

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

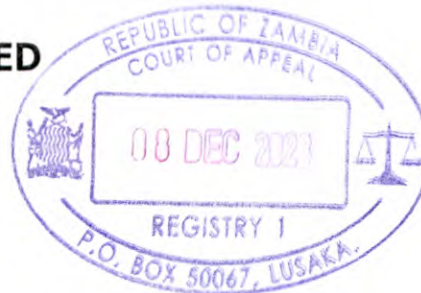
Appeal No. 186/2021

BETWEEN:

GOLFVIEW HOTEL LIMITED

AND

SPEEDPAY LIMITED



APPELLANT

RESPONDENT

CORAM: Chashi, Muzenga and Patel, JJA
On 19th September 2023 and 8th December 2023.

For the Appellant: Mr. S. Bwalya (Jnr) & Mr. K. Daka, Messrs Christopher Russel Cook & Co

For the Respondent: No appearance

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Appollo Refrigeration Services Company Limited v. Farmers' House Limited (1985) ZR 182**
- 2. Ulubembe Investments, AMB F. Kapoka & Navnit Patel v. Lethabo Primary School – CAZ Appeal No. 171 of 2019**

Legislation referred to:

- 1. The Rules of the Supreme Court (White Book) 1999 Edition.**
- 2. The Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia.**
- 3. The High Court Rules, Chapter 27 of the Laws of Zambia.**

1.0 INTRODUCTION

- 1.1 This is an appeal against a Ruling dated 30th March 2021 delivered by Lady Justice P. K. Yangailo, in which the appellant's cause was dismissed on account of wrong mode of commencement.

2.0 BACKGROUND

- 2.1 The background to this appeal is that the appellant (plaintiff in the court below) sued the respondent (defendant in the court below) by way of writ of summons claiming for rental arrears owing and payable in the sum of USD20,000.00 up to 11th June 2019 and notice pay in the sum of USD2,000.00 for one month's notice to vacate the property plus interest on the sums due, among other attendant reliefs.
- 2.2 The respondent entered conditional appearance but never made any application until close to 3 months later when the Deputy Registrar entered judgment in default of appearance and defence.

- 2.3 The respondent then filed an application to set aside the judgment in default before the Deputy Registrar, which application was declined. The respondent thus appealed to the Judge in Chambers, who allowed the appeal and set aside the judgment in default. The Judge further allowed the respondent to file their requisite application in respect of the conditional appearance, from 10th December 2020 the date of the said Ruling on appeal.
- 2.4 On 21st December 2020, the respondent filed an application to determine the cause on a point of law pursuant to **Order 14A of the Rules of the Supreme Court (White Book) 1999 Edition**, which application the Judge declined.

3.0 DECISION OF THE COURT BELOW

- 3.1 The court below then went on to consider the applications by the appellant to dismiss the respondent's application to determine the cause on a point of law and for entry of judgment in default of appearance and defence.
- 3.2 The Judge found the first application to be otiose as she had already dismissed it. The court below did not consider the second application on account that she was of the considered view that the matter/cause

was wrongly commenced by way of Writ of Summons when it should have been commenced by way of Originating Notice of Motion. Reliance of this verdict was placed on what the trial court called **Rule 3 of the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia (the Act)**.

3.3 The cause was thus dismissed on this score.

4.0 GROUNDS OF APPEAL

4.1 Unsettled by the dismissal of the cause, the appellant appealed to this Court fronting two grounds of appeal couched as follows:

- (i) **The honourable court below erred in law in dismissing the appellant's action on the basis that the mode of commencement of the action by the appellant was wrong at law.**
- (ii) **The honourable court below erred in law and fact in holding that the appellant's application for entry of judgment in default of appearance and defence failed on the basis that the mode of commencement of the action by the appellant was wrong at law.**

5.0 THE APPELLANT'S ARGUMENTS

5.1 The grounds were argued together and the gist of the argument was that the mode of commencement was correct as the **Landlord and Tenant (Business Premises) Act (the Act)** did not specifically

provide for the mode of commencement for the recovery of rental arrears and notice pay.

- 5.2 It was argued that since there is no specific mode of commencement, **Order 6 of the High Court Rules** kicked in. Reliance was placed on the cases of **Appollo Refrigeration Services Company Limited v. Farmers' House Limited**¹ and our decision in the case of **Ulubembe Investments, AMB F. Kapoka & Navnit Patel v. Lethabo Primary School**² among other cases.

6.0 THE HEARING

- 6.1 At the hearing of the appeal, learned counsel for the appellant placed reliance on the filed arguments. The respondent was not present, neither did they file any opposition.

7.0 DECISION OF THE COURT

- 7.1 We have carefully considered the record of appeal and the arguments in support of the appeal.
- 7.2 The learned court below dismissed the appellant's cause on account that it was wrongly commenced, by way of Writ of Summons instead of Originating Notice of Motion. It is trite that **Rule 3 of the Landlord and Tenant (Business Premises) Rules**, provides in mandatory

terms, the mode of commencement of matters under the **Act**, as being by way of Originating Notice of Motion. However, the learned court below should have gone further to examine the **Act** in order to determine whether the appellant's cause fell under the specified categories for which **Rule 3** applies. The matters to which **Rule 3** is subject are matters such as the determination of rent, applications for a new tenancy and other related matters.

- 7.3 The appellant commenced its cause seeking payment of rent arrears and notice pay. These claims are not covered under the **Act**. The practice therefore is that for those claims not covered by the **Act**, **Order 6 of the High Court Rules** kicks in, which requires that all matters must be commenced by way of Writ of Summons.
- 7.4 In the **Appollo Refrigeration Services Company Limited** case *supra*, the Apex Court held *inter alia* that:

"An originating notice of motion was not the proper process for a landlord's claim for possession of 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. A Landlord's action for possession was not so specified and should therefore be commenced by writ in accordance with Order 6 of the High Court Rules."

- 7.5 We recently reechoed the aforementioned position in the **Lethabo Primary School** case *supra*, that all matters must be commenced by way of Writ of Summons unless a Statute provides for a specific mode of commencement.
- 7.6 We agree with learned counsel for the appellant that the learned court below fell into grave error when it dismissed the cause. We hold the view that the matter was properly commenced and was properly before the court below. Had the learned court below properly directed herself, she would not have dismissed the cause. We find merit in the appeal and we allow it.

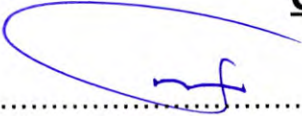
8.0 CONCLUSION

- 8.1 Having allowed the appeal, we set aside the Ruling of the court below dismissing the appeal.
- 8.2 We refer the matter back to the High Court for trial before another Judge.
- 8.3 Costs to abide the outcome of the matter in the court below.

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 J. Chashi

COURT OF APPEAL JUDGE

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 K. Muzenga

COURT OF APPEAL JUDGE

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 A. N. Patel, SC

COURT OF APPEAL JUDGE