

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



**2018/HP/1706**

**IN THE MATTER OF:  
AND  
IN THE MATTER OF:**

**THE ORIGINATING NOTICE OF MOTION**

**SECTION 5 (2) OF THE LANDLORD AND  
TENANT (BUSINESS PREMISES) ACT  
CHAPTER 193 OF THE LAWS OF  
ZAMBIA**

**AND  
IN THE MATTER OF:**

**RULE 3 OF THE LANDLORD AND  
TENANT (BUSINESS PREMISES) RULES  
CHAPTER 193 OF THE LAWS OF  
ZAMBIA**

**AND  
IN THE MATTER OF:**

**A LEASE AGREEMENT DATED 16<sup>TH</sup>  
SEPTEMBER 2017 RELATING TO PLOT  
NO. 1442, CHURCH ROAD CHIPATA**

**BETWEEN:**

**CHEN XIADI (T/A LV NIGHT SPOT)**

**APPLICANT**

**AND  
BENEDICT MANDAWA**

**RESPONDENT**

**Before the Hon. Mr. Justice M.D. Bowa in Chambers on 9<sup>th</sup> April 2020**

*For the Applicant Mr. Mweene of Fred Jere and Company*

*For the Respondent: In Person*

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## **JUDGMENT**

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### **Authorities referred to**

1. *Mususu Kalenga building limited, Winnie Kalenga vs. Richmans Money Lenders Enterprises (S.C.Z. Judgment NO. 4 of 1999)*

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

The Applicant commenced this action by originating summons dated 2<sup>nd</sup> October 2018 seeking the following reliefs.

- (i) A declaratory order that the notice to vacate dated 1<sup>st</sup> August 2018 is illegal and therefore null and void.*
- (ii) In the alternative, on order for payment of the sum of ZMW 452,000 being monies used to improve plot No. 1442 13, Church Road Chipata.*
- (iii) An order for damages for breach of lease agreement dated 16<sup>th</sup> September 2017.*
- (iv) Costs.*
- (v) Any other relief the court may deem fit.*

The affidavit in support dated 2<sup>nd</sup> October 2018 was sworn by Samuel Phiri a manager in the Applicant business outfit. He deposed that the Respondent and Applicant executed a tenancy agreement on the 16<sup>th</sup> of September 2017 pursuant to the provisions of the Landlord and Tenant (Business Premises) Act exhibited "SP1"

Further that the Applicant has been renting the said premises for the past year at a monthly rate of KZMW4500 payable 9 months in advance installments. The Applicant avers that they have been paying rent in accordance with the agreed terms without defaulting. It was averred further that in fact the Applicant has on a number of occasions paid more than what was outstanding to include water bills arrears and other payments. Exhibited "SP2" is a copy of the acknowledgement letter of upfront payments. The court learnt that the Applicant was issued with a notice a vacate by the Respondent dated 1<sup>st</sup> August 2018 stating that upon expiry of the lease agreement on 31<sup>st</sup> October 2018, there would be no renewal.

The deponent disclosed further that owing to the fact that he had been renting the premises for purposes of running a night club, he had over the years made improvements to the premises to the tune of ZMW452,000 as per summary of investment exhibited "SP4" further that the Applicant has employed staff that are dependent on the business who may suffer if it is to close. The Applicant believes that the notice given by the Respondent was irregular. That the notice was in fact issued to accommodate a third party who

paid a monthly sum of K6500.00 It was averred further that the Respondent's actions would prejudice the Applicant in light of the enormous investment in the premises that had been made to suit the purpose for which it was intended.

The affidavit in opposition to the originating notice of motion was filed on the 19<sup>th</sup> of June 2019 and sworn by Benedict Mandawa the Respondent herein. He deposed that contrary to the Applicants contention of meeting tenancy terms the Applicant has rental arrears of 6 months from January to June 2019 at K4500 per month totaling K27,000. That it was an express term of the lease agreement that upon expiry of the lease, the landlord had the option of renewing the lease with the Applicant or not. The Respondent thus exercised his option not to renew therefore saw no reason why he should be faulted.

He added that the lease was for a period of 1 year from 16<sup>th</sup> August 2017 to 16<sup>th</sup> August 2018 hence the Applicant could not have renovated the building for years as contended. Further that the minor decorations made to the building were to suit the Applicant's business and not add value to the building. The Respondent stated

further that no renovations were done to the building that he was aware of and the actual building itself cannot cost K452,000 which the Applicant was claiming for renovations only.

It was contended further that contrary to the Applicant's assertions, the notice to vacate the shop given to the Applicant was not irregular as it was given after the expiry of the lease agreement, and the Applicant was given 3 months' notice to vacate as required by law.

The Respondent denied the assertion that an arrangement has been made with a third party to occupy the building as the Applicant is still in occupation of the building and paying the same rental. He reiterated his position that the Applicant has not made any major renovations to the stand rented except minor decorations to suit the purpose of his business.

The Applicant filed an affidavit in reply dated 8<sup>th</sup> July 2019 sworn by Samuel Phiri the manager in the Applicants business basically denying the Respondents assertions and putting him to strict proof.

At the hearing held on 12<sup>th</sup> of July 2019, counsel for the Applicant Mr. Mweene relied on the affidavit in support of the originating notice of motion and the affidavit in reply. In his oral submissions. He referred the court to section 3 (1) of the Landlord and Tenant (Business Premises) Act Cap 193 of the Laws of Zambia which he contended applies to all tenancies. Also relied upon was section 3 (2) (d) of the Act. Counsel argued that the above sections make it clear that the Act only applies to lease agreements that do not exceed 21 years. Further that the affidavit in support of the originating notice of motion shows that the Applicant has been renting the premises for the past 1 year which was also confirmed by the affidavit in opposition sworn by the Respondent.

It was submitted that by section 5 (2) of the Act it was clear that the 3 months' notice that was given by the Respondent to the Applicant relating to the vacating notice was irregular and as such should not be entertained by the court. He prayed that the Applicants relief be granted as set out in the originating summons.

The Respondent opposed the application. He relied on his affidavit in opposition filed into court on 19<sup>th</sup> of June 2019. He expressed

surprise nonetheless that the matter was before court as the Applicant was still occupying the building.

I have carefully considered the application before me. The case rests on whether there was a breach of the tenancy agreement and the law in terms of the notice that was given to terminate the agreement that was subsisting between the Applicant and the Respondent. It is not disputed that there was such an agreement in subsistence exhibited "SP1" in the affidavit in support. The law governing tenancies of business premises is to be found in the Landlord and Tenant (Business Premises) Act with exceptions prescribed in section 3 (2) of the Act. The primary purpose of the act is to provide security of tenure for tenants occupying property for business, professional and other purposes and to enable such tenants to obtain new tenancies in certain cases.

The provision for security of tenure under section 4 of the Act reads as follows:

***"(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 provision of section ten, the tenant under 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.*

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 above that a notice to terminate by the landlord must be given at least 6 months before date of termination and to have effect the notice must invite the tenant to state whether he would be willing to continue and further state if it is the landlords intention to oppose the application for renewal based on one of the grounds set in section eleven of the Act.

The notice to terminate the tenancy exhibited “SP3” in the affidavit in support of the originating notice of motion is by way of letter dated 1<sup>st</sup> August 2018. The letter is reproduced below.

MANDAWA H  
PLOT NO 1  
CHURCH  
01<sup>ST</sup> AUGUST

The Director  
LV Night Spot  
Church Road  
CHIPATA

ATTENTION: MR. CHEN

Dear Sir

**RE: NOTICE TO VACATE THE BUILDING**

I take this opportunity to inform you that the building will be sold off.

I am therefore giving you a notice of three (3) months in which you have to vacate the shop.

Your last day will be on the 31<sup>st</sup> October, 2018. This means I will not re-new you agreement as it expires after one (1) year.

I take this opportunity to thank you for having been a good Tenant for the past year.

You have to make sure that the water bills are cleared as you vacate.

Yours faithfully,

Benedict Antonic Mandawa  
LANDLORD

From the above it is to be noted that the letter is not in a prescribed form. It is also clear to discern that it gives the tenant 3 months' notice as opposed to the statutory 6 months required by the law. It further does not invite the Applicant to indicate his desire to

continue with the lease. The letter however does state that the landlord did not intend to renew the lease as he intended to sell off the building. This arguably would fit in with the ground of objection contemplated in section 11 (1) (e) which states in part;

***“That on the termination of the current tenancy, The landlord requires possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole, and that in view thereof the tenant ought not to be granted a new tenancy.”***

This would only be partial fulfillment of the mandatory requirement of section 5 (5) and (6) in order to have the notice have effect and further far less the 6 months’ notice prescribed by the law.

The clause in the tenancy agreement exhibited “SP1” on termination of lease reads as follows.

#### ***TERMINATION OF AGREEMENT***

*The tenant understands that the landlord or their Agent can recover possession of at the end of the term (as defined) and may end the tenancy early if the Tenant fails to carry out their responsibilities. The landlord may end this agreement by giving the tenant at least two calendar months written notice in accordance with section 21 of the*

*Housing Act 1988 requiring possession of the property on a date specified in the notice. The Tenant may end this agreement by giving the landlord at least one calendar month written notice (expiring on the last day of rental period and not before the last day of this agreement.*

It is clear to discern from the above that the agreement is in direct conflict with the applicable law in terms of how the lease may be terminated by the landlord and the period of notice required. It further makes reference to the Housing Act 1988 presumably an English statute which is inapplicable to Zambia and tenancies for business premises. The Respondent's reliance on the clause in the lease that gave him an option not to renew the lease therefore does not come to his aid in light of the protective and mandatory provisions in section 5 of the Landlord and Tenant (Business premises) Act that prescribes how a landlord may terminate a lease. Thus in **Mususu Kalenga building limited, Winnie Kalenga vs. Richmans Money Lenders Enterprises**<sup>1</sup> the Supreme court upheld the high court decision that granted damages to a tenant whose goods had been locked up by the landlord in rented property for

failure to give notice in terms of the mandatory provisions of the Act.

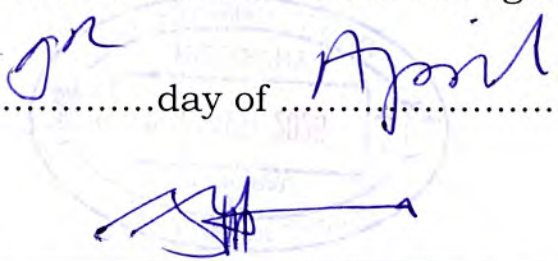
That said, the Applicant in this case is not itself blameless. It is contended that the Applicant has breached the tenancy agreement by being in arrears of rental payments. I further note that the Applicant's manager does not show any evidence confirming his assertion that the reason for the termination was on account of the Respondent signing a lease with a different party for more money.

I am further mindful of the revelation that in spite of the notice issued and the absence of any court order, the Applicant remains in occupation of the building on the same terms. The Respondent in fact expressed surprise why the matter was still in court when the matter came up for hearing. I enjoined the parties to try and resolve their dispute amicably in light of the above and they reported back at a status conference stating no agreement could be reached. The conflict as I see it therefore is to be resolved simply by the court making a declaration on the rights of the parties as regards the notice issued by the Applicant.

For reasons discussed above, I find and declare that the notice issued on the 1<sup>st</sup> of August 2018 has no effect as it falls short of the legal requirements for termination of leases as prescribed by section 5 of the Act. I make no order on the alternative prayer for payment of monies expended on renovations or order for damages for perceived breach of the lease agreement. It of course remains open to the Respondent if he so desires, to terminate the lease in accordance with the law based on the breaches alleged or his disclosed intent to dispose of the property as a whole.

Costs are for the Applicant to be taxed in default of agreement.

Dated at Lusaka the ..... day of ..... 2020



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**HON. JUSTICE M.D BOWA**