

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



2022/HP/1704

IN THE MATTER OF:

SECTION 4, 5 AND 6 OF THE LANDLORD AND
TENANT (BUSINESS PREMISES) ACT,
CHAPTER 193 OF THE LAWS OF ZAMBIA

IN THE MATTER OF:

RULE 3 AND 5 OF THE LANDLORD AND
TENANT (BUSINESS PREMISES) ACT,
CHAPTER 193 OF THE LAWS OF ZAMBIA

IN THE MATTER OF:

AN APPLICATION FOR A NEW TENANCY ON
SUBDIVISION B, FARM NO. 10636, KAFUE
ROAD, LUSAKA AND LUS/4517, LUSAKA

AND IN THE MATTER OF:

A LEASE AGREEMENT DATED THE 1ST DAY OF
OCTOBER 2014

BETWEEN:

SIMBISA BRANDS ZAMBIA LIMITED

APPLICANT

AND

TOTAL ENERGIES MARKETING ZAMBIA LIMITED

RESPONDENT



Before the Hon. Mr. Justice M.D. Bowa on the 5th January , 2024

For the Plaintiff: Mr. K.M Sikajwe of Jaques and Partners Legal Practitioners

For the Defendant: Miss. D. Nalishuwa of Musa Dudhia and Company

JUDGMENT

Cases referred to

1. *Roadmix Limited, Kearney and Company Limited vs. Furncraft Enterprises Limited SCZ Judgment No. 41 of 2014;*
2. *Zimco Properties Limited vs. Dinalar Enterprises (T/A Empire Cinema) (1988-89)ZR 114 SC*

3. *Horne & Meredith Properties vs. Cox and Billingsley (2014) EWCA Civ 423*
4. *Afro Butchers Limited vs. Evees Limited (1978)ZR 39*
5. *Friday Mwamba vs. Sylvester Ntenga and Others (SCZ Appeal No. 174 of 2010)*

Legislation referred to:

1. *Landlord and Tenant (Business Premises) Act, Cap 193 of the Laws of Zambia*
2. *Halsbury's Laws of England, 4th Edition, Vol 27*

1.0 Background

1.1. The Applicant commenced this matter via Originating Notice of Motion on the 31st of October, 2022 seeking the following reliefs:

1. *An order granting the Applicant of First Capital Bank House, Stand No. 2692c, Kafue Road, Makeni, a new tenancy to Subdivision B, Farm No. 10636, Kafue Road, Lusaka and Lus/4517, Lusaka commencing on the 10th day of January, 2023;*
2. *An order granting the Applicant new lease agreements to the aforementioned premises on the following proposed term;*
 - i. *The lease be renewed for a further period of five years commencing on the 10th day of January, 2023;*

ii. *The terms and conditions in the current lease agreement be maintained and that rental payments be made in accordance with the schedule under Article 5D2 and Annex J of the current subsisting tenancy Agreements;*

3. *Costs of and by this application be in the cause.*

2.0 Affidavit Evidence

2.1 The Applicant filed into Court an affidavit verifying statements of facts made in the Originating Notice of Motion on the 31st of October, 2022, deposed to by Morne Deetlefs a General Manager of the Applicant company. He deposed that the Applicant and Respondent entered into two lease Agreements on the 1st of October, 2014, namely the Parkway Lease Agreement and the North mead Lease Agreement.

2.1 It was agreed that the Respondent grant the Applicant authorization to operate their Parkway outlet and North mead outlet using the Brand name “BONJOUR”, in selling of different products such as drinks, biscuits, tobacco and telephone cards among others. Copies of the lease agreements were exhibited as “**MD1** and **MD2**”.

- 2.2 He further deposed that it was agreed that the Parkway Lease and the North mead Lease agreements were to exist for a term of five years and that both would end on the 30th of September, 2019 with the option to renew. He averred that both Lease agreements continued to be in operation beyond the 30th of September, 2019 and that the Respondent notified the Applicant by way of letters each inscribed the 23rd of December, 2021 that it had decided to terminate the Lease Agreements. Copies of the letters were exhibited as **“MD3 and MD4”** respectively.
- 2.3 He averred that the said notices were invalid and not in compliance with the law as they were not issued in the prescribed form. Further that the Respondent subsequently served the Applicant with new notices to terminate the lease agreements on the 1st of July 2022. Copies of the Notices were exhibited as **“MD5 and MD6** respectively.
- 2.4 He deposed that he believed based on the advice of his advocates that the Applicant can be granted new tenancy agreements. That it was on that basis that he craved the indulgence of this Court to grant the Applicant a new tenancy commencing 10th January, 2023 on the terms currently prevailing in the current lease agreements.
- 2.5 The Respondent filed into Court an affidavit in opposition on the 3rd of June 2023, deposed to by Ernest Mfula, the head of Retail and Digital Department of the Respondent

Company. It was his position that the Respondent entered into two lease agreements with the Applicant for tenancy of two of the Respondent properties. Copies of the lease agreements were exhibited as **“EM1”**.

- 2.5 He averred that during the subsistence of the leases, the Applicant consistently breached its obligations under the lease agreements and as a result, on the 30th of June 2022, the Respondent caused to be served on the Applicant two notices to terminate the tenancy on the business premises. That the notices were issued on the basis of the persistent delay in paying rent when it became due. Further the notices were issued due to the recurring and substantial breaches of obligations under the tenancies of the properties by the Applicant in particular the failure to pay the outstanding rentals in respect of the properties.
- 2.6 Further that the notices where issued as the Respondent intends to demolish or reconstruct the premises comprised in the holding or a substantial part of the premises and that the Respondent cannot reasonably do so without obtaining possession of the holding. Copies of the notices were exhibited as **“EM2”**.
- 2.7 He deposed that the Applicant consistently delayed in the payment of the rentals in breach of the lease agreements which required the Applicant to pay by the 21st of each month. That the Applicant would in certain circumstances not settle the rental arrears for even more than 90 days.

Copies of the Applicant's statements of account with the Respondent detailing the late payments of rentals were exhibited as **"EM3"**.

- 2.8 Further that the Respondent owing to the Applicant's persistent delay in paying of rentals was prompted to issue warrants of distress against the Applicant on the 7th of July 2022, for recovery of outstanding rentals. Copies of the warrants of distress were exhibited as **"EM4"**
- 2.9 It was his position that the Respondent does not wish to continue with the tenancy relationship owing to the Applicant's persistent failure to settle rentals on time which negatively impacts the operations of the Respondent. Further that the Applicant was obligated under the leases to settle utility bills such as electricity bills to ZESCO limited.
- 2.10 Further that the Applicant was expected to settle shared expenses such as those relating to the cleaning of lavatories and lavatory amenities. That the Applicant on several occasions either neglected, refused or failed to settle the same despite several reminders to do so on time. A copy of the email correspondence to the Applicant depicting reminders was exhibited as **"EM5"**.
- 2.11 He averred that having not remodeled the properties in many years, the premises and buildings have dilapidated below the Respondent's standards and therefore impacts its profitability. That it is the Respondent's intention to

remodel and reconstruct the properties to modernize the buildings and premises. Copies of pictures of a recently remodeled service station belonging to the Respondent was exhibited as “EM6” to show that that it was not unusual for the Respondent to remodel and modernize their buildings to meet the commercial demands of the market and increase profitability. It was therefore the Respondent’s position that it would be an injustice to grant the relief sought by the Applicant.

- 2.12 The Applicant filed into Court an affidavit in reply on the 19th of July, 2023 deposed to by Morne Deetlefs. It was his position that the Applicant took over the lease of Agreement that was entered into between the Respondent and INNSCOR Zambia Limited for a lease at North mead and Parkway. Copies of the Commercial Lease Agreements were exhibited as “**MD1** and **MD2**” respectively.
- 2.13 He averred that despite the change in directors and shareholding in INNSCOR that led to a further change in name to that of the Applicant, the new management under the Applicant company inherited INNSCOR’s debts to the Respondent and agreed to settle the said outstanding amounts.
- 2.14 He deposed that contrary to the asserts about the delay in paying of rentals, the Applicant’s position was that it has always paid its rentals despite the Respondent being in contravention of article 2 of D2 of the lease agreements.

Further that contrary to the Respondent's assertions, it was the Respondent's failure to reconcile payments made to them in their accounting books that led to lack of reconciliation on amounts due if any.

2.15 Further that the Applicant disputes the arrears calculated by the Respondent as the Applicant has reconciled all outstanding claims from the Respondent and have provided the details to the Respondent. Further that in addition the Applicant has paid a total sum of ZMW 640,000.00 as full and final settlement of all arrears as of July, 2022. A copy of the proof of payment was exhibited as **"MD3"**.

2.16 It was averred that the warrants of distress issued by the Respondent were issued on fictitious claims of rental arrears and that despite a stay by the High Court, the Respondent sent bailiffs to both locations who forced the Respondent to close for a period of 7 days. That this resulted in substantial loss of income and inconvenience to the Applicant's customers.

2.17 He deposed further that the Respondent has allowed bank ATMs to be installed at the North mead location contrary to the provisions of the lease. That the ATMs are connected to the Applicant's power supply and that the Respondent has not paid to the Applicant any contribution for the use of the power by the ATMs. Further that contrary to averment of non-payment of utility bills, it was the

Applicant's position that it has settled all utility bills up to date. Copies of the proof of payment for utility bills was exhibited as **"MD4"** .

2.18 It was further his position that the Applicant is responsible for cleaning and consumables of customer toilets at the North mead branch. That there is no sharing of costs as averred by the Respondent. Further that the interior and exterior of both the Parkway and North mead buildings have not been maintained in breach of the lease agreement by the Respondent. He further averred that the Applicant has no objection to the improvement and remodeling of the premises and is agreeable to upgrading its food counters once new leases have been issued.

2.19 The Applicant filed into Court a further affidavit in reply with leave of Court granted on the 21st of July 2023 dated the 25th of July, 2023 deposed to by Morne Deetlefs. It was his position that contrary to the Respondent's assertion of the alleged delayed payment of rentals, that the Applicant has always paid its rentals despite the Respondent being in contravention of article 2 of D2 of the lease agreements. Copies of email correspondence between the Applicant and Respondent where exhibited as **"MD1"**.

3.0 Skeleton Arguments

3.1 The Applicant filed into Court skeleton arguments on the 31st October, 2022. Reliance was placed on Rule 3 of the Landlord and Tenant (Business Premises) Regulations which provides 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.”

3.2 It was argued that the proceedings have been competently commenced before this Court. Further reliance was placed on section 6 of the Landlord and Tenant (Business Premises) Act which provides that:

(1) A tenant's request for a new tenancy may be made where the tenancy under which he holds for the time being (hereinafter referred to as "the current tenancy") is a tenancy granted for a term of years certain and thereafter from year to year.

(2) A tenant's request for a new tenancy shall be for a tenancy beginning with such date, not more than twelve nor less than six months after the making of the request, as may be specified therein: Provided that such date shall not be earlier than the

date on which, apart from the provisions of this Act, the current tenancy would come to an end by effluxion of time or could be brought to an end by notice to quit given by the tenant.

(3) A tenant's request for a new tenancy shall not have effect unless it is made by notice in the prescribed form given to the landlord and sets out the tenant's proposals as to the property to be comprised in the new tenancy (being either the whole or part of the property comprised in the current tenancy), as to the rent to be payable under a new tenancy and as to the other terms of the new tenancy.

3.3 It was argued that the Applicant is permitted by law to request for a new tenancy agreement from the Court. That it is in this vein that the Applicant seeks an order for a new tenancy commencing on the 10th of January, 2023 on the terms contained in the current lease agreements.

3.4 The Respondent filed into Court Skeleton arguments in opposition on the 30th of June, 2023. It was submitted that the Respondent was alive to the fact that the Landlord and Tenant (Business Premises) Act provides for security of tenure for tenants occupying premises for business purposes and enables such tenants to obtain new

tenancies in certain cases. However, it was the Respondent's position that this was not such a case.

- 3.5 It was submitted that where a tenant makes an application to the Court for a grant of a new tenancy, section 11 of the Act allows a landlord to oppose the grant of any new tenancy and that it is further instructive on acceptable grounds on which such landlord may base the objections.
- 3.6. It was submitted that as set out in the affidavit in opposition the Respondent issued notices in which it indicated that it would oppose an application to this Court under the Landlord and Tenant (Business Premises) Act, on the grounds of the persistent delay in payment of rentals and substantial breaches of the Applicant's obligations on the tenancy agreements. Further on the ground that the Respondent intends to demolish or reconstruct the properties.
- 3.7 It was submitted that the grounds as stated in affidavit in opposition are within the grounds as envisaged in section 11(1) of the Landlord and Tenant (Business Premises) Act. Reference was made to the case of **Zimco Properties Limited vs. Dinalar**

Enterprises (T/A Empire Cinema)² wherein the Supreme Court stated that:

“ There are comments in the paragraph with which we refer to the effect that the notice by a landlord should be liberally construed, and provide that the notice makes clear an intention to rely on any particular paragraph of section 11, the landlord can rely on any facts falling within that paragraph or a portion of it.”

3.8 It was submitted that the Respondent opposes the application for a new tenancy on grounds set out in section 11 (1)(b)(c) and (f). It was argued that all that one has to prove as regards persistent failure to pay rental in terms of the law is that rentals have not been paid as agreed and that there has been a consistent pattern of this conduct. Reference was made to an extract from the learned authors of **Halsbury’s Laws of England, 4th Edition, Vol 27** at para 500 where it states as follows:

“ Persistent delay in paying rent. To establish this ground, the landlord must show that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due. It is sufficient that there is a history of late payment, although it need not be prolonged; nor need there be substantial arrears of rent.”

3.9 It was argued that the Applicant as evidenced in the affidavit in opposition through exhibit “**EM3**”, has consistently failed to pay rent when it fail due. It was submitted that the Respondent should not be subjected to the continued pattern of conduct by the Applicant.

3.10 It was further argued that the Respondent lies on the other ground of the Applicant’s substantial breaches of its obligations under the existing tenancy to object to the grant of the new tenancy. Reference was made to the case of **Horne & Meredith Properties vs. Cox and Billingsley** ³ in which the Court held that:

“ the overall question under this head is whether it would be fair to the landlord, having regard to the tenant’s behavior, for him to be compelled to re-enter into legal relations with the tenant....”

3.11 It was submitted that where a tenant has previously breached obligations under the existing tenancy, such a tenant ought not to be granted a new tenancy as this constitutes a good reason not to grant new tenancies in spirit of section 11 of the Act. That as demonstrated, the Applicant has continued to breach the tenancy agreement by failing to meet its obligations.

3.12 It was further submitted that the Respondent's intention to demolish or reconstruct the premises comprised in the holding of the premises is a further ground on which the Court should not renew the leases. It was argued that this intention was made known to the Applicant when it was served with the notices to terminate.

3.13 Reliance placed on the case of **Afro Butchers Limited vs. Eves Limited**⁴ in which the Court made it clear that two elements ought to be established by the landlord, these being that at all material times right down to the date of hearing, the landlord did have and has a firm settled intention to demolish and reconstruct, which is not likely to change; and that the landlord must genuinely intend to occupy premises and must, on an objective test, have reasonable prospect of bringing this about with no insurmountable obstacles.

3.14 It was argued that from the time the Respondent issued the notice to quit with regard to the properties, it made it clear that it had and still has the intention of demolishing and reconstructing part of the premises occupied by the Applicant. That this is part of the reason why there has been no new tenancy between the parties.

3.15 It was submitted that the court ought to dismiss the application for a new tenancy as the Respondent has satisfied the requirements of the Act on the grounds as contained in section 11 as provided in section 12 of the Act, which provides that:

“(1) If the landlord opposes an application under subsection (1) of section four on grounds on which he is entitled to oppose it in accordance with section eleven and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy.

3.16 It was submitted that section 12(1) is very instructive and leaves no room for the Court to exercise its discretion. It was argued that having established all the grounds the Court should dismiss the application before it with costs.

3.17 The Applicant filed into Court arguments in reply, on the 19th of July, 2023. Reference was made to the case of **Friday Mwamba vs. Sylvester Ntenga and Others**⁵ in which the Court stated that parties should be free to make agreements on their own without the interference of the Courts or Parliament and that their

agreements should be respected, upheld and enforced by the Courts.

3.18 It was submitted that the Applicant and Respondent entered into lease agreements ending on the 30th of September, 2019 with an option to renew. It was argued that the Applicant has always paid its rentals on time and that it is the Respondent that has breached the agreements as demonstrated in the affidavits in support of the application.

3.19 Further reliance was placed on section 13(1)(a) of the Act which according to the Applicant gives the Court power to order that a tenant of a rented property shall retain possession while the Landlord carry's out any renovations on the property. It was submitted that the Court should in line with section 13 order that the Applicant retains possession as the Respondent carries out the intimated renovations.

4.0 Hearing

4.1 At the hearing Counsel for the Applicant Mr. Sikazwe entirely relied on the documents filed in support of the application. In response

Counsel for the Respondent Miss. Nalishuwa relied on the documents filed in opposition and supplement the same with oral arguments. It was her argument that one of the reasons advanced by the Respondent for not wishing to continue with the tenancy is the persistent delay in paying of rentals when they fall due

4.2 Further that the Applicant has not disputed its failure to pay rent timely, this is evidenced in paragraph 8 of the affidavit in reply in which the Applicant states that it paid ZMW 640, 000.00 in full and final payment of all arrears as of July 2022. That however, exhibit “**EM3**” of the Respondent’s affidavit in opposition is a statement of account showing rentals due as at 19th January, 2023.

4.3 It was argued that the total rent due for both premises is over 1 Million Kwacha. That the Applicant is clearly still in arrears and that this goes to prove that the Applicant has been consistent in its failure to pay rentals. Further that as regards the alleged breaches of article 5 (d) (2) of the lease agreement, that the Applicant has not shown the manner the Respondent has breached the lease agreement.

4.4 It was argued that article 5 (d) (2) requires that the Applicant submits turnover reports to the Respondent. That it is not clear how the Respondent breached the provision which imposes an obligation on the Applicant. Further as regards the assertion that the Respondent has breached the agreement relating the Applicant's right to enjoy the properties without interruption of the Respondent or any other person in line with article 5 (A3) of the Lease agreement, it was argued that Respondent has not breached the agreement to justify the renewal of the lease agreements.

4.5 Mr. Sikazwe in reply maintained that the Applicant paid its rentals on time and that any delay was occasioned by the Respondent's failure to reconcile its accounts on time. Further that as exhibited in "**MD3**" payments were made on time and that "**EM3**" of the Respondent's affidavit does not reflect the picture of what is owing as the Applicant has made full settlement of the dues.

5.0 Court's consideration

5.1 I have carefully considered the application before me. The case simply rests on whether the circumstances of the case allow for a renewal of the two Lease Agreements entered into between the

Applicant and Respondent herein. It is not disputed that there were two lease agreements in subsistence exhibited "**MD1** and **MD2**" in the affidavit in support. The law governing tenancies of business premises is to be found in the Landlord and Tenant (Business Premises) Act (herein after called the "Act") as rightly pointed out by the parties with exceptions prescribed in section 3 (2) of the Act.

5.2 The main purpose of the Act is to provide security of tenure for tenants occupying property for business, professional and other purposes and to enable such tenants to obtain new tenancies in certain cases. The provision for security of tenure under section 4 of the Act reads as follows:

"(1) A tenancy to which this Act applies shall not come to an end unless terminated in accordance with the provisions of this Act, and subject to the provision 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.

5.3 It is not in dispute that the Respondent issued notices to terminate the Lease agreements on the 30th of June, 2022 and

that it is as a result of the said notices that the Applicant made the application for renewal of the two leases before this Court pursuant to section 6 of the Landlord Act which empower this court to grant an order for renewal of a tenancy agreement.

5.5 The Respondent however objects to the application for a renewal anchored section 11 of the Act that allows a landlord to oppose the grant of any new tenancy. The section provides that:

“ (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:

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;

...

(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;...”

5.6 The Respondent contends that the Applicant has breached the Lease agreements by its persistent delay in paying rent when it becomes due. Proof of the delayed payments was exhibited in a statement of accounts exhibited as **“EM3”** in the affidavit in opposition. According to the Respondent, this led to the issuance of a warrant of distress to recover unpaid rentals against the Applicant as evidenced in **“EM4”**. Further that the Applicant has breached the lease agreements by failing to meet its obligations under the Lease agreements in terms of payment of utility bills. Proof of this was exhibited as **“EM5”** being email correspondences to the Applicant on the unpaid ZESCO bills

and unpaid contributions for the shared amenities on the properties.

5.7 The Applicant's position as regards the Respondent's objection is that it has not breached the lease agreements as it has paid its rentals on time. Further that it has settled all its rental arrears as evidenced by exhibit "**MD3**" and all its utility bills as evidenced by "**MD4**".

5.8 Having perused through the evidence on record I find that the Respondent's objection to the renewal of the leases is justified. The Respondent through exhibit "**MD3**" makes a clear admission of its failure to settle its rentals on time. No proof has been brought before this court by the Applicant to show that the delay was occasioned by Respondent's failure to reconcile its accounts. Moreover, the lease provides that the rentals are to be paid on the 21st day of every month. The failure to pay when the rent becomes due amounts to a breach. This fits in the ground for objection as provided in section 11 (1)(b) of the Act.

5.9 Further the other ground upon which an objection can be made for a new Tenancy agreement as provided under section 11 (1) is where there has been substantial breaches by of obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding. The Respondent has demonstrated through exhibit "**EM5**" the failure by the Applicant to settle utility bills and shared expenses on time. The Applicant has through exhibit "**MD4**" exhibited proof of having settled the utility bill. This however does not rebut that fact that the said bills were not settled in time as per complaints from the other tenants through the email correspondence in "**EM5**".

5.10 I find that the Respondent also has satisfied the second ground as provided in section 11 to justify the objection to the renewal of lease. Further the Respondent contends that it has the intention of demolishing and re-constructing the Properties hence the need for possession as envisaged in section 11 (1) (f). In as much as the Applicant has cited section 13(1)(a) of the Act to the effect that the Court can allow the Applicant to retain

possession as the Respondent carries out the re-construction of the Property, I find that this would be unjust in the present case. The Respondent has substantially proved that the Applicant has breached the terms of the lease agreements in line with grounds as specified in section 11(1) (a) (b)(c) and (f).

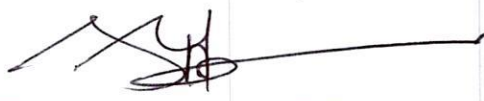
5.11 I am persuaded by the holding of the Court in the case of Horne & Meredith Properties vs. Cox and Billingsley (supra) that it would not be fair for a landlord to be compelled to re-enter into a tenancy agreement with a tenant bearing in mind the tenant's behavior. I find that this is not an appropriate case for me to grant an order for the renewal of the two lease agreements. My finding is in line with section 12 of the Act which provides that:

“(1) If the landlord opposes an application under subsection (1) of section four on grounds on which he is entitled to oppose it in accordance with section eleven and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy”

5.12 The net effect of this Judgment is that the Applicant's application fails. The Applicant should hand over possession of the properties within 30 days from the date of this Judgment.

The Applicant will of course be expected to settle any outstanding rentals that maybe due. Costs for this Application are for the Respondent to be taxed in default of agreement.

Dated at Lusaka this ^{5th}.....day of ^{January}.....2024.



HON. JUSTICE M.D BOWA