengthen his own. The preceding formulation was stated by Ngulube D.C.J. as he was then, in **Turnkey Properties Limited v Lusaka West Development Limited and Others (1985) ZR 85.**

Having outlined the above and having taken the facts of this case I have noted that the Applicant is in fact in default of the Lease Agreement by failing to pay to the Respondent the monthly rentals which rentals are to be paid two months in advance.

The Respondent by virtue of this default issued a notice to terminate the Lease Agreement dated 20th March 2017 which termination was to take effect on 30th April, 2017.

The Respondents have opposed the application for this injunction citing that the Applicant was seeking an equitable relief when it was not coming to equity with clean hands. The Respondent has also strongly opposed this Application because he is of the view that the Applicant's claims can adequately be compensated in damages.

I have considered all the facts raised in this Application and I agree that and injunction is an equitable remedy. It is clear from the

evidence that the Applicant's default means that he does not come to equity with clean hands.

Further, the Respondent argued that the Applicant could be compensated in damages by virtue of their claim for the renovations done. I do not agree with this because land matters deal with a right to property which cannot be quantified in damages.

Having said this, section 5(2) of the Landlord and Tenant Business Premises Act is very clear on the termination of a Lease Agreement. It provides as follows:

> *"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 referred to as "the date of termination"):*
>
> *Provided that this subsection shall have effect subject to the provisions of section twenty-three as to the interim continuation of tenancies pending the disposal of applications to the court.*
>
> *(2) Subject to the provisions of subsection (3), a notice under subsection (1) shall not have effect unless it is given not less than six months and not more than twelve months before the date of termination specified therein."*

In the present case the Respondent was given the Notice of Termination on 20th March 2017 for termination to be effected on 30th April, 2017. This alone is contrary to the provision requiring the notice period to be not less than six months and not more that twelve months.

In view of this I find that the notice to terminate did not comply with the provisions of section 5 above. It is for this reason only that I will grant this application for an interlocutory injunction pending the determination of the main matter. In any event in view of the lack of adherence to the provisions of section 5, the Applicant is still entitled to be on the leased premises pending the determination of the matter with respect to the other claims.

With regard to costs, ordinarily costs are suffered by the losing party unless cause is shown why the successful litigant should be deprived. I find no cause why I should deprive the Applicant of the costs. I accordingly award costs to the Applicant.

Leave to appeal is granted.

Dated the ..14th.... day of ..June..... 2017

MWILA CHITABO, S.C.

JUDGE