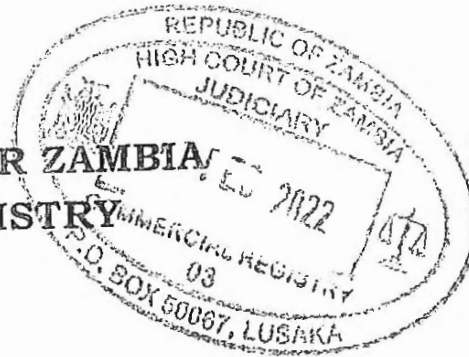


Chambers

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

(Commercial Division)



2020/HPC/0208

**IN THE MATTER OF: SECTION 4 (e), 13(1)(a) AND 14 OF THE RENT ACT,
CAP 206 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: RULE 3 OF THE RENT RULES, CAP 206 OF THE
LAWS OF ZAMBIA**

**IN THE MATTER OF: AN APPLICATION FOR AN ORDER FOR RECOVERY
OF RENTAL ARREARS AND POSSESSION OF THE
PREMISES KNOWN AS FLAT K02, NYUMBA YANGA
HIGH RISE FLATS LUSAKA**

BETWEEN

NATIONAL PENSION SCHEME AUTHORITY

APPLICANT

AND

KEEGAN NAKABOMBO LWIINDI

RESPONDENT

Before Lady Justice B.G. Shonga this 16th day of December, 2022

For the Plaintiff: Ms. S. N. Aongola (In- house)

For the Defendant: Mr. K. Mambwe, Messer. Ferd Jere & Co.

JUDGMENT

Cases Referred to:

- 1. *Printing and Numerical Registering Company v Simpson* [1875] L.R.
19 E.Q.462.**

2. *Colgate Palmolive (z) Inc v Able Shemu and 110 others Appeal No.181 of 2005.*

Legislation and Other Material Referred To:

1. *The Rent Act, Chapter 206 of the Laws of Zambia: s. 4 (e) and 13 (1) (a).*
2. *Cheshire, Fifoot & Furmston's Law of Contract, 5th Edition, (New York, Oxford University Press, 2007) at p.709.*
3. *Chitty on Contracts, volume 1, General Principles, 31st edition (London, Sweet and Maxwell, 2012) para 12-002 at p. 907.*
4. *Butterworths Common Law Series, The Law of Contract, 4th Edition (London, LexisNexis, 2010) at para 7.1 at p. 1589.*

1.0 BACKGROUND

The applicant commenced these proceedings by way of Originating Notice of Motion, filed together with a supporting affidavit on 20th March, 2020.

The applicant claims the following reliefs: (i) payment of the sum of K52,000 in rental arrears allegedly owed to it by the respondent as of 30th September, 2019; or all rent found to be due as of the date of Judgement; (ii) payment of the charge fees amounting to ZWM 24,000 for the period between 1st October,

2019 and March, 2020, allegedly accrued by the respondent due to his failure to vacate Flat K02 Nyumba Yanga High Rise Flats, Lusaka (the “demised premises”); iii) immediate vacant possession of the demised premises; (iv) interest on the amounts found due; (v) costs for these proceedings; and (vi) any other relief the Court may deem fit.

On 10th June, 2020, the respondent filed an affidavit in opposition and skeleton arguments.

2.0 SUPPORTING AFFIDAVIT

The affidavit in support is deposed by Butete Kaliye, the applicant’s Head of Real Estates in the Investments Department.

According to the affidavit, the respondent was, at all material times, a tenant of the applicant, who rented the demised premises. The respondent, it is averred, has been entering into annual lease agreements with the applicant for the possession and occupancy of the demised premises from June 2017, at an agreed rent of ZMW4, 000.00 per month.

The affidavit states that by letter dated 30th January, 2019, the respondent was given a conditional offer, being the "Initial Offer", to purchase the demised premises at a purchase price of K730,000.00 on specific terms and conditions; that the purchase price and outstanding rental arrears were to be fully paid within three (3) months from the date of offer; and that the respondent accepted the offer on 6th February, 2019. A copy of the offer and acceptance letter is before Court, exhibited through the affidavit, marked "**BK1**".

According to the deponent, on 19th March, 2019, the applicant wrote to the respondent to give him a second conditional offer, the "Final Offer" which was to supersede the Initial Offer, albeit the purchase price remained the same. It is avowed, however, that the respondent did not endorse his acceptance of the Final Offer. A copy of the Final Offer is before Court, exhibit marked "**BK2**" to the affidavit.

The affidavit goes on to reveal that on 10th October, 2019, the respondent made payment, in the sum of K84, 000. 00, towards

the purchase price. A copy of the respondent's Payment Summary was presented for my consideration, being exhibit marked "**BK4**" to the affidavit.

The deponent further attests that the Final Offer lapsed, and with the lapsing of that Offer, the tenancy agreement was terminated and the respondent was to settle his rental arrears and vacate the demised premises. In addition, the deponent avows that despite demand having been made upon the respondent, the respondent has not only failed to settle his rental arrears but has also refused to vacate the demised premises.

3.0. AFFIDAVIT IN OPPOSITION

The affidavit in opposition is deposed by the respondent. In it, he attests that he executed an annual tenancy agreement with the applicant in January, 2018. He accepts that the tenancy was in respect of the demised premises and that he was paying ZMW4000.00 monthly rentals.

The respondent proceeds to acknowledge that in January, 2019, the applicant gave him an offer to purchase the demised premises on the express terms that the purchase price of ZMW730,000.00 was to be liquidated in three months.

According to the respondent, subsequent to receiving the applicant's offer, he and a group of affected colleagues established a committee which engaged the applicant to reconsider the purchase price and the terms of agreement relating to payment period. The respondent drew my attention to exhibit "**KNL1**" to the affidavit in opposition. That letter, dated 25th February, 2019, is addressed to the Secretary to the Cabinet from the Chairperson of NAPSA High Rise Flats residents. In it, the residents appeal to the Secretary to the Cabinet to intervene as the residents were unable to raise the purchase price of K730, 000.00 within three (3) months. The letter indicates that efforts to secure audience with the applicant had failed.

As for payments made, the respondent admits that he made a payment of ZWM 84,000.00 sometime in October, 2019,

The deponent explains that following the respondent's failure to meet the conditions of offer, the applicant exercised its right to terminate the lease, call in payment of rent accrued by the respondent and commence applying charge fees in accordance with the Final Offer. That as of June 2020, the respondent was indebted to the applicant to the tune of ZMW88,000.00 in respect of rental arrears and accrued charges.

4.0 DETERMINATION

I have considered the affidavit evidence, submissions and legal arguments before Court. Firstly, I accept that this Court has the power, under *section 4 (e) as read with section 13 (1) (a) of the Rent Act, Chapter 206 of the Laws of Zambia* to make an order for recovery of possession of premises, whether in the occupation of a tenant or any other person and costs; and to order the recovery of arrears of standard rent where some rent lawfully due from the tenant has not been paid.

In this case, it is not in dispute that by letter dated 30th January, 2019, while the respondent was the applicant's tenant

occupying the demised premises, the applicant made an offer to the respondent to purchase the said premises at a price of K730, 000.00. It is also agreed that the respondent accepted the offer on 6th February, 2020.

I have studied the terms of the offer which contained, amongst other things, the following salient condition precedents:

- (i) That sitting tenants with outstanding rental arrears were given conditional offers that would become absolute only upon liquidation of all outstanding rental arrears. The respondent's arrears were stated to have stood at K16,000 as of 31st December, 2018.
- (ii) The full purchase price was to be paid within three (3) months of the date of the letter of 30th January, 2019.
- (iii) The offer would automatically lapse if the respondent failed to pay the full purchase price within the three months period.

occupying the demised premises, the applicant made an offer to the respondent to purchase the said premises at a price of K730, 000.00. It is also agreed that the respondent accepted the offer on 6th February, 2020.

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- (i) That sitting tenants with outstanding rental arrears were given conditional offers that would become absolute only upon liquidation of all outstanding rental arrears. The respondent's arrears were stated to have stood at K16,000 as of 31st December, 2018.
- (ii) The full purchase price was to be paid within three (3) months of the date of the letter of 30th January, 2019.
- (iii) The offer would automatically lapse if the respondent failed to pay the full purchase price within the three months period.

Further, by clause 3 of the offer, the letter also served as three months' notice to vacate effective the date of expiry of the offer to purchase if the offer expired due to failure to pay.

Additionally, clause 4 (ii) provided that upon failure of making full payment of the purchase price, the lease would terminate upon expiry of the offer period and rentals would remain payable until the vacation.

As regards withdrawal of acceptance to purchase the demised premises, clause 6 reads, in part, as follows:

"Should you wish to withdraw from the purchase of the Flat...you shall notify the authority in writing.

Having cogitated on the undisputed facts, I find that the Initial Offer was to expire, upon failure of the respondent to comply with the conditions, three months from 30th January, 2019, being the date of the offer. That is, on 30th April, 2019 (the "Expiry Date").

Notwithstanding the above, it is clear from the affidavit evidence before Court that on 19th March, 2019, before the Expiry Date

of the Initial Offer, the applicant made another offer, the Final Offer, to the respondent. The Final Offer opened with the following sentence:

"Kindly note that this letter serves to supersede our earlier offer of 29th January, 2019 and is effective 1st April, 2019."

The Final offer contained the condition precedent that the offer would expire within 3 months of receipt of the said offer. However, there is no evidence before Court to enable me to ascertain when the offer was received. It also required the payment of K146,000.00 being a 20% down payment within 6 months from 1st April, 2019 to 31st September, 2019. Additionally, it incorporated a provision for the charge of loss of use of the demised premises for as long as the purchaser continues to occupy the premises after failure to vacate.

The applicant invites me to find that the respondent accepted the Final Offer, by conduct, when he paid K84,000.00 on 10th October, 2019, towards the purchase price. In my view, since the respondent had already accepted the Initial Offer on 6th February, 2019, a valid agreement had already been concluded.

I rest on the trite law that the essential requirements of a simple contract are:

- (i) consensus.
- (ii) capacity.
- (iii) consideration
- (iv) legality
- (v) formality
- (vi) Intention to create legal relations.

In this case the two parties, whose capacity to contract is not disputed, agreed that the respondent would purchase the demised premises within three months of the date of offer in exchange for payment of the purchase price of K730, 000.00 by the respondent. Absent a suggestion that the contract was for an illegal purpose or that it gave rise to a moral rather than a legal obligation, I am satisfied that the parties entered a valid agreement with the intention that the agreement shall have legal consequences and shall be legally enforceable.

Having concluded that a valid agreement was entered into by the respondent's acceptance of the Initial Offer, the agreement

could only be varied by the consent of both parties. The law on variations can be discerned from the instruction of the learned authors of *Cheshire, Fifoot & Furmston's Law of Contract, 5th Edition*, (New York, Oxford University Press, 2007) at p.709 who expound as follows:

"what has been created by agreement may be extinguished by agreement. An agreement by the parties to an existing contract to extinguish the rights and obligations that have been created is itself a binding contract, provided that it is either made under seal or supported by consideration."

I have analysed the affidavit evidence before me and I observe that there is no evidence before Court to support a conclusion that respondent accepted the Final Offer or that he agreed to a variation of the Initial Offer.

Even if I were to consider the payment made by the respondent, that payment fell shy of the 20% minimum deposit required to be paid and it was paid out of time in October, 2019, after the September, 2019 deadline. Therefore, the payment was made outside the terms of the Final Offer. That being the case, I do not agree that the respondent accepted the Final Offer by conduct.

As regards the Initial Offer, it is clear that the respondent expressly accepted it when he endorsed his acceptance on the acceptance section of the offer letter on 6th February, 2019. Moreover, I note that neither party has presented any written withdrawal of the respondent's acceptance as required by clause 6 of the accepted offer. Considering that the respondent expressly accepted the Initial Offer, and bearing in mind the absence of any evidence of withdrawal, I am of the settled mind that the parties entered into a valid and binding agreement which was never varied or in any other way superseded.

Having concluded that the agreement between the parties comprised the Initial Offer as expressly accepted by the respondent, I heed the erudition of the writers of *Chitty on Contracts, volume 1, General Principles, 31st edition (London, Sweet and Maxwell, 2012) para 12-002 at p. 907*. They guide that it is well established that the party signing an agreement that has been reduced to writing will ordinarily be bound by the terms of the written agreement.

Moreover, the applicant has illuminated the case of *Printing and Numerical Registering Company v Simpson (1)*, cited at page 8 in the case of *Colgate Palmolive (Z) Inc v Shemu and Others (2)* to illustrate how the courts have applied the principle that where parties have signed a contract, they are bound by the terms of the said contract.

In view of the foregoing, I elect to determine this matter based on the terms and conditions of the agreement that arose from the Initial Offer. In so doing, I note that it is not disputed that as of the Expiry Date of the Initial Offer, 30th April, 2019, the respondent had failed to make full payment of the purchase price. That being the case, I accept that the offer lapsed; the lease terminated; and the respondent was put on 3 months' notice to vacate from 30th April, 2019, in accordance with the contract entered into between the parties.

As regards the termination of the lease, I draw attention to the works of *Butterworths Common Law Series, The Law of Contract, 4th Edition (London, LexisNexis, 2010) at para 7.1 at p. 1589* which edifies as follows:

“Termination’ refers to the discharge of the parties to a contract from the obligation to perform their contractual obligations. Termination may occur on the exercise of a right (common law or statutory) to terminate, automatically ... or by agreement”

In this case, the offer to purchase expired by the respondent’s failure to satisfy the conditions precedent. Additionally, termination of the lease agreement was automatically activated in accordance with the express terms of the agreement between the parties.

Consequently, I consider that the plaintiff has established its case on a preponderance of probability. As a result, Judgement is rendered in favour of the applicant as follows.

The respondent is directed to:


- i. pay the applicant the sum ZMW 52,000.00 owed to the applicant as of 30th September, 2019, plus all accrued outstanding rent from 30th October, 2019 to the date of this Judgment, less the sum of K84,000.00 paid by the respondent on 10th October, 2019.
- ii. The respondent shall vacate the demised premises within 14 days of service of this Judgment upon him

and he must surrender possession of the premises to the applicant.

- iii. Interest on the rental arrears at 6% per annum from date of writ to date of Judgment and thereafter at 8% per annum until full and final settlement.

With respect to the applicant's claim for payment ZWM 24,000 for the period between 1st October, 2019 and March, 2020, allegedly accrued by the respondent due to his failure to vacate, I note that the claim emanates from a term contained in the Final Offer. Since the applicable agreement between the parties germinates from the Initial Offer, which offer did not have a term which imposed a charge of fees for failure to vacate, that particular claim fails and is dismissed. Costs are awarded in favour of the applicant, to be taxed in default of agreement.

Dated this 16th day of December, 2022


B. G. SHONGA
JUDGE

