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**IN THE SUPREME COURT OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
**(CIVIL JURISDICTION)**

SCZ No. 18 of 2007  
Appeal No. 133/2005

**BETWEEN:**

**THE REGISTERED TRUSTEES OF APPELLANT  
THE ARCHDIOCESE OF LUSAKA**

**APPELLANT**

**AND**

**OFFICE MACHINE SERVICES LIMITED**

**RESPONDENT**

**CORAM: Sakala, CJ., Mumba, JS. and Kabalata, Ag.JS.**

**On 3<sup>rd</sup> May and 14<sup>th</sup> August` 2007**

**For the Appellant: No appearance**

**For the Respondent: Mr. B. Luwo of Eric Silwamba and Company**

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**J U D G M E N T**

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**Sakala, CJ., delivered the Judgment of the Court.**

**Cases referred to:**

- 1. Robert Lawrence Roy Vs. Chitakata Ranching Company Limited  
[1980] ZR 198**
- 2. Erinford Properties Limited Vs Cheshire County Council [1974] 2  
All ER 455**

**3. DPP Vs Jack Lenga [1983] ZR 37****4. BP Zambia PLC and Interland Motors Limited SCZ Judgment 5 of 2001**

We heard this appeal in the absence of representation for the appellant upon the Court being satisfied that the appellant must have been aware of the hearing date. On behalf of the appellants, however, written heads of argument were filed with the Court. These have been taken into account.

This is an appeal against a ruling of the High Court (Zikonda J) sitting at Lusaka, dated 22<sup>nd</sup> June 2005. In the ruling, the Court held that it was satisfied that it had jurisdiction to decide on the Originating Notice of Motion for compensation that had been filed before it. By that ruling, the Court rescinded its earlier Order of 15<sup>th</sup> October 2005 by which it had ordered the matter to be sent back to Mwanza J, who had dealt with the main issue. The rescission was made pursuant to Order 39 Rule 1 of the High Court Rules, Cap 27 of the Laws of Zambia.

For convenience, we shall refer to the appellant as the respondent and the respondent as the applicant, which designations the parties were in the Court below.

The background facts of the case leading to this appeal are that by an Originating Notice of Motion for a New Tenancy, the applicant, pursuant to Section 4 of the Landlord and Tenant (Business Premises) Act, Cap 193, as read together with Rule 5 of the Business Premises Rules, applied for a New Tenancy for a term of three years in relation to the respondent's premises

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known as Offices on the Ground Floor, Design House, Lusaka. The application was made after the respondent had issued a notice to terminate the previous tenancy.

The application for a new tenancy was heard by the Hon. Mr. Justice Mwanza. On the 24<sup>th</sup> of June 2004, the Hon. Mr. Justice Mwanza delivered his ruling in that application and declined to grant the renewal of the tenancy.

On 26<sup>th</sup> August 2004, by way of an Originating Notice of Motion for compensation, the applicant applied for, among other reliefs, an Order that the respondent should pay the applicant the sum of K635,160,000.00 as proper compensation for actual loss the applicant had suffered as a tenant in consequence of the Court declining to grant a new tenancy. This application was allocated to the Hon. Mr. Justice Zikonda and not the Hon Mr. Justice Mwanza, who had dealt with the application for renewal of tenancy.

However, on 27<sup>th</sup> September 2004, the respondent filed a Notice of Intention to Raise Preliminary Issues. The preliminary issues were:

- (a) "That this matter is misconceived, unnecessary and/or an abuse of Court process in view of Cause No.2003/HP/1124 involving the same parties.***
- (b) That in view of the said Cause No.2003/HP1124 and assuming the applicant was dissatisfied with the Judgment therein it should have applied for the review of the same considering the extensive powers of review reposed in the Court. That in any event this application for compensation should have been made***

***before the same Court that heard the applicant's application for a new tenancy in view of the provisions of Section 19 of the Landlord and Tenant (Business Premises) Act."***

The Notice of Intention To Raise Preliminary Issues came up for hearing before the Hon. Mr. Justice Zikonda on 15<sup>th</sup> October 2004. On the same day after hearing arguments and submissions for and against; the Court (Zikonda J) made the following ruling:

***"I have carefully considered the affidavit of both parties and the submission by both counsel. I am satisfied that this should be a matter that is referred to Judge Mwanza who dealt with the main issue out of which the applicant is now seeking compensation. I am also of the opinion that the matter before this Court is not a Commercial matter per se. The matter is referred to the Judge-in-charge for reallocation to Judge Mwanza. Costs are in the cause."***

However, despite the above ruling, the record shows that on 8<sup>th</sup> March 2005, the matter was again back before the Hon. Mr. Justice Zikonda. On that day, according to the record, Counsel for the respondent said the following:-

***"I have heard what the Court has said; we feel that this is a matter, which should go before Judge Mwanza. The order made by the Court on 15<sup>th</sup> October 2004 has not been set aside or reviewed. This Court observed that there was no need to have commenced this matter under the Commercial List, the Applicant would have made an application before Judge Mwanza, the costs were awarded to the Respondents and have been paid. We still insist that the matter***

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*should be heard by Judge Mwanza, in view of the wording of the Landlord and Tenant (Business) Act."*

In reply, according to the record, Counsel for the Applicant stated:

*"I simply say that the fact that we are back before his Lordship is because whatever position was arrived at prior to this afternoon's hearing has been taken by events by the administrative action of the Court. It is therefore incompetent for the Respondent to raise the same issues which the Court has dealt with. The Applicant is saying it has a right to articulate before this court and that right should not suffer merely because a technical procedure or misunderstanding to hear that right. Our understanding of Section 19 of the Landlord and Tenant (Business) Act is that it does not specifically make it mandatory for the Court that hears the application, on an application for a new tenancy to still deal with questions of compensation. Our understanding of Section 19 is that the Statute confers on an unsuccessful tenant an accrued right to seek compensation from the previous Landlord within the limit of Section 19. In so far as that right has not been heard and pronounced upon, in the absence of agreement, such tenant has a right to come to Court and be heard accordingly. All we ask is that do the circumstances of this case suggest in any way Applicant in this matter has got a right to compensation. That is the test we feel should be applied to this case. If indeed that is the case then the details as to whether or not there is compensation due are matters of proof and assessment before the Deputy Registrar."*

Thereafter, Counsel for the respondent replied as follows:

***"I repeat that the Court Ruling or Order was not set aside or varied or appealed. The administrative discussions have not varied or reversed the courts order on record. Secondly the issue is not whether or not the applicant has a right to compensation. We have raised the argument which the Court agreed and will repeat those arguments. I will also emphasis that in view of provisions of Section 19."(sic)***

The Court reserved its ruling. On 22<sup>nd</sup> June 2005 the Court delivered the ruling. In order to appreciate and understand the issues involved in this appeal, it is necessary to quote that ruling in full. The ruling reads as follows:

***"This matter is before me pursuant to Order 39 Rule 1 of the High Court Rules, Cap 27 of the Laws of Zambia. The facts are that on 27<sup>th</sup> September 2004, the Respondent filed into Court a Notice of Intention to raise Preliminary Issues. On 15<sup>th</sup> October 2004, this Court heard the matter inter-parte. After hearing the submission of both Counsel, the Court's decision was that the matter be referred to the Hon. Mr. Justice Mwanza. However, the Judge-In-Charge of Civil List discussed this matter with this Court and referred the matter back to this Court and requested this Court to review its decision under Order 39 Rule 1 of the High Court Rules Cap 27 of the laws of Zambia. The gist of the Respondent's Counsel's submission is that this matter was before the Hon. Mr. Justice Mwanza who dealt with the matter and Judgment was rendered on***

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***24<sup>th</sup> June 2004. The Respondent's Counsel contended that the claim prayed in this cause by the Plaintiff should have been raised in the matter, which was decided by the Hon. Mr. Justice Mwanza on 24<sup>th</sup> June 2004. He submitted that the matter should be referred to the Hon. Mr. Justice Mwanza.***

***Counsel for the applicant submitted that this Court has power and jurisdiction to hear this matter. He contended that the claim being sought by the Plaintiff is one, which this Court can deal with. He stated that the Hon. Mr. Justice Mwanza has not adjudicated the matter before Court.***

***After having considered the submissions by both Counsel, I am satisfied that this Court has jurisdiction to decide on the merits of this case. I therefore rescind my earlier Order made on 15<sup>th</sup> October 2005 pursuant to Order 39 Rule 1. This Court will determine the matter. The costs are in the cause. Leave to appeal is granted."***

The respondent has appealed to this Court against the above ruling of 22<sup>nd</sup> June 2005. The appeal is based on two grounds; namely: that the learned trial Judge erred in point of law and fact in reviewing his earlier Order made on 15<sup>th</sup> October 2004 without any legal basis; and that the learned Trial Judge misdirected himself both in law and in fact in rescinding his earlier Order made on 15<sup>th</sup> October 2004 as the effect of his Order would promote or encourage multiplicity of actions.

On behalf of the applicant, as well as on behalf of the respondent, written heads of argument were filed based on the two grounds. On behalf

of the applicant brief submissions were made to augment the written submissions.

The summary of the written heads of argument on behalf of the respondent on ground one is that the action before the Hon. Mr. Justice Zikonda had its genesis from a judgment of another Court, The Hon. Mr. Justice Mwanza under Cause 1003/HP/1124. It was submitted that the trial Judge (Zikonda J) misdirected himself in rescinding his earlier Order made on 15<sup>th</sup> October 2005, in which he had referred the matter back to the Hon. Mr. Justice Mwanza, who had earlier dealt with the main issue from which the applicant had sought compensation; and that there was no basis at all in law for the learned trial Judge to have reviewed and/or rescinded its earlier decision as a result of a discussion which the trial Judge had with the Judge-In-Charge. The case of **Robert Lawrence Roy Vs. Chitakata Ranching Company Limited**,<sup>(1)</sup> in which this Court, among others, held that events which occurred for the first time after delivery of judgment could not be taken into account as grounds for review of judgment was cited in support of the arguments and submissions on ground one.

The gist of the written heads of argument on ground two, on behalf of the respondent, is that it was common cause that the applicant at first initiated the action before the Hon. Mr. Justice Mwanza under Cause No. 2003/HP/1124 for a new tenancy; but after being unsuccessful, the applicant commenced a fresh Court action in the Commercial Court for compensation under Section 19(1) of the Landlord and Tenant (Business Premises) Act. It was submitted that from the wording of Section 19(1) the claim for compensation should have been advanced as an alternative to the claim for renewal of the tenancy before The Hon. Mr. Justice Mwanza, instead of



starting a fresh action. It was pointed out that this Court has on several times expressed its displeasure for multiplicity of actions over same subject matter; and that in rescinding its earlier order, the Court was infact promoting or encouraging a multiplicity of actions which this Court has time and again frowned upon.

The Court was urged to allow the appeal and to order that the issue on compensation be heard before the Court (Mwanza J) that heard the main issue for which the applicant is seeking compensation.

The summary of the written response to the written arguments on ground one is that the trial Judge exercised his discretion under Order 39(1) of the High Court Rules in reversing his position in his ruling of 22<sup>nd</sup> June 2005. The case of Roy<sup>(1)</sup> was extensively cited in support of this argument. It was concluded that ground one of appeal should be dismissed as the learned trial judge deemed it sufficient to be guided by the Judge-In-Charge who enjoys supervisory jurisdiction over all the Judges on the Commercial list.

The summary of the written response to written arguments on ground two is that the prayer that was sought by the applicant before the Hon. Mr. Justice Mwanza was not related to the subsequent claim, which was restricted to matters of compensation. It was contended that there was no other prayer in the case before the Hon. Mr. Justice Mwanza except for the grant of a new tenancy. It was submitted that the Hon. Mr. Justice Mwanza, having declined to grant a new tenancy, had adjudicated the sole substantive matter to its full and final determination and was consequently *functus*

**officio. The case of Erinford Properties Limited Vs Cheshire County Council<sup>(2)</sup> on functus officio was cited in support of this argument.**

It was further submitted that by the judgment dated 24<sup>th</sup> June 2004 in case No. 2003/HP/1124, the Hon. Mr. Justice Mwanza rendered that cause permanently inactive save for matters of review and appeal which were never invoked by the respondent. It was also submitted that it was not open at this stage for the subsequent matter involving matters of compensation and interest to be determined by the Hon. Mr. Justice Mwanza under cause No. 2003/HP/1124 as he had since become **functus officio**. The case of **DPP Vs Jack Lenga<sup>(3)</sup>** was cited in aid of this argument. It was thus pointed out that it was a misconceived argument to suggest that there was a multiplicity of actions when in actual fact one matter was brought to finality and the claim arising in the subsequent matter bore no similarity in nature.

Counsel for the applicant in the rest of his argument in response to ground two went to great extent to explain the circumstances that would amount to multiplicity or forum shopping. He submitted that the matter before the Hon. Mr. Justice Zikonda culminates from the enforcement of Hon. Mr. Justice Mwanza's decision dated 24<sup>th</sup> June 2004. Counsel cited a number of cases in which this Court had pronounced on multiplicity of action. It was contended that the action before the Hon. Mr. Justice Mwanza was separate and distinct from the claims before the Hon. Mr. Justice Zikonda and the Hon. Mr. Justice Mwanza. It was finally submitted in response to ground two that the issue of multiplicity of action did not arise, as the earlier action was not active at the time the applicant proceeded with this action concerning compensation.

We have carefully considered the arguments and the submissions by both parties. We have also considered the Ruling of the 22<sup>nd</sup> June, 2005, leading to this appeal. At the outset, we wish to quickly indicate that the Notice of Intention To Raise Preliminary issues was properly taken on behalf of the respondent. We also wish to point out that on 15<sup>th</sup> October 2004, the Court (Zikonda J) was on firm ground when he referred the Originating Notice of Motion for Compensation to the Hon. Mr. Justice Mwanza, who had earlier determined the Originating Notice of Motion for a New Tenancy.

On ground one, we agree with the submissions on behalf of the respondent that the Hon. Mr. Justice Zikonda misdirected himself by rescinding the Order of 15<sup>th</sup> October 2004 in which he had referred the application for compensation to the Hon. Mr. Justice Mwanza who had dealt with the application for the grant of a new Tenancy.

Order 39 Rule 1 reads as follows:

***“Any Judge may upon such grounds as he shall consider sufficient, review any Judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous Judgment or decision.”***

The import of Order 39, Rule 1 is, indeed, very clear. We, therefore, on the facts of this appeal, find no basis in law for the Hon. Mr. Justice Zikonda to have reviewed and or rescinded his earlier decision of 15<sup>th</sup> October, 2004 referring the matter to the Hon. Mr. Justice Mwanza, simply because he had a discussion with the Judge-In-Charge. We reject the contention that on the

facts of this case the Hon. Mr. Justice Zikonda exercised his power of review correctly.

We, therefore, allow ground one of appeal and hold that the Hon. Mr. Justice Zikonda erred in point of law and fact in reviewing his earlier order made on 15<sup>th</sup> October, 2004 referring the application for compensation to the Hon. Mr. Justice Mwanza.

On ground two, we agree with the arguments and the submissions on behalf of the respondent that the effect of the Hon. Mr. Justice Zikonda's rescinding of his earlier order of 15<sup>th</sup> October 2004, referring the issue of compensation to Hon. Mr. Justice Mwanza, was to promote and or encourage multiplicity of actions.

The applicant applied to Court (Mwanza J) for a new tenancy pursuant to Section 4 of the Landlord and Tenant (Business Premises) Act, Cap 193 under Cause No. 2003/HP/1124. The Hon Mr. Justice Mwanza refused to grant the new Tenancy. Section 19(1) of the Landlord and Tenant (Business Premises) Act, Cap 193 reads as follows:

***"19.(1) Where, on the making of an application under section four, the court is precluded (Whether by subsection (1) or (2) of section twelve) from making an order for the grant of a new tenancy by reason of any of the grounds specified in paragraphs (e), (f) and (g) of subsection (1) eleven and not of any grounds specified in any other paragraph of that subsection (or where no other ground is specified in the Landlord's notice under section five or, as the case may be, under subsection (6) of section six, than those specified in the said paragraphs (e), (f) and (g), and either no application under***

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***the said section four is made or such an application is withdrawn), then, subject to the provisions of this Act, the tenant shall be entitled on quitting the holding to recover from his Landlord by way of compensation such amount as may be determined by the Court."***

We are satisfied that from the wording of the above section, the claim for compensation of the applicant should have been made as an alternative to the claim for the renewal of the tenancy before the Hon. Mr. Justice Mwanza, instead of commencing a fresh action after the action for renewal of the tenancy had been declined. In the least, the applicant should have made its application for compensation in the same cause before the Hon. Mr. Justice Mwanza.

Indeed, this Court has on many occasions expressed its displeasure on multiplicity of actions over the same subject matter. In rescinding his earlier order, the Hon. Mr. Justice Zikonda was infact promoting or encouraging multiplicity of actions.

We take note that according to the record of appeal, compensation was not prayed for before the Hon. Mr. Justice Mwanza. In our view, however, in terms of the law, this did not preclude the applicant to apply for compensation before the Hon. Mr. Justice Mwanza. The issue of *functus officio* did not and could not arise and on the facts of this appeal, the issue of *functus officio* was totally irrelevant.

Compensation, under Section 19 of the Act is an appendage to the main action for a new tenancy. It cannot, therefore, be dealt with as a different action.

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We also allow ground two of appeal and hold that the learned trial Judge (Zikonda J) misdirected himself in law and in fact in rescinding his earlier order of 15<sup>th</sup> October 2004 as the effect of his order would be promoting or encouraging multiplicity of actions.

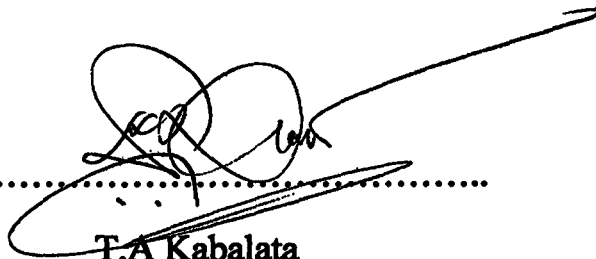
The two grounds of appeal having been successful; we reverse the court below (ZikondaJ). We set aside the Ruling dated 22<sup>nd</sup> June, 2005. We order that the issue of compensation be held before the Court (Mwanza J) that determined or dealt with the main issue of a new tenancy out of which the applicant is seeking compensation. This will, indeed, be in keeping with the law and the spirit of discouraging multiplicity of actions. The costs of this appeal will follow the event, to be taxed in default of agreement.



E.L. Sakala

**CHIEF JUSTICE**

F.N.M. Mumba

**SUPREME COURT JUDGE**

T.A. Kabalata

**ACTING SUPREME COURT JUDGE**