

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2018/HP/0101

(Civil Jurisdiction)

**IN THE MATTER OF: SECTION 4 OF THE LANDLORD AND TENANTS
(BUSINESS PREMISES) ACT, CHAPTER 193 OF THE
LAWS OF ZAMBIA**

BETWEEN:

ELEMLIAH TEMBO

AND

RUTH MUTALE



APPLICANT

RESPONDENT

**BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO
IN CHAMBERS ON 27TH DAY OF MARCH, 2018**

For the Applicant: Mr. B. Mutakuta - Messrs. Robson Malipenga & Co.

For the Respondent: Ms. Ruth Mutale - In Person

JUDGMENT

CASE AUTHORITIES REFERRED TO:

1. *Ellis vs. Allen* 1914 1 Ch. 904;
2. *Southern Cross Motors Limited vs. Nonc systems Technology Limited* (2012) ZR Volume 1;
3. *Zambia Export and Import Bank Limited vs. Mkuyu Farms Limited* (1993 - 1994) Z.R 36;
and
4. *JZ Car Hire Limited vs. Malvin Chala and Scirocco Enterprises Limited* (2002) ZR 112.

LEGISLATION REFERRED TO:

1. *The Landlord and Tenants (Business Premises) Act, Chapter 193 of the Laws of Zambia;*
2. *The High Court Rules, Chapter 27 of the Laws of Zambia; and*
3. *The Rules of the Supreme Court (White Book) 1999 Edition.*

By way of Originating Notice of Motion dated 19th January 2018, brought pursuant to **Section 4** of **The Landlord and Tenants (Business Premises) Act¹**, the Applicant claims against the Respondent the following reliefs: -

- a) *An Order that the Respondent pays the sum of K33,000.00 due to the Applicant for outstanding rentals;*
- b) *Interest;*
- c) *Damages;*
- d) *Costs; and*
- e) *Further or other relief.*

The Applicant filed herein an Affidavit in Support of the Originating Notice of Motion deposed to by one **Elemiah Tembo**, who is the Applicant herein. The Applicant deposed, *inter alia*, as follows: -

1. *That the Applicant is the legal owner of a shop situated in Kamanga compound;*
2. *That the Applicant entered into a verbal tenancy agreement with the Respondent, in which it was agreed that the Respondent will pay rent of K11,000.00 per month to the Applicant for the said shop effective from 1st December 2016 to 1st April, 2017;*
3. *That the Respondent started giving problems in terms of paying rentals and rentals accrued up to K33,000.00;*
4. *That without prior notice, the Respondent vacated the shop on 1st April 2017, leaving unpaid rental in the amount of K33,000.00;*
5. *That after numerous attempts to get the Respondent to settle the money owed, the Respondent on 17th October 2017, wrote to the Applicant acknowledging the debt and proposing to settle the debt in monthly*

instalments of K1,000.00. A copy of the acknowledgment is exhibited as "EM1"; and

6. *That the Applicant refused to accept the Respondent's proposal.*

The Respondent on 15th March 2018, filed herein an Affidavit in Opposition deposed to by Ruth Mutale, the Respondent herein, in which she averred, *inter alia*, as follows: -

1. *That she rented a shop from the Applicant at an agreed rental price of K11,000.00;*
2. *That on or around December 2016, thieves broke into the shop and stole all that the Respondent had invested in the shop for its business, which led to a halt of the business as she could no longer carry on trading. This in turn led to her failure to pay rentals;*
3. *That she in good faith made a proposal to settle the rental arrears in instalments commensurate to what she deemed to be able to afford despite not having any source of income; and*
4. *That even her proposal to settle the rental arrears in monthly instalments of K1,000.00 would be stretching her efforts as she has no source of income.*

I scheduled this matter for hearing on 27th March, 2018. At the hearing of this matter, Learned Counsel for the Applicant Mr. Mukatuka, relied on the Applicant's Affidavit in Support and submitted *viva voce*, that the Respondent in her Affidavit in Opposition admitted owing the Applicant rental arrears in the sum of K33,000.00. He drew the Court's attention to **Order XXI Rule 6** of **The High Court Act**² and implored the Court to enter Judgment on admission. He further submitted that the Respondent has proposed to settle the outstanding rentals arrears in monthly

instalments of K1,000.00, which the Applicant has rejected. He also submitted that the Respondent has not placed before this Court any proof of her income as required under the law where one wishes to pay the admitted sum in instalments. He prayed that the Applicant's application be granted as prayed.

In response, the Respondent admitted owing the Applicant rental arrears in the sum of K33,000.00 and proposed to pay the admitted sum by instalments.

I have considered the claims by the Applicant in the Originating Notice of Motion and the averments deposed to in the Affidavit in Support filed herein. I have further considered the Respondent's Affidavit in Opposition and application for payment of the admitted sum by monthly instalments of K1,000.00. I have also considered the submissions orally advanced by both parties herein.

I wish to state from the outset that **Order XXI** of **The High Court Rules**² and **Order 27 Rule 3** of **The Rules of the Supreme Court**³ empowers the Court to enter Judgment in favour of a party based on admissions of facts made by the other party on its claims.

Order XXI Rule 1 of **The High Court Rules**² states as follows: -

"Notice of admissions

Any party to a suit may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the writ of summons, statement of claim, defence or other statement of any other party."

Order XXI Rule 5 of **the High Court Rules**² states as follows: -

" Admission by defendants

If any defendant shall sign a statement admitting the amount claimed in the summons or any part of such amount, the Court or a Judge, on being satisfied as to the genuineness of the signature of the person before whom such statement was signed, and unless it or he sees good reason to the contrary, shall, in case the whole amount is admitted, or in case the plaintiff consents to a judgment for the part admitted, enter judgment for the plaintiff for the whole amount or the part admitted, as the case may be, and, in case the plaintiff shall not consent to judgment for the part admitted, shall receive such statement in evidence as an admission without further proof." (emphasis mine)

In my humble view, **Order XXI Rule 5 of the High Court Rules²** empowers the Court to exercise its discretion to enter Judgment on Admission, upon being satisfied that there is a statement of admission by the Defendant, with the genuine signature of the Defendant appended to it.

Order 21 Rule 1 of The Rules of the Supreme Court³ states as follows: -

"Admissions

1. Admission of case of other party

Without prejudice to Order 18, rule 13, a party to a cause or matter may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party."

Order 27 Rule 3 of The Rules of the Supreme Court³ states as follows: -

"Judgment on admissions

Where admissions of fact or of part of a case are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties and the Court may give such judgment, or make such order, on the application as it thinks just.

An application for an order under this rule may be made by motion or summons." (emphasis mine)

My first consideration at this stage, is to determine whether this application properly sits under the above cited authorities. In view of that, I must be satisfied that the Respondent herein has made an admission of fact or an admission of part of the Applicant's case, either in their pleadings or otherwise. The use of the word "otherwise" which I emphasised above, clearly include other sources, other than pleadings. It is therefore my considered view that an admission contained in an affidavit falls within the category of "or otherwise" approved in the above cited authority. *In casu*, the originating process is in the form of an Originating Notice of Motion. Accordingly, the admission that must be considered herein may be contained in an Affidavit as it is clear from the cited authorities that an admission may be made expressly in an Affidavit or it may be an admission arising as a result of the rules, as has happened *in casu* where the Respondent has admitted owing the sum claimed by the Applicant in her Affidavit in Opposition to the Originating Notice of Motion and *viva voce* submissions, but has applied to pay the admitted sum in instalments.

I refer to **Order 27 Rule 3 (2)** of **The Rules of the Supreme Court**³, which states as follows: -

"Admissions of fact

Such admissions may be express or implied, but they must be clear..."

The above was also expounded in the case of **Ellis vs. Allen**¹. It follows therefore, that the admission that must be considered must evidently confirm the claim or part thereof that is admitted. *In casu*, a perusal of the record shows that the Respondent admitted owing the sum claimed by the Applicant in paragraphs 8, 9 and 10 of the Affidavit in Opposition and proposed to pay the admitted sum of K33,000.00 in monthly instalments of K1,000.00. Quite clearly, the said Affidavit contains an express admission of the total sum claimed by the Applicant. Since this fact has been admitted, in my considered view, it ceases to be an issue.

I refer to **Order 23 Rule 3 (7)** of **The Rules of the Supreme Court**³, where it is stated as follows: -

"The Court may...as it thinks just

The jurisdiction of the Court is discretionary, but in the absence of reason to the contrary the order is made so as to save time and costs."

In casu, the admission is made in the Affidavit in Opposition dated 15th March, 2018, which is a sworn testimony deposed to by the Respondent, who has appended her signature in the presence of a Commissioner for Oaths. I am satisfied that there is a statement of admission by the Respondent, with the genuine signature of the

Respondent appended to it. Accordingly, being satisfied that the Respondent issued a statement admitting the total amount claimed by the Applicant, and being satisfied as to the genuineness of the signature of the deponent of the Affidavit in Opposition, which contains the admission, and further not seeing any good reason to the contrary, I hold that this is a proper case for me to exercise my discretion to enter Judgment on admissions in respect of the admitted sum. I accordingly, enter Judgment in favour of the Applicant, for the admitted amount, in the sum of K33,000.00 to be paid with interest from the date of Originating Notice of Motion to date of hereof at the short term Bank of Zambia deposit rate. Thereafter at the current Commercial Banks lending rates.

I will now consider the application by the Respondent to pay the admitted claim in instalments. In her *viva voce* submissions, the Respondent submitted that she can only afford to settle the debt by monthly instalments of K1,000.00. In her Affidavit in Opposition, the Respondent averred in paragraph 9 that she has no source of income and has eight dependants that directly look up to her for their livelihood.

In response, the Applicant averred in paragraph 11 of his Affidavit in Reply filed herein on 22nd March 2018, that the Respondent will not be overstretched if ordered to pay the full amount forthwith as she can sell her car, which she once informed him that she would sell to clear the outstanding rental arrears. This was not disputed by the Respondent at the hearing.

I refer to **Order XXXVI Rule 9** of **The High Court Rules**², which states as follows: -

"Payment by instalments and stay of execution

Where any judgment or order directs the payment of money, the Court or a Judge may, for any sufficient reason, order that the amount shall be paid by instalments, with or without interest. The order may be made at the time of giving judgment, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any instalment, the whole amount remaining unpaid shall forthwith become due:

Provided that where there is a default in paying any one instalment, there shall be no order for stay of execution on the balance." (emphasis mine)

In the case of **Southern Cross Motors Limited vs. Nonc systems Technology Limited**², the Court held that: -

"the kind of evidence to be adduced in order for the Court to ascertain whether there is sufficient case of special circumstances includes, a look at the applicant's income, nature and value of property owned, details of the applicant's indebtedness to other persons apart from the Judgment creditors."

I further refer to the case of **Zambia Export and Import Bank Limited vs. Mkuyu Farms Limited**³, where the Supreme Court held that: -

"It is quite clear from Order 36 Rule 9 that a Court may order that a Judgment debt be satisfied by instalments upon sufficient cause being shown by the Judgment Debtor."

Looking at the above authorities, it is clear that there is a pre-condition for the granting of an order to pay the Judgment debt in instalment, which is "sufficient reason" being shown. Although the above cited Order does not list the considerations that would amount to "sufficient reason", these considerations are outlined elsewhere, particularly in **Order 47 Rule 1 (3) of The Rules of the Supreme Court**³. The said **Order 47 Rule 1 (3) of The Rules of the Supreme Court**³ states as follows: -

"An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicant's inability to pay, disclosing his income, the nature and value of any property of his and the amount of any other liabilities of his." (emphasis mine)

It is clear from the foregoing that the pre-condition to the issuance of an order for payment of a Judgment debt in instalment is evidence of the Applicant's income, the nature and value of his property and the amount of his other liabilities.

In casu, the Respondent has not disclosed her income, the nature and value of her property and the amount of her other liabilities. She has not demonstrated sufficient cause or any special circumstances to entitle her to liquidate the admitted sum in instalments. Accordingly, I find no justification for me to order payment of the admitted debt in instalments. The admitted debt shall be paid in a lump sum of K33,000.00.

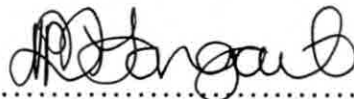
With regard to the Applicant's claim for damages, it is my considered view that the Applicant's claim in respect of damages should have been accompanied by detailed evidence to support such damages. The Applicant did not place before this Court detailed evidence in support of his claim for damages under this head. The view that I take is fortified by the case of **JZ Car Hire Limited vs. Malvin Chala and Scirocco Enterprises Limited⁴**, where it was stated in this respect as follows: -

"It is the party claiming any damages to prove the damage."

Accordingly, the claim for damages fails and is hereby dismissed.

Costs are awarded to the Applicant to be taxed in default of agreement.

Delivered at Lusaka on the 27th day of March, 2018.



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**P. K. YANGAILO
HIGH COURT JUDGE**