

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)



2023/HP/1441

IN THE MATTER OF: **RULE 3 OF THE LANDLORD AND TENANT
(BUSINESS PREMISES) ACT CHAPTER 193 OF THE
LAWS OF ZAMBIA**

IN THE MATTER OF: **SECTIONS 4(1) AND 5 (1), (2) OF THE LANDLORD
AND TENANT (BUSINESS PREMISES) ACT
CHAPTER 193 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **FLAT NO. 9 OF SUBDIVISION 37 OF FARM NO.
4881, KABULONGA, LUSAKA**

BETWEEN:

SCHWEIZER AGRICULTURE

APPLICANT

AND

ST. EUGENE OFFICE PARK LIMITED

RESPONDENT

**Before the Honourable Mrs Justice Ruth Chibbabbuka on the 27th day of
May, 2024**

For the Applicant: Ms. M.T, Messrs Mulengeshi & Company

For the Respondent:

JUDGMENT

Cases referred to:

1. *Roadmix Limited, Kearney and Company Limited Vs Furncraft Enterprises Limited Appeal No. 122/2010*
2. *Newplast Industries Limited v The Commissioner of Lands and the Attorney General (2001) Z.R 51*
3. *Boardroom Investments Limited Vs Lusaka Gold Club Appeal No. 119/2019*

Legislation referred to:

The Landlord and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia

1.0 Introduction

The applicant issued an Originating Notice of Motion on the 21st August, 2023 claiming the following reliefs:

- i A declaration that the eviction by the respondent was illegal;
- ii An order for possession of Flat No. 9 of Subdivision 37 of Farm No. 488A, Kabulonga;
- iii Damages for unlawful distress to be assessed by the Registrar;
- iv Damages for any inconvenience caused to the applicant to be assessed by the registrar;
- v Damages for loss of use of the seized goods to be assessed by the Registrar;
- vi Any other relief the court may deem fit; and
- vii Costs.

2.0 The applicant's affidavit evidence

The applicant filed an affidavit in support of the Originating Notice of Motion, on even date deposed to by Everisto Mwansa, a Director of the applicant company who avers as follows:

On the 1st January, 2023, the applicant and respondent entered into a lease agreement for the premises known as Flat No. 9 of subdivision 37 of Farm No. 488A Kabulonga, Lusaka. The parties agreed on a monthly payment of K10,000.00 as rent. It was a term of the agreement that payments were to be made every other 3 months. The applicant has been making payments towards the aforementioned rent.

On the 9th May, 2023, the applicant received a demand letter for the payment of a sum which it did not recognise as it was up to date with the payments. Further, originating process was commenced under cause number

2023/HP/0819 with claims of amounts unknown to the applicant. The applicant through its counsel responded to the claims and requested for a reconciliation through the respondent's advocates. Despite the matter being in court, a bailiff came to the applicant's premises, seized the applicant's goods and caused damage to the demised premises. The respondent also locked the premises preventing the employees from working thereby causing disruption to the business as well as loss and damage.

3.0 The respondent's affidavit evidence

The respondent filed an affidavit in opposition on the 4th September, 2023 deposed to by Mutumba Iduma, a Manager Finance and Administration in the respondent company who avers as follows:

The lease agreement has no clause that allows payment every 3 months rather that clause 6.1 of the lease agreement provides that payments must be payable quarterly in advance. The lease agreement was not renewed because of the applicant's inability to meet the conditions of the lease agreement. The applicant continued to occupy the premises without the respondent's consent. The expired lease required the applicant to notify the respondent if the applicant company wished to renew the lease agreement.

The applicant was illegally occupying the premises without paying monthly rentals and the said cause of action referred to by the applicant was discontinued.

4.0 The applicant's affidavit in reply

The applicant filed an affidavit in reply on the 30th November, 2023, deposed to by Everisto Mwansa a Director in the applicant company who avers as follows:

The lease was renewed at a meeting held between the respondent's representative and the applicant. The renewal is further evidenced by the respondent requiring the applicant to pay rentals for the months in the year 2023.

The respondent never issued any notice to the applicant and it is a fact that the applicant was legally occupying the subject property. The Tenancy Agreement does not have a provision that requires the applicant to notify the respondent of its intention to renew the lease and neither does it have a termination clause.

It was an agreed position in the previous cause of action that the case be withdrawn to allow the parties sit down and reconcile the amount owed at the time as both parties had conflicting statements.

4.0 The hearing

At the hearing, only the applicant was in attendance. The respondent sent a Learner Legal Practitioner which signified that they were aware of the hearing but opted not to attend. The Learner Legal Practitioner has no audience before the court. On the basis that the respondent was aware of the date of hearing, the Court proceeded to hear the application.

Counsel for the applicant placed reliance on the documents filed by the applicant and argued that there was no need for the eviction to take place as the lease agreement between the parties is guided under the *Business Premises Act*. That as such, the respondent was mandated to give the applicant 6 months' notice as per the *Business Premises Act*. It was counsel's further argument that the applicant had demonstrated in its affidavit filed on the 21st August, 2023, that it used to make payments towards the rent and as such the eviction was unlawful.

The court was referred to paragraph 11 of the said affidavit which exhibits the pictures of the damaged property and shows the barbaric nature of the execution of warrant of distress which was done by a private bailiff. Reference was also made to the affidavit in reply filed on the 30th November, 2023, and the exhibit marked "EM1" under paragraph 6 which shows an invoice from the respondent bearing the date 1st January, 2023. That in the said invoice the respondent was asking for rentals from January to March in the sum of K31,000.00 and the

affidavit in support reveals that a total sum of K51,000.00 was paid to the respondent.

On the foregoing arguments, counsel contended that the applicant used to make payments towards the rentals as shown in the exhibits, as such there was no need for the warrant of distress. Counsel argued that the respondent's actions have caused a great inconvenience to the applicant and they have suffered beyond measure.

Counsel prayed that the application be granted in the applicant's favour.

The decision of the Court

It is to be noted that neither party filed any skeleton arguments or list of authorities to support their position. As such, this court will proceed to determine the matter on the documents before it as well as the applicant's counsel's submissions at the hearing of the matter.

The applicant's claims in this cause of action are outlined herein below as follows:

- (i) A declaration that the eviction by the respondent was illegal;
- (ii) An order for possession of Flat No. 9 of Subdivision 37 of Farm No. 488A, Kabulonga;
- (iii) Damages for unlawful distress to be assessed by the Registrar;
- (iv) Damages for any inconvenience caused to the applicant to be assessed by the registrar;
- (v) Damages for loss of use of the seized goods to be assessed by the Registrar;
- (vi) Any other relief the court may deem fit; and
- (vii) Costs.

The applicant has placed reliance on *Rule 3*, and *sections 4 (1) and 5 (1), (2)* of the *Landlord and Tenant (Business Premises) Act Chapter 193* of the *Laws of Zambia*.

Rule 3 of the *Landlord and Tenant (Business Premises) Act Chapter 193* of the *Laws of Zambia* states that:

“An application made to the court under the Act shall be commenced by an originating notice of motion. Evidence in support thereof may be on affidavit or, where an affidavit is not required by these Rules, viva voce.”

Rules 5 and 6 of the said Act provide that:

5. (1) The originating notice of motion by which an application under section four of the Act for a new tenancy is made must state

(a) the premises to which the application relates and the business carried on there;

(b) particulars of the applicant's current tenancy of the premises and of every notice or request given or made in respect of that tenancy under section five or six of the Act; and

(c) the applicant's proposals as to the terms of the new tenancy applied for including, in particular, terms as to the duration thereof and as to the rent payable thereunder.

6. (1) On issuing the originating notice of motion by which an application under section four of the Act for a new tenancy is made, the applicant must file an affidavit verifying the statements of fact made in the notice of motion.

(2) Not less than four days before the day fixed for the first hearing of the notice of motion, the respondent must file an affidavit stating-

(a) whether he opposes the grant of a new tenancy and if he does, on what ground;

(b) whether, if a new tenancy is granted, he objects to any of the applicant's proposals as to the terms thereof and, if he does, the terms to which he

objects and the terms he proposes in so far as they differ from the terms proposed by the applicant.

From the foregoing provisions of the *Landlord and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia*, it can be gleaned that an Originating Notice of Motion is used in a claim for a new tenancy for a business premises in a relationship between a landlord and tenant. In *casu* it is not in dispute that the premises in question are business premises, however the claims that have been made in this action as outlined above are not covered by the said *Landlord and Tenant (Business Premises) Act*.

To elucidate, the Supreme Court in the case of **Roadmix Limited, Kearney and Company Limited Vs Furncraft Enterprises Limited**¹ at **pages 10 to 11** held as follows:

“A perusal of the Originating Notice of Motion shows that the claims made by the respondent can be divided into two categories. The first relates to claims arising under an existing lease while the second category relates to an application for a new tenancy under the Landlord and Tenants (Business Premises) Act. The request for a new tenancy is specifically provided for under sections 4 and 6 of the Landlord and Tenant (Business Premises) Act as well as under Rule 5 of the Landlord and Tenant (Business Premises) Rules. The claim for a new tenancy cannot, therefore, be combined with claims for declarations and damages which are distinct and require to be brought by writ of summons and depend on pleadings and viva voce evidence being called on both sides.....”

*We, therefore, agree with Mr. Mutemwa that the learned trial Judge erred in law and fact when she held that this matter could be commenced by Originating Notice of Motion. We accordingly affirm our decision in the case of **Newplast Industries Limited v The Commissioner of Lands and the Attorney General**² that the mode of commencement of an action is*

generally provided for by the relevant statute and not the relief being sought.

From what we have stated above, it is clear that these proceedings have been misconceived. With the exception of the claim for a new tenancy, this matter was not properly before court and the learned trial Judge had no jurisdiction to determine the matter on its merit.”

The foregoing position was also reiterated by the Court of Appeal in the case of **Boardroom Investments Limited Vs Lusaka Gold Club.**³

Being guided by the foregoing authorities, it is apparent that the Originating Notice of Motion was not the correct mode of commencement for the nature of the claims that the applicant has brought before this court which comprise of; one declaration; an order for possession and three separate heads of damages. In the premises, the appropriate and correct mode of commencement for these claims is a Writ of Summons and pleadings with *viva voce* evidence to be called on both sides.

Consequently, this court has no jurisdiction to determine this cause of action and the same is accordingly dismissed with costs to the respondent to be taxed in default of agreement.

Leave to appeal is granted.

Dated the.....^{27th} day of ^{May}.....2024.

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
27 MAY 2024
R. H. Chibbabbuka
P.O. BOX 50087, LUSAKA
HIGH COURT JUDGE