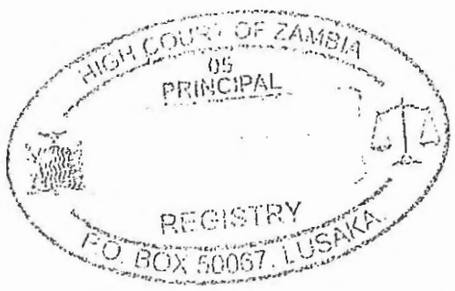
IN THE HIGH COURT FOR ZAMBIA **2017/HP/0702**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(*CIVIL JURISDICTION*)



BETWEEN:

THE BAY HOTEL LIMITED **APPLICANT**

AND

MUSALI GARDENS LIMITED **RESPONDENT**

CORAM: Hon. Lady Justice E. P. Mwikisa

For the Applicant: Mr. L. E. Eyaa of KBF Partners

For the Respondent: . Mr. M. Mpemba and Mr. F. W. Daka of Messrs Makebi Zulu Advocates

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JUDGMENT

Cases referred to:

1. *Appollo Refrigeration Services Co. Ltd v Farmers House Limited (1985) Z.R. 182*
2. *Roadmix Limited and Another v Furncraft Enterprises Limited SCZ Judgment No. 41/2014*
3. *Cikuta v. Chipata Rural Council (1974) ZR 24*
4. *New Plast Industries Ltd v. The Commissioner of Lands and the A.G. (2001) ZR 51*
5. *Examination Council of Zambia Pension Trust Scheme Registered Trustees and Another v Tecla Investments Limited Selected Judgment No. 39 of 2018*
6. *Makanya Tobacco Company Limited v J&B Estates Limited Selected Judgment No. 19 of 2015*

7. *Musinga v Daka (1974) ZR 37*

Legislation referred to:

1. The Lands and Deeds Registry Act Cap 185 of the Laws of Zambia
2. *Landlord and Tenant (Business Premises) Act (the Act) Cap 193*

This is an application by way of originating notice of motion dated 5th May, 2017. This application is supported by affidavits filed into court on 28th April, 2017, and a further affidavit filed into court on 5th May, 2017, both sworn by one Maureen Rabecca Rosen, a Director in the Applicant's Company, who inter alia deposed that the Applicant and the Respondent entered into a Tenancy Agreement wherein the Respondent rented out the demised property known as Plot No. 207, Harry Mwaanga Nkumbula Road, Siavonga, to the Applicant, for a term of ten (10) years renewable, at a monthly rental of US$ 3,000.00 or K15,000,000, equivalent at K5,000.00 per dollar. The said rent was payable quarterly in advance, one (1) month deposit of US$ 3,000.00 or K15,000,000 equivalent and deposit on fitting and furniture of K2,500,000.00 as shown by exhibit marked "MRR1", a true copy of the lease agreement. That pursuant to the provisions of clause 1 (j) of the lease agreement, the Applicant took over the Respondent's

liabilities when Siavonga District Council made a threat to withdraw the plot from the Respondent on 15th February, 2013. That the rates and annual rent bills outstanding for 2011, ZESCO bills, water and telephone bills in the sum of K16,291.00, on 23rd October, 2013, as well as owners rates to Siavonga District Council amounting to K20,271.00, were paid on behalf of the Respondent as shown on exhibit marked "MRR2".

It was further deposed that sometime in 2012, pursuant to clause 1 (h) of the lease agreement, the Respondent authorized the Applicant to undertake renovations of the demised property known as Plot No. 207, Harry Mwaanga Nkumbula Road, Siavonga in the tune of over K2 million through Dr. G. M. Rossi and it was agreed that the applicant do produce a bill of quantity relating to the renovations done to the property yet to be presented to the Respondent.

It was deposed further that the Applicant accumulated rental arears due to the fact that the Applicant used most of its resources to refurbish the demised property as authorized by the Respondent in accordance with the provisions of clause 3 (a) of the Lease Agreement and also that the Respondent kept on postponing to agree on a fixed rental in Zambian currency, as such suffered a

sharp indirect increment due to escalating dollar exchange rate after signing the lease agreement.

That further, the Respondent on 30th October, 2013, through their Property Consultant Mr. M.C. Mbale, assured the Applicant that during the first 5 years, US$ 3,000.00 at K5,000.00 per dollar or K15,000,000.00 rent per month, would remain in force, there after an adjustment of 20% rental increment would apply as from January, 2014, as per exhibit "MRR6" a true copy of the letter.

That on 12th February, 2014, the Respondent's Property Consultant issued a notice of introduction of 10% withholding tax enforced in January, 2014, to be paid directly to ZRA as shown on exhibit "MRR7" a true copy of the letter.

That on 30th May, 2014, the Respondent's Property Consultant issued a notice of rental increment by 10% to cushion and affirm his earlier letters dated 15th May, 2014, and 12th February, 2014, as shown on exhibit "MRR7" meaning that the Respondent would charge 10% from K15,000.00 monthly rental to paying 10% withholding tax effective January, 2015, thereby increasing rentals to K16,500.00 per month.

That the Respondent through Dr. G. M. Rossi' visited the Applicant from 28th to 31st August, 2014, and acknowledged as well as approved the renovations, improvements or capital investment made to the demised property, known as Plot No. 207, Harry Mwaanga Nkumbula Road, Siavonga, by the Applicant. That there is now produced and shown on exhibit "MRR9 and MRR10" true copies of invoice, captain order and cash collecting sheet issued to Dr. G. M. Rossi, evidencing the visit as well as pictures of improved structures of demised property known as Plot No. 207, Harry Nkumbula, Siavonga. The rest of the depositions are contained in the said lengthy affidavit.

The reliefs sought as per the amended originating notice of motion are that:

(i) The Court do interpret the validity of the lease agreement for the demised premises known as Plot No. 207, Harry Mwaanga Nkumbula Road, Siavonga entered into between the Applicant and the Respondent dated the 11th December, 2011, in relation to the verbal agreement entered into in 2012, pursuant to the provisions of clause 1 (h) and 3 (c) of the lease agreement;

(ii) An order by Court for grant of New Lease Agreement;

(iii) An order by Court to determine the monthly rentals of the demised premises;

(iv) A declaration that the rentals of the demised premises should be fixed and quoted in the Zambian local currency which is kwacha and ngwee and not in United States Dollars;

(v) An order that the Court do determine whether the unilateral variation of the rentals payable under the lease referred to in paragraph (3) by the Respondent is lawful;

(vi) The purported notice of termination of the lease agreement and give up of the premises to the Respondent by 3rd May, 2017, and 3rd November, 2016, is unfair before the 10 years' tenancy period pursuant to clause 1 (a) and (e) of the Lease Agreement without taking into consideration the major capital investment or improvement on the leased premises with the Respondents premises which bill of quantities is yet to be presented;

(vii) An order that should the Respondent wish to terminate the lease agreement, it should pay renovation costs as per bill of quantities dated 20th December, 2016, to be agreed upon by the Respondent and the Applicant;

(viii) Or in the alternative an order that the Respondent offers the leased premises for sale to the Appellant less the cost of renovations;

(ix) An order of interim injunction refraining the Respondent or its agents from taking possession or evicting the Appellant from the demised lease premises known as Plot No. 207 Harry Mwaanga Nkumbula Road Siavonga or interfering in the Applicants quite enjoyment of the demised premises until final determination of this matter;

(x) An order staying sale of seized goods on 24th April, 2017 pending application to set aside warrant or distress for irregularity;

(xi) Damages, good will and special damages as a result of unlawful execution on 27th April, 2017, in execution of warrant of distress dated 24th April, 2017;

(xii) Any other relief the Court may deem fit and;

(xiii) The costs of the proceedings to be borne by the Respondent

The Applicant in its written submissions stated that the disputed facts can be summarized as follows:

i) Whether the renovations and the capital investment made to the demised property by the Applicant were done with or without the consent of the Respondent;

i) Whether the distress by the Respondent on the applicant on the 27th April, 2017, was regular and within the confines of the law; and

iii) Whether the rent increment by the Respondent in respect to the demises property was in accordance with the tenancy agreement.

That the issue is whether the renovations and the capital investment made to the demised property by the Applicant were done with or without the consent of the Respondent.

Paragraph 1 (h) of the lease agreement provides that:

> ***"Not without the consent in writing of the Landlord first obtained to erect or permit or suffer or be made any alteration or addition to the premises or suffer to be made any alteration or addition to the premises or to add or alter any new building or alteration erected or made pursuant to the consent of the Landlord".***

That by virtue of the above provisions of the lease, no improvement to the demised property could be done without written consent of the Respondent. That the Applicant in her affidavit evidence deposed that consent to make capital improvements to the demised property was given by the Respondent.

It is the Applicant's submission that the consent to make capital improvements to the leased property can be seen in the letter dated 12th October, 2012, which is exhibited as "GMR3" in the

Respondent's Affidavit in Opposition wherein the Respondent informed the Applicant to make any new improvements to the property to ensure the success of the Applicant's projects and that the same was fine with the Respondent.

In addition, it was submitted inter alia that the Respondent's Director Mr. Gaudenzio Massimino Rossi visited the demised property several times and at no material time did he oppose the capital improvements made by the Applicant in writing or otherwise. Hence, by the foregoing conduct, it was submitted that the Respondent in addition to the written consent in the letter aforementioned, prima facie accepted and acknowledged the improvements by the Applicant to the demised premises.

It was submitted further that the Applicant made capital improvements to the leased property and has shown the said improvements in the bill of quantity exhibited in the Affidavit in Support as per exhibit "MRR20 to MRR21".

The second issue is whether the distress by the Respondent on the Applicant on the 27th April, 2017, was in accordance with the lease agreement and the law. It was submitted that the Landlord has the right to render distress on a tenant in a Business Premises to recover rent arrears without a Court Order unless the lease

agreement provides otherwise. However, it was submitted that before the Landlord can exercise the right to distrain on a Tenant, it must be established that there is a Landlord and Tenant relationship arising from a lease agreement from which rent is expected. Further, that the rent must be certain at the time it falls due and the same must be in arrears.

It was submitted further that by the time the purported rentals as claimed by the Respondent fell due, the rent payable was not certain as the Respondent had increased rentals as and when it deemed it fit to do so. That the Applicant had actually complained about the radical increment of rentals as can be seen by a letter dated 28th November, 2016. With respect to the foregoing, that it is clear that the rent was not certain and therefore the Respondent could not levy distress on uncertain rent.

It was also submitted that the Applicant had invested in the property by undertaking substantial improvements to the property by making payments in respect to Ground Rent as well as other bills such as Electricity, Water and Telephone, which were supposed to be made by the Respondent. That the authors of **Woodfall on Landlord and Tenant Vol 1 (199)** at page 7/35 paragraph 1.112, state that:

"Accordingly, a payment of ground rent by the tenant in default of payment by his mesne landlord operates pro tanto as payment of his own rent or mesne profits claimed against him...."

Hence, it was submitted that the payment of the aforesaid bills should operate pro tanto as payments of rent and therefore that the same was supposed to be deducted from the rentals when they fell due, which the Respondent did not do. That therefore, the distress was irregular for failure to reconcile the purported rent arrears with the payments made by the Applicant.

That notwithstanding the foregoing, no inventory was issued by the Respondent and served on the Applicant in respect of the items which the Respondent had distrained during the execution of the Warrant of Distress. That this was irregular.

In addition to the foregoing, it was the Applicant's submission that the distress was illegal as the same was done before the notice period given by the Respondent in accordance with the lease agreement and the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia, had elapsed. It was argued that according to clause 3 (d) of the Lease Agreement, it was agreed by the parties as follows:

"(c) The tenancy agreement may be terminated by either party giving the other notice of (6) months in writing".

In Section 3 (1) of the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia provides that:

> ***"Subject to the provisions of subsection (2) this Act shall apply to all tenancies in Zambia".***

That according to section 5 (1) and (2) of the Landlord and Tenant (Business Premises) Act, it is provided that:

> ***"(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"):***
>
> ***"(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 herein."***

It was submitted that by virtue of the foregoing, the Respondent should not have levied distress on the Applicant before the lapse of the notice period. That the Applicant in its affidavit evidence has shown that the Respondent issued a notice to terminate on the 3rd November, 2016, giving the Applicant six (6) months' notice as required by clause 3 (d) of the Lease Agreement and section 5 of the Landlord and Tenant (Business Premises) Act. That the Respondent, before the notice period elapsed, issued a Warrant of Distress on the 27th April, 2017, and distrained the Applicant's property.

The third issue is whether the rent increment by the Respondent in respect of the demised property was in accordance with the Tenancy Agreement. That according to the Lease Agreement, it was provided under clause 1 (a) and (b) that:

"1. The Tenant hereby covenants with the Landlord as:

(a) To pay quarterly rent in advance. The lease will be for 10 years renewable;

(b) payment as follows:

i) 3 months' rent in advance at USD$ 3,000.00 = USD$ 9,000.00."

That under the Lease, USD$ 3,000.00 was equivalent to ZMW 15,000.00 per month and by a letter dated 30th October, 2013, marked "MRR6"and exhibited in the Applicant's Affidavit in Support, it was agreed that the rentals were to remain the same for the first five (5) years of the lease and that thereafter an adjustment of 20% increase would apply.

That notwithstanding the foregoing, the Respondent by a letter dated 28th October, 2015, informed the Applicant that effective January, 2016, rentals would adjust to USD$ 3,000.00 equivalent to ZMW 30,000.00 per month. That this was contrary to the terms contained in the letter dated 30th October, 2013, as the increment was more than 20%.

It was argued that the rental increment by the Respondent contravenes the terms of the letter dated 30th October, 2013, which provided the terms of the rental increments. That in this regard, the rental increment by the Respondent is contrary to the Lease Agreement.

On the other hand, the affidavit in opposition of originating notice of motion was sworn by one Dr. Gaudenzio Rossi who deposed therein that on or about the 11th day of December, 2011, the Applicant and the Respondent executed a Lease Agreement governing their relationship as Landlord and Tenant wherein the Respondent rented out the demised property being Plot No. 207, Harry Nkumbula Road, Siavonga to the Applicant, for a term of 10 years renewable, wherein the Applicant was obligated to pay monthly rentals at USD 3,000.00 payable quarterly in advance, I month deposit of USD 3,000.00 and a deposit on fittings and furniture at ZMW 2,500,000.00 as per copy of the said tenancy agreement exhibited and marked "GMR1".

It was also deposed that it was a further term of the Lease Agreement as per clause 1 (h) that the Tenant was to obtain written consent from the landlord to effect capital renovations or improvements on property. That it was agreed upon that the

tenant was to pay USD 3,000.00 every three months towards rentals as per clause 1 (b) (i) of the Tenancy Agreement but that the Applicant is a defaulting Tenant who stopped paying rentals resulting in a total breach of the Lease Agreement between the parties.

It was further deposed that the Applicant has further breached the Lease Agreement by effecting capital renovations or improvements to the demised property without obtaining consent from the Respondent. That the Applicant has breached the said Agreement by building various structures on the demised property as shown by letters dated 3rd January, 2016, 8th November, 2016 and 15th November, 2016, where the Applicant has conceded to having made such improvements. Exhibited and marked "GMR2" are the said copies of the letters. That the Applicant has never obtained such written consent from the Respondent neither has the Respondent varied the terms of their agreement on any prior occasion allowing the Applicant to make such improvements. That the Respondent has even gone further to remind the Applicant by a letter dated 12th October, 2012, on permission required by the Applicant before improvements can be made as per their agreement as shown by exhibit marked "GMR3".

It was deposed that the Applicant has been in default and is still in default of rental arrears for more than 2 years. That the Respondent had made various demands as per letter dated 23rd June, 2016, wherein at the time the Applicant was owing ZMW190,200.00 and further by letters of demand dated 3rd November, 2016, and 21st November, 2016, in which the Respondent demanded that the Applicant make payments regarding the rental arrears in the amount of ZMW256,200.00 as shown by exhibit marked "GMR4".

That the Applicants by letters dated 31st July, 2016, 28th September, 2016, and 25th November, 2016, responded to the Respondents demands and admitted to be in arrears and further made commitments to settle the said rental arrears as shown by exhibit marked "GMR5".

That the Applicant has however been difficult and has refused to amicably resolve this matter by failing to respond to the Respondent's proposals and has brought up issues to further delay the Respondents attempt to obtain appropriate relief.

That in an attempt to stall the Respondents attempt to obtain appropriate relief by a letter dated 28th November, 2016, the Applicant disputed the amount owed by it, even after it had

admitted owing the said rentals and taking steps to settle the amount owed.

That the Respondent by a letter dated 3rd November, 2016, was left with no option but to give the Applicants notice to terminate the Lease Agreement based on the continued breach of the Tenancy Agreement. It was deposed that the Respondent is well within it's right to terminate the Lease Agreement in terms of clause 3 (b) and (d) of the Tenancy Agreement and no valuation is required to be done as all the capital improvements made on the property are in clear breach of the clause 1 (h) of the Tenancy Agreement. That any other non-capital improvements made on the property are to be accounted to rental arrears owed.

That by the warrant of Distress, the Applicant was in rental arrears of ZMW 256,200.00 and that the Applicant has continued to breach the covenants of the tenancy agreement. That the Respondent and the Applicant are in clear breach of clause 1 (h) therefore the Applicants allegations that these improvements need to be taken into account as stated in paragraph 20 of their affidavit in support of Originating Notice of Motion is misplaced.

It was also deposed that the Respondent does not wish to continue business relations with the Applicant as it has proven to be a

difficult Tenant by refusing, failing or neglecting to pay rental arrears for more than 2 years. Further that the Respondent is in right standing to evict the Applicant from the demised premises as it gave the Applicant the requisite notice period as provided by law and by the Lease Agreement to vacate the premises. That granting the Applicant the reliefs sought would be denying the Respondents liberty to exit the Tenancy Agreement as provided by clause 3 (d) of the Tenancy Agreement and thereby changing the terms of the agreement without the consent of the Respondent.

That the Respondent has continually suffered irreparable loss and damages as a result of the non-payment of rentals by the Applicant and the Applicant should not continue enjoying the fruits of the contract at the expense of the Respondent.

I have carefully considered the affidavit evidence on record as well as the submissions made by Counsel from both sides. Before I get into the merits of the case, I wish to start by determining whether or not I have jurisdiction to entertain all the reliefs claimed in this matter. In the case of **Appollo Refrigeration Services Co. Ltd v Farmers House Limited (1985) Z.R. 182**[1] the Supreme Court held as follows:

"An originating notice of motion was not the proper process for a landlord's claim for possession of business premises since all the applications which can be made by an originating notice of motion under the Landlord and Tenant (Business Premises) Act are specified in the various sections. A Landlord's action for possession was not so specified and should therefore be commenced by writ in accordance with Order 6 of the High Court Rules."

I am guided by the Supreme Court in the authority above that not every action between a landlord and a tenant of business premises should be commenced by way of originating notice of motion. The applications which can be made by way of originating notice of motion under the Landlord and Tenant (Business Premises) Act are those specified in the various sections of the Act.

In casu, the Applicant commenced this action by originating notice of motion. The amended originating notice of motion dated 5th May, 2017, sought the following orders from the Court:

"1. The Court do interpret the validity of the lease agreement for demised premises known as Plot No. 207, Harry Mwaanga Nkumbula Road, SIAVONGA entered between the Applicant and Respondent dated 11th December, 2011, in relation to verbal agreement entered in 2012 pursuant to provisions of clauses 1(h) and 3(c) of the Lease Agreement;

2. An Order by Court for grant of New Lease Agreement;

3. An Order by Court determining the monthly rentals of the demised premises;

4. A declaration that the rentals of the demised premises should be fixed and quoted in the Zambian local currency which is kwacha and ngwee and not in United States dollars;

5. An Order that the Court do determine whether the unilateral variation of the rentals payable under the lease referred to in paragraph (3) above by the Respondent is lawful;

6. The purported notice of termination of the lease agreement and give up of the premises to the Respondent by 3rd May, 2017 dated 3rd November, 2016 is unfair before the 10 years tenancy period pursuant to clause 1(a) and (e) of the Lease Agreement and without taking into consideration the major capital investment of improvement on the leased premises with the Respondent's permission which bill of quantity is yet to be presented;

7. An Order that should the Respondent wish to terminate the Lease Agreement, it should pay renovation costs as per bill of quantity dated 20th December, 2016, to be agreed upon by the Respondent and the Applicant;

8. Or in the alternative an order that the Respondent offers the leased premises for sale to the Applicant less the costs of renovations;

9. An order of interim injunction refraining the Respondent or its agents from taking possession or evicting the Applicant from the demised leased premises known as Plot No. 207, Harry Mwanga Nkumbula Road, SIAVONGA, or interfering with the Applicant's quiet enjoyment of the demised premises until final determination of this matter;

10. An Order Staying Sale of Seized goods on 24th April, 2017, pending application to set aside warrant of distress for irregularity;

11. An order for specific performance as per Lease Agreement dated 11th December, 2011 and the letters dated 30th October, 2013 and 4th April, 2016;

12. Damages for good will and special damages for aborted workshop as per letter of cancellation dated 3rd May, 2017 and other business orders as a result of unlawful execution on 27th April, 2017 in execution of warrant of distress dated 24th April, 2017;

13. Any other relief this Honourable Court may deem fit; and

14. the costs of the proceedings to be borne by the Respondent."

In the case of **Roadmix Limited and Another v Furncraft Enterprises Limited SCZ Judgment No. 41/2014**[2], the Supreme Court had occasion to deal with a similar case. In that case, as per the Judgment, the action in the High Court was commenced by an originating notice of motion and was for, what the Supreme Court termed, a raft of declarations and orders. These included: a declaration that the respondent was not a tenant of the 2nd appellant; an order to set aside a warrant of distress, a declaration that a tenancy relating to shed 2 at a Farm 397A/D/C/3 Kafue Road was renewed on 1st March, 2010, at a monthly rent of US$1,750.00; an order for a new tenancy, a declaration that the removal of the respondent from and locking up its business premises was wrongful, null and void and a claim for damages of K2,500.00 per day from 9th April, 2010, until possession was given back.

The Supreme Court in that case held as follows:

> ***"The argument by State Counsel Zulu that it was not competent to commence two actions, namely an action for renewal of a tenancy by way of Originating Notice of Motion in one court and issue a Writ of Summons in another court relating to the relief for various***

declarations and damages, is attractive in so far as a multiplicity of actions and conflicting judgments is concerned. This, however, does not address the issue that two statutes provide for how the respondent should file its claims. Even though the claims may appear to arise out of one subject matter, namely a business premises, it is not entirely correct to argue that the claims for a declaration and damages should be combined with the claim for a new tenancy under an Originating Notice of Motion."

The Supreme Court went further to state:

"A perusal of the Originating Notice of Motion shows that the claims made by the respondent can be divided into two categories. The first category relates to claims arising under an existing lease while the second category relates to an application for a new tenancy under the Landlord and Tenants (Business Premises) Act....

The claim for a new tenancy cannot, therefore, be combined with claims for declarations and damages which are distinct and require to be brought by writ of summons and depend on pleadings and viva voce evidence being called on both sides."

In casu, as shown by the claims in the originating notice of motion, some of the claims made by the Applicant herein are not suited to be commenced by originating notice of motion as they are not provided for in the Landlord and Tenant (Business Premises) Act. I am of the considered view that only the claims under paragraphs 1, 2 and 3 in the originating notice of motion are suited for such commencement. The Applicant herein combined claims required to be brought by writ of summons and those which are to be

brought by originating notice of motion, which should not be the case as per the **Roadmix Limited and Another v Furncraft Enterprises Limited** case supra.

The Supreme Court went further to state in the said **Roadmix Limited and Another v Furncraft Enterprises Limited** case supra that:

"State Counsel Zulu conceded that the mode of commencement in respect of some of the claims was wrong, but nevertheless submitted that the proceedings should be deemed as if they were commenced by Writ of Summons. We do not agree with him. In the Apollo Refrigeration Services case, we granted an application to deem the action as if it had been commenced by writ. In that case, the landlord sought only one relief, which was for possession of the business premises and it was wrongly commenced. The deeming was done to make the process appear to have begun by writ and beyond that, there were no further matters to be determined in finality. In the present claim, five of the claims made were brought under the wrong procedure and only one claim relating to the renewal of the tenancy was properly commenced under the Act. If we deem this action to have been commenced by writ, this would entail that even the claim for the new tenancy would have to be commenced by writ which decision would lead to an irrational result....

From what we have stated above, it is clear that these proceedings have been misconceived. With the exception of the claim for a new tenancy, this matter was not properly before court and the learned trial Judge had no jurisdiction to determine the matter on its merit."

It therefore follows, that I do not have jurisdiction to entertain some of the claims or applications herein that do not fall within the scope of those suitable to be commenced by originating notice

of motion as they are not properly before Court on the basis that they have been wrongly commenced. In the case of **Chikuta v. Chipata Rural Council**[3], the Supreme Court held that the court has no jurisdiction to make declarations where the wrong mode of commencement is used. Similarly in the case of **New Plast Industries Limited v. The Commissioner of Lands and the Attorney General**[4], it was held that the mode of commencement of an action is generally provided by the relevant statute and not the relief being sought.

Further in the case of **Examinations Council of Zamia Pension Trust Scheme Registered Trustees and Another v. Tecla Investments Limited**, Supra, the Supreme Court stated that:

> ***"It is trite that Originating Summons may be used to commence an action where issues in dispute between parties revolve around simple questions of pure law where it is unlikely that substantial dispute of facts may arise."***

I will therefore only deal with claims in paragraphs 1, 2 and 3 of the amended originating notice of motion. In the amended originating notice of motion, the Applicant sought the Court's interpretation on the validity of the lease agreement entered into by the parties herein. In the written submissions from both Counsel, it has been submitted that the lease agreement was never

registered. I note that Counsel for the Applicant submitted in reply that it is too late in the day for the Respondent to raise issues in relation to non-registration of the lease when they were not raised in their pleadings. I however hold the view that since the Applicant itself urged the Court to interpret the validity of the lease agreement, it becomes prudent to take the non-registration into account in order to determine this issue.

Section 4(1) of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia provides as follows:

> ***"Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year, or to create any charge upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the grantor remains in apparent possession, unless already registered pursuant to the provisions of "The North-Eastern Rhodesia Lands and Deeds Registration Regulations, 1905" or "The North-Western Rhodesia Lands and Deeds Registry Proclamation, 1910", must be registered within the times hereinafter specified in the Registry or in a District Registry if eligible for registration in such District Registry:..."***

It is not in dispute that on 11th December, 2011, the parties herein executed a lease agreement governing their landlord/tenant relationship wherein the Respondent leased out to the Applicant Property No. 207 Harry Nkumbula Road, Siavonga, (the demised

premises) for a term of 10 years' renewable. Counsel for the Respondent submitted that the lease has never been registered. Counsel for the Applicant did not dispute this when he contended, in the written submissions, that despite the fact that the lease was not registered, it does not take away the Applicant's right under the law as a tenant.

In light of the above, I find that the lease agreement herein was not registered. Section 6 of the Lands and Deeds Registry Act goes further to provide inter alia, that:

> ***"Any document required to be registered as aforesaid and not registered within the time specified in the last preceding section shall be null and void: ..."***

Furthermore, in the case of **Examination Council of Zambia Pension Trust Scheme Registered Trustees and Another v Tecla Investments Limited Selected Judgment No. 39 of 2018**[5] the Supreme Court had occasion to determine if a lease agreement for a period of over one year, which was not registered as required by section 4 of the Lands and Deeds Registry Act was valid or null and void. The Supreme Court in that case held as follows:

> ***"It is agreed that the lease agreement was not registered as required by Section 4(1) of the Lands and Deeds Registry Act. There can be no dispute either that section 6 of the Act provides for the consequences for failure to register any document that is required to be registered***

under section 4. Such document shall be null and void. In Krige and Another v Christian Council of Zambia and Makanya Tobacco Company Limited v J&B Estates Limited we dealt with the same issues and we held that the effect of non-registration of a document that is required to be registered is that it is void for all purposes whatsoever. This is well settled law."

Pursuant to the authorities cited above, I am of the considered view and find that the subject lease agreement herein was null and void for want of registration. I am guided by the Supreme Court in the said case of **Examination Council of Zambia Pension Trust Scheme Registered Trustees and Another v Tecla Investments Limited** supra that I therefore ought not to grant any of the remedies sought by the parties which were anchored on the validity of the said lease as it could not be enforced or relied upon.

However, although the lease was ineffective, a tenancy may arise independently of the lease. In the case of **Makanya Tobacco Company Limited v J&B Estates Limited Selected Judgment No. 19 of 2015**[6], the Supreme Court quoted with approval a passage from Megarry's Manual of the Law of Real Property at pages 365 to 366 as follows:

"...A lease which did not satisfy the above requirements was void at law and passed no legal estate. However, although at law the lease was ineffective to create any tenancy, a tenancy might arise independently of the lease; for if the tenant took possession with the landlord's consent, a tenancy at will arose, and as soon

as rent was paid and accepted, the tenancy at will was converted into a yearly or other periodic tenancy, depending on the way in which the rent was paid. Thus if in 1870 a lease for 99 years was granted orally or merely in writing, the largest estate which the tenant could claim in a court of law was equally a yearly tenancy; and his claim to this depended not on the lease but upon his possession and the payment and acceptance of rent."

The Supreme Court in the **Makanya** case supra went on to hold as follows:

"Since the lease agreement entered into between the parties on 3rd September, 2009 is null and void for want of registration, none of the covenants under the lease can be enforced. However, the matter does not end here. It is common ground that the appellant took possession of the premises and paid an annual rent in advance, amounting to US$66,000 at US$5,500 per month for the period 2nd September, 2009 to 3rd September, 2010. The rent was accepted by the respondent. Therefore, a yearly periodic tenancy was created between the parties."

In casu, it is not in dispute that the Applicant took possession of the demised premises sometime after the parties entered into the purported lease agreement dated 11th December, 2011, at a rent of US$ 3,000 or K15,000 Kwacha equivalent at K5000 per dollar payable quarterly in advance. It is clear from the record that the Applicant did pay rent until it started defaulting as acknowledged by both parties. I therefore find that despite the lease being unenforceable, there was a periodic tenancy created between the parties herein because the record shows that the Applicant took

possession of the demised premises with the consent of the Respondent and paid rent quarterly which rent was accepted by the Respondent until the Applicant started defaulting.

Section 4(1) of the **Landlord and Tenant (Business Premises) Act (the Act) Cap 193** provides:

"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 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."

The provisions cited above make it mandatory for a tenancy to which this Act applies to be terminated in accordance with the Act.

Section 2 of the Act further defines tenancy as:

> ***""tenancy" means a tenancy of business premises (whether written or verbal) for a term of years certain not exceeding twenty-one years, created by a lease or under-lease, by an agreement for or assignment of a lease or under-lease, by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgagor and mortgagee as such, and references to the granting of a tenancy and to demised property shall be construed accordingly;***

In the case of ***Musinga v Daka (1974) ZR 37***[7], the Court stated as follows:

"I hold that the words 'term of years certain' in the definition of tenancy can be read as 'a term certain not exceeding twenty-one years and therefore includes the term certain of eleven months of the plaintiff's tenancy."

I have already found that a periodic tenancy was created between the parties herein and in light of the **Musinga v Daka case** supra, it falls within the definition of tenancy in the Act. Thus, the Act applies in this case and I am therefore of the considered view that the Applicant herein remains a protected tenant under the Act.

The second relief sought in the originating notice of motion was for an order by Court for grant of a new lease. Since I have found that the Applicant is a protected tenant under the Act, it is imperative to make reference to the necessary provisions of the Act. The affidavit in opposition in paragraph 23 shows that the Respondent, by letter dated 3rd November, 2016, gave the Applicants notice to terminate tenancy of business premises based on continual breach of the tenancy agreement in that the Applicant had failed to pay rent in respect of the demised premises. The said notice was on prescribed form and drafted inter alia as follows:

"1. We, Musali Gardens Limited, of P.O Box 30815 LUSAKA, landlord of the above-mentioned premises, hereby give you notice terminating your tenancy on the 3rd day of May 2017.

2. You are required within two months after the giving of this notice to notify me in writing, whether or not you will be willing to give up possession of the premises on that date.

3. We would oppose an application to the court under the Act for the grant of a new tenancy on the ground that you have consistently abrogated Clause 1(a) and (b) of the tenancy agreement in that you have failed to pay rent in respect of the rented property as and when it becomes due.

4. This notice is given under the provisions of section 5 of the Landlord and Tenant (Business Premises) Act.

Section 5 of the Act provides for termination of tenancy by the landlord. 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.

(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."

In light of the authority above, the Respondent gave notice to the Applicant in prescribed form as required. The said notice also mentioned the date of notice, namely, 3rd May, 2017, which was a

period of six months before the date of termination as provided for in subsection 2. The notice also required the Applicant to notify the Respondent whether or not it would be willing to give up possession at the date of termination. It also stated that the Respondent would oppose an application for the grant of a new tenancy on grounds that the Applicant failed to pay rent. I am therefore of the considered view that the Respondent herein satisfied the requirements as provided in Section 5 of the Act.

The Applicant urged this Court for a grant of a new lease agreement. I will re-state that section 4(1) of the Act provides:

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 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...."

In casu, the landlord gave notice under section 5 of the Act as shown. Section 10 of the Act allows the Court to grant a new tenancy. It provides that:

"10. (1) Subject to the provisions of this Act, on an application under subsection (1) of section four for a new tenancy, the court shall make an order for the grant of a tenancy comprising such property, at such rent and on such other terms as are hereinafter provided.

(2) Where such an application is made in consequence of a notice given by the landlord under section five, it shall not be

entertained unless the tenant has duly notified the landlord that he will not be willing at the date of termination to give up possession of the property comprised in the tenancy."

Furthermore, Rule 5 of the Landlord and Tenant (Business Premises) Rules provides as follows:

"5. (1) The originating notice of motion by which an application under section four of the Act for a new tenancy is made must state

(a) the premises to which the application relates and the business carried on there;

(b) particulars of the applicant's current tenancy of the premises and of every notice or request given or made in respect of that tenancy under section five or six of the Act; and

(c) the applicant's proposals as to the terms of the new tenancy applied for including, in particular, terms as to the duration thereof and as to the rent payable thereunder."

As shown, the Respondent had already given notice. According to section 10(2), this Court can only entertain the application for a new tenancy made in consequence of a notice given by the landlord, as is the case in casu, when the tenant has duly notified the landlord that it will not be willing to give up possession of the demised premises at the date of termination. A perusal of the Applicant's response to the Respondent's letter and notice terminating the tenancy dated 8th November, 2016, did not explicitly state that it would not be willing to give up possession of the demised premises at the date of termination although the said

letter raised concerns over the said termination implying the same. The said letter stated inter alia as follows:

> ***"Our prayer is for continuity with respect to rental discharge considering that the Bay has been stabilized in its outlook except for the rooms that we intended to start upgrading to acceptable standards."***

I am of the considered view that the letter above did not amount to the Applicant duly notifying the Respondent that it would not be willing to give up possession at the date of termination. I am further of the considered view that the Applicant should have explicitly stated that it would not be giving up possession of the property for it to amount to due notification as required by the Act.

In addition to this, the said application did not comply with Rule 5 as shown above as it did not state the particulars as required therein. I am therefore of the considered view that the application is defective. It is on this basis that this claim fails. Consequently, the claim under paragraph 3 of the originating notice of motion, also fails, namely; an order by Court to determine the monthly rentals of the demised premises. I further note that in relation to the claim in paragraph 3, Counsel for the Applicant relied on Section 7 of the Act. I am of the considered view that Section 7 is not applicable because the landlord, according to that section, is

the one required to make the application to Court for the Court to determine the rent and it has not done so in this case.

It is for the above reasons, that the claims in paragraphs 1, 2 and 3 of the originating notice of motion fail. As stated earlier, I do not have jurisdiction to entertain the other claims as they were improperly commenced. The application thus fails in it's entirety.

I award costs to the Respondent to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka the 8th **day of** June**, 2022**

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ELITA P. MWIKISA
HIGH COURT JUDGE