Appeal No. 164/2013

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

(Civil Jurisdiction)

IN THE MATTER OF	**Section 3 of the Landlord and Tenant (Business Premises) Rules Cap 193 of the Laws of Zambia**
AND	
IN THE MATTER OF	**Stand No. 3145, LUSAKA**

B E T W E E N:

NIDA PROPERTIES LIMITED **APPELLANT**

AND

OMNIA FERTILIZERS LIMITED **RESPONDENT**

Coram: Phiri, Muyovwe and Wood, JJJS.
On the 1st day of March, 2016 and 9th March, 2016.

For the Appellant:	**Ms. A.D.A. Theotis of Theotis Mataka and Sampa Legal Practitioners**
For the Respondent:	**Mr. A.J. Shonga, Jr. S.C., and Mr. S.N. Lungu of Messrs Shamwana and Company.**

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

1. Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises, SCZ Judgment No. 4 of 1999
2. Nkhata and Others v The Attorney-General (1966) Z.R. 124 (CA)
3. The Attorney-General v Lee Habasonda (SCZ Judgment No. 23 of 2007)
4. Attorney-General v Peter Mvaka Ndlovu (1986) Z.R. 12
5. BP Zambia Plc v Interland Motors Ltd (2001) Z.R. 37, at page 41
6. Zambia Revenue Authority v Jayesh Shah (2001) Z.R. 60
7. Zambia Revenue Authority v Hitech Trading Company Limited (2001) Z.R. 17
8. Scholl MFG Co. Ltd v Clifton (Slim-line) Ltd (1967) - CH 41.

Works referred to:

1. Woodfall's Law of Landlord and Tenant at page 1022
2. Hill and Redman's Law of Landlord and Tenant, 12th Edition at page 497
3. Introduction to Land Law, 4th Edition, at page 255
4. The High Court Act, Cap 27

Legislation referred to:

1. Landlord and Tenant (Business Premises) Act, Cap 193 of the Laws of Zambia
2. Supreme Court of Zambia Act, Cap 25 of the Laws of Zambia
3. The Supreme Court (Amendment) Rules, 2012 - Statutory Instrument No. 26 of 2012.
4. English Law (Extent of Application) Act, Cap 11 of the Laws of Zambia
5. Rule 10(5) of the Supreme Court Rules, Cap 25.
6. Rule 37 of the Supreme Court Rules

7. Rent Act, Cap 206 of the Laws of Zambia

For convenience we shall refer to the Appellant as the Plaintiff and the Respondent as the Defendant, which is what they were in the High Court.

This is an appeal against the judgment of the High Court dated 8th May, 2013 dismissing the Plaintiff's action launched under **Section 3 of the Landlord and Tenant (Business Premises) Act, Cap 193 of the Laws of Zambia**, seeking a declaration that the defendant's Notice to quit served on 1st April, 2011 was illegal, null and void; and seeking damages for breach of the lease agreement on business premises known as **STAND 3145, Lusaka**.

The case for the plaintiff, as pleaded in its affidavit in support of the originating notice of motion, is that it owned a warehouse on the disputed property. By a lease agreement dated 29th January, 1999, the warehouse was leased to the defendant, initially for a period of four (4) years commencing on 1st January, 1999 with a provision for renewal on expiry. The lease agreement was renewed for further fixed terms over

the years; and on the same terms and conditions with varying rentals.

The lease agreement giving rise to the action in the High Court was for a fixed term of three years and was due to expire on 31st March, 2012. However, before the agreed fix term expired, on the 1st of April, 2011 the defendant gave notice to terminate the tenancy effective from the 30th day of September, 2011; a period of 6 months before the expiration of the agreed period on the 31st of March, 2012.

The issue for determination by the High Court was whether the defendant's notice to quit was legal and valid. The High Court was also asked to determine if at all the defendant's conduct to quit the demised business premises six (6) months before the expiry of the lease agreement did not amount to breach of the lease such as to entitle the plaintiff to be paid damages.

The defendant's case was that the current lease agreement was to expire in March, 2012; that the defendant had acquired its own premises and therefore gave six (6) months' notice to

the plaintiff to vacate the latter's premises; that nothing stopped the defendant from informing the plaintiff of its desire to vacate the premises and the notice of six months was reasonably sufficient for that purpose and that the plaintiff should have taken steps to find new tenants, but opted to remain silent.

The learned trial judge considered the provisions of the **Landlord and Tenant (Business Premises) Act, Cap 193** and concluded that such tenancy may be terminated in various ways, such as effluxion of time; on the expiration of the term granted; by the happening of some event upon the term limited conditionally, by surrender, by forfeiture, re-entry or ejection or breach of covenant or by notice. The High Court adjudged that by giving notice, the defendant was merely exercising one of the various avenues available to terminate the tenancy; and six (6) months' notice to quit was sufficient for the plaintiff to find other tenants to occupy the premises. On the basis of that reasoning, the High Court dismissed the plaintiff's action with costs. It is against this judgment that

the defendant appeals to this court on four grounds. The grounds of appeal were couched in the following words:

1. **The learned Trial Judge misdirected herself when she held that by giving notice the defendant was merely exercising one of the various avenues available to terminate the Tenancy when the Lease Agreement and the Landlord and Tenant (Business Premises) Act does not provide for termination by notice.**
2. **The learned Trial Judge erred in both law and fact when she found in favour of the defendant without giving the legal basis of the same other than the quotation from unknown source that "effluxion of time, on the expiration of the term granted. By the happening of some event upon the term limited conditionally, by surrender, by forfeiture, re-entry or ejection or breach of covenant or by notice."**
3. **The Learned Trial Judge erred when she failed to consider the evidence of the plaintiff in the supplementary affidavit of 3rd April, 2012 and the further additional affidavit of 23rd July, 2012 which clearly showed that the handover of the subject property and the last utility bills settled for the property by the respondent was done on and was**

up to 31st March, 2012 the last day of the Lease; and

4. **The Learned Trial Judge fell in error when she failed to adjudicate upon all the matters that were before her for determination to the detriment of the appellant.**

Both parties filed their written heads of argument upon which they relied. They also augmented their written heads of argument with oral submissions.

In support of ground one of the appeal, Ms Theotis submitted that the relationship between the plaintiff, as landlord, and the defendant, as tenant, was governed by the **Landlord and Tenant (Business Premises) Act, Cap 193**; and **Section 8** thereof provided for a notice in writing by the tenant that he does not desire the tenancy to be continued. The notice should be given not later than three months from the date on which the tenancy would come to an end by effluxion of time. According to Ms Theotis, the notice must be given within three months after the tenancy period has lapsed. When such notice is given, **Section four** would not have effect

in relation to that tenancy. **Section 8** of the **Landlord and Tenant (Business Premises) Act** provides as follows:

> **"Where the tenant under a tenancy to which this Act applies, being a tenancy granted for a term of years certain gives to the immediate landlord, not later than three months from that date on which apart from the Act, the tenancy would come to an end by effluxion of time, a notice in writing that the tenant does not desire the tenancy to be continued, Section Four shall not have effect in relation to that tenancy."**

Section 4 provides for the continuation of tenancies after certain circumstances take place that would otherwise terminate the tenancy; by providing, in **Section 4(2)** that:

> **"The provisions of Subsection (1) shall not prevent the coming to an end of a tenancy by notice to quit given by the tenant, by surrender or forfeiture, or by the forfeiture of a superior tenancy."**

Ms Theotis conceded that that **Section 4(2) of Cap 193** shows that a tenant can terminate the tenancy by notice to quit, surrender or forfeiture of a superior tenancy, but argued that this section, like all other Sections of the Act, should not

be read in vacuum and therefore, **Section 4(2)** seeks to show that the provisions of **Section 4(1)** which relate to the continuation of tenancies does not prevent the coming to an end of a tenancy by notice to quit given by the tenant, by surrender, or by the forfeiture of a superior tenancy. According to Ms Theotis, **Subsection 2 of Section 4 of Cap 193** does not give to the tenant the right to terminate the tenancy in the manner provided thereunder but seeks to show that it will not prevent the tenancy being terminated in such manner if any of those means are available to a tenant. She submitted that under the present circumstances such means were not available to the tenant as the Lease Agreement did not provide for termination by notice to quit being given by the tenant. She argued that the Act does not provide for termination by notice to quit in the manner exercised by the defendant; and neither does the Lease Agreement. On the basis of this reasoning, Ms Theotis concluded that the Learned Trial Judge misdirected herself when she held that by giving notice, the defendant was merely exercising one of the various avenues available to terminate the Tenancy.

In support of her arguments regarding the notice to quit, Ms Theotis cited our decision in the case of **Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises[1],** in which we held that the respondent was in occupation for more or close to 7 months before the office was locked, and that it was therefore incumbent upon the appellants to comply with the provisions of the Act by giving the respondent a proper notice terminating the lease and if the notice was not complied with, to commence proceedings for possession of the office and recovery of mesne profits.

Ms. Theotis also argued in support of ground two, that the learned trial Judge ignored the evidence contained in the additional affidavit and a further additional affidavit and a supplementary affidavit in support of the originating Notice of Motion filed by the plaintiff on 12th October, 2011, 3rd April, 2012, and on 23rd July, 2012, respectively; which brought on the record of the trial court further evidence which was not earlier available. The additional evidence was in form of a request by the defendant for their outstanding bills from

Lusaka Water and Sewerage Company up to 31st March, 2012 and the defendant's letter dated 28th March, 2012 officially handing over the keys to the premises. Ms Theotis argued that by ignoring the additional and further affidavit evidence filed by the plaintiff, the learned trial Judge failed to take into account of all the evidence before the court which he ought to have taken into account; and therefore, that the findings of facts and conclusion arrived at by the High Court should be disturbed and reversed. In support of this proposition, Ms Theotis referred us to the cases of **Nkhata and Others v The Attorney-General**(2) and **The Attorney-General v Lee Habasonda**(3) in which we defined what a proper judgment of the court should contain. We were also referred to the case of **Attorney-General v Peter Mvaka Ndlovu**(4) where we held that where it is unmistakable from the evidence itself and the unsatisfactory reasons given for accepting it, that the trial court could not have taken proper advantage of having seen and heard witnesses; this is ground for disturbing the findings of fact. (This decision followed **Nkhata and Others v Attorney General**(2).)

Ground 3 and ground 4 were argued together. Ground 3 alleged that there was failure by the High Court to consider the relevant evidence that was placed before it, while ground 4 alleged failure by the High Court to adjudicate on all matters that were before it. Ms Theotis submitted that while the notice was supposed to expire on the 30th day of September, 2011, the document at page 49 of the record showed that the official handing over of the keys and the premises by the defendant to the plaintiff was dated 28th March 2012, 6 months after the purported notice to quit was due to expire. There was further documentary evidence at pages 60 and 64 of the record that the defendant was paying water bills at the disputed property until the 31st of March, 2012. Ms Theotis argued that had the court below taken this evidence into account, then even if it was correct to find that the lease could be terminated by notice, it would have ordered that the plaintiff was entitled to *mesne* profits for the period equivalent to 6 months. Ms Theotis cited the case of **Mususu Kalenga Building Limited**[1] where it was held that the landlord acted at his own peril by locking out the tenant and holding on to the assets.

When we asked Ms Theotis whether the water billing was up to 28th September, 2011, her response was that she was not sure about that although she was certain that the keys and the premises were handed back on 28th March, 2012. Ms Theotis submitted that the new evidence that was before the court was not disputed by the defendant and implored us to make a determination that the defendant acted at their own peril by holding on to the premises and the keys beyond their own notice period; for which they should be ordered to pay *mesne* profits, which would come to the same claim of damages for breach of the Lease Agreement which the plaintiff was seeking.

In response to the plaintiff's arguments in ground one of the appeal Mr. Shonga, SC, submitted that whilst Section 8 requires that notice be given to the landlord not later than three months from the date on which the tenancy would come to an end by effluxion of time, there is nothing in the Section, that requires that the notice be given within three months after the tenancy period elapses. Mr. Shonga contends that a

tenant is not precluded from giving notice to a landlord, any time prior to the scheduled termination of a tenancy by effluxion of time. That by giving notice in the manner it did, the defendant was merely exercising its power conferred by the Act, which was a perfectly legal way of terminating the tenancy. It was further argued that the Lease Agreement in issue has no provision for termination by notice. That notwithstanding, it is the defendant's contention that the notice to quit was an implied term of the Lease Agreement. In support of this argument, Mr. Shonga quoted passages from **Hill and Redman's Law of Landlord and Tenant, 12th Edition at page 497** and another in **Woodfall's Law of Landlord and Tenant at page 1022** where the learned authors state as follows:

> **"The right to determine a tenancy from year to year by notice to quit is a necessary incident to such tenancy: a stipulation against such notice being given by one party or by the other is repugnant to the nature of the tenancy, and therefore void, and a mere surplusage."**

We were also referred to a passage by **Riddal, J.G.** the learned author of **Introduction to Land Law, 4th Edition, at page 255,** where he states:

> **"As a contract, a lease is subject to the principles of contract law"**

whose sources includes Common Law, doctrines of equity and statutes; including applied statutes in force in England, which are applicable in Zambia by the **English Law (Extent of Application) Act, Cap 11 of the Laws of Zambia**.

It was therefore submitted that the court below did not misdirect itself when it held that by giving notice, the defendant was merely exercising one of the various avenues available to terminate the tenancy as notice to quit is provided for by the **Landlord and Tenant (Business Premises) Act**, as an implied term of the Lease Agreement as well as the Common Law.

In response to ground two of the appeal, the learned Counsel for the defendant submitted that in its judgment, the High Court quoted authorities in support of its conclusion in

favour of the defendant. The authorities included **Woodfall's Law of Landlord and Tenant**[5], which was cited at the beginning of the judgment, to the effect that the notice to quit is implied by the **Landlord and Tenant (Business Premises) Act**, and the Common Law.

In response to ground 3 and 4 of the appeal, Mr. Shonga submitted that the learned trial Judge was not obliged to consider the evidence contained in the said affidavits. Having found that the notice given by the defendant was sufficient, the defendant's act of handing over the premises to the plaintiff on 28th March, 2012 and paying the outstanding water bills as of 31st March, 2012, cannot waive the notice given to the plaintiff terminating the tenancy. It was also submitted that the court below did adjudicate upon the issues which were before it; and these issues were:

1. **Whether or not the purported notice to quit was legal and valid; and**
2. **Whether or not the defendant's action to quit the demised premises 6 months before the expiration**

of the lease did amount to a breach of the lease and entitling the plaintiff to be paid damages.

The learned trial Judge found that the notice was legal and valid and held that the 6 months notice was sufficient. It was also argued that the evidence contained in the supplementary affidavit of 3rd April, 2012 and the further additional affidavit of 23rd July, 2012 were of no relevance to the issues at hand, and the lower court was within its power to disregard their contents.

Mr. Shonga also lamented the manner the plaintiff's further additional affidavit evidence found itself on the record after the case had been closed for submissions in the court below without leave of court and without any effort to amend the originating Notice of Motion as the circumstances were changing.

Ms Theotis, in reply conceded that leave to file the two further affidavits should have been sought and obtained from the court below, and that there should have been an application to adduce further evidence after the close of the

hearing and submissions. That failure to do so violated the rules of court. However, Ms Theotis insisted that although the rules were violated, the new evidence was already before the lower court and it should have either been considered or rejected, with reasons. Ms Theotis also conceded that the record of appeal filed on behalf of the plaintiff did not comply with the rules of court as only very few pages bear the prescribed numbering in accordance with **Rule 10(5) of the Supreme Court Rules, Cap 25.** Ms Theotis' explanation was that she took over the record after it had already been prepared. She conceded that the record was filed in violation of Rule 10(5) and apologized for the breach. This, notwithstanding, we fell on to our discretion under **Rule 37 of the Supreme Court Rules** to permit the plaintiff to proceed with the appeal.

We have examined the judgment appealed against and the record of appeal. We have also considered the submissions on both sides, as well as the authorities cited.

The preamble to the **Landlord and Tenant (Business Premises) Act, Cap 193** of the Laws of Zambia, sets out the purpose of this Act, to protect tenants occupying property for business. It states:

> **"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."**

There is no contest in the present case, to the fact that the Lease Agreement between the plaintiff and the defendant was governed by this Act. The basic facts of this case, up to the notice to quit are also not in contention. They are agreed. The issues for determination by the High Court and now before us, are whether the defendant's notice to quit was legal and valid; and whether the defendant's conduct during the 6 months period before the expiry of the lease agreement did not amount to breach of the lease.

There was no contest to the fact that the Lease Agreement in issue did not have an express break clause. The

summary of the plaintiff's argument is that the tenant had no right to terminate the Lease Agreement by Notice to quit before it lapsed by effluxion of time. Notice to quit is defined under Section 2 to mean:

> **"A notice to terminate a tenancy (whether a periodical tenancy or a tenancy for a term of years certain) given in accordance with the terms (whether express or implied) of that tenancy."**

The summary of the defendant's argument is that although the Lease Agreement in issue did not provide a break clause, Notice to quit is implied in **Section 4(2)** as read with **Section 8** of the **Landlord and Tenant (Business Premises) Act**; and as confirmed by the English Common Law position stated in **Woodfall's Law of Landlord and Tenant** and various other works referred to by Mr. Shonga.

We do accept the defendant's submission that at Common Law, the lease as a contract, is subject to the principles of Contract Law and that the right to determine a tenancy from year to year by notice to quit is a necessary

incident to such tenancy; and that a stipulation against any such notice being given by one party or by the other party is repugnant to the nature of the tenancy, and therefore void.

We note that the case of **Mususu Kalenga Building Limited and Another[1],** and the English case of **Scholl MFG Co. Ltd[8]** were concerned with the Landlord's notice to terminate a business tenancy. Under our **Landlord and Tenant, (Business Premises) Act, Cap 193,** the Landlord's notice to terminate is governed by Section 5 which is not in issue in the present case. The case of **Scholl MFG Co. Ltd[8],** however, underscored statutory modification of terms of tenancies relating to their coming to an end; and the recognition that under the Common law, apart from surrender or forfeiture, a tenancy may come to an end by effluxion of time, if for a term of years certain, or by notice given by the tenant to the landlord or by the landlord to the tenant, if a periodic tenancy, or a tenancy for a term of years certain subject to a break clause.

The statutory modification of applicable Lease Agreements in the termination clause under the **Landlord and Tenant (Business Premises) Act** is similar in force to the statutory modification in the termination clauses provided by the **Rent Act, Cap 206 of the Laws of Zambia** whose purpose is to protect tenants of dwelling houses. In the case of **BP Zambia Plc v Interland Motors Ltd**[5] this court dispelled the notion that there can be an interminable contract or agreement, in the following passage:

> **"All we can say is that there can be no such thing as an interminable licence agreement. As with any other contract, it can be terminated whether for good cause or for bad cause; whether in keeping with the termination clauses (if any) or even in breach in which event damages would be payable. In this case, there was no evidence that the defendant was in any way in breach when they terminated the agreement by notice."**

Likewise, in the present case, we do not read into the Lease Agreement signed between the plaintiff and the defendant any term or condition that the agreement is interminable by 6 months' notice to quit under Section 8 of

the **Landlord and Tenant (Business Premises) Act, Cap 193** of our laws. We therefore find that the lower court was on firm ground when it found and concluded that the defendant, by giving six months' notice to quit, was merely exercising one of the various avenues available to terminate the tenancy and that the six (6) months' notice to quit was sufficient for the plaintiff to find other tenants. Consequently, we dismiss ground one of appeal.

Coming to ground two which is largely related to ground one, we do note that although the judgment of the High Court was indeed quite short; nevertheless the learned trial judge did indicate the authorities considered and the reasons for the conclusion arrived at; in addition to the brief history of the case; which brief history has not caused any discomfort to the plaintiff. Specifically, the learned trial Judge did indicate that she had heard both parties and read their affidavits and referred to the law of **Landlord and Tenant**. In addition, the learned trial Judge's quotation. which learned counsel for the plaintiff claimed was from an unknown source, comes from

Section 4(2) of the Act. We find no merit in ground two of the appeal.

Coming to ground 3 and 4 which were argued together, we do note that the court below did in fact ignore the additional or new evidence purportedly introduced by the plaintiff's additional and supplementary affidavits. The plaintiff's argument is that this evidence, notwithstanding that it had not been formally introduced into the proceedings, had not been objected to and therefore, was already before court and should have been considered in the judgment of the lower court. We have considered this argument, and we are in agreement that authorities abound to the proposition that cases should be decided on their substance and merit **(See Zambia Revenue Authority v Jayesh Shah[6]).** We are also alive to the further proposition that the rules must be followed, but the effect of a breach will not always be fatal if the rule is merely regulatory or directory.

The reception of new evidence either in the High Court or in this court is a matter that is extensively governed by the

Rules of Court and specific provisions of the **High Court Act Cap 27** and the **Supreme Court of Zambia Act, Cap 25** of the Laws of Zambia. Ms Theotis concedes to this fact and further concedes that no leave of court was obtained to enable the plaintiff to file the additional and the further additional affidavits after the hearing of the matter was closed and submissions either invited and/or already made. She was categorical in stating that leave should have first been obtained before the additional affidavits were filed. Ms Theotis however, insisted that the evidence was already before the court, notwithstanding the default, and therefore should have been considered because it was uncontested. We disagree with this proposition. In the case of **Zambia Revenue Authority v Hitech Trading Company Limited**[7], we stated that:

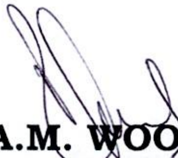
> **"(iii) For an application to introduce new evidence to succeed, it must be shown that the evidence could not be obtained with reasonable diligence at trial; that the evidence will have an important influence on the result of the case and that the evidence will be credible."**

This holding clearly presupposes that the reception of new evidence must be preceded by a successful application. No such application was made either in the court below or in this court. In this court, the application should have been made pursuant to **Section 25 of the Supreme Court Act.** It should also be noted that beyond the 30th September, 2011, the validity of the Lease Agreement between the parties became a contentious issue requiring care and due diligence in the handling of evidence in order to avoid causing substantial miscarriage of justice; and the need to have this evidence tested became inevitable. Since there was no application to adduce new evidence, and no leave was obtained to permit the plaintiff to do so, the lower court, in our considered view, was at liberty to ignore the affidavits in issue. We cannot fault the learned trial judge in doing so. The decision she made was backed by Statutes and the Rules of Court which cannot be ousted by the need to have all matters determined on their substance and merit. We extend this view to ground 4 of the appeal. We find no merit in both grounds 3

and 4 and we dismiss the appeal. Costs will follow this event, to be taxed in disagreement.

G.S. PHIRI
SUPREME COURT JUDGE

E.C. MUYOVWE
SUPREME COURT JUDGE



A.M. WOOD
SUPREME COURT JUDGE