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

2018/HP/739

B E T W E E N:

SHARON JONES **APPLICANT**

AND

BEN SIMWINGA **RESPONDENT**

Before the Hon. Justice Mr M.D. Bowa the 30th day of June 2020

For the Applicant: In Person
For the Respondent: In Person

JUDGMENT

Case referred to.

1. Anderson Mazoka & Others vs. Levy Patrick Mwanawasa & ECZ (2005) ZR 138

Legislation referred to

1. The Rent Act Cap 206 s 3, 4

2. The Landlord and Tenant Business premises Act Cap 193 of the Laws of Zambia sections 5(5) and (6), 11(1)

Other material referred to

1. Rules of the Supreme Court of England 1999 edition 28 r 8.

The Applicant commenced this action by originating summons dated 16th April 2018. The originating summons was later

amended with leave of court on 25th September 2018 by which the Applicant seeks the following.

1. *An order to compel the Respondent to pay rental arrears amounting to K36,600.00*
2. *An order to compel the Respondent to pay an amount of K2400.00 for damage caused to the property.*
3. *Damages for the inconvenience caused to the Respondent.*
4. *Any relief the court may deem fit.*
5. *Costs incidental to these proceedings.*

The application was supported by an affidavit dated 1st October 2018. The Respondent opposed the application by affidavit in opposition dated 06th November 2018 disputing the claim and contending it was the Applicant who breached the tenancy agreement by not giving the due notice and damaging the fittings that he put up at the rented property.

Having considered the affidavits, I arrived at the conclusion that triable issues were raised rendering proceeding by affidavit evidence inappropriate. I therefore, in terms of order 28 r 8 of the Rules of the Supreme Court of England 1999 edition ordered that the matter proceed as if commenced by writ warranting the

reception of oral evidence. I further ordered that the affidavits on record would stand as pleadings and granted the parties leave to file supplementary bundles of documents if they so desired.

Trial proceeded on the 27th of September 2019. The Applicant testified as PW1. Her evidence was that she commenced this action against the Respondent because he had rented her shop in Chisamba and was failing to pay the rentals due. She gave him over a year to put his house in order with the hope that he was going to manage to sort out the rentals but to no avail. The agreed rental was initially K6000 and he moved into the premises between 2015 and 2016.

Noticing the Respondent was not paying the rent when due, she decided to report the matter to the police. When the issue could not be resolved by the police she commenced the current court proceedings initially at the small claims court and subsequently before the High Court because of the sum involved which was in excess of K21,000. Prior to this she called the Respondent and asked him to leave the shop in the state he had found it when he took up the tenancy.

She requested the Respondent amongst other things to put back the metal and grill doors that were at the shop. The Applicant explained that the Respondent had replaced these with aluminium doors and glass which were in a state of disrepair. When she checked the interior of the shop the walls had mirrors that were broken.

She added that the Respondent had made demarcations with bricks inside the shop for his patrons to drink from. He had also fitted black tiles on top of the existing Kariba stones that were damaged. It was the Applicant's further testimony that damage was occasioned to the walls when the mirrors were being removed. She therefore asked the Respondent to plaster the wall and paint it with the paint that she had bought.

She went to the shop after 3 weeks and found nothing had been done. When asked about the anticipated work the Respondent told her he would take some boys to fix the walls and paint the shop. After a week she discovered that the people he had engaged had done a bad job. He then changed his number so the Applicant could not get a hold of him. When she managed to get his number, he would not pick up her calls. Her efforts to get him

to make good on the damage to the shop failed leading to her decision to sue him.

It was her contention that the Respondent initially indicated he needed time to settle what was due but changed his tone when the matter came to court stating he could not pay as he was chased from the shop. It was her evidence that the total she was claiming as due was K36,000. K21, 300 of that amount was rental arrears whilst the difference was the cost for replacement of the metal doors, grill gates and plastering of the walls that she had to foot on her own.

When cross examined, the Applicant accepted that she did evict the Respondent from the premises and stated that she gave him 48 hours' notice. She accepted that she broke the toilet outside the bar explaining that she did not want outsiders to use it once the Respondent was out of the shop. She also accepted breaking the toilet at the back of the bar near the gate apparently for the same reason.

She maintained that she did not allow the Respondent to make any changes to the premises when he initially occupied the shop. She subsequently agreed he could do so at his own cost. She

accepted that there was no clause in the lease which stated that the tenant was expected to remove any improvements he had made and replace with what was there before.

Cross examined further the Respondent accepted that she was the one who removed his tiles. She further agreed that she did not accept the K1000 he offered as instalment payments towards the K21, 000 that he owed.

In re-examination, the Applicant testified that she refused to accept the K1000 offered as instalment payment because it was too small an amount. She testified further that she did not authorise the Respondent to place tiles in the shop. Further that the tiles were all broken at the time that she was taking them out and she did this in her quest to clean up the shop. She added that the tenancy agreement did not give the Respondent the leverage to make changes as he pleased. She eventually allowed him to do so after holding discussions with him and on the understanding that any alterations done would be at his cost.

PW2 was Emmanuel Banda a businessman, and uncle to the Applicant. His evidence was that the Respondent was renting a shop from his niece. There came a point during the tenancy that

the Respondent failed to pay rentals for the shop. PW2 used to frequent the shop quite a bit with the Applicant so he was aware of the agreement and the goings on as the tenancy unfolded. At some point the Applicant decided that in light of the months passed without receiving payment in rentals, it would be best to evict the Respondent. It was PW2's evidence that the Respondent was evicted from the shop sometime in 2018.

An inspection conducted following his eviction revealed that the wall was damaged as the Respondent was removing mirrors from the wall. He testified further that there was a house within the yard in the back that formed part of the rented property. The interior of the house had broken window panes. It was PW2's evidence that the Respondent committed himself to fix the damage in his presence. After a while it was observed that the Respondent was not keeping his word. Discussions were held with him with a view of resolving the issue. No resolution was reached which led to the present court action.

When cross examined PW2 insisted that it was the Respondent who removed the mirror from the walls after he was evicted.

PW3 was Godfridah Banda. Her evidence was that PW1 is her daughter and owned a shop which she leased out to the Respondent. Mrs Banda used to sell in the same shop until her daughter decided to lease it out. Being constantly with her daughter, she was aware that the Respondent was initially paying his rentals but started defaulting in due course. She would see her daughter come to the shop to demand for payments. The Respondent was eventually evicted from the premises.

Following the eviction, she accompanied her daughter and PW2 to the shop to conduct an inspection. They found that a lot of things were damaged. The grill doors had been removed, mirrors that the Respondent had affixed on the walls had been broken and the floor was dug up and had visible holes. She added that there was a house behind the shop which the Respondent had started putting up demarcations in the living room area. Further all the windows in the house were broken. In addition, that all the cupboards in the kitchen were damaged.

When cross examined PW3 testified that she believed that it was the Respondent who broke the mirrors.

That was the case for the Applicant.

In his defence the Respondent (DW1) testified that he moved into the Applicant's shop on the 10th of June in 2014. It was agreed that the rentals would start running from August 2014. At the time he was paying K4500. He paid the rent though he didn't start running his business because he had to carry out renovation works on the building. There were no tiles and ceiling board at the time. It took him a while to complete the works which he recalled went up to 24th of December 2016. He continued paying the rent throughout this period.

After he opened his bar to the public, he worked for 3 months and the rent was increased to K8000. At some point business became difficult and he started facing problems to pay the rentals. Arrears accrued to K16, 000. The Applicant reported the matter to Emmasdale police and he was summoned to present himself to an inspector Ngandu.

Too his dismay, despite being a purely business arrangement he was locked up in cells and later released on bond. He looked for the money and cleared the outstanding arrears. He stayed on in the shop and accumulated some more arrears totalling K19, 000 which he paid to the Applicants lawyer, a Mr Mubita. It would appear this money was not given to the Applicant as she started

demanding for money in spite the payment. He was summoned back to Emmasdale Police, where the lawyer agreed he had received the money.

The Respondent stayed on in the shop and accumulated rentals up to K21, 300. He had K3000 on him when the Applicant next demanded payment. He paid this amount but the Applicant contended that the money was only sufficient to cover the cost of damages she claimed he had occasioned by demarcating one of the rooms.

The following day on the 11 March 2018, the Applicant went to the bar at 16:00 hours. She started shouting at the Respondent and told him she did not want to find him at the premises the next day. She proceeded to the ladies room and broke the toilet. She also went to the gent's toilet and damaged it as well. This happened in full view of clients who were in the bar at the time. He accordingly started to remove the T.V sets and musical system.

The following morning the Applicant's workers went to the bar and started removing the ceiling board, tiles and doors. They also removed all the mirrors and windows he had put. The Applicant

later called and asked the Respondent to collect all his property. He started to remove what he could and took the property to his house. He explained that a lot of things were damaged and remained at the bar.

He testified further that the Applicant demanded that he should clean the walls and polish the stones that were on the floor before he fitted the tiles. The Respondent told her he did not have money to do so at the time because she had not given him any notice before evicting him.

An attempt at mediation to resolve the dispute failed as the Applicant refused to accept the K1000 he offered to pay in instalments towards the settlement of the outstanding K21, 000. Further that she was also claiming damages which he did agree with. It was the Respondent's testimony that he invested a lot of money into the shop. He put up ceiling boards, tiles and pavers outside the shop. He also fixed aluminium doors and windows all to the tune of K230, 000.

He was thus disputing the claim in damages but accepted that he had rental arrears of K21, 300. It was his evidence that his damages far exceeded what the Applicant claimed that he owed.

He reiterated his position that he was not given any notice for termination of the lease.

When cross examined the Respondent maintained that the Applicant did authorise him to carry out the renovations when he first moved in. She did not ask him to stop doing the work. He testified further that there was no signed tenancy agreement at the time.

He added that he told the Applicant he needed to make the shop attractive for his customers. The Applicant said nothing to him about leaving the premises as he found it at the end of the lease. He maintained that he only signed the tenancy agreement after occupying the shop for 2 years.

Cross examined further he told the court that when he first occupied the building, the shop had metal doors and ordinary window frames whilst the floor had flat stones and the walls were painted in brown water paint. He declined that he had accumulated rentals up to K28, 000.

He accepted that he had made demarcations in some of the rooms but contended that this was done with the Applicant's blessings. He insisted that there was no agreement that he was to

leave the shop as he found it, nor did the Applicant make any verbal representation to that effect. It was his evidence that all the fittings he had put in were intact when he moved out. He remained resolute that it was the Applicant who broke the toilets and removed the doors that he had put.

There was no re-examination.

DW2 was Derrick Zimba. He testified that he was the adviser for the night club and bar that the Respondent was running. On the 11th of March 2018 he was at the club. At around 16:00 hours, He saw the Applicant walk in and observed her breaking toilets. She said she wanted the Respondent who was her tenant, out of the building the next day. This happened as the business was running and in full view of the patrons.

The following day, her workers came through and started breaking the ceiling boards, doors and tiles. They then demanded that the club management should remove all the rubble and leave the premises.

He asked the Respondent whether he had been given any notice to vacate the place and was told that none was rendered. The Respondent however confirmed that he owed the Applicant K21,

000. DW2 then advised the Respondent that in spite of his indebtedness the Applicant had no right to break things and to put him in cells over rentals. He accordingly advised the Respondent to take the matter to court.

When cross-examined DW2 stated that the Applicant first had word with the Respondent before she proceeded to break things. He testified further that it was the Applicant's workers that took out the air cons. He denied that the Respondent had mentioned anything to him about receiving a warning letter from the Applicant. He accepted that he was neither a party to the lease nor did he ever sign any tenancy agreement with the Applicant.

That was the close of the Respondent's case.

I have carefully considered the evidence before me. I find undisputed the fact that a tenancy agreement subsisted between the Applicant and the Respondent for the lease of a shop in Chisamba. I also find as undisputed that the Respondent was running the shop as a bar and took up the house in the rear of the bar as part of the rented property. I accept that renovations were effected to the premises to suit the purpose for the business conducted. This included the fixing of mirrors to the wall, placing

of doors and tiles. I also find as not in dispute the fact that the Respondent accumulated arrears and was evicted from the shop after having been in the premises for a term of years.

The controversy I am to resolve appears to be on the amount claimed as owing and whether the Respondent is under any obligation to meet the cost of repairs effected to the property as claimed by the Applicant. It is common cause that the Applicant commenced this action pursuant to section 4 (e) (i) and (ii) of the Rent Act Cap 206 of the Laws of Zambia.

The preamble which guides on the intent of the said legislation provides that it is:

"An Act to make provision for restricting the increase of rents, prohibiting the payment or premiums and restricting the right of possession of a dwelling house, and for purposes incidental to and connected with the relationship of landlord and tenant of a dwelling house."

The extent of application of the Act as prescribed in section 3 reads:

"3. (1) Subject to the provisions of subsection (2), this Act shall apply to all dwelling-houses in Zambia, whether or not the terms of the letting of such dwelling-houses include the use in common with the

landlord or other persons authorised by him of other rooms in or amenities of or portions of the building of which the said dwelling-house forms a part or the grounds or gardens immediately adjacent thereto, and whether or not the terms of the letting include a provision for services or the use of furniture."

From the above it is clear to discern that the Rent Act is primarily concerned with leases involving dwelling houses. The exhibited lease marked **"B51"** relied upon by the Applicant in her affidavit in support tends to suggest the rented property was indeed a dwelling house. However the evidence led clearly confirms it was a shop that was leased out as a business premises and operated as a bar and night club. As stated earlier in my findings above, the house at the rear also appears to have been used as part of this purpose and there is nothing to suggest it was being used as a dwelling house within the meaning placed in the Rent Act.

Having found that the property was being used for business and for a term of years necessarily implies that the applicable law which governed the existing tenancy is the Landlord and Tenant (Business Premises Act) Cap 193 of the Laws of Zambia. This Act intended to provide security of tenure for tenants, has a very strict regime on how a tenancy may be terminated. Section 5 (1)

of the Act makes provision for the termination of the tenancy by the Landlord. The section provides that:

"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."

By section 5(2) of the Act, in order to have effect the notice to quit should be given ***not less than six months and not more than twelve months before the date of termination specified therein."*** (Emphasis mine)

Subsection (5) and (6) goes further to provide that:

"(5) A notice under this section shall not have effect unless it requires the tenant, within two months' after the giving of the notice, to notify the landlord in writing whether or not at the date of termination, the tenant will be willing to give up possession of the property comprised in the tenancy.

"(6) A notice under this section shall not have effect unless it states whether the landlord would oppose an application to the court under

this Act for the grant of a new tenancy and, if so, also states on which of the grounds mentioned in section eleven he would do so."

It is clear from the evidence before me that the above was not followed. The Applicant does not dispute that she evicted the Respondent from the premises. She contends she gave him 48 hours' notice whilst the Respondent testified it was actually less than 24 hours. Whichever the case, the notice given in this period was far short of the 6 months' notice required under the law.

The Applicant further did not give the Respondent the opportunity to state whether he intended to renew the lease or let alone state that she would be objecting to the grant of a new lease under one of the grounds stipulated in section 11 of the Act. I therefore find that the purported termination of the lease was in fact illegal.

I am also willing to find that the Applicant in her haste to evict the Respondent damaged the fittings that he had placed in the building. She does not dispute breaking the 2 toilets and removing the tiles. I accept that it was her workers who also removed the mirrors, doors and air conditioning that was placed

and that she later invited the Respondent to collect the rubble of the things removed.

The Applicant insists the Respondent must meet the cost for the repair of the premises. A lease agreement will typically contain a clause requiring a tenant to leave the leased property in a good state of repair and paint the premises as they vacate. This appears to be to be included in clause 4 (j) and (k) in the tenants covenants. However, the evidence before me is that the Applicant herself occasioned the damage whose cost she now expects the Respondent to meet. It appears to me unconscionable that she should insist on this path in light of her own conduct and clear failure to give the required notice.

The Respondent did not file in a counterclaim in this case but I have no doubt that he incurred damage to the property and fixtures he had put up at the rented property. I find it would be wholly inequitable to grant the Applicant any damages for the loss she contends she incurred or cost of repairs in the circumstances of this case. I would accordingly dismiss the claim.

However, as stated earlier above, it is not in dispute that the Applicant is owed money in rentals. The lease agreement indicates the rental was K8000 per month. K21300 is accepted by the Respondent as the amount due and owing. In her amended originating summons the Applicant contends she was owed K36, 600 as rental arrears. Curiously, in her evidence before court she asserted that K21, 300 of that amount were rental arrears whilst the deference was the cost for replacement of the metal doors, grill gates and plastering of the walls that she had to foot on her own. This is at variance with her pleadings in which she claimed K2400 as the cost of the damage to her property.

I am therefore not satisfied that the Applicant lead credible evidence to show how she arrived at the amounts she claimed were due in accordance with her pleadings. In the case of **Mazoka and 2 others vs. Levy Patrick Mwanawasa & 2 others**[1], the Supreme Court stated the following:

"As we said in Khalid Mohamed vs. The Attorney General (1982) ZR 49, this court said on the burden of proof that; an unqualified proposition that a Plaintiff should succeed automatically wherever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he

fails to do so the mere failure of the opponents defence does not entitle him to judgment. I would not accept a proposition that even if a Plaintiffs case has collapsed of its own volition or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a Defendant in such circumstances would not even need a defence.

We held in that case that a Plaintiff cannot automatically succeed wherever defence failed; he must prove his case..."

I therefore find that having failed to establish she is owed K36, 600, I grant the Applicant judgment for in the undisputed sum of K21, 300 as rental arrears. I also award interest on the judgment sum at average short term deposit rate as determined by Bank of Zambia from date of originating summons to date of judgment and thereafter at commercial bank lending rate till date of final payment. Costs will follow the event to be taxed in default of agreement.

Dated at Lusaka the 30th day of June 2020.

JUDGE.