AFRO BUTCHERIES LIMITED v EVEES LIMITED (1987) Z.R. 39 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA, JJ.S.
15TH OCTOBER, AND 21ST DECEMBER, 1987
(S.C.Z. JUDGMENT NO. 28 OF 1987)

Flynote

Landlord and Tenant - Landlord and Tenant (Business Premises) Act - Landlord establishing ground for refusing new tenancy - Irrelevance of the availability of alternative accommodation.

Headnote

The respondent landlord served a notice to quit setting out the grounds of opposition to any application by the tenant for the grant of a new tenancy. The trial judge held that the respondent's ground for refusing a new tenancy was genuine but went on to consider the availability of alternative accommodation in other premises owned by the tenant.

Held:

Once a landlord satisfies the court on anyone or more of the grounds on which a landlord is entitled to oppose the application the availability of alternative accommodation is irrelevant.

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Cases cited:

(1) Fleet Electrics v Jacey Investments [1956] 3 All E.R. 99
(2) Gregson v Cyril Lord [1962] 3 All E.R. 907
(3) Appollo Refrigeration Services Co. Ltd v Farmers House Ltd. (1985) Z.R. 182

Legislation referred to:

Landlord and Tenant (Business Premises) Act, Cap. 440 ss.4, 5 (6), 10, 11(1) (g)

For the appellant: E.B. Mwansa, Jaques and Parmers.
For the respondent: A.M. Hamir, Sold Pawl, Hamir and Lawrence.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

This is an appeal by a tenant whose application to a High Court judge for a new tenancy under section 4 of the Landlord and Tenant (Business Premises) Act, Cap.440, was unsuccessful, the landlord having opposed the application on the ground specified in section 11(1) (g) i.e. that on the termination of the current tenancy, the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business carried on by them therein. The facts of the case were that the landlord served a valid notice to quit specifying the said ground as the one it would rely upon to oppose the tenant's application. The tenant properly applied to the High Court for a new tenancy and in that application set out its proposals regarding the terms of a new tenancy. The property

concerned is a butchery located on a portion of stand No. 728 Cairo Road, Lusaka, which the tenant has occupied since 1973. The landlord operates a shop in the same building and next to the butchery while other portions, not having a frontage on Cairo Road, are let to various over tenants.

The tenant supported its application by an affidavit which, instead of simply verifying the application and the proposals, stated that the landlord had been requesting the tenant to pay revised rents and the tenant had been resisting; that the landlord had previously attempted to obtain from the court an order for possession but had failed because there was no valid notice to quit; and that, in the tenant's opinion, the landlords' notice to quit and she opposition to the application were mala fide because of the previous disagreements over increased rents, and because it had previously lost a court case. The landlord filed an affidavit and also called a witness. The landlord dealt with the allegations made by the tenant and also deposed through its witness to the effect that it required the premises in order to establish another line of business and to expand the facilities available to it for the proposed as well as the existing business. It was also disclosed that the tenant had another butchery in another part of Lusaka. The arguments and the submissions were directed at the issues which we have outlined and which the parties themselves had raised. At the conclusion of the hearing, the learned trial judge found to the effect that the Act exists for the protection of the interests of both the landlord as well as the tenant; that the fact that the tenant had another butchery elsewhere was a relevant factor since the Act allegedly required the landlord to ensure that the tenant had alternative accommodation before eviction could be effected; that the inconvenience to be suffered by the tenant in moving his workers and equipment to the other butchery could not outweigh the legitimate wishes of the landlord to use its premises to improve its business; and that ultimately the tenant had failed to advance sufficient and convincing reasons to compel him to grant a new tenancy.

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As will soon appear, there were a number of misdirections in the approach adopted by the learned trial judge and in the factors Fought to be material in this case. Most of these errors, if not all of them, were in fact occasioned by the approach which the parties adopted in raising the various issues and in the presentation of their respective cases. The first ground of appeal illustrates the continuing misapprehension on the part of the tenant as to the nature of the application for a new tenancy. The ground alleges that the learned trial judge erred in law and in fact to have held that the tenant did not advance sufficient and convincing reasons to compel the court to grant a new tenancy. The arguments in support have been to the effect that the learned trial judge ought to have accepted that the landlord was not genuinely in need of the premises and had served a notice to quit only because of previous disagreements over proposed increases in rent. As we see it this ground of appeal, (but without the supporting arguments) would state an entirely valid criticism. In an application for anew tenancy, the onus can never be on a tenant to advance sufficient and convincing reasons to compel the court to grant a new tenancy of business premises. On the contrary, the tenant must have his new tenancy unless the landlord satisfies the court on any one or more of the grounds on which a landlord is entitled to oppose the application. The onus is on the landlord to convince the court on his ground of opposition, and the only "burden" which the tenant can be said to bear is that of demolishing his landlord's ground rather than discharging any primary burden of establishing his own entitlement to a new tenancy. That this is so can be illustrated by a brief glance through the Act itself: Under section 4, not only does The contractual tenancy not come

to an end but, the tenant is allowed to apply for a new tenancy if, for instance, the landlord has served a notice to quit; by the terms of section 5(6) such notice must have specified the Wound under section 11 on which the landlord would oppose the tenant's application; and the language of section 11 in stating that "the court shall make an order" makes it abundantly clear that, in order for the court to refuse to grant a new tenancy, the court must have been persuaded by the landlord to accept his ground under section 11 for opposing the tenant's application. To the extent, therefore, that the learned trial judge suggested that it was for the tenant to satisfy him, this was a misdirection.

However, the learned trial judge did find in a way that the landlord actually required the premises for its own business. Mr Mwansa's arguments were to the effect that the landlord had no bona fide intention to use the premises for its own business but invoked section 11(1) (g) as a way of being rid of the tenant on account of disagreements over proposed rent increases. He relied on correspondence where increased rent was demanded by the respondent and resisted by the appellant. He also relied on the evidence given on behalf of the landlord in which there was a complaint against the tenant for refining to pay realistic rent. Mr Hamir argued in opposition and submitted that the learned trial judge had made a correct Finding when he held that the landlord desired to occupy the premises for a business it intended to conduct. His argument was that the appellant had not demonstrated any misdirection or error on the part of the learned trial judge in coming to this conclusion.

When a landlord's opposition to a grant of a new tenancy is based on an intention to do one or other of the matters specified under s.11, such as an intention to occupy

or to demolish and reconstruct, it is a question of fact whether, at the appropriate time and right down to the date of hearing, the landlord did have a firm and settled intention not likely to be changed: See *Fleet Electrics v Jacey Investments* (1). The landlord must genuinely intend to occupy the premises himself and must, on an objective test, have a reasonable prospect of bringing this about, that is, there must be no insurmountable obstacles - such as with planning permission for the proposed user and so on: See *Gregson v Cyril Lord* (2). It is useful to refer to the English decisions on points which they have considered, not only because of their persuasive value, but more importantly, because our own Act is in many respects virtually word for word the same as their Landlord and Tenant Act of 1954, and their courts were thus considering similar issues based on identical legislation. The learned trial judge did consider the history of the relationship between the parties and the contention by the tenant that the landlord's opposition was not advanced in good faith but with mala fide intentions. He also considered the landlord's evidence to the effect that there was a genuine desire to expand its business operations. Although the learned trial judge apparently accepted the landlord's evidence, he went on to give reasons not strictly relevant to the issue.

The learned trial judge considered that one of the matters to be taken into account is that the landlord should ensure that the tenant has alternative accommodation and, because the tenant had another butchery, it was seeking additional accommodation and this would not be granted at the expense of the landlord because the inconvenience of shifting to the other butchery "cannot be so

weighty a ground upon which the owner of the premises can be denied the use of its premises to improve its business". Under paragraph (g) of section 11 (1), the question of alternative accommodation is irrelevant and does not arise. That consideration only arises, for example, in cases falling under paragraph (d) with which we are not here concerned. In view of the course we propose to take, it is unnecessary to deal with the rest of the arguments, including the argument, which is clearly untenable that the landlord is in any way fettered by the Act in the type of business which he can carry on if he opposes successfully

The learned trial judge's ultimate finding in favour of the landlord was, we consider, greatly influenced by the misdirections on the burden of proof and the criteria to be taken into account, as discussed here in before. As these misdirections were fundamental, the judgment based on them cannot stand and we propose to set it aside. However, we also find that the issues raised, concerning the genuineness of the landlord's intention, are such that they can only be resolved on a matter of credibility before a trial court dealing with the application and correctly directing itself. Such trial court would have to make a finding of fact on the landlord's alleged intention and may also have to deal with an application by the tenant, under section 19 for compensation if a new tenancy will still not be granted. In that event, the trial court will have to deal with the question of possession as well since we consider it wholly unjustifiable and unnecessary that there should be a multiplicity of actions which we understand to be the case here, where the landlord is reported to have commenced a new action for possession. Section 13 of the High Court Act, Cap. 50, requires that once the parties are properly in court, all relevant issues between them should be resolved and farther new litigation obviated. The cases, such as *Apollo*

Refrigeration Services Co. Ltd v Farmers House Ltd (3) concerning a landlord's action for possession, relate to a landlord's own original action for possession and were in no way intended to exclude the operation of section 13 of Cap. 50 in a case where there are already valid proceedings brought by a tenant. If, on the rehearing, a new tenancy will be granted, the court will no doubt also consider the proposals made and any counter proposals which may include the payment of realistic rent both in the interim and under the new tenancy. The parties and the court may wish to seek guidance generally from Order 97 R.S.C. 1985 White Book and other English texts.

It follows from what we have been saying that the appeal is allowed; the decision below set aside; and a rehearing ordered before a different judge of the High Court. The costs are reserved to the trial court and will abide the outcome of the rehearing

Appeal allowed, Retrial ordered .
