

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

(Commercial Jurisdiction)

2016/HPC/0355



**IN THE MATTER OF: THE LANDLORD AND TENANT (BUSINESS PREMISES)
ACT CHAPTER 193 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: SECTION 4, 5(1) AND (2) AND 23 OF THE ACT

**IN THE MATTER OF: THE PREMISES KNOWN AS SHOPS NO 19 LEVY
BUSINESS PARK**

BETWEEN:

FRESHVIEW CINEMAS

APPLICANT

AND

NATIONAL PENSION SCHEME AUTHORITY

RESPONDENT

Before Lady Justice B.G Lungu on 22nd August, 2016 in chambers at Lusaka.

For the Applicant:

*Mrs. C Hampugani, Mr. M Sitali
Messrs Milner & Paul Legal Practitioners.*

For the Respondent:

Mr . K. Musaila - Messrs Chonta Musaila & Pindani Advocates

J U D G M E N T

CASES REFERRED TO:

- 1. American Cyanamid Company V Ethicon Limited [1975] A.C. 396**
- 2. Shell And Bp Zambia Limited V Conidaris And Others (1975) Z.R. 174**
- 3. Turnkey Properties V Lusaka West Development Company Limited (1984) Z.R.86**

4. *Ndove v National Educational Company Limited (1980) Z.R. 184*
5. *The Rating Valuation Consortium And D.W. Zyambo & Associates (Suing As A Firm) Vs The Lusaka City Council And Zambia National Tender Board (2004) Z.R. 109 (S.C.), (SCZ Judgment No. 13 2004)*

LEGISLATION AND OTHER MATERIALS REFERRED TO:

1. *High Court Act, CAP 27 of the Laws of Zambia, CAP 27 of the Laws of Zambia*
2. *Commercial Litigation; Pre-Emptive Remedies, (London, Sweet And Maxwell, 2005), At Page 2-3, In Paragraph A 1005*

This is an interlocutory application on the part of the Applicant for an order of interim injunction restraining the Respondent whatever by itself, it's servants or agents or whosoever described from evicting the Applicant from the business premises otherwise known as Shop No. F19 Levy Business Park, Lusaka until determination of the main matter.

Briefly, the Applicant moved the Court on 15 July 2016, by Originating Notice of Motion, for the following reliefs:

- i. An order that the Applicant is entitled to have quiet enjoyment of the premises otherwise known as Shops No. F19 Levy Business Park, Church Road, Lusaka (the "Premises");
- ii. An Order granting the Applicant a new tenancy of the Premises;
- iii. An order of interim injunction restraining the Respondent whatever by itself, it's servants or agents or whosoever described from evicting the Applicant from the business premises otherwise known as Shop No. F19 Levy Business Park, Lusaka until determination of the main matter;
- iv. Any other reliefs the Court may deem fit.

It is relief number (iii) of the main claim that the Applicant besieges the court to consider granting by way of interim remedy before determination of the main matter. The application is supported by an Affidavit sworn by Stephen Nyirenda, the Chief Executive Officer of the Applicant Company.

The salient facts as deposed in the Affidavit in Support are that: (i) on or about 19th June 2012 the Applicant entered into a Lease Agreement with the Respondent for the possession and occupancy of the Property for the running of a cinema; (ii) the Lease was for a period of 9 years 11 months and 26 days with a commencement date of 6th August 2011 and lease expiry date of 31st July 2021, but that the Lease was not a registered lease; (iii) there was an Agreement, which preceded the lease agreement, between the Applicant and the Respondent that the Applicant would only start paying rent after the Respondent paid for all monies in respect of subcontracted works during the construction of the cinema; (iv) before the Respondent paid for all the subcontracted works, the Respondent resumed billing the Applicant for rentals and other related costs, which costs had gone up to an unverified amount of K18, 623,037.65; (v) the Respondent issued a demand to the Applicant for the Applicant to pay rentals, which demand the Applicant did not meet on the communicated ground that the Applicant was of the view that the Applicant was not liable to pay for all the subcontracted works in accordance with the earlier agreement between the Parties; (vi) on 15th January, 2016 the Respondent commenced an action by way of Originating Notice of Motion under Cause No. 2016/HPC/0014 claiming payment of the sum of ZMW 18, 623, 037.65 as rentals due and other charges in respect of the Premises, which proceedings are pending; (vii) by Notice to Terminate dated 18th March, 2016 the Respondents issued the Applicant with a Notice to terminate the tenancy between the Applicant and the Respondent with respect to the Premises. The

Notice was said to be given under the provisions of section 5 of the Landlord and Tenant (Business Premises) Act, CAP 193 of the Laws of Zambia.

The application for injunction is opposed by the Respondent. In opposing the application, the Respondent filed an Affidavit sworn by Dorothy Soko, the Director of Investments in the Respondent institution, and Skeleton Arguments dated 15th August 2016.

The deponent of the Affidavit in Opposition did not deny paragraphs 6 and 7 of the Affidavit in Support, which attested to the existence of an unregistered Lease Agreement between the Parties. She expressly confirmed that the Respondent commenced a court action against the Applicant under cause no. 2016/HPC/0014 with respect to a dispute relating to obligations under the tenancy agreement between the Parties. The deponent further affirmed that the Respondent issued a Notice to terminate the tenancy to the Applicant. I therefore took the following as agreed facts:

- i. That the Parties entered into a Lease Agreement for 9 years, 11 months and 26 days, effective 6th August 2011, expiring on 31st July 2021, wherein the Applicant was a stated tenant and the Respondent a stated Landlord in respect of the Premises.
- ii. The Lease which was executed by the parties in 2012 was not registered with the Lands and Deeds Registry.
- iii. The Applicant has not been paying rent notwithstanding that the Lease Agreement contains a specific amount of basic monthly rental due under paragraph 1.14 and that there is currently an action bearing cause number 20016/HPC/0014 between the parties relating to the same premises which was commenced before the main action under which this application is made.

I find that the key inconsistency in facts between the Affidavit in Support and the Affidavit in Opposition is that the Respondent, through the deponent, categorically denied the existence of any agreement between the Parties that the Applicant was not liable to pay for any rentals until the Respondent paid for subcontracted works. In this regard, the deponent of the Affidavit in Opposition deposed that there has never been any agreement between the Parties that the Respondent would reimburse the Applicant for the cost of installing fixtures, fittings and equipment.

Notwithstanding the disputed facts, I find that the agreed facts are sufficient for purposes of considering this application. In this regard, the Applicant, in its Skeleton Arguments, highlights the principles on which an injunction can be granted and refers to the celebrated cases of ***American Cyanamid Company v Ethicon Limited***¹, ***Shell and Bp (Z) Ltd v Conidaris***² and ***Turnkey Properties vs Lusaka West Dev Co Ltd & Others***³.

The authorities referred to converge in requiring that the Court undertake the following incremental inquiry, which was aptly encapsulated by the learned authors of ***Commercial Litigation; Pre-emptive Remedies, (London, Sweet and Maxwell, 2005), at page 2-3, in paragraph A 1005***, as follows:

- a) Consider whether there a serious question to be tried. That is, the claim must not be frivolous, or vexatious and must have some prospect of succeeding;
- b) If there is a serious question to be tried, consider whether if the Plaintiff were to succeed at trial in establishing his right, the Plaintiff could be adequately compensated by an award of damages for the loss he would have sustained as a result of

the Defendant continuing to do what was sought to be enjoined between the time of the application, and the time of trial.

- c) If damages would be an adequate remedy, and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the claimant's claim appeared;
- d) If, however, damages would not provide an adequate remedy for the Plaintiff in the event of his succeeding at trial, consider whether, if the Defendant were to succeed at trial in establishing his right to do that which was sought to be restrained, the Defendant would be adequately compensated by an award of damages under the Plaintiff's undertaking in damages;
- e) If damages in the measure recoverable under that undertaking would be an adequate remedy, and the Plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction;
- f) Where there is doubt as to the adequacy of the respective remedies in damages available to either party or both, then the general balance of convenience arises. At this stage, the Court is engaged in weighing the respective risks that injustice may result from deciding one way rather than the other at a stage when the evidence is incomplete;
- g) Where factors relevant to the general balance of convenience are evenly balanced, generally take such measures as may be necessary to preserve the status quo; and

h) Resist resolving conflicts of evidence or undertaking a detailed consideration of the law.

This was the approach taken by my learned brother, Chirwa J, as he was then, in the case of ***Ndove vs. National Educational Company Limited***,⁴ where it was held that in an application for an interlocutory injunction, though the Court is not called upon to decide finally on the rights of the parties, it is necessary that the Court should be satisfied, on the material before it that the Plaintiff has a real prospect of succeeding at trial. I am persuaded by this decision and consequently pause to caution myself that it is not part of the Court's function, at this stage of the litigation, to delve into resolving conflicts of evidence on affidavits as to the facts on which the claims of either party may ultimately depend; or to decide difficult questions of law which call for detailed argument.

With this caution, I begin by considering whether there is a serious question to be tried, the response of which, if affirmative, would invariably form a basis for some prospect of success, with an attendant prospect of an entitlement to some relief. If negative, my enquiry ceases.

In considering whether there is a serious question to be tried, I found that it was inescapable to examine the core relief or fundamental cause of action as contained in the Originating Summons. That is, that the Applicant claims a right or entitlement to occupy Shops No. F19 Levy Business Park.

The Affidavit evidence before Court reveals that the right to occupancy, as claimed, is derived from a lease agreement between the Applicant and the Respondent, exhibit "SN1" of the Affidavit in Opposition. I have examined the Lease Agreement, and it does not

bear a Lands and Deeds Registry registration Stamp. The absence of the registration stamp supports the undisputed contention that the Lease Agreement was not registered as prescribed by the Lands and Deeds Registry Act.

Sections 4 (1) and 5 as read with section 6 of the Lands and Deeds Registry Act requires every document purporting to be a lease or agreement for lease or permit of occupation of land for a longer term than one year to be registered within prescribed times, failure to which it will be null and void.

As indicated above, non-compliance of the lease renders it statutorily null and void under section 6 of the Lands and Deeds Registry Act.

As I alluded to earlier, it has not been disputed that the Lease is not registered, neither has any party deposed that this status has changed. Accordingly, there is no evidence before me to show that the lease agreement was registered in accordance with the provisions of the Act and I accordingly find that the agreement for a lease is null and void.

This being the case, the question which begs to be addressed is whether it is likely that an action premised on a void agreement bears some prospect of success.

The Supreme Court had occasion to consider the standing of statutorily void contracts in the case of ***The Rating Valuation Consortium and D.W. Zyambo & Associates (Suing As A Firm) Vs The Lusaka City Council and Zambia National Tender Board***⁵, where it was held that "***Where in construing a statute, the contract is rendered illegal and unenforceable or void by a provision in a statute, the court***

will not enforce such a contract". In essence, the Court will not enforce a void contract.

In view of this binding Supreme Court decision, I am of the settled mind that it is unlikely that an action, such as this, founded on a void contract which the Court will not enforce, bears some prospect of success. Such an action, I find, is devoid of a triable issue. Consequently, this application fails the first test question of there being a serious question to be tried. This failure is fatal to the application.

For the reasons stated above, I consider that this is not an appropriate case for the Court to exercise its discretion to grant the equitable relief sought jurisdiction. The application is dismissed.

Leave to appeal is granted.



Judge B.G Lungu