IN THE HIGH COURT FOR ZAMBIA **2017/HPC/0189**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

IN THE MATTER OF : ORDER 113 OF THE RULES OF THE SUPREME COURT OF ENGLAND AND WALES (WHITEBOOK) 1999 EDITION

IN THE MATTER OF : ORDER 27 OF THE HIGH COURT RULES, CAP 27 OF THE LAWS OF ZAMBIA

IN THE MATTER OF : AN APPLICATION FOR SUMMARY POSSESSION OF STAND NO. 2096, SITUATE IN LIVINGSTONE

BETWEEN:

LIVINGSTONE CLUB REGISTERED TRUSTEES **APPLICANT**

AND

LITTLE PARK LIMITED **1ST RESPONDENT**

YATABA NYAUSISKA MTOMBORWA **2ND RESPONDENT**

Before the Honourable Mr. Justice W.S Mweemba at Lusaka in Chambers.

For the Applicant: *Mr M. Cheelo – Messrs MAK Partners.*

For the Respondent: *Mr L. K. Phiri & Mr N. Muyatwa – Messrs KBF & Partners.*

RULING

LEGISLATION REFERRED TO:

1. ***The High Court Act, Cap 27 of the Laws of Zambia.***
2. ***Order 113 of the Rules of the Supreme Court of England 1999 Edition (White Book).***

CASES REFERRED TO:

1. ***Newplast Industries v the Commissioner of Lands and the Attorney General (2001) ZR 51.***
2. ***Liamond Choka v Ivor Chilufya (2002) ZR 33.***

3. ***Hongling Xing Xing Building Company Limited v Zamcapital Enterprises Limited (for National Electronics Retail Limited) 2010/HP/439.***
4. ***Twampane Mining Corporative Society Limited v E and M Storti Mining Limited SCZ Judgment No. 20 of 2011.***

This is a Ruling on a Notice of Intention to Raise Preliminary Issues pursuant to the provisions of Order 14A and 33/3 of the Rules of the Supreme Court, 1965 (Whitebook) RSC, 1999 Edition on the following point of law:

1. *Whether or not the Applicant can commence this action under* ***Order 113 Rule 1 of the Rules of the Supreme Court 1965 (Whitebook) 1999 Edition****, in view of the fact that the Respondent is not a Squatter and the Applicant is aware of the real dispute with the occupier Respondents.*

It is supported by an Affidavit and Skeleton Arguments filed into Court on 20th July, 2017. The Affidavit was sworn by Yataba Nyausiska Mtomborwa the 2nd Respondent herein and Managing Consultant in the Respondent Company.

Mr Mtomborwa deposed that on 13th April, 2017 the Applicant filed an Originating Summons for Summary Possession of land being Stand No.2096, situate in Livingstone. However, he had taken issue with the Originating Summons for Summary Possession as it was commenced in total disregard of the rules governing commencement of action.

That this was not the correct manner under which the matter may have been commenced and the Applicant was aware of the main issue in dispute as the Respondents were on the said land lawfully. As it were, that the 1st Respondent was only late in rental payments.

That therefore this s a proper case for this Court to dismiss this matter for irregularity on a point of law with costs to the Respondents.

There is also an Affidavit in Opposition filed into Court on 23rd August, 2017. It is deposed by Brian Mwamba the General Secretary of the Applicant.

It is averred that the Applicant issued an Originating Summons under ***Order 113 Rule 1 of the Whitebook 1999 Edition*** and he is advised and believes that it was the proper mode used in commencing the said action.

That the 1st Respondent has not only delayed to pay rentals but has failed, refused and neglected to pay. That a Notice to Terminate the lease for failure to pay rentals was issued and the Lease Agreement actually terminated. Exhibited marked "**BM1**" is the Notice for Re-entry of Stand No. 2096 Livingstone.

He avers that on the basis of these facts, he believes that this is not a proper case for this Court to dismiss the matter for irregularity on a point of law as the Applicant was on firm ground.

Moreover, that the 1st Respondent and 2nd Respondent had not come to this Court with clean hands.

There is also an Affidavit in Reply which was filed into Court on 11th September, 2017. It is deposed to by Yataba Nyausiska Mtomborwa aforesaid. Mr Mtomborwa avers that the 1st Respondent has not neglected to pay rentals and that there is no Notice to Terminate that was served.

According to him, the purported Notice to Terminate had a provision for service that was not signed by the recipient, which meant that no Notice to Terminate was served on the Respondents. Therefore, this was a ruse by the Applicant to use an afterthought as a way to mislead the Court.

That notwithstanding it would be observed from the purported Notice to Terminate that it was purportedly written and served on 7th April, 2017 and this action was commenced on 13th April, 2017 which period of time is contrary to the statutory notice period for business premises which is at least 6 months.

That based on the foregoing, it was incumbent upon the Applicant to comply with the provisions of the law by giving the Respondents a proper Notice terminating the lease (six months) and if the Notice was not complied with then there was no way the Applicant can subsequently commence proceedings for summary possession of land, the Applicant therefore acted on its own peril.

That when this action was instituted, the Respondents were and are still tenants of the Applicant as there was no Notice to Terminate served.

That therefore, this is a proper case for this Court to dismiss the matter for irregularity on a point of law as the Respondents are on firm ground.

The application is supported by Skeleton Arguments and according to Counsel for the Respondents, the application is founded on ***Order 14A and Order 33 Rule 3 of the Rules of the Supreme Court (Whitebook) 1999 Edition***. The two provisions state as follows: -

"Order 14A

Rule 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 (»»text) or any other provision of these rules.

Rule 2

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

Order 33

Rule 3

"The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

According to Counsel for the Respondents, it had been shown in the Notice of Motion and Affidavit that the manner in which the Applicant commenced the action was in breach of the law and practice relating to commencement of action.

That the issue before Court is whether or not the action could be commenced by way of summary possession.

Counsel began by contending that the rule regarding commencement of action is a well settled matter in this jurisdiction and he relied on the case of **NEWPLAST INDUSTRIES V THE COMMISSIONER OF LANDS AND THE ATTORNEY GENERAL (1)** where the Supreme Court observed thus:

"In our view, it is not entirely correct that the mode of commencement of any action largely depends on the relief sought.

The correct position is that the mode of commencement of any action was generally provided by the relevant statute. Thus, where a statute provides for the procedure of commencing an action, a party has no option but to abide by the procedure."

He also cited ***Order 113 Rule 1 of the Rules of the Supreme Court 1965 (Whitebook) 1999 Edition*** which states that: -

"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."

According to Counsel, the Respondent did not fall within the meaning of any of the people envisaged in the Rule. The 1st Respondent was a tenant under the provisions of the Lease Agreement and had not yet been served with a Notice to quit in accordance to the provisions of ***Section 5 (1) of the Landlord and Tenant (Business Premises) Act Chapter 193 of the laws of Zambia***, which provides as follows:

"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"):"

Based on this provision it was submitted that no Notice to Terminate a tenancy had been served on the Respondents herein and the application of ***Order 113 Rule 1 of the Whitebook*** was misplaced and misconceived by the Applicant and should not be entertained.

Counsel further stated that the law had been discussed in various cases in this jurisdiction such as in the case of **LIAMOND CHOKA V IVOR CHUILUFYA (2)** where the court cited the relevant portion of the editorial introduction provided by the learned author of the Whitebook on the matter.

It is stated that the circumstances in which the procedure can be used are restricted to cases where the land is occupied by persons who have entered or remain in possession of land without the licence or consent of the person claiming possession. It does not apply to persons holding over after the determination of the lease.

Counsel also cited the case of **HONGLING XING XING BUILDING COMPANY LIMITED V ZAMCAPITAL ENTERPRISES LIMITED (FOR NATIONAL ELECTRONICS RETAIL LIMITED) (3),** in which Dr. P. Matibini J stated that:

> **"By the way, Order 113 relates to summary proceedings for possession of land. Typically, Order 113 is resorted in circumstances where land is occupied by persons who have entered into or remained in possession of the land without the licence or consent of the person claiming possession. This summary procedure is however discouraged where the plaintiff is aware of the real dispute with the occupier."**

It is contended that, it is trite law that cases commenced by Originating Summons under this provision should generally be able to be resolved with little or no evidence beyond that produced in an affidavit, which may be the reason why courts had discouraged the use of this procedure where there was a real dispute known to the Applicant as was in this case the rental arrears and intention by the Respondents to hold fairways on the golf club.

It is argued that it is clear that the attempt by the Applicant to employ the summary procedure in the Whitebook was misconceived, incorrect, incompetent and therefore an abuse of Court process.

It is submitted that from the facts in casu and the law cited, it is clear that this Court is guided that this is not a proper case where the Applicant could proceed to move the Court and bring an action by way of summary procedure under ***Order 113 Rule 1 of the Whitebook*** thus the Applicant's action is defective. Counsel implored the Court to consider the Supreme Court's

assertions in the case of **TWAMPANE MINING CORPORATIVE SOCIETY LIMITED V E AND M STORTI MINING LIMITED (4)** where it was stated as follows: -

> **"That Litigants who choose to ignore Rules of Court do so at their own peril."**

In conclusion counsel for the Respondents submitted that this was not a proper case where the Applicant can proceed by way of summary procedure. That this matter is erroneously before the Court and should be dismissed with costs.

The Applicant also filed Skeleton Arguments to oppose the application before Court. It is stated that the Applicant had filed into Court an Originating Summons and Supporting Affidavit whereupon the Respondents filed an Affidavit in Opposition and later on a Notice of Motion to raise a preliminary issue.

It is contended that it is clear that the Respondents were misdirected in raising the preliminary issue on a point of law claiming that the Applicant wrongfully commenced the action under ***Order 113 Rule 1 of the Rules of the Supreme Court*** which has already been quoted above.

According to Counsel for the Applicant, in the case of **CHOKA V CHILUFYA (2)**, the Supreme Court noted that summary procedure under ***Order 113 of the Rules of the Supreme Court***, can only be suitable for squatters and others without any genuine claim of right or who have since transformed into squatters.

It is submitted that, the question to be resolved is whether the Respondents had any claim of right or had now been transformed into squatters.

It is the Applicant's position that the answer is that the Respondents have no claim of right because consent was withdrawn by the Applicant when the lease was terminated and the Respondents were transformed into squatters.

It is therefore contended by the Applicant that ***Order 113 Rule 1 of the Whitebook*** applied to the Respondents and this application is unfounded. Further that it is a clear principle of law that "*he who comes to equity must come with clean hands.*" That it is clear from the 2nd Respondents Affidavit that they are seeking refuge in a Notice of Motion to raise a Preliminary Issue.

When this matter came up for hearing on 14th September, 2017 both Counsel for the Respondents and Counsel for the Applicant were before Court. They relied on their respective Affidavits and Skeleton Arguments.

The issue before Court according to Counsel for the Respondents is:

Whether or not the Applicant can commence this action under ***Order 113 Rule 1 of the Rules of the Supreme Court 1965 (Whitebook) 1999 Edition***, in view of the fact that the 1st Respondent is not a Squatter and the Applicant is aware of the real dispute with the occupier Respondents.

Whilst the issue according to Counsel for the Applicant is whether the Respondents had any claim of right or had now been transformed into squatters.

In summary, the case of the Respondent's is that they were not properly served with Notice of Termination of the Lease Agreement because the letter was not acknowledged by the recipient. Further that the 1st Respondent was not given the requisite notice of 6 months for Business Premises at law and the Applicant could therefore not commence proceedings for summary possession of land. In the circumstances it has been argued that this matter ought to be set aside.

On the other hand, the argument of the Applicant herein who vehemently opposes the application is that the application was commenced in a proper manner by way of Originating Summons and Affidavit in Support.

It is contended that the Respondents were misdirected in raising the preliminary issue on a point of law. According to Counsel for the Applicant, the Respondents had no claim of right to the land in question because consent was withdrawn by the Applicant when the lease was terminated and the Respondents had clearly been transformed into squatters.

It is my considered view that the Respondents application has no merit for the following reasons.

Firstly, it is clear from the original application that the 1st Respondent who was a tenant of the Applicant owes the latter rentals as set out in exhibit "**BM2**" a letter from the 2nd Respondent admitting liability.

Secondly, I note that the prior relationship between the parties was governed by the Lease Agreement that was signed by the parties and exhibited as "**BM1**" in the Affidavit in support of Originating Summons and Ex-parte Summons for an Order of Interim Injunction filed into Court on 13th April, 2017.

The Lease Agreement between the Applicant and the 1st Respondent is for a fixed term of twenty (20) years from 1st January, 2006. It is trite law that a fixed term lease is only determinable by notice if such a possibility is expressly provided for in the terms of the lease. P.V. Baker the learned author of ***Magarry's Manual of the Law of Real Property, 5th Edition, 1975*** States as follows at page 326:

> "**A lease or tenancy for a fixed period cannot be determined by notice unless this is expressly agreed upon. Thus a lease for a substantial term such as 21 years often contains provisions enabling the tenant to determine it... the length of the notice**

required, the time when it is to be given and other matters of this kind, depend on the terms of the lease. In the absence of any such provision the lease will continue for the full period."

The Lease Agreement herein has no provision for determination or termination of the lease or tenancy by notice. In the circumstances I find that the Lease Agreement between the Applicant and the 1st Respondent cannot be terminated by Notice. As submitted by Counsel for the Respondents the provisions of the ***Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia*** apply to the Lease Agreement herein. However, ***Section 5 of the Act*** does not apply because of ***Section 4(2) of the Act*** which provides for tenancies to which the Act applies to come to an end by notice to quit given by the tenant, by surrender, or forfeiture, or by the forfeiture of a superior tenancy.

The subject Lease Agreement has a Forfeiture Clause under which the lease may be forfeited on breach of a condition or covenant by the 1st Respondent as Tenant (Lessee). The continuance of the lease herein is therefore conditional upon the Tenant performing it obligations, and upon breach of one of them the term created by the Lease Agreement determines forthwith upon entry by the Applicant as Landlord. The Forfeiture Clause/Re-entry Clause is 4.1 and it states as follows:

"4.1 If the reserved rent or any part thereof shall be in arrears for thirty (30) days (whether formally demanded or not) or if there shall be breach of any stipulation or provision contained in the schedule or if the club shall cease to function the Landlord may after consultation with the general membership of the club and the liaison member request the Tenant to show cause why the said Landlord should not re – enter in the name of the whole and thereupon the term hereby created shall forthwith determine without prejudice to the Landlord's rights and remedies in respect of any such breach."

Therefore, the argument by the Respondents that there was no requisite Notice to Terminate the Lease Agreement served upon the 1st Respondent is misconceived and does not have merit since the 1st Respondent was no longer a tenant of the Applicant pursuant to this provision and the letter dated 7th April, 2017 and exhibited as "**BM3**." This letter was written to notify the Director of Little Park Limited (the 1st Respondent) interalia that upon being given notice to show cause why the Landlord should not re enter in the name of the whole the term of the lease, the lease forthwith determined.

As already stated above, it is my considered view that while the ***Landlord and Tenant (Business Premises) Act, Cap 193 of the Laws of Zambia,*** states that a Landlord of business premises should give the tenant 6 months' Notice to Terminate the tenancy, this provision does not apply in this case because of the specific Lease Agreement the parties executed which had a provision on forfeiture and re-entry. The Lease Agreement herein came to an end by forfeiture in accordance with ***Section 4(2) of the Act***.

I find and hold that upon the Applicant giving the 1st Respondent Notice for re-entry of Stand No. 2096 Livingstone for failure to pay rentals on or about 7th April 2017 the term of the lease or tenancy terminated and the 1stRespondent remained in occupation without the licence or consent of the Applicant as Landlord and as such the Applicant could bring proceedings by Originating Summons. The 1st Respondent was clearly transformed into a squatter.

The assertion by the 2nd Respondent that because the provision for service on the Notice to Terminate was not signed by the recipient meant that no Notice to Terminate was served on the Respondent's is a red-herring. It is clear from his Affidavit that the Respondents had knowledge of the existence of the Notice for re-entry dated 7th April, 2017 and as such, the Respondents are taken to have been notified of it.

I therefore find that commencing an action under ***Order 113 of the Rules of the Supreme Court of England and Wales (Whitebook) 1999 Edition*** was the proper mode in the circumstances.

In the premises, I therefore find no merit in this application and dismiss it with costs to the Applicant in the main matter.

Leave to appeal is granted.

DELIVERED IN CHAMBERS AT LUSAKA THIS 7TH DAY OF AUGUST, 2020.

WILLIAM S. MWEEMBA
HIGH COURT JUDGE.