

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2021/HP/307

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

IN THE MATTER OF: THE PROPERTY KNOWN AS HOUSE NO.
14 INGWE ROAD, WOODLANDS, LUSAKA

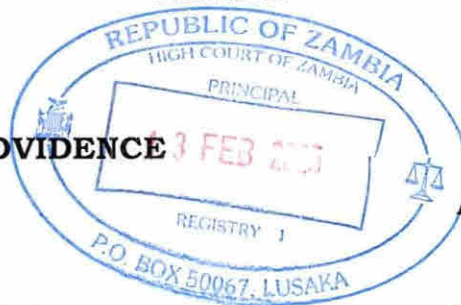
IN THE MATTER OF: AN APPLICATION UNDER SECTION 4, 5
AND 23 OF THE LANDLORD AND
TENANT (BUSINESS PREMISES) ACT
CHAPTER 193 OF THE LAWS OF
ZAMBIA

BETWEEN:

SISTERS OF DIVINE PROVIDENCE
TRUST LIMITED

AND

ETHEL LUNGA CHISAKUTA



APPLICANT

RESPONDENT

BEFORE THE HONOURABLE MRS. JUSTICE M.C. KOMBE

For the Applicant:

*Ms. A. Mwalula - Mesdames Ndemanga
Mwalulua and Associates.*

For the Respondent:

*Ms. M.M. Chisulo - Mesdames Chalwe and
Kabalata Legal Practitioners.*

J U D G M E N T

Cases referred to:

1. Boardroom Investments Limited (T/A Fairways Café) v. Lusaka Golf Club (Appeal No. 119/2019).
2. Mususu Kalenga Buildings Limited v. Richmans Money Lenders (1999) Z.R 27.
3. Zimco Properties Limited v. Dinalar Randee Enterprises (SCZ Judgment No. 1 of 1989).
4. May and Butcher Limited v. R (1934) 2 K.B 17.
5. Betty's Cafes Ltd. v. Phillips Furnishing Stores Ltd [1959] AC 20.
6. Carter v. Boehm (1776) 3 BURR 1909-1910.
7. Crown Cork Limited v. Pamela Jackson (SCZ Judgment No. 27 of 1988).
8. University of Zambia v. Timothy Kafa Nyirenda (2017/HP/0539).
9. Anderson K. Mazoka v. Levy Mwanawasa (2005) Z.R 138.
- 10 Minos Panel Beaters Ltd v. B. Chapasuka (1986) Z.R 1 SC.

Legislation and materials referred to:

1. The High Court Act Chapter 27 of the Laws of Zambia.
2. The Rules of the Supreme Court 1999 Edition.
3. Landlord and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia.
4. The Rent Act Chapter 206 of the Laws of Zambia.
5. "Restatement of American Law: Contracts"
6. The Halsbury's Laws of England (3rd Edition) Volume 23.
7. Megarry and Wade: The Law of Real Property (6TH Edition) Sweet and Maxwell Limited, 2000, London.

1. INTRODUCTION

- 1.1 The Applicant commenced this action by originating notice of seeking the following reliefs:

(i) An Order that the Applicant is entitled to have quiet enjoyment of the premises known as House Number 14 Ingwe Road, Woodlands, Lusaka;

(ii) An Order that the purported termination of the Lease agreement by the Respondent is in breach of Section 5 of the Landlord and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia and therefore is null and void;

(iii) An Order that the Lease Agreement entered into between the Applicant and the Respondent on 1st January, 2019 for a period of 3 years is still valid;

(iv) An Order granting the Applicant a new tenancy of the premises otherwise known as House Number 14 Ingwe Road Woodlands, Lusaka;

(v) Any other relief that the court may deem fit; and

(vi) Costs of the action.

2. THE APPLICANT'S AFFIDAVIT EVIDENCE

2.1 The affidavit in support of the originating notice of motion was deposed by **JAMES KAPESA**, a Director in the Applicant Company. The deponent revealed that the Applicant ran a school called Friends of Jesus which school was at Plot No. 8 and 10 Mutende Road Woodlands as well as House Number 14 Ingwe Road, Woodlands. He produced a copy of the schools'

- Certificate of Registration which was marked as “**JK1**” and a copy of the Business Levy Certificate that was marked as “**JK2**”.
- 2.2 He explained that sometime in 2018 the Applicant was approached by the Respondent who stated that she owned the property known as House Number 14 Ingwe Road, Woodlands, that was adjacent to the school and offered to lease the said property to the Applicant to enable the Applicant expand the school premises.
- 2.3 The Applicant accepted the Respondent’s offer as they were looking for space to house their pupils and informed the Respondent that it would require a five (5) year lease for the premises to enable it comply with the requirements of the Ministry of Education.
- 2.4 The deponent further explained that the Applicant and the Respondent entered into a lease agreement dated 24th September, 2018, for a one (1) year duration which was not executed by the parties.
- 2.5 On 1st December, 2018, the Applicant took possession of the property House No. 14 Ingwe Road Woodlands and began to use it as part of the school.

- 2.6 The deponent asserted that the Applicant reminded the Respondent of the need for a longer lease in an email dated 27th September, 2018, and attached a year lease.
- 2.7 Subsequently, by a lease agreement dated 1st January, 2019, the Respondent demised unto the Applicant the property known as House No. 14 Ingwe Road Woodlands for a period of three (3) years from 1st January, 2019, at a monthly rent of K10, 000.00 payable three months in advance. Produced and marked “**JK5**” was a copy of the said lease agreement. The said property was leased to the Applicant for the purposes of using it as classrooms for the growing number of pupils for the Applicant’s school, Friends of Jesus School who were learning from the Applicants adjoining property.
- 2.8 It was also deposed that the Respondent was well aware that the demised property was being used for classrooms for the Applicant’s pupils. This emanated from the communication from the Respondent where they acknowledged the fact. The deponent produced a copy of an email communication dated 1st January, 2019 from the Respondent where they acknowledged that students were using the property. The Respondent at no time expressed concern about the use of the property as

classrooms, until with the authority of the Respondent the Applicant erected temporal structures on the premises sometime in 2020.

- 2.9 The deponent asserted that the Applicant had been making rental payments in compliance with clause 3 (a) of the Lease Agreement until early 2020 when the Applicant faced financial challenges due to the outbreak of covid-19 pandemic which caused a delay in the payment of rentals due to premature closure of the school resulting in parents and pupils not paying school fees. The Respondent was engaged and the arrears were cleared in full at later date. The rentals were up to date and paid up to April, 2021. The Applicant produced a copy of the Bank Instruction for the payment of K40, 000.00 marked as “**JK7**”.
- 2.10 It was further deposed that the Applicant was advised and verily believed that the lease agreement was regulated by the Landlord and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia and by virtue of this, any provision in the lease agreement which offended the Act was null and void.
- 2.11 The deponent maintained that sometime in June, 2020, the Applicant verbally requested from the Respondent that they erect temporary structures at the premises and the Respondent

agreed in an email dated 28th June, 2020, that was produced and marked as **“JK8”**.

2.12 That the Respondent also verbally undertook to avail the Applicant the Certificate of Title for the demised property to facilitate for council approval. The Applicant erected the temporary structures using wood and blocks, however the Respondent was not happy with the same and ordered that the same be demolished.

2.13 On 11th September, 2020, the Respondent wrote to the Applicant accusing the Applicant of having erected permanent structures without her approval and ordered that the Applicant carries out all repair works and revert to the original proposal of using the property for accommodation and not classrooms contrary to the original agreement as the property would not be used as classrooms. A copy of the original letter was produced and marked **“JK9”**.

2.14 This proposition came as a surprise to the Applicant as from inception, the premises were being used as classrooms for pupils. On 18th September, 2020, the Respondent brought two people to demolish the structures that the Applicant had put up but the Applicant met the Respondent on the same day at the

Friends of Jesus School premises and pleaded with them not to demolish the structures.

2.15 The Applicant wrote to the Respondent on 20th September, 2020, undertaking to repair all damage caused as well as take down the temporal structures at the time of vacation.

2.16 It was also deposed that the Respondent used to make appointments to visit the property once in a while, however in or around September, 2020, she began making impromptu visitations to the demised property for inspection and most of the times without prior appointments in breach of Clause 3(g) of the Tenants Covenants under the lease agreement.

2.17 In further breach of the lease agreement and the covenant for quiet enjoyment, the Respondent had embarked on a campaign of harassing the Applicants during pick up time for the pupils and shouting in full view of the pupils and the parents with the intention of causing scandal and ultimately forcing the Applicant to give up possession and quiet enjoyment of the demised property.

2.18 The harassment included cutting down trees on the premises without due consideration that the pupils were opening with no

space for playing as branches and logs would remain uncollected.

- 2.19 The deponent also deposed that the conduct of the Respondent constituted trespass and was calculated at forcing the Applicant to give up possession of the demised premises despite paying rentals regularly. The deponent asserted that the Applicant was not allowed to use the house located at the premises from September, 2020, despite making payments up to April, 2021.
- 2.20 He added that on 14th December, 2020, the Respondent issued a three (3) months' notice terminating the lease pursuant to Clause 4 (a) of the lease agreement which purported to give three (3) months' notice period. Produced and marked "**JK12**" was a copy of the termination notice.
- 2.21 The Applicant was advised and believed that the purported termination of the lease was null and void as it was a breach of law that required six (6) months' notice before termination of the lease.
- 2.22 The deponent alleged that sometime in February, 2021, the Respondent had the booster pump removed from the premises thereby depriving the Applicant of water at the premises in order to prevent the Applicant from using the house at the premises.

3. THE RESPONDENT'S AFFIDAVIT EVIDENCE

- 3.1 The affidavit in opposition was deposed to by the Respondent. She explained that she was the Landlord to the property subject of this action. That she recollected that in August 2018, she approached the Sister in Charge of the Applicant, Sister Ruth Nambeya (hereinafter referred to as Sister Nambeya) who was in charge of running Friends of Jesus School which was adjacent to her family property known as Plot No. 14 Ingwe Road Woodlands Lusaka.
- 3.2 The Respondent approached Sister Nambeya to ask if she would be interested in renting the said property as a convent as there was none on site. She explained that Sister Nambeya seemed keen and interested in the property and asked her if she would be interested in selling the property. She declined.
- 3.3 Sister Nambeya inspected the property and stated that it would be used as a house for the convent as it was close to the school and that one of the rooms would be used as a chapel. The only challenge was that there were three nuns and each needed to have their own rooms while the property had three rooms. Sister Nambeya asserted that this would be workable.

- 3.4 The Respondent denied that at no point did Sister Nambeya ever mention anything to do with expansion of the school premises. According to Sister Nambeya, the Department of Education had approved funding towards the rentals for the convent being the Respondent's property.
- 3.5 That Sister Nambeya requested for a lease agreement which she sent on or about 20th September, 2018, through an email which was not responded to.
- 3.6 On 23rd September, 2018, Sister Nambeya made a verbal request that the Respondent changes the lease agreement from one (1) year to five (5) years and that the provision providing for interest accruing at 3.3 % for late rentals be revised.
- 3.7 On or about 27th September, 2018, the Applicant sent the Respondent a five (5) year lease which she did not approve. The Applicant advised that the lease would start running in October, 2018, however, the Applicant did not make payment until the 15th October, 2018. The Applicant made payment in the sum of K20, 000.00 before the lease agreement was signed.
- 3.8 The Respondent further deposed that since she was still renovating the property at the time the Applicant made payment, the Applicant proposed that they would take

possession of the property in January, 2019 as the school term was almost ending. Despite advising the Applicant to take possession of the property in January, 2019, the Applicant without her knowledge and permission took pupils to the property for three Fridays in the month of November, 2018, thus making the walls in the house dirty.

3.9 Upon discovery of the same, she requested that the Applicant pays for the cleaning of the dirt which the Applicant paid for from the deposit that was made in October, 2018.

3.10 The Respondent asserted that the Applicant did not take possession of the demised premises in December 2018, as it was agreed that part of the money that was paid in October, 2018, would be directed towards rentals for December. The money was also meant to compensate for the delay in taking possession and all the times the Applicant took its pupils to her property.

3.11 The Respondent also deposed that the Applicant was only given the receipt for the December, 2018 rentals, on or about 28th January, 2019, as the Applicant insisted on the deposit being applied to the January, 2019 rentals.

3.12 She and the Applicant eventually settled for a three (3) year lease which was signed on or about 1st January, 2019, at a monthly

rental of K10, 000.00 payable three months in advance. Produced and marked "**ELC6**" was a copy of the three (3) year lease executed between the Respondent and the Applicant.

3.13 After execution of the lease, the Applicant was granted quiet possession and enjoyment of the property.

3.14 On a date unknown as she was driving by the property and discovered that the Applicant was using the property for school purposes and was building structures on the property without her consent contrary to Clause 3 (f) of the lease agreement. Produced and marked "**ELC7**" were copies of WhatsApp messages between the Sister Nambeya and the Respondent relating to construction of structures on the property.

3.15 She further deposed that in September, 2020, she had a discussion with Sister Nambeya regarding the original purpose of the demised premises and for the Applicant to stop all construction of the structures that the Applicant had illegally erected on the property. A copy of the email was produced and marked "**ELC8**".

3.16 At the time of the discussion, the said illegal structures had a concrete slab and were on window and roof level as shown in the photographs marked "**ELC9**" as at 18th September, 2020.

- 3.17 The Respondent also deposed that Sister Nambeya acknowledged that the premises were leased out for residential purposes and that it would demolish the illegal structures and put a member of staff on the property. Produced and marked **“ELC10”** was a copy of the email and letter from Sister Nambeya advising to make good the terms of the lease agreement and WhatsApp messages between her and Sister Nambeya where she undertook to put a member of staff on the property.
- 3.18 It was also deposed that during the meeting on 18th September, 2020, Sister Nambeya pleaded that the structures be left until December, 2020 when schools had closed as she had students there. She temporarily agreed to give her time until schools closed even though she did not get permission to construct the structures.
- 3.19 The Respondent asserted that the Applicant advised that it would put a member of staff on the property and demolish the illegal structures but the Applicant continued building and completed the structures as shown on the photographs marked **“ELC11”**.
- 3.20 She further explained that she had allowed the Applicant to put up temporal structures for its pupils to sit in during the rainy

season while waiting to be picked up and not the structures the Applicant had constructed.

3.21 The Respondent alleged that the Applicant had been irregular with its rentals even before the covid-19 pandemic and was not notifying her of late payments. This prompted her to request for postdated cheques. The rentals for the year 2021 that were paid four months in advance was as a result of the termination notice she issued in December, 2020.

3.22 The Respondent denied having availed the Applicant with the property's Certificate of Title as there was no need for the change of purpose of the property. The Respondent further denied having made impromptu visits to the property without informing the Applicant beforehand.

3.23 The Respondent explained that she had made visits to the property for purposes of sinking a borehole after Sister Nambeya complained of erratic water supply.

3.24 The Respondent also alleged that the Applicant was communicated to when the trees were cut down and was aware of the need to cut down the trees as the roots were causing damage to the foundation of the house.

- 3.25 The Respondent claimed that while cutting down the trees, it was discovered that the booster pump had a leak. She resorted to taking the booster pump for repair with the intention of returning it at a later date once it was repaired.
- 3.26 The Respondent was advised that the booster pump could not be repaired and that a new one had to be purchased.
- 3.27 The Respondent added that she gave the Applicant three (3) months' notice of the termination of the lease due to a fundamental breach of the lease and as per the lease agreement they executed believing that it fell within the Rent Act as the property was leased as a residential property. Produced and marked "**ELC18**" was a copy of the termination notice.
- 3.28 The Respondent alleged that the Applicant had been using the demised premises in a way that it violated the law as no change of use had been applied for with the Lusaka City Council. That she had made an effort to offer the Applicant an alternative premise that was being leased as a school premises which the Applicant declined to take.
- 3.29 The Respondent accused the Applicant of devaluing the property to an extent that the security deposit would not suffice to the

property to its original state. Produced and marked “**ELC19**” were photographs of the house presently.

3.30 The Respondent further asserted that the Applicant had not taken care of the surroundings and that the Applicant had removed the lawn from the premises as shown by the photographs marked “**ELC20**” of how the lawn looked like before and after the premises was leased out.

3.31 The Respondent averred that she was desirous of renovating the property and conform it to its original purpose. The Respondent refuted being desirous of renewing the lease agreement when it expired.

4. APPLICANT’S AFFIDAVIT EVIDENCE IN REPLY

4.1 The Applicant filed an affidavit in reply deposed to by **JAMES KAPESA** who was the Director in the Applicant.

4.2 He deposed that he was informed that when the Respondent was approached by the Applicant, Sister Nambeya informed her that the premises required expansion of the school premises for Friends of Jesus School. Present at the meeting were the Schools Deputy Head Teacher at the time Sister Emelda Mukangwa and Sister Mary Mulenga.

- 4.3 The deponent further was made known that the Applicant's convent was a ten (10) minute drive from the property and therefore there was no need to establish a new convent. The deponent denied that the Respondent had ever stated that she wanted the premises to be used as a convent. The deponent asserted that only a congregational leader and council of the Applicant had the mandate to establish a convent and Sister Nambeya did not have such mandate.
- 4.4 The deponent also explained that Sister Nambeya informed the Respondent that in order to comply with the requirements of the Ministry of Education, the Applicant would require a five (5) year lease in order to avoid unnecessary disturbances of the pupils' education.
- 4.5 The deponent denied that the Applicant received any funding from the Department of Education for its convent. The deponent deposed that contrary to the Respondent's assertions, she was the one who sent the five (5) year lease upon being requested by the Applicant. Produced and marked "**JK1**" was a copy of the email dated 27th September, 2018, which enclosed the five (5) year lease.

- 4.6 Due to the Applicants busy schedule, the lease was only signed on 15th October, 2018, where the Applicant paid the sum of K20,000.00.
- 4.7 Upon payment of the said amount, Sister Nambeya consulted the Respondent on how the children could access the property. It was settled that the Applicant would create a small opening in the shared wall fence behind the school building, just after the marquee tent which the Applicant had used as a shelter for five (5) years. It was therefore not true that the Applicant had taken pupils to the property without her knowledge.
- 4.8 The deponent maintained that they had taken pupils to the Respondent's property based on the understanding that the Applicant had already paid for the property despite not signing the lease at the time. The lease was eventually signed on or about 1st January, 2019, by senior members of staff Ms. Linda Ndimbwa and Mr. Wisdom Kaite. It was only after the execution of the lease that the Applicant realized that the lease was not a five (5) year lease but a three (3) year lease.
- 4.9 The deponent asserted that contrary to the Respondent's allegations that she was unaware of the purposes that Applicant had rented the property, the Respondent would go to the

property to collect the cheque of the payment as it was not made through a bank transfer.

4.10 On one occasion when she went to collect the cheque No. 566 in March and May, 2019, Sister Nambeya took the Respondent around and showed her the children that were learning from the property. The Respondent did not protest or complain at that point.

4.11 Regarding the building of structures on the property, it was deposed that the Respondent expressly allowed the Applicant to build temporary structures as was exhibited on “**JK8**”. The deponent maintained that the structures that the Applicant put up could be removed within reasonable notice. The structures were erected to enable it to accommodate pupils in a safe environment. The Applicant produced a letter from Fabian Banda a structural Engineer who confirmed that the structures were temporal, marked as “**JK2**”.

4.12 The deponent refuted that the Applicant was in agreement with the Respondent to build a shelter for the children to use at pick up during the raining season. The deponent stated that as a matter of fact, there was a marquee that was used for five years that could accommodate 500 pupils. The Applicant produced

“ELC13” where the Respondent allowed the Applicant to build the structures which it had put up.

4.13 The deponent denied that the Applicant had the intention of rezoning the Respondent’s property. The only reason that the Applicant asked for the Certificate of Title to the property was in order to comply with the Ministry of Education regulations 1975 for renewal of registration of private school.

4.14 The deponent reiterated that the Respondent made innumerable impromptu visits to the property without prior arrangements. At different times the Respondent stormed into the school and shouted at the Applicant’s employees in the presence of both pupils and parents. The deponent asserted that the Applicants utilized water from its own borehole due to the fact that the water tank on the Respondent’s property had no water. The Respondent’s water tank was connected to the Applicant’s booster pump which were only fixed after the notice to vacate was given.

4.15 The deponent deposed that rentals had been paid in lump sums at the right time, save for when the Government altered the school calendar due to covid-19 pandemic in 2020. Produced

and marked **“JK2”** was a proof of the lump sums to the Respondent.

4.16 The deponent declared that the Applicant did not have an issue of the Respondent cutting down of trees for the preservation of the property. The Applicant had a problem with the fact that after the trees were cut, logs and braches were left uncollected on the premises when schools were about to open.

4.17 The deponent disputed the fact that the Respondent had given the Applicant three (3) months’ notice to terminate the lease. The deponent was advised by counsel to the Applicant that the said notice was irregular as the purpose for which the property was leased was for the business of Friends of Jesus School and not for residential purposes as alleged and could not fall under the Rent Act.

4.18 The deponent denied that erecting of the temporal structures had damaged the Respondent’s property. He added that the Applicant had as a matter of fact renovated the main house. The deponent referred to **“JK4”** which showed the property in its current state.

4.19 The deponent further denied that it was unable to maintain the premises in its current state as the property was more habitable than it was before.

5. HEARING

5.1 At the hearing of the matter, the parties relied on the documents that had been filed including the skeleton arguments.

5.2 Learned counsel for the Applicant Mrs. Mwalula posed several questions requiring the courts determination. The first question was:

(i) Whether the tenancy falls under the Landlord and Tenant (Business Premises) Act.

5.3 Counsel submitted that the Applicant and the Respondent entered into a three (3) year tenancy agreement with the Respondent relating to House No. 14 Ingwe Road Woodlands on 1st January 2019 as exhibited in “JK5”. The Applicant intended to use the property as an extension of the School of Friends of Jesus, a business that the Applicant was running at Plots No. 8 and 10 of Mutende Road Woodlands which was adjacent to the subject property.

5.4 That the property was rented for the purpose of running the business of Friends of Jesus School and the tenancy between

the Applicant and the Respondent was governed under the Landlord and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia and not the Rent Act Chapter 206 of the Laws of Zambia.

- 5.5 In this regard, reference was made to the definition of business in the Landlord Tenant (Business Premises) Act in which business is defined as follows:

“Business” means a trade, an industry, a profession, or an employment, and includes any activity carried on by a body of persons, whether corporate or unincorporated, but does not include farming on land.”

- 5.6 The aforementioned Act further defined *“Tenancy”* as:

“tenancy of business premises (whether written or verbal) for a term of years not exceeding twenty-one years, created by a lease or under-lease, by an agreement for or assignment of lease or under-lease, by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgage and a mortgagee as such, and references to the

**granting of a tenancy and to demised property
shall be construed accordingly.”**

- 5.7 Mrs. Mwalula submitted that from the above definitions, the Applicant had a valid tenancy agreement with the Respondent under the Landlord and Tenant (Business Premises) Act to enable it carry out its business as an extension of Friend of Jesus School. That the Respondent was aware that the Applicant was carrying out the business of running a school from inception of the tenancy on 1st January, 2019.
- 5.8 Counsel argued that the Respondent only raised the issue of the premises being used as a school two years after the fact in letter dated 11th September, 2020, in spite of the Respondent frequently visiting the premises.

(ii) Validity of Notice Period in the Notice of Termination of Lease.

- 5.9 It was submitted that although the lease agreement between the parties constituted a valid contract, certain provisions were not in line with the Landlord and Tenant (Business Premises) Act.
- 5.10 The Courts attention was drawn to Clause 4 of the executed lease agreement which provided for termination of the lease either by giving three (3) months’ notice in writing to the other

party and which was contrary to the provision of the law. Section 5 of the Landlord and Tenant (Business Premises) Act provides:

“5. (1) The landlord may terminate a tenancy to which this Act applies by a notice given to the tenant in the prescribed form specifying the date on which the tenancy is to come to an end (hereinafter referred to as “the date of termination”):

Provided that this subsection shall have effect subject to the provisions of section twenty-three as to the interim continuation of tenancies pending the disposal of applications to the court.

(2) Subject to the provisions of subsection (3), a notice under subsection (1) shall not have effect unless it is given not less than six months and not more than twelve months before the date of termination specified therein.”

5.11 It was also submitted that the notice that was given to the Applicant by the Respondent was irregular as it was not in the correct format prescribed by the Act. In the notice, the Landlord had to clearly stipulate whether they would not oppose an application to the court under the Act for the grant of a new

tenancy, or the Landlord would oppose such grant of a new tenancy and give reasons why.

5.12 The termination notice was served by the Respondent on the Applicant dated 14th December, 2020, as exhibited in **JK12**. Furthermore, the Respondent issued the Applicant a three (3) months' notice despite the legal requirement for a landlord to give a tenant notice of six (6) and twelve (12) months.

5.13 Counsel relied on the case of **Boardroom Investments Limited (T/A Fairways Café) v. Lusaka Golf Club**⁽¹⁾ wherein the Court of Appeal held that the peculiar nature of a lease agreement relating to business premises was that it was composed of express terms that were to be found in the actual lease agreement, as well as express terms imposed by statute law that were found in the Landlord and Tenant (Business Premises) Act. (Emphasis theirs)

5.14 Mrs. Mwalula submitted that clause 4 of the lease agreement between the Applicant and the Respondent providing for three (3) months' notice was void as it was against the timeline provided by statute of six (6) and twelve (12) months before date of termination. Reference was made to the case of **Mususu**

Kalenga Buildings Limited v. Richmans Money Lenders (2)

wherein the Supreme Court reiterated that it was incumbent upon the Landlords to comply with the provisions of the Landlord and Tenant (Business Premises) Act by giving tenants proper notice when terminating the lease.

5.15 Counsel submitted that the notice to terminate from the Respondent to the Applicant, having failed to meet the requirements of the Landlord Tenant (Business Premises) Act was irregular and void *ab initio* and must not be upheld by this Court.

(iii) Breach of Contract

5.16 It was the Applicant's submission that it is a legal requirement for the Respondent to comply with the statutory requirements of Section 5 of the Landlord and Tenants (Business Premises) Act. The Respondent breached the lease agreement by issuing a termination notice in breach of the statutory requirements and was entitled to damages for breach of the same.

5.17 Again, counsel made reference to the Court of Appeal case of ***Boardroom Investments Limited (T/A Fairways Café)*** where it was stated that a lease agreement for business premises was for

all intents and purposes a 'contract' which was governed by the ordinary rules of contract law. The Court further held as follows:

“Where a landlord breaches a lease agreement or provision of the Landlord and Tenant (Business Premises) Act such as giving a one-month notice to quit instead of 6 months, the tenant may be awarded damages...”

5.18 It was further counsel's submission that the Respondent breached the lease by making impromptu visits to the premises without notifying the Applicant in breach of clause 3 (g) of the Lease Agreement (Tenants Covenants) which provided for the Respondent to be permitted onto the premises only with prior appointment.

5.19 In addition to clause 3(a) of the lease agreement (Landlords covenants), the Respondent had continually interrupted the Applicant's enjoyment of the premises even going as far as threatening the Applicant with demolition of the temporal structures which the Respondent allowed to be erected and disrupting water supply to the premises.

5.20 Mrs. Mwalula submitted that the Respondent claimed that the Applicant breached the lease agreement by constructing illegal

structures without prior written consent of the Respondent. This could not be upheld by the Court as the Applicant sought the permission of the Respondent before putting up the structures and permission was granted as evidence on exhibit marked “JK8”.

5.21 Counsel argued that the structures erected were temporal and not connected to the Respondents sewer networks.

(iv) Whether the Applicant is entitled to renewal of the Lease Agreement

5.22 On this issue, it was submitted that the Applicant was seeking an order granting it a new tenancy of the premises known as House No. 14 Ingwe Road, Woodlands, Lusaka. Mrs. Mwalula submitted that the Applicant was entitled to a new tenancy as it was a running school and business on the premises. Counsel further asked the Court to note that the Applicant had asked for a five year lease to be in compliance with the requirements of the Ministry of Education but the Respondent instead gave them three (3) year lease. The Applicant referred to Section 4 of the Landlord and Tenant (Business Premises) Act which provides:

“4(1) A tenancy to which this Act applies shall not come to an end unless terminated in accordance with the provision of this Act; and, subject to the provisions of section ten, the tenant under such a tenancy may apply to the court for a new tenancy –

(a) If the landlord has given notice under section five to terminate the tenancy; or

(b) If the tenant has made a request for a new tenancy in accordance with section six.”

5.23 It was submitted that since the Respondent had issued a Notice to terminate albeit being irregular in terms of Section 5 of the Landlord and Tenant (Business Premises) Act, the Applicant sought recourse for a new tenancy for a three- year period. The Court was referred to the case of **Zimco Properties Limited v. Dinalar Randee Enterprises**⁽³⁾ wherein the Supreme Court held that in order for a landlord to oppose a new tenancy, there was need to comply with the requirements under section 11 (1) of the Landlord and Tenant (Business Premises) Act.

5.24 Lastly it was submitted that the Respondent had not afforded the Applicant reasons for not renewing the Lease Agreement save for the alleged breach of contract by the Applicant putting up temporal structures that were sanctioned by the Respondent.

5.25 Counsel prayed that the reliefs sought be granted.

5.26 The Respondent filed the skeleton arguments in opposition and identified five substantive issues for determination being:

(i) Whether the lease agreement executed by the Applicant and the Respondent in January, 2019 constituted a valid lease agreement.

(ii) Whether the purported termination of the lease Agreement by the Respondent was in breach of section 5 of the Landlord and Tenant (Business) Act and therefore null and void.

(iii) Whether the Lease Agreement entered into between the Applicant and the Respondent on 1st January, 2019 for a period of three years was still valid.

(iv) Whether the Applicant should be granted a new tenancy of the premises.

5.27 In relation to the first issue, learned counsel Ms. Chisulo submitted that according to Sir Fredrick Pollack, a contract was a promise or set of promises which the law would enforce. Counsel referred to the American Law institute which gave an elaborate definition in their paper titled "Restatement of American Law: Contracts" when they defined contracts as:

“A promise or set of promises, the breach of which the law gives a remedy, or performance of which the law in some way recognizes as a duty.”

5.28 Counsel submitted that the lease agreement dated 1st January, 2019, constituted a valid contract between the parties for the lease of a property otherwise known as Plot No. 14 Ingwe Road, Woodlands, Lusaka, and was therefore enforceable against the Applicant.

5.29 In relation to the second issue, it was submitted that the Termination Notice which was issued was valid as what the Respondent leased out was a residential property governed by the Rent Act Chapter 206 of the Laws of Zambia. Counsel submitted that should the Court find in favour of the Applicant that the lease agreement was governed by the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia, the Applicant was willing to give the Applicant the requisite six (6) months termination notice as envisaged in the Act.

5.30 Regarding the third issue, it was submitted that the lease agreement entered into between the Applicant and the Respondent was not valid at present as the Applicant

fundamentally breached the lease agreement. Counsel submitted that the position of the law as to what constituted a valid and enforceable contract was summed up in the case of **May and Butcher Limited** ⁽⁴⁾ by Viscount Dunedin who quoted A Casebook on Contract at page 75 as follows:

“It is true that in the case of a contract, breach of a condition precedent prevents the contract from ever becoming operative.”

5.31 Ms. Chisulo submitted that the Applicant constructing illegal permanent structures without prior written consent of the Respondent was a fundamental breach of the said lease agreement which gave the Respondent the right to terminate or discharge the Respondent from her obligations under the said lease agreement.

5.32 Counsel reiterated that the lease agreement between the Applicant and herself was strictly for residential purposes and not for business purposes. That altering of the property without any planning authority put the Respondent in conflict with the law being the true owner of the property.

5.33 Reference was made to section 13 (1) (b) of the Rent Act which provides that:

“13. (1) No order for the recovery of possession of any premises or for the ejectment of a tenant therefrom shall be made unless-

(b) the tenant, or any person residing with him, has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers, or has been convicted of using the premises or allowing the premises to be used for a criminal or illegal purpose, or the condition of the premises has, in the opinion of the court, deteriorated owing to acts of waste by, or the neglect or default of, the tenant or any other person.” (Emphasis theirs)

5.34 In addressing the last issue, counsel submitted that the Respondent objected to the Applicant being granted a new tenancy under the provision of section 11 of the Landlord and Tenant (Business Premises) Act which provides as follows:

“11. (1) The grounds on which a landlord may oppose an application under subsection (1) of section four are such of the following grounds as may be stated in the landlord's notice under section five or, as the case may be, under subsection (6) of section six, that is to say:

(a)where under the current tenancy the tenant has any obligations as respects the repairs and

maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations;

(b) That the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due;

(c)that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding;

(d)that the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable, having regard to the terms of the current tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his business and to the situation and extent of, and facilities afforded by, the holding;

(e)where the current tenancy was created by the subletting of part only of the property comprised in a superior tenancy and the landlord is the owner on the termination of the superior tenancy, that the aggregate of the rents reasonably obtainable on separate lettings of the holding and the remainder of that property would be substantially less than the rent reasonably obtainable on a letting of that property as a whole, that on the termination of the current tenancy the landlord requires possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole, and that in view thereof the tenant ought not to be granted a new tenancy;

(f)that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding;

(g)save as otherwise provided in subsection (2), that on termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business carried on by him therein, or as his residence.”

5.35 It was thus submitted that the Respondent objected to the Applicant being granted a new tenancy based on the above provisions of the law as the Applicant had been in breach of the lease agreement by not paying rent on time. The erecting of the illegal structures on the property without the Respondent's consent was another reason the Respondent did not want to renew the tenancy.

5.36 Counsel referred the Court to the case of Betty's Cafes Ltd. v. Phillips Furnishing Stores Ltd ⁽⁵⁾ where Lord Danckwerts J, Lord Keith of Avonhold and Lord Denning held that:

“The intention so expressed had the necessary qualities of fixity and genuineness. It was not disputed that it had not been proved that such an intention existed at the date of the notice of opposition. That the intention established by the Landlords was sufficient to negative the grant of a new lease; the landlords proved the intention required by section 30 (1) if they proved its, existence at the date of hearing...”

5.37 And it was further submitted that the Applicant was not entitled to any other relief that the court deemed fit or any other reliefs sought in its Originating Notice of Motion as the Applicant was

in breach and therefore had no recourse in law. The Respondent asserted that equity clearly dictated that *“he who comes to equity, must come with clean hands”*.

5.38 It was submitted that in the current case, the Applicant had come with soiled hands as it clearly concealed from the Respondent the main reason it was leasing the premises. The aforementioned proposition was stated in the case of **Carter v. Boehm** ⁽⁶⁾ by Lord Mansfield when he stated that:

“Good faith forbids either party by concealing what he privately knows, to draw the other party into a bargain, from his ignorance of that fact and his believing the contrary.”

5.39 Ms. Chisulo submitted that there was legally binding lease agreement between the Applicant and the Respondent which was terminated as a result of the Applicants fundamental breach of the same agreement. This rendered the agreement unenforceable against the Respondent. Reference was also made to the case of **Crown Cork Limited v. Pamela Jackson** ⁽⁷⁾ where Gardner DCJ stated:

“If the contract contains a condition entitling the vendor to rescind on the happening of certain

events; the vendor may if these events arise, rescind if the conduct of the purchaser is such as to amount to a repudiation of the contract and the parties can be restored to their original position.”

5.40 It was thus submitted that the Applicant’s failure to stick to the original purpose of the lease agreement amounted to repudiation of the lease agreement between the parties as the Applicant’s default resulted in the premises being used for illegal purposes. The Respondent further submitted that the interim Injunction be discharged as the Applicant did not disclose the material facts in the matter and was therefore not entitled to the reliefs sought.

6 DECISION OF THE COURT

6.1 I have carefully considered the parties’ affidavit evidence and submissions herein and I am indebted for the same.

6.2 The Applicant herein seeks an order that it is entitled to have quiet enjoyment of the premises known as House No. 14 Ingwe Road; that the purported termination of the Lease Agreement by the Respondent is in breach of section 5 of the Landlord and Tenant (Business Premises) Act; that the Lease Agreement

entered into between the Applicant and the Respondent is still valid and an order granting the Applicant a new tenancy of the demised premises.

6.3 Based on the evidence, the following facts are not in dispute:

- (i) The Applicant and the Respondent on 1st January, 2019 entered into a lease agreement in relation of House No. 14 Ingwe Road Woodlands.
- (ii) The duration of the tenancy agreement was three (3) years and that this period could be renewed for a further term on the same terms after which the price could be adjusted for not more than 7% before the expiration of the agreement.
- (iii) The rental price was K10,000.00 to be paid every three months plus a refundable security deposit equal to one month's salary.
- (iv) On 14th December, 2020, the Respondent wrote a letter terminating the lease agreement and gave the Applicant three (3) months' notice and to hand over the demised property on 31st March, 2021.

6.4 What is in dispute is whether the Applicant is entitled to the reliefs sought as herein highlighted.

6.5 The Applicant in their submissions identified questions which I acknowledge need to be addressed by this Court in order to determine whether or not the Applicant is entitled to the reliefs sought.

(i) **Whether the tenancy agreement falls under the Landlord and Tenant (Business Premises) Act or the Rent Act.**

6.6 There is a dispute whether the Landlord and Tenant (Business Premises) Act or the Rent Act governed the relationship between the Applicant and Respondent in relation to the demised property.

6.7 It is the Applicant's contention that it had a valid tenancy agreement with the Respondent under the Landlord and Tenant (Business Premises) Act to enable it carry out its business as an extension of Friends of Jesus School. It is contended that the Respondent was aware that the Applicant was carrying out the business of running a school from inception of the tenancy on 1st January, 2019. That the only time the Respondent raised an issue that the premises were being used as a school was almost two years after the fact by way of a letter dated 11th September, 2020.

6.8 The Respondent on the other hand contends that the Applicant without her permission started operating a school business from her property called Friends of Jesus School as the property was leased out as a residential property to be used as a Convent governed by the Rent Act.

6.9 In determining the issue, I find it imperative to have recourse to the preambles of the Acts to ascertain the purpose of the Acts. The Preamble of the **Landlord and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia** enacts as follows:

“An Act to provide security of tenure for tenants occupying property for business, professional and certain other purposes; to enable such tenants to obtain new tenancies in certain cases; and to provide for matters connected therewith and incidental thereto.”

6.10 The preamble of the **Rent Act Chapter 206 of the Laws of Zambia** on the other hand provides as follows:

“An Act to make provision for restricting the increase of rents, determining the standard rents, prohibiting the payment of premiums and restricting the right to possession of dwelling-houses, and for other purposes incidental to and

connected with the relationship of landlord and tenant of a dwelling-house.”

- 6.11 What is clear from the foregoing is that both Acts are instrumental in the regulation of the relationship between landlord and tenant. Where the two Acts differ is that while the Landlord and Tenant (Business Premises) Act is designed to regulate the relationship between landlord and tenants for business relationships, the Rent Act is specifically designed for the relationship between landlord and tenants for a dwelling house.
- 6.12 I have carefully examined the terms of the lease agreement which was executed by the Applicant and the Respondent. It is clear that both parties neglected to describe or disclose in the lease agreement the use/purpose the demised premises was leased for.
- 6.13 While there is no express provision, I have carefully considered the exhibits and the affidavit evidence, I have observed the following:
- (i) Based on **“JK1”**, Friends of Jesus School was duly registered to and in accordance with the provisions of the Registration of Business Names Act No.16 of 2011.

- (ii) By virtue of the Lusaka City Council Certificate of payment for Business Levy marked as “**JK2**”, Friends of Jesus School is a business entity and operates as a business.
- (iii) As shown by paragraph 4 of the Respondent’s affidavit in opposition, the Respondent was aware that Sister Nambeya who is the Sister in Charge of the Applicant, was also in charge of running a school namely Friends of Jesus School which is adjacent to the demised property.
- (iv) According to paragraph 14 of the affidavit on opposition, the Respondent was informed by Sister Nambeya that the Applicant would take possession of the property in January, 2019 as the school term was almost ending.
- (v) That even though the Applicant was supposed to take possession of the property in January, 2019, the Applicant without the Respondent’s knowledge took pupils to her property in the three Fridays in the month of November, 2018 thus making the walls in the house dirty.
- (vi) In addressing what is contained in (v) above, the Respondent in her correspondence to the Applicant in

the email dated 1st January, 2019 which is marked **“JK6”**, stated *“Consideration should also be given for the period the property was used by your students in the Month of November & payment be made for its use.”*

(vii) The tenant who signed the lease agreement on 1st January, 2019 was Friends of Jesus School while the Respondent signed the lease agreement after the tenant on 7th January, 2019 as the landlord.

(viii) In **“JK8”** which is an email, the Respondent agreed to the erection of temporary structures by the Applicant so long as the structures did not have permanent foundations and did not connect into the existing sewer networks.

(ix) The Respondent in her letter dated 23rd February, 2020 marked **“ECL12”** addressed the same to the management of Friends of Jesus and not the Applicant.

6.14 In view of the above evidence, the only reasonable inference that can be inferred is that as at 1st January, 2019 when the Applicant and the Respondent entered into the lease agreement, the Respondent knew that the Applicant was using the property as a school. That is why in the email dated 1st January, 2019,

marked “**JK6**”, she requested that rentals be paid for the period that the pupils occupied the premises in the month of November, 2018.

- 6.15 If at all the Respondent had not consented to the Applicant using the demised premises as a school, she should have made it known to them before executing the lease agreement especially that the tenant indicated in the execution clause is Friends of Jesus School and not the Applicant.
- 6.16 Furthermore, the Respondent should have questioned why Sister Nambeya stated that they could only take possession of the property in January, 2019 as the school term was ending. In my view, Sister Nambeya tied the taking the possession of the premises to the school term because the premises were going to be used as a school and not a Convent.
- 6.17 Notwithstanding the foregoing, the evidence shows, that the Respondent proceeded to execute the lease agreement when she knew that the Applicant which was running a school business was using the demised premises to accommodate pupils.
- 6.18 In addition, by virtue of the Applicant having asked the Respondent to add the temporary structures, the Respondent should have known that the Applicant was using the premises

as a school and not a Convent. I say this because it does not make logical sense for the Applicant which is in the business of running a school to have requested to make temporary shelters for a Convent.

6.19 In view of the foregoing, I do not accept the argument by the Respondent that she demised the premises strictly for residential purposes and not for business and that the Applicant had changed the use of the demised premises.

6.20 In this regard, I find as a fact that:

(a) The Respondent knew from inception of the tenancy on 1st January, 2019 that the demised premises was to be used as an extension of the Friends of Jesus School and not a Convent.

(b) The Rent Act is not applicable as its application is restricted to regulating the relationship of landlord and tenant of a dwelling house being any building or house used as a place of residence.

(c) The lease agreement entered into on 1st January, 2019 between the Applicant and the Respondent is accordingly governed by the Landlord and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia.

(ii) Whether the Notice of Termination of the Lease was valid.

6.21 The second issue to be determined is whether the Notice to terminate that was given by the Respondent is valid by virtue of section 5 of the Landlord and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia.

6.22 The Applicant contends that although the lease agreement between the parties constituted a valid contract, certain provisions contained therein flew in the teeth of the provisions of the Landlord and Tenant (Business Premises) Act.

6.23 Reference was drawn to clause 4 of the agreement which provides for the termination of the lease by either party giving three months' notice in writing to the other party. That this is contrary to the law and thus irregular.

6.24 It is also contended that the Notice to Terminate that was given by the Respondent is not the correct format prescribed by law.

6.25 The Respondent on the other hand contends that the Notice to Terminate which was issued against the Applicant on 14th December, 2021 is and was valid as what the Respondent leased out was a residential property governed by the Rent Act.

6.26 An alternative argument was also proffered by the Respondent that should this Court find in favour of the Applicant that the lease agreement subject of these proceedings is governed by the Landlord and Tenant (Business Premises) Act, the Applicant is willing to give the Applicant the requisite six months' termination notice as envisaged in the Act.

6.27 For the sake of clarity, section 5 of the Landlord and Tenant (Business Premises) Act provides that:

“5. (1) The landlord may terminate a tenancy to which this Act applies by a notice given to the tenant in the prescribed form specifying the date on which the tenancy is to come to an end (hereinafter referred to as “the date of termination”):

Provided that this subsection shall have effect subject to the provisions of section twenty-three as to the interim continuation of tenancies pending the disposal of applications to the court.

(2) Subject to the provisions of subsection (3), a notice under subsection (1) shall not have effect unless it is given not less than six months and not more than twelve months before the date of termination specified therein.”

6.28 The above provision is clear in stipulating that Notice to Terminate will not have effect if it is given in less than six months'. The notice will also not have effect if it is given more than twelve months before the date of termination. This was espoused in the case of **Citizen University Zambia v. Timothy Kafa Nyirenda** ⁽⁸⁾ wherein it was stated that:

“In the present case the Respondent was given the Notice of Termination on 20th March 2017 for termination to be effected on 30th April, 2017. This alone is contrary to the provision requiring the notice period to be not less than six months and not more that twelve months.”

6.29 The “prescribed form” referred to under section 5(1) of the Act is found in the schedule to the Regulations or a form “substantially to the like effect” (Regulation 2) and is reproduced here under:

“The Landlord and Tenant (Business Premises) Act

Landlord’s Notice to Terminate Tenancy of Business Premises

To:.... of..... tenant of business premises known as.....

- 1. I.....of Landlord of the above mentioned premises, hereby give you notice terminating your tenancy on theday of19.....**
- 2. You are required within two months after the giving of this notice to notify me in writing whether or not you will be willing to give up possession of the premises on that date.**
- 3. I would oppose an application to the court under the Act for the grant of a new tenancy, or I would oppose an application to the court under the Act for the grant of a new tenancy on the ground that (here state ground or grounds)**
- 4. This notice is given under the provisions of Section 5 of the Landlord and Tenants (Business Premises) Act**

Dated thisday of19.....

Signed..... Landlord..... Address”

6.30 I have carefully examined “**JK12**” which was the Notice to Terminate from the Respondent to the Applicant dated 14th December, 2020. It is very clear that the Respondent did not give six months’ Notice to Terminate the lease and the Respondent did not comply with the format set out above by stating that she

would oppose an application for a new tenancy by specifying the grounds. In short, the Notice was not in accordance with the prescribed form or in substantial conformity therewith.

- 6.31 In this regard, I find that subsection (1)(2)(5) and 6 of section 5 of the Act was not complied with and therefore, the Notice to Terminate the lease agreement entered into between the Applicant and the Respondent is null and void and therefore of no effect.
- 6.32 It therefore follows that clause 3 of the lease agreement that states: *“This agreement may be terminated by either party giving three (3) months’ notice in writing to the other party of intention to terminate”* is invalid by reason that it is not in conformity with the law.
- 6.33 Before I proceed to consider the next issue, I have observed that the Applicant also submitted that it be awarded damages for breach of the lease agreement as the Respondent terminated the lease in contravention to section 5.
- 6.34 It was further submitted that the Respondent breached the lease agreement by continually interrupting the Applicant’s quiet enjoyment of the premises even going as far as threatening the

Applicant with the demolition of the temporal structures which she had allowed to erect.

6.35 According to the learned authors Megarry and Wade in the textbook The Law of Real Property, a lease is both a contract and in most cases an estate. The consideration for that contract is usually the payment of rent. Thus, it being a contract, it is governed by the ordinary rules of contract law.

6.36 In this regard, I subscribe to what the Court of Appeal stated in the case of ***Boardroom Investments Limited*** that where a landlord breaches a lease agreement or provision of the Landlord and Tenant (Business Premises) Act such as giving a month's notice to quit instead of six months, the tenant may be awarded damages.

6.37 However, in the present case, the Applicant did not plead damages for breach of contract but only advanced the claim in its submissions. In the case of **Anderson K. Mazoka v. Levy Mwanawasa** ⁽⁹⁾, the Supreme guided on the purpose of pleadings when it held that:

“The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate

in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such.”

6.38 The above holding is very clear in that the parties are bound by their pleadings which means that the Applicant cannot at the stage of submissions introduce new claims which it did not plead in the originating notice of motion.

6.39 So while I have made a finding that the Respondent did not comply with the provisions of section 5 regarding the Notice period and the format when she issued a Notice to Terminate, the relief sought in the pleadings as far as this issue is concerned is an order that the termination of the lease agreement is in breach of section 5 and therefore null and void.

6.40 The argument therefore that it is entitled to damages for breach of contract is misconceived and it is dismissed.

6.41 The Applicant also contends that the Respondent breached clause 3(a) of the lease agreement as she had continually interrupted the Applicant's enjoyment of the premises even going as far as threatening to demolish the temporal structures.

- 6.42 The Respondent has denied this allegation and contends that she never made impromptu visits to the property without informing the Applicant beforehand. That she made visits to the property for the purposes of sinking a borehole after the Applicant complained of erratic water supply which required her presence.
- 6.43 It is also contended that the Applicant has been granted quiet enjoyment of the property but she discovered that the Applicant was using the property for school purposes and was actually building structures on the property without her permission. This was contrary to clause 3 (f) of the lease agreement.
- 6.44 The Respondent also contends that because of the fundamental breach by the Applicant by failing to stick to the original purpose of the lease agreement, this amounted to a repudiation of the lease agreement as the Applicant was using the premises for illegal purposes.
- 6.45 I will state at this stage that I have made a finding that the Respondent knew that the Applicant was using the premises for school purposes. In view of this finding, the Respondent cannot therefore argue that the Applicant was using the premises for illegal purposes.

- 6.46 Furthermore, on the contention by the Respondent that the Applicant had constructed permanent structures which she did not authorize, there is correspondence marked '**JK8**' in the affidavit in support. In that correspondence the Respondent was requested to inform the Applicant that there was no objection to the proposal by the Applicant to construct temporary structures for as long as the same did not have permanent foundations and was not connected to existing sewer pipes.
- 6.47 From the tenor of the affidavit in opposition, the Respondent's position is that the structures are permanent as they had concrete slab.
- 6.48 However, based on the letter from Eng. Fabian Banda marked '**JK2**' in the affidavit in reply, he certified that the classrooms built on the Respondent's property were purely temporal structures. To this effect, the Applicant in paragraph 26 of the affidavit in reply made an undertaking to decommission the temporal structures as soon as it vacates the premises.
- 6.49 In view of the foregoing, I find that the Applicant did not breach clause 3 (f) of the lease agreement by constructing permanent structures.

6.50 On the other hand, I do accept the Applicant's position and I find that the Respondent used to go to the premises to demand the demolition of the structures because it is clear that the Respondent at all material times contended that the Applicant had constructed permanent structures on the premises without her prior written consent.

6.51 In this vein therefore, I find that the Respondent breached clause 3 (a) of the Landlords Covenants' to the effect that the tenant shall peaceably hold and enjoy the demised premises during the tenure without any interruption by the Landlord.

(iii) Whether the Applicant is entitled to renewal of the Lease Agreement

6.52 The Applicant contends that it is entitled to a new tenancy as it is running a school business on the premises and that the Respondent had since issued a Notice to terminate albeit irregularly in terms of section 5 of the Landlord and Tenant (Business Premises) Act. That the Applicant's recourse is to seek a new tenancy for a further three- year period.

6.53 It is further contended that the Respondent has not offered any valid reason why the Applicant should not be granted a new

tenancy save for the alleged breach of contract by the Applicant by putting up temporal structures which was in fact sanctioned by the Respondent. That the Applicant has further undertaken to decommission all its temporal structures at the time that it will vacate the premises.

6.54 The Respondent on the other hand contends that she objects to the granting of a new tenancy as the Applicant has been in breach of the lease agreement by not paying rent on time and by constructing illegal permanent structures on her property without prior written consent and without obtaining planning authority from the relevant authorities.

6.55 It is further the Respondent's contention that it has offered the Applicant alternative premises to lease which premises are already a school and that she intends to demolish all the illegal structures that have been erected.

6.56 The Landlord and Tenant (Business Premises) Act permits the Tenant to renew the tenancy.

6.57 The section reads as follows:

“4(1) A tenancy to which this Act applies shall not come to an end unless terminated in accordance with the provisions of the Act; and subject to the

provisions of section ten, the tenant under such a tenancy may apply to the court for a new tenancy-

- (a) If the Landlord has given notice under section five to terminate the tenancy; or**
- (b) If the tenant has made a request for a new tenancy in accordance with section six.”**

6.58 It is clear upon a fair reading of the above provision that it provides security of tenure for tenants occupying property for business purposes. This is because a tenancy shall only come to end if terminated in accordance with the provisions of the Act.

6.59 Furthermore, there are only two circumstances in which a new tenancy may be made. The first one is where the landlord has given notice under section five to terminate the tenancy and the second one is where the tenant has made a request for a new tenancy in accordance with section six.

6.60 This was clearly stated in the case of **Minos Panel Beaters Ltd v. B. Chapasuka** ⁽¹⁰⁾ where it was held therein:

“Section 4 of the Landlord and Tenant (Business Premises) Act specifically provides that a tenant who has been served with a notice to quit may apply to the court for a new tenancy.”

6.61 What clearly comes out from section 11 of the Act is that the landlord can oppose an application under section 4 for the renewal of the tenancy. This may be on the grounds that the tenant has under the currency of the tenancy obligations as respects the repairs and maintenance of the property, has delayed in paying rent, there have been substantial breaches and the landlord has offered alternative accommodation.

6.62 In the present case, the reason why the Applicant applied for a new tenancy is because the Respondent had given a Notice to Terminate the lease agreement. The Applicant therefore proceeded to make the application in accordance with section 4 of the Landlord and Tenant (Business Premises) Act.

6.63 However, I have made a finding that the Notice to terminate was not in compliance with section 5 of the above stated Act and thus it was null and void. This means that for all intents and purposes, the lease agreement signed by the parties did not come to an end as it was purportedly terminated in contravention of the Act.

6.64 It follows therefore and I find that the order sought for a new lease agreement does not arise as the lease agreement between the Applicant and the Respondent entered into on 1st January, 2019

is valid and that the relationship of landlord and tenant still exists.

6.65 In view of the above finding, it is pointless for me to consider the grounds advanced by the Respondent opposing the grant of a new tenancy to the effect that the Applicant breached the lease agreement.

6.66 Be that as it may, I am cognizant of the fact that the initial lease agreement between the parties expired at the end of three years from 1st January, 2019 when the matter was pending determination before this Court.

6.67 While that is the case, I am enjoined under section 13 of the High Court Act, Chapter 27 of the Laws to administer law and equity in the exercise of my jurisdiction. And to grant absolutely or on such terms and conditions as shall seem just, remedies or reliefs which a party may be entitled to in respect of any legal or equitable claim or defence brought before the court so that as far as possible, all matters in controversy between the parties may be completely and finally determined to avoid multiplicity of legal proceedings.

6.68 In view of the above, it is very clear that clause 1 of the lease agreement provides for an option to renew the lease on the same

terms for a further period of three years after which the price may be adjusted not more than 7% before the expiration of the agreement. This is intended to ensure continuity and stability.

6.69 I should hasten to add that it is trite law that a notice exercising an option is ineffective if it is not given within the time specified in the lease agreement.

6.70 In the present case, there is no clear provision when the option can be exercised. That notwithstanding, the learned authors of Halsbury Laws of England, 3rd Edition, paragraph 1095 stated that:

“A tenant desirous of exercising an option to renew must conform with the conditions in the lease as to its exercise. If no time is stated in which the option is to be exercised, the right to do so will continue so long as the relationship of landlord and tenant exists even though the original term has expired, but the landlord who has power to determine the tenancy at the end of some period prior to that at which the exercise of the option takes effect, may lawfully do so at that time notwithstanding that the tenant has given notice of his intention to exercise the option.”
(Underlining mine for emphasis only).

- 6.71 What is abundantly clear from the foregoing exposition is that if no time is stated in which the option is to be exercised, the right to do so will continue so long as the relationship of landlord and tenant exists even though the original term has expired. However, the landlord has also the power to determine the tenancy at the end of some period notwithstanding that the tenant has given notice of intention to exercise the option.
- 6.72 It follows therefore and I find that the Applicant has the right to exercise the option to renew the lease agreement because there is still a relationship of landlord and tenant existing between the two parties even though the original term expired.
- 6.73 I also find that the Respondent has also the power to determine the tenancy by giving the requisite notice to the Applicant in accordance with the law notwithstanding the Applicant's right to renew the lease.

7 COURT ORDERS


- 7.1 In view of the findings I have made in this judgment in relation to the issues for determination, I hold that the Applicant has proved its case on a balance of probabilities as herein indicated and I order as follows:

- (i) The Applicant is entitled to quiet enjoyment of the premises known as House No.14 Ingwe Road Woodland, Lusaka in accordance with clause 3(a) of the lease agreement.
- (ii) The Notice to Terminate the lease agreement entered into between the Applicant and Respondent is null and void as it was not in accordance with section 5 of the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia. Consequently, the lease agreement is valid.
- (iii) An application to the Court for an order for a new tenancy under section 4 of the Landlord and Tenant (Business Premises) Act does not arise as the Notice to terminate was not in accordance with section 5 of the said Act.
- (iv) In the exercise of my equitable jurisdiction as conferred by section 13 of the High Court Act, I order that the Applicant has the right to exercise the option to renew the lease agreement in accordance with clause 1 of the lease agreement subject to the Respondent's power to determine the lease agreement in accordance with the law.
- (v) In the absence of an agreement by the parties regarding the renewal of the lease in accordance with clause 1 of the lease

agreement, the Applicant shall yield possession to the Respondent of the demised premises being House No. 14 Ngwee Road, Woodlands Lusaka upon the expiration of six (6) months from the date hereof in order to avoid disruption in the conduct of school business.

- (vi) The interlocutory injunction against the Respondent is hereby discharged.
- (vii) Considering the circumstances of the case, each party shall bear their own costs.
- (viii) Leave to Appeal is granted.

DELIVERED AT LUSAKA THIS 13TH DAY OF FEBRUARY, 2025


..... 13 FEB 2025

M.C. KOMBE
JUDGE