

IN THE HIGH COURT FOR ZAMBIA

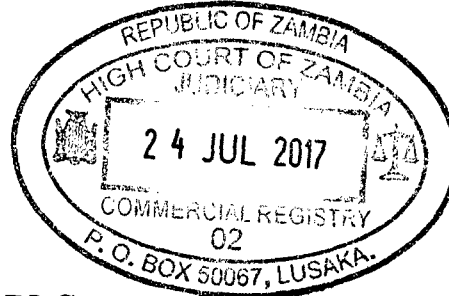
2017/HPC/0094

AT THE COMMERCIAL REGISTRY

AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



ZAMBEEF PRODUCTS PLC

APPLICANT

AND

ARCADES DEVELOPMENT PLC

RESPONDENT

Before the Honourable Justice Irene Zeko Mbewe in Chambers

For the Applicant: Ms N.B Chanda and Mr. K Weshimanga of Messrs AM Wood

For the Respondent: Mr. N Desai of Messrs Solly Patel Hamir and Lawrence

RULING

Cases Referred to:

1. *MTN Nigeria Communications Limited v A Aluko and Another [2013] LPELR 204*
2. *Genesis Finance Limited and Longreach Commodities [2012/HPC/0144 unreported]*

3. *CMA CGM Limited and Interfood Zambia Limited. [2016/HPC/0276 unreported)*
4. *Leopold Walford v Unifreight*
5. *United Engineering Group Limited v Mungalu and Others [2007] ZR 30*

Legislation Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*
3. *Lands and Deeds Registry Act, Cap 8 of the Laws of Zambia*
4. *Landlord and Tenant (business Premises) Act Cap 193 of the Laws of Zambia*

This is a Ruling on the Respondent's notice of motion to raise a preliminary issue made pursuant to **Order 33 Rule 3 and 7, Order 18 Rule 19 of the Rules of the Supreme Court 1999 Edition** as read together with **Order 3 Rule 2 Cap 27 of the Laws of Zambia, Cap 27 of the Laws of Zambia** for the determination of the following issues -

1. **Whether the Applicant herein has legal standing (loci standi) to bring an application for grant of a new tenancy, determination of standard rent, and all other reliefs as pleaded in the Originating Notice of Motion filed into Court on 28th March 2017 despite said Applicant not**

being a party to the contractual relationship of Landlord and Tenant between Zambeef Retailing Limited of the one part and the Respondent Arcades Development PLC of the other part.

2. In the alternative whether the Applicant herein being a third party and an outsider to the contractual relationship of Landlord and Tenant between the Respondent and Zambeef Retailing Limited has a cause of action as against the Respondent herein for inter alia an action for grant of a new tenancy.
3. In the alternative, whether the Honourable Court has the jurisdiction to hear and determine an application for the grant of a new tenancy made pursuant to Section 4 (1) (a) of the Landlord and Tenant (Business Premises) Act Cap 193 of the Laws of Zambia despite such an application being made other than the tenant of a premises.
4. In the further alternative, whether the Applicant herein as a shareholder in Zambeef Retailing Limited, has the requisite locus standii to commence and pursue an action seeking relief on behalf of a third party company Zambeef Retailing Limited, a private company limited by shares which private company has a separate and distinct legal capacity to sue and be sued.

5. In the further alternative, whether the Applicant's affidavit filed in support of originating notice of motion is incurably defective and irregular as the jurat contained herein is not dated and does not stipulate the place at which the affidavit was sworn or oath taken, contrary to the mandatory provisions of Order V Rule 20 (g) of the High Court Rules Chapter 27 of the Laws of Zambia as read with Section 6 of the Commissioner for Oaths Act, Cap 33 of the Laws of Zambia.
6. In the further alternative, whether the Applicant's application for a determination of standard rent has been brought outside the prescribed period of three months from the date of commencement of the Tenant as contained in Section 28 (1) of the Landlord and Tenant (Business Premises) Act Cap 193 of the Laws of Zambia.

The Respondent's filed a supporting affidavit deposed to by Sonny Mwila Mulenga the Chief Operations Officer of the Respondent Company. It is deposed that an Originating Notice of Motion and supporting affidavit was received by the Respondent's Advocates on 3rd March 2017 (**Exhibit "SSM1"**) showing the Applicant as "*Zambeef Products PLC*". That the Originating Notice of Motion confirms the Lease Agreement relating to Shop Unit 4 at Arcades

Shopping Centre Lusaka (**Exhibit "DSM1"** of the affidavit in support) was between Arcades Development PLC of the one part and Zambeef Retailing Limited of the other part. It is deposed that the said Zambeef Retailing Limited is a private company whilst Zambeef Products PLC is a public limited company (**Exhibit SMM2 and 3"**) and that the two are separate and distinct legal entities. The gist of the Respondent's evidence is that Zambeef Products PLC is not a party to the lease agreement between the Respondent and Zambeef Retailing Limited and has no legal capacity to apply for a new tenancy on behalf of Zambeef Retailing Limited. Consequently that there is no cause of action against the Respondent as the Applicant has no contractual or legal relationship as landlord and tenant. That the purported affidavit is not dated nor does it stipulate the place at which the affidavit was sworn or oath taken, and is therefore defective. That the Applicant's application is misconceived, irregular and an abuse of court process as there is no legal basis for the Applicant to apply for grant of a new tenancy or for determination of standard rent.

The Applicant filed an opposing affidavit dated 24th March 2017 and deposed to by Danny Shaba Museteka the Company Secretary of the Applicant Company Zambeef Retailing Limited. It is deposed that the Applicant did file into Court an Originating Notice of Motion and supporting affidavit and indicates the Applicant as Zambeef Products Limited instead of Zambeef Retailing Limited. That the same is a genuine mistake and not intended to mislead the Respondent. According to the deponent, that the mistake is not such as to cause any reasonable doubt as to the identity of the person that was intended to commence the action as against the Respondent as the Lease Agreement refers to Zambeef Retailing Limited, and the notice to terminate is addressed to Zambeef Retailing Limited (**Exhibit "DSM2-5"**). That at all material times, the Respondent dealt with Zambeef Retailing Limited and that the error does not nullify or defeat the proceeding nor is it suitable for determination of the disputes without full trial of the action. It is deposed that the affidavit in support shows the place at which the affidavit was sworn or oath taken as in Lusaka. That the

Respondent's application is oppressive, misconceived, vexatious and an abuse of court process and ought to be dismissed.

The Respondent's filed an affidavit in reply which more or less underscored the averments in their affidavit in support of the Notice of Motion to raise a preliminary issue. Interestingly, Counsel for the Respondent attempted to sneak in other preliminary issues on the non filing of the skeleton arguments and list of authorities by Counsel for the Respondent, and the Court shall make no pronouncement on it as the issue is not properly before the Court. The gist of the evidence is on a non-party to the proceedings being Zambeef retailing Limited and that the misnomer was in fact not a misnomer but a fundamental defect in the originating process. That the deponent of the Applicant's affidavit is the Company Secretary for the Applicant Zambeef Products PLC and not for Zambeef Retailing Limited (**Exhibit "SSM3"**).

I have considered the affidavit evidence, skeleton arguments and list of authorities including oral submissions of both Counsels.

A number of preliminary issues have been raised by the Respondent herein and the first preliminary issue will determine the answer to the other 5 issues.

The first preliminary issue is whether the Applicant herein has legal standing (*loci standi*) to bring an application for grant of a new tenancy, determination of standard rent, and all other reliefs as pleaded in the Originating Notice of Motion filed into Court on 28th March 2017 despite the said Applicant not being a party to the contractual relationship of Landlord and Tenant between Zambeef Retailing Limited of the one part and the Respondent Arcades Development PLC of the other part.

A perusal of the affidavit in support of the Originating Notice of Motion shows that it is deposed to by Danny Shaba Museteka in his capacity as Company Secretary of the Applicant Company Zambeef Products Limited. The Lease agreement is between the Respondent and Zambeef Retailing Limited (**Exhibit "DSM-1"**). A perusal of the affidavit in support of the Originating Notice of Motion in paragraph 5 states the Applicant as Zambeef Retailing Limited. The issue for determination is whether the Applicant is

wrongly cited and a misnomer and if it invalidates the court process.

It is trite law that for the Court to have jurisdiction, proper parties must be before the Court as a suit is in essence a determination of the legal rights and obligations of the litigants. A misnomer is an error in naming a person or entity to an action or wrong use of a name. It is a mistake to the name and not the identity of the party to the litigation. In other words, the correct person is brought to Court under a wrong name. Counsel for the Respondent argues that the Applicant is wrongly cited as the Respondent never had any contractual relationship with the Applicant but with an entity known as "*Zambeef Retailing Company*." In paragraph 5 of the affidavit in support of the Originating Notice of Motion, it clearly states that the Applicant is the tenant known as "*Zambeef Retailing Company*". In the subtitle under the tenancy agreement in paragraph (aa) it states that the tenant shall trade or do business from the premises under the name *Zambeef*. I have no doubt in my mind that this is a genuine mistake. I am persuaded by the

Nigerian case of **MTN Nigeria Communications Limited v A Aluko and Another**¹ where the Court held as follows:

"Now where there is a mistake with regard to the name of a litigant in an action, such a mistake is described as a misnomer. It simply means a mis-description or wrong use of a name. It is a mistake as to the name and not as to the identity of the particular party to the litigation."

I am satisfied that the mistake made in the description of the Plaintiff was bona fide, and I am not precluded from granting an amendment simply because there was carelessness as to citing the party. In my view the amendment relating to change in name shall in no way prejudice the Respondent. Having found that there was a misnomer, it renders the preliminary issue relating to *loci standi*, and the Applicant being a third party and an outsider to the contractual relationship of landlord and tenant, and consequently whether there is a cause of action as against the Respondent, all redundant, and I make no further pronouncement.

For the avoidance of doubt, I invoke **Order 20 Rule 5 of the Rules of the Supreme Court, 1999 Edition**, and leave is deemed to have been granted to amend the Applicant's name so as to reflect the correct and intended party. The Applicant shall amend the originating process within seven (7) days of this Order and re-file the affidavit in support of the Originating Notice of Motion. This preliminary issue fails.

The next preliminary issue for determination is whether the affidavit in support of the application to amend the party is defective as the Jurat does not show place and date it was sworn contrary to **Order 20 (g) High Court Rules, Cap 27 of the Laws of Zambia**. Turning to the defects concerning the Jurat, it is important to consider whether the defect as described is as to form or is fundamental and likely to touch on jurisdiction. Is it curable? Counsel for the Respondent cited the case of **Genesis Finance Limited and Longreach Commodities², CMA CGM Limited and Interfood Zambia Limited³**.

I find that the jurat in the Plaintiff's Affidavit is contrary to the mandatory provisions and requirements of **Order 5 Rule 20 (g) of**

the High Court Rules, Cap 27 of the Laws of Zambia which provides as follows:

"The following rules shall be observed by Commissioners and others before whom affidavits are taken:

(g) *The jurat shall be written, without interlineations, alteration or erasure (unless the same shall be initialed by the Commissioner) immediately at the foot of the affidavit, and towards the left side of the paper and shall be signed by the Commissioner.*

It shall state the date of the swearing and the place where it is sworn.

The Commissioner For Oaths Act, Cap 33 of the Laws of Zambia under Section 6 provides that:

"Every Commissioner For Oaths before whom any oath or affirmation is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

It is clear from the wording of the two cited sections in the respective law that an Affidavit that fails to show in the jurat the date the oath was taken or the place it was sworn or affirmed, is contrary to the mandatory provisions of **Order 5 Rule 20 (g) High**

Court Rules, Cap 27 of the Laws of Zambia and **Section 6 of the Commissioner For Oaths Act, Cap 33 of the Laws of Zambia.**

Therefore, I find that the Affidavit is incurably defective. There is a plethora of authorities on failure to follow court rules. In the case of **Leopold Walford v Unifreight⁴** the Supreme Court held that:

“As a general rule, breach of a regulatory rule is curable and not fatal, depending upon the nature of the breach and the stage reached in the proceedings.”

I concur with the principles set out in the cited authorities, and the consequences of failure to follow court rules. It is clear that from the language of **Order 5 Rule 20 (g) of the High Court Rules, Cap 27 of the Laws of Zambia and Section 6 of the Commissioner For Oaths Act, Cap 33 of the Laws of Zambia**, it is mandatory and not directory. Arising from my earlier order to amend the Applicant's name, the preliminary issue relating to the Applicant's defective jurat becomes redundant as the Applicant is granted leave to amend and re-file the affidavit in support of the Originating Notice of Motion. This preliminary issue fails.

Counsel for the Respondent argues in the alternative, whether the Applicant's application for a determination of standard rent has been brought outside the prescribed period of three months from the date of commencement of the tenancy as contained in Section 28 (1) of the **Landlord and Tenant (Business Premises) Act Cap 193 of the Laws of Zambia**, and whether the Applicant's application for a determination of standard rent is statute barred and thus legally untenable. Counsel for the Applicant argues that their claim is for determination and/or declaration of the rent payable by the Applicant under the Agreement for the period October 2015. Counsel for the Applicant argues that following an increase in rent, it became necessary for the Applicant to move this Court to make a declaration as to what rentals were payable based on the provisions of the lease agreement.

In addressing the preliminary issues, it is important to set out the chronology of events relating to the tenancy between the parties. A perusal of the affidavit evidence shows that a lease agreement was entered into on 1st November 2008 for a period of 4 years 11 months and 28 days which expired on 28th October 2013.

Paragraph 8 and 9 of the Applicant's affidavit in support of the Originating Notice of Motion indicates that following the expiry of the initial lease, the Applicant continued to pay the monthly rental. **(Exhibit DCM-3"**). That by a letter dated 14th August 2015, an offer to renew the lease agreement was made which in my view was a conditional offer subject to final acceptance and approval of the landlord. There is no proof that a formal written tenancy was entered into between the parties. In the absence of a formal tenancy, what relationship exists between the parties?

In order to sufficiently deal with the issue of the tenancy, it is important to answer the following questions namely -

1. Was there an agreement between the parties?
2. What was the nature of this agreement?
3. Was it validly terminated by the Respondent?

The evidence on record shows that there was an agreement between the parties which agreement was neither translated into a formal lease nor registered in terms of the requirements under the **Lands and Deeds Registry Act Cap 198 of the Laws of Zambia**. In

ascertaining the nature of the agreement, I have to examine the intention of the parties as a whole and the circumstances. I opine that the rights of the parties is governed by the relationship they created between them through possession on the part of the Applicant, and acceptance of monthly rent by the Respondent. I find that a periodic monthly tenancy was created and the period by which the rent is measured is on a monthly basis. This is ascertainable from the Respondent having accepted monthly rentals. It is evident that this periodic tenancy commenced at the expiry of the formal lease in October 2013.

I find that there exists a landlord and tenant relationship. This can be discerned from the rental account statement which covers a period 1st January 2015 to 15th November 2016. I find that the rentals payable are as reflected in the invoice and rental account statement.

There is an implied term that the terms of the expired lease continue to apply to the new periodic tenancy except in so far as any term is inconsistent with the new periodic tenancy created. I find that this arrangement was a monthly tenancy of a business

premises and therefore governed by the provisions of the **Landlord and Tenant (Business Premises) Act, Cap 193 of the Laws of Zambia under Section 3 (g) (ii)**. The Respondent gave notice pursuant to the said Act. This then entails that the procedure set out in the said Act has to be complied with.

I agree with Counsel for the Respondent that an application for standard rent can only be brought three months of the commencement of the tenancy. From the documentary evidence on record, and having found that a monthly tenancy exists, I find that the application for standard rent was brought within three months. According to the rental account statement for 2016, it shows a rental payment on 15th November 2016 and in a letter dated 1st December 2016, the Applicant is advising that it is not willing to give up possession of the property comprised in the tenancy and will be applying to Court for the grant of a new tenancy pursuant to Section 4 (1) (a) of the **Landlord and Tenancy Business Premises) Act** which states as follows:

"4. (1) A tenancy to which this Act applies shall not come to an end unless terminated in accordance with the

provisions of this Act; and subject to the provisions of section ten, the tenant under which such a tenancy may apply to the court for a new tenancy-

- (a) if the landlord has given notice under section five to terminate the tenancy; or**
- (b) if the tenant has made a request for a new tenancy in accordance with section six.**

Counsel for the Respondent argues that the application for determination of standard rent having been made on 28th February, 2017, is almost 27 months after the alleged renewal of the tenancy in November 2013. Counsel contends that it is statute barred under Section 28 of the **Landlord and Tenant (Business Premises) Act Cap 193 of the Laws of Zambia** and cites the case of **United Engineering Group Limited v Mungalu and Others**⁵ in support of this proposition. That an application for standard rent can only be brought within three months of the commencement of the tenancy. Conversely, Counsel for the Applicant argues that the claims for determination or declaration of rent made by the Applicant does not

fall under section 28 of the **Landlord and Tenant (Business Premises) Act** as the tenancy continues upon the same terms and conditions. That the Applicant does not seek the determination of rent payable but merely seeks a declaration by Court that the rent payable by the Applicant from October 2015 to date is as provided by the lease agreement. Section 28 (1) of the **Landlord and Tenant (Business Premises) Act** provides as follows:

"Notwithstanding anything to the contrary contained in this Act or any other written law or in any lease, a tenant whose tenancy commences on or after 1st January 1972 and to which a tenancy this Act applies, may, within three months from the commencement thereof (if he is aggrieved by the rent payable thereunder) apply to the Court for determination of rent; and subject to the provisions of subsection (2), the court shall determine the rent which shall be substituted for the rent agreed to be paid under the tenancy."

The notice to terminate was issued on 25th November 2016 pursuant to Section 5 of the **Landlord and Tenant (Business**

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• **Mackson Mungalu and Others⁵** cited by Counsel for the Respondent, the Supreme Court held that:

" The Appellant was pleading that the action by the Respondents was statute barred. Section 28 (1) is not a mere rule stipulating time. The Act is a statute. Limitation of action are not only those that directly fall or are specifically mentioned in the Limitation Act of 1939. Any Act of Parliament can provide limitations and a plea of statute bar can be taken as a defence or preliminary point."

The Supreme Court further held that where a tenant does not apply within the time limit, it is inherent jurisdiction in the court to strike out a stale claim when there has been no kind of evincing by the claimant of any ground whereby he could seek to get around the obvious time barrier.

Following the monthly tenancy existing between the parties as evident from the payment of the rental on 15th November, 2016, I find that the Applicant responded within the time frame

contemplated in Section 28 (1) of the **Landlord and Tenant (Business Premises) Act, Cap 193 Laws of Zambia** and therefore I opine that the application is not statute barred. The cited case is not useful to the present case.

The Applicant claims for a declaration of the rent payable under the agreement for the period October 2015. I concur with Counsel for the Applicant that this Court has the general and inherent jurisdiction to grant declaratory relief. In view of my earlier findings in the preceding paragraphs, I shall make no further pronouncement on this issue as the same will be heard during the determination of the substantive matter.

For the avoidance of doubt, the Applicant is hereby granted leave to amend the supporting affidavit to reflect the correct party to the action, and re-file their affidavit in support of the Originating Notice of Motion within seven (7) days of this Ruling, and the Respondent is given fourteen (14) days on receipt of the amended affidavit within which to file their opposing affidavit.

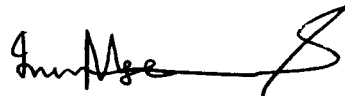
The Respondent's preliminary issue lacks merit and is dismissed.

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• In the circumstances of the matter, I make no order as to costs.

The Originating Notice of Motion shall be heard on 14th August, 2017 at 09.30 hours.

Leave to appeal granted.

Dated at Lusaka this 24th July, 2017



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IRENE ZEKO MBEWE
HIGH COURT JUDGE