

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(CIVIL JURISDICTION)

2014/HK/375

BETWEEN:

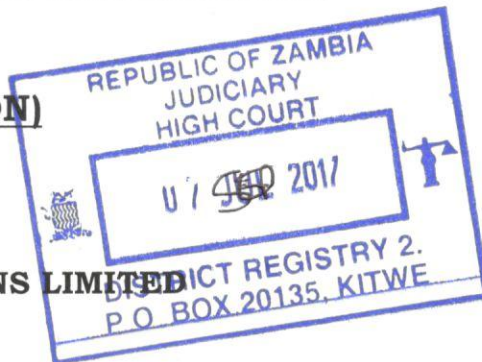
MULTIPLE IMPRESSIONS LIMITED

AND

WORKERS COMPENSATION FUND CONTROL BOARD

PLAINTIFF

DEFENDANT



Before; Madam Justice C. B. Maka-Phiri

For the Plaintiff: Mr. C Tafeni of Messrs Suba Tafeni & Associates

For the Defendant: Mr. P. Siapwili, In-House Legal Counsel

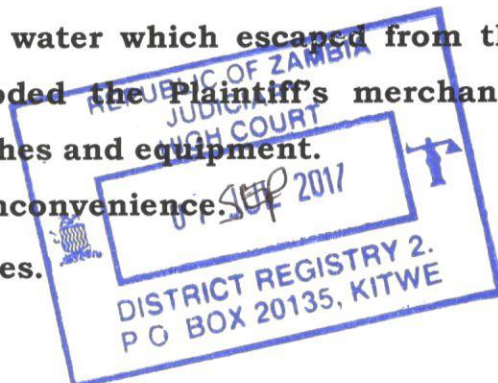
J U D G M E N T

Work referred to:

1. Clerk and Lindsell on Torts, 20th Edition, Sweet and Maxwell

The plaintiff commenced this action by way of writ of summons on 23rd June, 2014, and advanced the following claims:

- i) Damages for nuisance and/or negligence occasioned by the Defendant for water which escaped from the Defendant's water tank and flooded the Plaintiff's merchandise in the form of furniture, clothes and equipment.
- ii) Damages for inconvenience.
- iii) Special damages.



- iv) Any other relief.**
- v) Interest.**
- vi) Costs.**

By statement of claim, the plaintiff averred that it entered into a lease agreement with the defendant on 1st June, 2013 for business premises known as rooms MO1A and B28 Compensation House, Obote Avenue, Kitwe. That between the 16th and 19th May, 2014, a water tank and or pipes above the roof of the rented premises ruptured due to the defendants negligence and thereby caused flooding in the plaintiffs premises. The particulars of the negligence alleged are as follows:

- i) Failing to maintain the water tank and or pipes thereto**
- ii) Failing to keep the water tank and or pipes in good working order.**

The plaintiff averred that by reason thereof, it suffered damage, consequential loss and special damage.

The defendant admitted in its defence that it had entered into a tenancy agreement as averred by the plaintiff. The defendant further admitted that water was leaking and flowing from one of the pipes which upon being notified, the defendant attended to the pipe and leakage was stopped. The defendant averred that at the time of the said leakage, the plaintiff had in fact abandoned the rented premises for fear that its goods will be seized for non-payment of rent. The defendant denied any negligence on its part and averred that it carried out regular maintenance to the water tank and pipes

at the rented premises. The defendant denied that the plaintiff suffered any damage or loss and made the following counterclaim;

i) Payment of the sum of K166, 524.00 being rental arrears in respect of shop no. MO 1A and B, Kitwe.

ii) Interest

iii) Costs

iv) Any other relief that the court shall deem fit.

At the hearing of the matter, Agness Mwamba, the Managing Director in the plaintiff company was PW1. She testified that the Plaintiff operated a retail shop and was dealing in household goods, office furniture and clothing. That on 10th June, 2013 the plaintiff entered into a tenancy agreement with the defendant to rent the defendant's business premises at stand No.28 Obote Avenue, Compensation House, Kitwe. The lease agreement between the parties was shown at pages 1 - 8 in the Plaintiff's bundle of Documents. The monthly rental charge according to the said lease agreement was K4, 700 while the monthly service charges were K940.

PW1 testified that between 16th and 18th May, 2014, the rented premises were flooded with water and the plaintiff's goods got damaged. According to PW1, the floods were caused by the dislocation of the pipe on top of the shop thereby discharging water and sewer into the plaintiff's shop. PW1 explained that though this was not the first time a flooding was occurring at the rented

premises, this particular flooding was excessive. PW1 testified that the defendant being the owner of the flats above the shops/rented premises had the responsibility to maintain the pipes and other structures that needed to be repaired.

PW1 testified that the list and value of the items that got damaged was shown at pages 10 - 12 of the Plaintiff's bundle of documents whilst the pictures of damaged items were shown at pages 14 - 33 in the Plaintiff's bundle of documents. It was PW1's contention that the shop and or rented premises were unusable to date as no repairs have been made. The plaintiff has however not surrendered the shop to the Defendant. Further that the damaged goods could neither be sold nor given away because the damage was too grave.

PW1 denied assertions that the plaintiff abandoned the rented shop because of outstanding rental arrears. PW1's evidence was that the outstanding rentals was K18,660 only and that this was evidenced by the defendant's tax invoice shown at page 9 in the Plaintiff's bundle of documents. Consequently, PW1 denied the defendant's claim of rental arrears in the sum of K166, 524. PW1 explained that rentals were paid quarterly through the defendant's bank account after which a deposit slip would be taken to the defendant's Kitwe office. PW1 did not however produce any deposit slips alleging that they were all stolen. PW1's prayer was that the plaintiff should be compensated for the loss suffered due to the floods.

When cross examined, PW1 stated that the relationship between the parties has been difficult because of maintenance. PW1 insisted that the plaintiff had been paying rentals in line with the Tenancy Agreement. PW1 denied that the plaintiff owed the defendant rental arrears as claimed and that it was not true to assert that the plaintiff had never paid any rentals since it took occupation of the rented premises. PW1 conceded that the actual goods that were allegedly damaged due to the floods were not brought before court. PW1 further stated that because the business was not operational, the Plaintiff was losing K10, 000 per day.

The defendant called one witness. DW1, Brian Musonda, is an Accountant in the defendant company. DW1 confirmed that the relationship between the parties was that of tenant and landlord respectively. DW1 further confirmed that the tenancy agreement shown at pages 1-8 of the plaintiff's bundle of document was the lease agreement entered into between the parties in 2013. DW1 testified that the relationship between the parties has been problematic because of the plaintiff's failure to pay rent in accordance with the lease agreement. That the Plaintiff has not paid rentals from January 2014 to date despite the fact that invoices were sent as well as demand letters. DW1 referred to the statement of account shown in the Notice to produce which showed the amounts invoiced to the Plaintiff of which the Plaintiff has not paid. DW1 explained that the statement of account showed cumulative figures whereas the invoice was for a quarter. It was DW1's prayer

that the court should order the plaintiff to pay the outstanding rental arrears.

When cross examined, DW1 admitted that the plaintiff had complained of leakages in the shop that it was occupying. DW1 further stated that he went to the shop on several occasions and each time he found it closed as a result of which he concluded that the shop was abandoned. DW1 admitted that it was the landlord's obligation to make the premises tenantable. Further that at one time, the defendant was informed of the leakage and its maintenance team rushed to the premises. DW1 conceded that the statement of account was not backed by invoices. DW1 further explained that the tenancy agreement between the parties run for one financial year and the one before court was for the period 1st April 2013 to 31st March, 2014. DW1 further explained that the amount of K112, 521 on the statement of account was brought forward from the previous year. DW1 further explained that the invoices had no balances because it was for accounting purposes only and that whether the client paid rent or not, the landlord had to pay Value Added Tax (VAT) to Zambia Revenue Authority. DW1 conceded that he did not avail before Court the other invoices, demand notice and tenancy agreement.

The plaintiff's submissions were filed into court on 18th July, 2016. The gist of the submission was that the undisputed fact of the leakage and overflow of water at the plaintiff's rented premises

entails that a nuisance did occur and the plaintiff is entitled to damages. Further that the defendant was negligent as the leakage and flow of water could only be attributed to lack of care and maintenance.

The plaintiff cited the learned authors of **Clerk and Lindsell on Torts, 20th edition**, where the tort of nuisance is defined as:

“an act or omission which is an interference with, disturbance or annoyance to a person in the exercise or enjoyment her ownership or occupation of land or some easement, profit, or other right used or enjoyed in connection with land.”

The same authors define negligence as:

“The existence of a duty of care, breach of the duty of care and consequential damage”

It was the plaintiff's contention that according to the evidence the plaintiff's tenancy with the defendant was still subsisting except the floods and state of the shop has made it impossible for the plaintiff to do business. The plaintiff relied on the tax invoice shown on page 9 of the plaintiff's bundle of documents, to argue that the defendant had impliedly and by conduct extended the lease agreement with the plaintiff for another one year. It was the plaintiff's contention that the defendant would not have extended the lease agreement if the plaintiff was in arrears. It was the plaintiff's submission that the goods listed whose pictures are shown before court in the plaintiff's bundle of documents were damaged and it suffered loss.

The plaintiff disputed the defendant's counter claim and argued that the figures being claimed do not add up on account that the lease agreement which commenced on 1st April 2013 at K4, 700 per month cannot accrue rentals amounting to K166, 524 in one year. It was the plaintiff's prayer that the court should uphold the plaintiff's claim and dismiss the defendant's counterclaim with costs.

The defendant's submissions were filed into court on 30th September, 2016. It was the defendant's submission that whilst there was indeed a leakage of water from one of the pipes, the said leakage was worked on and stopped. This was after the defendant was notified of the leakage by the occupant of the adjoining shop to the plaintiff's rented shop. It was the defendant's submission that at the time when its artisans went to the rented premises to work on the leakage, the plaintiff had long abandoned the premises and had all its goods removed from the premises for fear that the plaintiff would seize them in distress for non-payment of rent. The defendant reiterated its counter claim against the plaintiff in the sum of K166, 524 being rental arrears as at 30th June 2014 and submitted that the plaintiff has failed to produce any deposit slips to support the alleged rental payments.

It was the defendant's submission that the plaintiff has failed to prove on the balance of probabilities that its equipment, furniture and clothes were damaged. Further that the court was not availed

the opportunity to see the damaged goods if at all they existed and that the copies of photos produced in court falls short of the test of the proof required. The defendant urged the court to dismiss the plaintiffs claim for damages allegedly occasioned to its goods, equipment and furniture. The defendant further submitted that the plaintiffs claim for loss of business at K10, 000 per day should fail because PW1 failed to produce the daily sales register to support the claim. The defendant urged the court to uphold the counterclaim with costs.

I have considered the evidence adduced in this matter and the written submissions filed into court by counsel representing both parties. From the evidence it is not in dispute that the plaintiff and defendant were tenant and landlord respectively. The lease agreement that established this relationship is shown at pages 1-8 of the plaintiff's bundle of documents. It should be noted that though the lease agreement produced before court is not signed by the defendant, DW1 confirmed that the said lease agreement was the one that established the tenant-landlord relationship between the parties. According to the said lease agreement, the effective date of the lease was the 1st of April, 2013, for a term of one year, though the plaintiff only signed the lease agreement on 1st June, 2013. PW1s evidence therefore that the parties entered into a lease agreement on 1st June, 2013 is contrary to what is stated in the lease agreement.

It is further not in dispute that the rented premises described as rooms MO1A and B 28, Compensation House, Obote Avenue , Kitwe are business premises. The rent payable was K4, 700 per month whilst monthly service charge of K940 was payable quarterly on the 1st of every quarter. The plaintiff's business at the rented premises was retail, dealing in furniture, office equipment and clothing.

It is further not in dispute that there was a leakage of water from one of the pipes in the building into the plaintiff's rented premises which occurred between the 16th and 19th May, 2014. PW1's unchallenged evidence was that there was a big pipe servicing the flats on top of the rented shop which dislocated thereby discharging water and sewer into the rented shop through the roof. DW1 admitted in cross examination that the defendant was notified of the leakage of water by the plaintiff's neighbor. There is no evidence to show that PW1 had reported this particular leakage to the defendant and as such I can safely conclude that the plaintiff did not notify the defendant of this particular leakage. Suffice to note that the defendant was aware of PW1's previous complaints of leakages at the rented premises.

According to DW1, the defendant's maintenance team rushed to the premises to work on leakage upon notification and the leakage was stopped. Though no one from the said maintenance team was called as a witness, the defendant's evidence that the leakage was worked on and stopped was not challenged by the plaintiff. I therefore find

as a fact that following the leakage of water at the plaintiff's rented premises, the defendant acted on the despair or defect upon being notified of the same by the plaintiff's neighbor.

The defendant's evidence was that when the maintenance team went to repair the defect, the plaintiff had long abandoned the shop. DW1 further testified that each time he took the invoice to the plaintiff's rented premises, he found it closed and hence his conclusion that the plaintiff had abandoned the premises. The plaintiff has disputed this evidence. There is however no evidence to show that the business or shop was operational at the time of the leakage. Further the fact the plaintiff did not report the leakage the moment it occurred suggests strongly that the plaintiff was not in occupation of the shop. Otherwise what would be the reason for not reporting such a serious incident which had an effect of disrupting business? It should be noted further that at the time of the leakage between 16th and 19th May, 2014, the lease agreement shown before court which was for a one year term had expired as at 31st March, 2014. This status goes to strengthen the defendant's position that at the time of the leakage the plaintiff had abandoned the shop. I therefore agree with the defendant's evidence that at the time of the leakage, the plaintiff had abandoned the shop and when the artisans went to repair the defect the plaintiff were not in occupation of the premises.

I am therefore unable to find as a fact that the items alleged to be damaged by the floods whose pictures are shown at pages 10-12 of the plaintiff's bundle of documents were in fact taken subsequent to the leakage the subject of this case. The said pictures could have been taken at any other time and place and there is no way of knowing. It was imperative therefore for the plaintiff to show the actual damaged property to the court and at the least to the defendant immediately when the incident was alleged to have occurred.

The issue for determination is whether or not on the facts of this case, the defendant can be found liable for nuisance and or negligence. Negligence as submitted by the plaintiff is the existence of a duty of care, breach of duty of care and consequential damage. The plaintiff must prove that the defendant owed it a duty of care in the circumstances; that the defendant breached that duty and the plaintiff suffered consequential damage. In a Landlord-tenant relationship, the parties' mutual duties and responsibilities arise from the tenancy agreement. The landlord thus owes a duty of care to the tenant arising from the tenancy agreement as well as at common law.

The tort of nuisance on the other hand may be described as unlawful interference with a person's use or enjoyment of land or some right over or in connection with land." The tort takes three forms, encroachment on a neighbor's land; direct physical injury to

the land or interference with the enjoyment of the land. Nuisance at common law allows one occupier to sue another if there was anything happening in the first property which affects the second. For instance water leaking from one flat into another may entitle the occupier of the second flat to sue for nuisance.

According to the lease agreement, it was the defendant's duty to keep the rented premises and the entire building in good and substantial repair and to carry out such repairs and works which it was obliged to carry out under the agreement. The defendant was thus under a duty of care to keep the building in good and substantial repair during the tenancy. It was the defendant's duty to maintain in good state of repair any pipes, drains and sewerage disposal works within the entire building. The rented premises were supposed to be in tenantable state at all times so as to enable the plaintiff conduct its business without any interference.

Did the defendant breach its duty of care to the plaintiff? Where a landlord is in breach of his repairing obligations and as a result of the defect the tenant suffers loss, then the Landlord could be held liable in negligence. The general rule however is that liability does not arise until the landlord has received notice of the disrepair. This makes sense especially where the disrepair occurs during the tenancy. Once the landlord is aware of the disrepair and fails to take appropriate precautions and or fails to do what a reasonable man would do, then the landlord would be in breach of duty.

In the case in casu, it is not in dispute that there was leaking of the water from the pipes above the rented premises. The defect of the pipes was not attributed to the plaintiff but the defendant who had the obligation to maintain the pipes. The plaintiff as already noted did not notify the defendant of this disrepair or leakage. The defendant was however notified of the leakage by the plaintiff's neighbor and immediately rushed to repair the defect. The defendant thus acted on its repairing obligations within reasonable time and cannot in my considered view be said to have breached its duty of care for it to be held liable in negligence. The claim for negligence cannot thus be sustained and it is hereby dismissed.

Did the leakage of water cause a nuisance? The leaking of water into the rented premises was a nuisance as it interfered with the plaintiff's use of rented premises. My finding of fact however is that the plaintiff was not in occupation of the rented premises at the material time and as such did not suffer any loss to be entitled to damages. The claim for damages for nuisance equally fails.

As for the plaintiff's claim for special damages and or loss of business at K10, 000 per day, I find no evidence to support this claim. The plaintiff failed to show any proof of any sales to justify the claim of loss of business. I thus agree with the defendant's submission that the claim should fail as the plaintiff failed to produce the daily sales register to support the claim. It is trite law

that special damages must be specifically proved before court by way of receipts or documentation failure to which a party will only be entitled to nominal damages depending on the circumstances of the case. In the case in casu, it is astounding that the plaintiff can chose to stay aloof for such a long period without mitigating the loss if any. It is trite that in a tenant-landlord relationship, a reasonable tenant will effect repairs to the defect were the landlord is not acting expediently and thereafter deduct the repair expenses from the rentals. The purpose for this approach is so that the business is not affected for long. What the plaintiff wants this court to believe that it folded its business because of the leakage is unbelievable and simply goes to show that the plaintiff was not doing any business in the rented premises at the time when the leakage occurred. The claim for loss of business of K10, 000 per day is dismissed.

I now come to the counter claim. I wish to note from the outset that the statement of account that the defendant has relied upon does not mathematically make sense. The defendant was supposed to produce proper record showing the rentals paid by the plaintiff and then the default if any. To simply start with a balance brought forward of K112, 521 as at 1st September, 2013 does not add up. Suffice to note that the tenancy agreement was effective 1st April, 2013, at monthly rentals of K4, 700 and service charges of K940. By 1st September, 2013, the plaintiff had been in occupation of the rented premises for five months. It is thus impossible that at such monthly rate, rentals could accumulate to K112, 521 as at 1st

September, 2013. Further as submitted by the plaintiff for a lease agreement which commenced on 1st April 2013 at K4, 700 per month, rentals cannot accrue to K166, 524 in one year. The defendant has lamentably failed to prove its counterclaim of K166, 524 and it is hereby dismissed.

Finally, I wish to comment on the plaintiff's submission that its tenancy agreement with the defendant is still subsisting and that the defendant had impliedly and by conduct extended the lease agreement. This submission is in my considered outside the scope of this case as the issue of whether or not the tenancy agreement is still subsisting was not pleaded. It is therefore futile for the plaintiff to raise it in submissions as it was not one of the issues for determination in this case. I have therefore not pronounced myself on the matter.

Having dismissed the plaintiff's claim and the defendant's counterclaim, I order that each party will bear its own costs.

Leave to appeal is hereby granted.

Delivered at Kitwe this 7th day of September, 2017

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C. B. Maka-Phiri (Mrs.)
High Court Judge