

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPLE REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)



**2017/HP/1876**

**IN THE MATTER 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 IN  
RESPECT OF THE PROPERTY KNOWN AS  
PLOT 12A IBEX HILL ROAD, LUSAKA.**

**IN THE MATTER OF: AN APPLICATION FOR AN ORDER TO SET  
ASIDE WARRANT OF DISTRESS**

BETWEEN:

**TOP ONE SECURITY COMPANY LIMITED**

**APPLICANT**

AND

**MARTINE MTONGA**

**1<sup>ST</sup> RESPONDENT**

**ANNE MTONGA**

**2<sup>ND</sup> RESPONDENT**

**BEFORE HONOURABLE MRS. JUSTICE S. M. WANJELANI ON 21<sup>ST</sup>  
DAY OF MAY, 2018**

*For the Applicant:*

*Mr. M. Mulele, Messrs GM Legal  
Practitioners*

*For the Respondents:*

*Mr. M. Chitundu, Messrs Barnaby &  
Chitundu Advocates*

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## **JUDGMENT**

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**Case referred to:**

1. *Holmes Limited V Buildwell Construction Limited (1973) ZR 97  
(H.C.)*



**Legislation referred to:**

1. *Landlord and Tenant (Business Premises) Act Chapter 193 of the Laws of Zambia*

The Applicant commenced this action by way of Originating Notice of Motion pursuant to the **Landlord and Tenant (Business Premises) Act**, seeking the following reliefs:

- 1) *An order for a new 10 year tenancy in respect of the property known as **Plot 12A, Ibex Hill Road, Lusaka**;*
- 2) *An order setting aside the Warrant of Distress issued and executed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 5<sup>th</sup> October 2017;*
- 3) *An order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents bear the Bailiffs fees for the Warrant of Distress in 2 above;*
- 4) *An order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and their agents from evicting the Applicant from **Plot 12A, Ibex Hill Road, Lusaka**;*
- 5) *An order for damages and/loss of use of the motor vehicle seized by the Bailiffs pursuant to the Warrant of Distress issued by the 1<sup>st</sup> and an 2<sup>nd</sup> Respondents;*
- 6) *Costs of this action; and*
- 7) *Any other relief the Court may deem fit.*

The Notice of Motion was accompanied by an Affidavit sworn by the Applicant's Managing Director, **Abraham Mambwe Accra**, who averred that the Parties entered into a Lease Agreement in respect of **House No. 12A of Farm 100, Ibex Hill, Lusaka**, on 1<sup>st</sup> February, 2017.



The Deponent averred that the lease property was in a dilapidated state and the Landlords agreed for the Applicant to effect renovations as per **Clause 4 (e) of the Lease Agreement**.

The Deponent further averred that at the time of commencement of the Lease, the Landlords owed Lusaka Water and Sewerage Company (LWSC) a sum of K14,554.13 and the water to the premises had been disconnected, and consequently the Parties agreed that the Applicant was to deduct K5,000.00 every quarter to go towards payment of the water bill to LWSC.

The Deponent stated that the Applicant had made the following payments;

- (i) K10,000.00 from February to April, 2017 where K5,000.00 was deducted for renovations.*
- (ii) K5,000.00 for the May to July 2017 quarter where K5,000.00 was deducted for renovations and K5,000.00 for the water bill; and*
- (iii) K5,000.00 for the August to October, 2017 quarter where K5,000.00 was deducted for renovations and K5,000 for the water bills as per exhibit **"AMA 3"**, being copies of the payments.*

The Deponent averred that the last K5,000.00 towards the water bill was to be deducted from the November, 2017 to July 2018 quarter whereupon LWSC would reconnect the water to the premises.



It was the Deponent's contention that despite being up to date with the rental repayments, the Respondents issued a Warrant of Distress on 5<sup>th</sup> October, 2017 erroneously repeating that the Applicant was in arrears of K20,000.00 and further purported to terminate the lease agreement. He added that there was no basis for the alleged termination as the Applicant's rent account was in credit after having spent K50,000.00 on renovations, and consequently the Applicant suffered damages as a result of the Bailiff's seizure of its motor vehicle which vehicle was used to deploy its security guards.

The Deponent concluded by stating that the Applicant had renovated the premises to suit its operations and having been in the premises for close to a year, it had gained a lot of goodwill which was in peril of dissipation if evicted and prayed that the reliefs sought be granted.

The Respondents filed an Affidavit in Opposition sworn by the 1<sup>st</sup> Respondent, **Martine Mtonga**, in which he averred that the property needed slight renovations as there had been a tenant prior to the Applicant moving in and the Applicant had moved in despite being aware of the water having been disconnected to the premises.

The Deponent averred that despite deducting the K5,000.00 for the water bill, per quarter, the Applicant never made any payment to LWSC and further never provided any receipts or proof of payment in relation to the alleged renovations.



It was further averred that at the time the Warrant of Distress was issued, the Applicant was in arrears of K5,000.00, which was due on 15<sup>th</sup> August, 2017, and according to **Clause 4 (a) of the Lease Agreement**, the Respondents were at liberty to terminate for rent that was outstanding for at least 21 days.

The Deponent averred that the Applicant had not paid the rentals due for November 2017 to January 2018, that were due on 15<sup>th</sup> November, 2017, further breaching the terms of the Lease Agreement. In addition, it was averred that the Applicant cannot pass on the cost of modifying the premises to suit its business operations to the Respondents.

During the hearing, Counsel for the Applicant relied on the Affidavit in Support of the Notice of Motion and submitted that the purported termination of the Lease Agreement was not in line with the provisions of **Section 5 of the Landlord and Tenant (Business Premises) Act** and anything in relation thereof was null and void, even if there was default on the part of the Applicant. It was conceded that it was premature for the Applicant to seek a new Lease in view of the fact that the current Lease had only run for one year of the five year term, and accordingly abandoned the relief for the Court to grant a 10 year tenancy in respect of the property.

Counsel for the Respondent also relied on the Affidavit in Opposition. He added that the Respondents were at liberty to terminate because the rentals were outstanding for 21 days, as the rentals for the period August 2017 to October, 2017, were only paid



on 27<sup>th</sup> September, 2017 instead of 15<sup>th</sup> August, 2017. It was contended that the Applicant was in breach of the Lease Agreement and not entitled to the reliefs sought as it had come to Court with unclean hands.

Both Counsel indicated to the Court that they would file submissions but only the Respondents' Counsel had done so at the time of writing this judgment. I will refer to those submissions were necessary.

I have considered the respective Parties Affidavits, the exhibits as well as submissions from respective Counsel.

There is no doubt that there was a Landlord and Tenant relationship between the Parties as evidenced by the Lease Agreement executed on 3<sup>rd</sup> January, 2017 although the "Indenture" indicates 1<sup>st</sup> February 2017. The Originating Notice of Motion was commenced pursuant to the **Landlord and Tenant (Business Premises) Act** . I note that the Lease Agreement merely states that it relates to **House Number, 12A, of Farm 100, Ibex Hill Lusaka** and that one of the Parties is a Company but there is no indication anywhere in the Lease that the premises would be used as business premises and this aspect only comes out in the pleadings. It is trite according to rules on Parol Rule evidence as stated in the case of **Holmes Limited V Buildwell Construction Limited**<sup>(1)</sup> that:

***"Where the Parties have embodied the terms of their written contract in a written document, extrinsic evidence is not generally admissible to add to, vary,***



***subtract from or contradict the terms of the written contract.”***

I will, therefore determine this matter based on the terms of the Lease Agreement as presented before this Court.

Having abandoned the relief in terms of a new 10 years lease, the only issues for determination are the relief for an Order to set aside the Warrant of Distress; an Order for the Respondents to bear the Bailiff's fees; and damages for the loss of use of the motor vehicle seized by the Bailiffs pursuant to the Warrant of Distress.

The starting point in my view is to establish whether there was a breach of the Lease Agreement terms by the Applicant. The Agreement stated in *Clause 1* that the rentals were payable monthly in advance on the 15<sup>th</sup> of every month while *Clause (e)* states that the “Landlords” shall withhold a sum of K5,000 for each quarterly rental payment to be applied to the renovations of the premises. From the evidence on record, it is apparent from the Parties' conduct that the rentals were being paid quarterly with the deductions for water and renovations being withheld by the Tenant.

Thus it's not in dispute that the rentals were due on the 15<sup>th</sup> of the month of the quarter and for the August to September, 2017, payment was effected on 27<sup>th</sup> September, 2017.

In my view, even though the payment was made, it was in breach of the agreement as the money should have been paid on 15<sup>th</sup> August 2017. In addition, the record shows that even though the Tenant



was withholding K5,000.00 per quarter for the water payment, no payment was made as evidenced by exhibit “**MM1**” which is showing the balance as at 1<sup>st</sup> January 2018 being K14,614.13.

In addition, the Lease attachment shows the agreed works that were to be undertaken by the Applicant but there is no evidence to show the works that were done or the costs thereof for the Court to make an informed decision that indeed, the Applicant had expended the K50,000.00 alluded to.

The Applicant has also not rebutted the allegation that it has not paid any rentals since this Court granted the injunction to restrain the Respondent from evicting it from the premises.

Based on the foregoing and my finding that the **Landlord and Tenant (Business Premises) Act** is not applicable in this matter, I find that the Applicant was in breach of the Lease Agreement and the Respondents were entitled to invoke *Clause 4 (a)* and issue a Warrant of Distress to collect the outstanding rentals.

I, thus find that the Respondents are entitled to recover all the rentals due as at the date of this Judgment as well as a refund of the K10,000.00 retained by the Applicant for payment for the water bill.

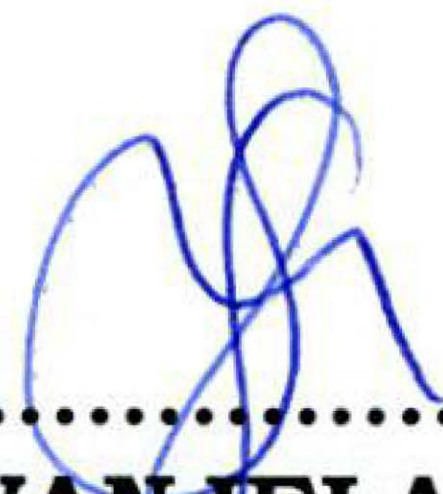
As regards the question of what was expended on renovations, the Applicant shall avail the Respondents with the necessary documentation as proof of what was expended on the agreed renovations, which cost shall be set off from what is due to the



Respondents. Any renovations done outside the agreed terms will be borne by the Applicant itself.

The net result of the above findings is that the Applicant has failed to prove its case on a balance of probabilities and I dismiss the matter accordingly, save for the reconciliation of the amount expended on the renovations. The costs are awarded to the Respondents, which in default of agreement shall be taxed. I further discharge the Order of Interim Injunction granted on 28<sup>th</sup> December, 2017. Leave to appeal is granted.

**Delivered at Lusaka this 21<sup>st</sup> day of May, 2018.**



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**S.M.WANJELANI**  
**JUDGE**