IN THE SUPREME COURT OF ZAMBIA — APPEAL NO. 27 OF 1993.

HOLDEN AT LUSAKA.

(Civil jurisdiction)

MIDLANDS UPHOSTEERS LIMITED — Appellant

Vs

N. R. PATEL AND OTHERS — Respondents

Coram: Sakala, Chirwa and Muzyamba, JJJ.S.
20th July and 8th September, 1993.

Mr. S. Sikota of Centre Chambers for the appellant.
Mr. E.J. Shamwana, S.C., of Shamwana and Company, for the respondents.

JUDGMENT

Sakala, J.S., delivered the judgment of the court.

This is an appeal against a judgment of the High Court dismissing the appellant's application for a new tenancy at Stand No. 469 "C", Cairo road, Lusaka, for a period of six years from 1st August 1991 with provisions for annual reviews of rent and an option to renew in 1997.

The brief facts leading to the appeal are that, the appellant had been and is still carrying on his business at Stand No. 469 "C" Cairo road, Lusaka, since 1957. They promptly paid rent for all the years. On 7th January, 1991, the appellant received a notice to vacate the premises. On 27th June, 1991 the appellant filed an application with the court for a new tenancy.

On these brief facts, the learned trial judge observed that the application fell within the provisions of the Landlord and Tenant (Business Premises) Act Cap 440. Thereafter the court set out the relevant provisions of Section 4 (1) (a) relating to continuation of tenancy and grant of new tenancy; Section 5 (1) (2) relating to termination of tenancy by the Landlord and the provisions of Section 10 (1) (2) (3) and (4)

relating to an order by court for grant of a new tenancy. The court found that Section 10 (3) of the Act limited its powers unless subsection (4) applied. The court noted that the application had been made five months and nearly three weeks after the notice to quit had been served on the appellant and that the prescribed period of not "more than four months" had not been complied with. The court also noted that no application for leave to apply out of time as required by Section 10 (4) of Cap 440 had been made.

The court concluded that the application failed for non compliance with the mandatory provisions of Section 10 (3) of Cap 440 and declined to consider the matter any further.

Two grounds of appeal were filed namely, that the learned trial judge erred in holding that Section 10 (3) of Cap 440 had limited the court's power unless subsection (4) of the same Act applied and that the learned trial judge erred by not considering the points in the appeal and appellant's advocate's submissions.

Arguing the appeal before us, Mr. Sikota on behalf of the appellant pointed out that the main point in issue was whether the appellant should have been allowed to argue their case in view of the provisions of Section 10 (3) of Cap 440. He submitted that the respondent having failed to raise an objection at the earliest opportunity until the submission stage, the court should have decided the application on merit. Counsel further submitted that the court having allowed the appellant to argue his case, it should be assumed by inference that leave had been granted, particularly that there is no specific procedure set out for making an application under Section 10 (4) of Cap 440. He pointed out that the delay in the present case was only for one month and twenty days and that on the face of the record, sufficient reasons for the delay had been shown. Mr. Sikota informed this court that the matter having been heard and argued, this court was competent to either decide it on merit or remit it to the High Court for that court to determine whether a new tenancy should be granted. Mr. Sikota lamented that

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the appellant should not be made to suffer due to a technical mistake brought about by his advocate.

Mr. Shamwana on behalf of the respondents pointed out that the issue in the appeal was short in that it was common cause that the application for the new tenancy had been made after the time limit specified in Section 10 had expired. He submitted that the terms of Section 10 (3) were not only specific but mandatory. He pointed out that the only exceptions are contained in Section 10 (4) which requires that sufficient reasons for the delay must be given before a court can grant leave. Mr. Shamwana wondered why the advocate for the appellant did not apply for leave to file application out of time when the matter was raised though belatedly. According to counsel the court in this matter, in the absence of an application for leave, had no alternative but to hold that Section 10 (3) had not been complied with. He submitted that for the appellant to succeed, he must show on record that he had given sufficient reasons for the delay. Mr. Shamwana further submitted that the provisions of Section 10 (4) of Cap 440 can only be exercised by an applicant who should show sufficient reasons and not at the court's own motion. He pointed out that there was no application and no sufficient reasons given in the instant case. In the circumstances, he submitted that the court was not competent to exercise its discretion. Mr. Shamwana also pointed out that the issue was not that the appellant was a good tenant or not and that putting the blame on the lawyer who acted for the appellant could not assist the appellant at this stage. He submitted further that this court is not competent to determine the appeal on merit as it was limited to deal with the matter on whether or not the learned trial judge was right to dismiss the application for non compliance with the provisions of Section 10 of Cap 440.

We have carefully examined the judgment of the trial court. It is common cause that the application for a new tenancy failed on a procedural ground of having been made out of time and there having been no application

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made for leave to apply for the grant of a new tenancy out of time. Section 10 (3) of the Landlord and Tenant (Business Premises) Act Cap 440 reads as follows:-

> "10 (3) subject to the provisions of subsection (4) no application under subsection (1) of Section (4) shall be entertained unless it is made not less than two months nor more than four months after giving the landlords notice under Section 5 or as the case may be after making of the tenants request for a new tenancy."

Section 4 (1) provides for the continuation of a tenancy and the grant of a new tenancy on application by a tenant. It was not in dispute in the present appeal that the appellant applied for a new tenancy after one month and twenty days after the specified period of "....not less than two months or more than four months after giving the landlord notice.....". The words of subsection (3) make it mandatory that the application be made within the prescribed period. The words are "..... no application ..... shall be entertained unless it is made not less than two months or more than four months .....". The exceptions to subsection (3) of Section 10 are found in subsection (4) of the same Section which reads:-

> "4 The court may for sufficient reason on such terms as it thinks fit, permit a tenant to apply to the court for a new tenancy under subsection (1) of Section 4, notwithstanding that the application is not made within the period specified in subsection (3)".

This subsection by the use of the word "may" gives a court a discretion. The exercise of this discretion however is dependent on "sufficient reason" being shown by an application why the application is being made out of time. The fact that one had been a good tenant cannot in our view be a sufficient reason for granting an applicant leave to apply out of time. We are unable to agree with Mr. Sikota that we must assume that leave had been granted

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because the matter had been heard and fully argued before the court. The situation would have been different had the appellant applied for leave and given reasons for being out of time even at the tail end of the case. This they did not do. There is no basis for us to assume reasons for the appellant having made the application out of time.

We agree with Mr. Shamwana that the provisions of Section 10 (3) (4) are not only specific and clear but also mandatory. The question of the appellant's advocates having made a technical mistake does not arise and is not a "sufficient reason."

This appeal is dismissed with costs.

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E.L. Sakala,
SUPREME COURT JUDGE.

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D.K. Chirwa,
SUPREME COURT JUDGE.

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M.M. Muzyamba,
SUPREME COURT JUDGE.