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SCZ Judgment No.
41/2014

IN THE SUPREME COURT OF ZAMBIA
NO.122/2010

APPEAL

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

ROADMIX LIMITED
APPELLANT

1ST

KEARNEY AND COMPANY LIMITED
APPELLANT

2ND

AND

FURNCRAFT ENTERPRISES LIMITED
RESPONDENT

Coram: Mwanamwambwa Ag. DCJ, Hamaundu and Wood, JJS.

On 2nd September, 2014 and 17th September, 2014.

For the Appellant: Mr. M. Mutemwa – Messrs Mutemwa Chambers.

For the Respondent: Mr. S.S. Zulu, SC – Messrs Zulu & Company.

JUDGMENT

WOOD, JS, delivered the Judgment of the Court.

CASES REFERRED TO:

1. *Development Bank of Zambia & KPMG Peat Marwick v Sunvest Ltd & Sun Pharmaceuticals Ltd (1995-97) Z.R. 187.*

2. *B.P Zambia PLC v Interland Motors Ltd (2001) Z.R 37.*

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3. *Apollo Refrigeration Services Company Limited v Farmers House Limited (1985) Z.R. 182.*

4. *Chikuta v Chipata Rural Council (1974) Z.R. 241.*

5. *Montgomery v Foy (1895) 2 Q.B.D 321.*

6. *New Plast Industries Limited v the Commissioner of Lands and the Attorney General (2001) Z.R.51.*

LEGISLATION REFERRED TO:

1. *The Landlord and Tenant (Business Premises) Act, Cap 193 of the Laws of Zambia.*

2. *The High Court Rules, Cap 27 of the Laws of Zambia.*

This is an appeal by the appellants as landlords, against a ruling of the High Court which dismissed the appellant's preliminary issue that the respondent's action had been wrongly commenced.

The action in the High Court was commenced by an Originating Notice of Motion and was for 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 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

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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.

At an ex-parte hearing at the instance of the respondent, the learned trial Judge granted the respondent an order staying the warrant of distress on 13th April, 2010. On 23rd April, 2010, the appellants filed a preliminary issue challenging the mode of commencement. The argument which Mr. Mutemwa advanced in respect of the preliminary issue in the court below was that the procedure that the respondent had used to commence the action was wrong and the action was, therefore, not properly before the High Court.

The learned trial Judge disagreed with Mr. Mutemwa and took the view that Rule 3 of the Landlord and Tenant (Business Premises) Rules, Chapter 193 of the Laws of Zambia, allows for

the commencement of an action under the Act by way of Originating Notice of Motion. The learned trial Judge also held the view that if a Writ of Summons was issued in respect of some of the claims in the Originating Notice of Motion, there would be a multiplicity of

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actions over the same subject matter. She held that this would be contrary to what was held in the case of *Development Bank of Zambia & KPMG Peat Marwick v Sunvest Ltd & Sun Pharmaceuticals Limited*¹ which deprecates commencing a multiplicity of actions over the same subject matter and the case of *B.P Zambia PLC v Interland Motors Ltd*² which cautions against conflicting decisions over the same subject matter.

On appeal, Mr. Mutemwa raised two brief grounds of appeal which were on point. The first ground of appeal was that the learned trial Judge erred in law and fact when she held that the matter at hand was one that could be commenced by Originating Notice of Motion. The second ground of appeal was that the learned trial Judge misdirected herself at law when she held that

the facts in the case of *Apollo Refrigeration Service Company Limited v Farmers House Limited*³ could be distinguished from the case at hand.

Mr. Mutemwa advanced the arguments he had relied on in the court below. His submission was that in the case of *Apollo*

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*Refrigeration Services Company Limited v Farmers House Limited*³, we held that an Originating Notice of Motion was not the proper process for a landlord's claim for possession of a 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 of the Act. He submitted that the position with regard to commencement of an action under the Landlord and Tenant (Business Premises) Rules, as illustrated in the *Apollo Refrigeration Services* case, is that only those applications specified in the Landlord and Tenant (Business Premises) Act should be commenced by Originating Notice of Motion. Those not specifically provided for should be commenced by Writ of

Summons like all other cases whose mode of commencement is not specifically provided for.

Mr. Mutemwa pointed out that five of the respondent's claims, in the Originating Notice of Motion, are not specifically stipulated under the Landlord and Tenant (Business Premises) Act, as applications that can be commenced by Originating Notice of

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Motion. He submitted that the only claim that qualified to be commenced under an Originating Notice of Motion was the claim relating to a claim for a new tenancy. The other claims for declarations and damages should have been commenced by Writ of Summons, as provided for in Order 6 of the High Court Rules, Cap 27 of the Laws of Zambia. He also cited the case of *Chikuta v Chipata Rural Council*,⁴ in which we held that the court has no jurisdiction to make declarations where the wrong mode of commencement is used.

In response, State Counsel Zulu submitted that the appellants purported to terminate the lease without the required

six months' notice provided for under Section 5 of the Landlord and Tenant (Business Premises) Act. He argued that under Rule 3 of the Landlord and Tenant (Business Premises) Rules, an application under the Act must be made by Originating Notice of Motion. He stated that the respondent had complied with the rule, since it was also claiming an order for the grant of a new tenancy, in addition to

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the other claims for declarations and damages as stated in the Originating Notice of Motion.

State Counsel Zulu did not agree with Mr. Mutemwa's submission that the respondent's claim should have been split in order to comply with Order 6 of the High Court Rules and the Landlord and Tenant (Business Premises) Act. This was so because authorities such as *Montgomery v Foy*⁵, *Development Bank of Zambia & KPMG Peat Marwick v Sunvest Limited & Sun Pharmaceuticals Limited*¹ and *B.P Zambia PLC v Interland Motors Ltd*² all state that a multiplicity of actions over the same subject

matter should be avoided. He submitted that the case law he had cited did not support the argument that the claims in the Originating Notice of Motion should be split into those under the Landlord and Tenant (Business Premises) Act and those under Order 6 of the High Court Rules. He argued that in order to comply with Order 6 of the High Court Rules and the law against multiplicity of actions, the learned trial Judge had the discretion to deem the proceedings to have been commenced by Writ of

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Summons and order pleadings so that the matter proceeds in the normal way. State Counsel Zulu argued that the facts in this case should be distinguished from those in the case of *Apollo Refrigeration Services Company Limited v Farmers House Limited*³.

We are grateful to counsel for the parties for their heads of argument and authorities which we have taken into consideration. A perusal of the Originating Notice of Motion shows that there are two orders, three declarations and a claim for damages being sought by the respondent.

Order 8/1-5/2 Rules of the Supreme Court, 1997 Edition gives some guidance on what an Originating Motion is. It states as follows:

“Proceedings by originating motion are, in the main, applications and appeals to the High Court under various statutes. Where, in a statute, provision is made for such an application either specifically prescribing the use of an originating motion or without specifying procedure, an originating motion is the appropriate means of approaching the court.”

It is apparent from the respondent’s heads of argument that the respondent has conceded that the mode of commencement was

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not entirely correct. State Counsel Zulu acknowledged that only the claim for a new tenancy comes under the ambit of Rule 3 of the Landlord and Tenant (Business Premises) Rules. We are in agreement with the submission from State Counsel Zulu that the law frowns upon a litigant commencing a multiplicity of actions relating to the same subject matter between the same parties. However, he has not cited any authority which states that where there is a combination of claims with different modes of

commencement stipulated by statute, then a party can choose a preferred mode of commencement.

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

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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.

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 request for a new tenancy is specifically provided for under Sections 4 and 6 of the Landlord and Tenant (Business Premises) Act as well as under Rule 5 of the Landlord and Tenant (Business Premises) Rules. 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.

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We have also perused the case of *Apollo Refrigeration Services Company Limited v Farmers House Limited*³ and the ruling made by the learned trial Judge in respect of this case. In the Apollo Refrigeration Services case, a landlord of business premises commenced an action to recover possession of the business premises by Originating Notice of Motion, thinking that

every action between a landlord and tenant of a business premises had to be commenced in that fashion by virtue of the Landlord and Tenant (Business Premises) Act and the rules thereunder. The landlord also relied on a notice to quit served by the previous landlord.

While it may be argued that the facts of this case are not on all fours with the Apollo Refrigeration Services case, both cases involved a claim in respect of a business premises under the Landlord and Tenant (Business Premises) Act and both were wrongly commenced by Originating Notice of Motion. The legal principles enunciated in the case of Apollo Refrigeration Services apply to this appeal as both cases dealt with matters to be

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commenced under the Landlord and Tenant (Business Premises) Act. We are, therefore, of the view that the learned trial Judge misdirected herself at law when she held that the case of Apollo Refrigeration Services should be distinguished from the current matter.

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

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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.

We, therefore, agree with Mr. Mutemwa that the learned trial Judge erred in law and fact when she held that this matter could be commenced by Originating Notice of Motion. We accordingly affirm our decision in the case of *New Plast Industries Limited v The Commissioner of Lands and The Attorney General*⁶ that the mode of commencement of an action is generally provided by the relevant statute and not the relief being sought.

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. The appeal is allowed and the ruling of the High Court is set aside with costs to the appellants, to be agreed or taxed in default of agreement.

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M.S. MWANAMWAMBWA
ACTING DEPUTY CHIEF JUSTICE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

.....
A.M.WOOD
SUPREME COURT JUDGE