

**ZIMCO PROPERTIES LIMITED V DINALAR RANDEE ENTERPRISES (T/A
EMPIRE CINEMA) (1988 - 1989) Z.R. 114 (S.C.)**

SUPREME COURT

NGULUBE, A.C.J., GARDNER, AG. D.C.J., AND CHAILA, J.S.
(S.C.Z. JUDGMENT NO. 1 OF 1989)

Flynote

Landlord and Tenant - Landlord and Tenant (Business Premises) Act - Ground for opposing new tenancy.

- Whether landlord is immediate or superior.

Headnote

The appellant was the owner of premises consisting, (inter alia,) of a cinema and office which were let to the respondent. The appellant served notice under the Landlord and Tenant (Business Premises) Act on the respondent to terminate the tenancy giving the reason that it wished to dispose of the premises to its minority shareholder. The respondent gave notice in opposition claiming a new tenancy. At the hearing the appellant gave evidence that the minority shareholder needed the whole of the premises because of a shortage of office accommodation. The court found that the

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minority shareholder needed the accommodation because of shortage of space but granted a new tenancy for equitable reasons because the respondent had no opportunity to find alternative accommodation. The respondent cross-appealed against the finding that repossession by the appellant to accommodate its staff was within the meaning of the Act. The appellant argued that to regain possession under the Act where 'the rents reasonably obtainable on separate lettings of the holding and the remainder of that property would be substantially less than the rent reasonably obtainable on the letting of that property as a whole . . .' did not require there to be a superior landlord and the appellant was the landlord. Also, that the reference in the Act to or "otherwise disposing of the said property as a whole' meant there was no need to consider the existence of a superior landlord or the question of obtaining a better rent. Further, that as the state was the only superior landlord the provision could not apply. The respondent contended that no evidence was put before the trial court that a better rental yield would be obtained by letting the property as a whole and the appellant had failed to prove his claim within the terms of section 11(1)(e). Also, because the interest of the minority shareholder had been created within five years of the application the appellant could not oppose the application for a new tenancy until the expiration of five years from the date of the acquisition.

Held:

(1) A landlord to successfully oppose a new tenancy under section 11(1) (e) would have to show the existence of a superior tenancy (other than from the state) and that the landlord is the owner of the property at the termination of such superior tenancy and that a better rental yield would be got by letting the property as a whole and that on termination of the current tenancy such landlord requires possession of the holding for the purpose of letting or

- otherwise disposing of the said property as a whole.
- (2) To treat a transfer to a holding company for the purpose of allowing that company to oppose the grant of a new tenancy, on the ground that it needed to accommodate its employees in the premises before the expiration of five years from the date of such transfer, would defeat the object of section 11 (2).

Case referred to:

- (1) Apollo Refrigeration Services Co. Ltd. v Farmers House Ltd. (1985) Z.R. 182

Legislation referred to:

1. Landlord and Tenant (Business Premises) Act, Cap. 440
2. Lands (Conversion of Titles) Act, Cap. 289

Work referred to:

Woodfall's Law of Landlord and Tenant Vol 2

For the appellant: N. Mukelabai, ZIMCO Properties Limited.

For the respondent: R. Mitchley.

Judgment

NGULUBE,C.J.: This is an appeal against a judgment of the High Court granting a new tenancy to the respondent. There is also a cross-appeal against the finding in the same judgment that the appellant had proved that it was entitled to possession of the property.

The facts of the case were that the appellant was the owner of Findeco House in Cairo Road, Lusaka and had let part of the premises consisting of a cinema hall and office to the respondent. It was intended that the parties should enter into a written tenancy agreement, a draft of which

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was prepared, but this agreement was never signed, and the respondent occupied the premises on a verbal agreement at a monthly rental agreed between the parties from the 27th February 1985. On the 29th January 1988 the appellant served the respondent six months notice to terminate tenancy. Paragraph 3 of the notice read as follows:

- "3. ZIMCO Properties Limited would oppose an application to the court under the Act for the grant of a new tenancy on the ground that on the termination of the current tenancy the landlord requires possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole in favour of the Zambia Industrial and Mining Corporation Limited (ZIMCO Limited) the sole majority shareholder of ZIMCO Properties Limited - (Landlord), and that in view thereof the tenant ought not to be granted a new tenancy - s. 11(1) (e) Cap. 440."

The respondent thereupon gave notice of application for a new tenancy and issued an originating notice of motion claiming such a new tenancy. In the affidavit in opposition to the claim for a new tenancy the appellant's representative averred that since the giving of notice to terminate the tenancy, the premises known as Findeco House has been transferred to a holding company known

as ZIMCO Limited, on the 1st April, 1988. At the hearing of the application before the High Court the applicant's witness gave evidence that he required to continue in possession of the premises, that he had always paid the rent due and, in answer to the claim that ZIMCO Limited required the whole of the premises for occupation as offices by their staff, that many other tenants had not been given notice to quit. The witness for the appellant gave evidence that ZIMCO Limited had requested the transfer of the whole of Findeco House because they faced an acute shortage of office accommodation. He said that the building was handed to ZIMCO Limited from the 1st April, 1988. The second witness for the appellant, the group secretary of ZIMCO Limited, said that ZIMCO Limited required Findeco House for office accommodation and that it was intended that the cinema occupied by the respondent should be used as a meeting hall for the company. He said further that it was intended to spend K5,000,000-00 on rehabilitating the lifts in the premises and K10,000,000-00 to improve the whole building. He said that, if not given possession of the respondents part of the premises, ZIMCO Limited would not benefit from the proposed repairs. In cross-examination this witness said that the certificate of title was still in the name of the appellant but that it was intended that it should be in the name of ZIMCO Limited and the transfer which had already been affected was by administrative arrangement. In re-examination this witness said that the landlord at the time of hearing was the appellant and not ZIMCO Limited.

The learned trial commissioner in his judgement said that in answer to the question on whether the landlord had given a sound reason for wishing to repossess the property he would say without hesitation that he believed that ZIMCO Limited did need more rooms for its employees, and this could not be said to be a misplaced ground. The learned trial commissioner said as follows:

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"Repossession of property by a landlord for the purpose of accommodating its own staff is within the meaning of Section 11(1) (e) of the Act, Cap. 440."

The learned trial commissioner then went on to say that the respondent had not had the opportunity to find alternative accommodation and for this equitable reason and solely on the basis of equity he made an order that the respondent be granted a new tenancy for two years.

It is against that granting of a new tenancy that the appellant now appeals and it is against the learned trial commissioner's finding that the repossessing of the property by the landlord for the purpose of accommodating its own staff was within the meaning of Section 11(1)(e) of the Act that the respondent now cross-appeals.

At the outset it was conceded by Mr. *Mitchley*, on behalf of the respondent that the learned trial judge could not have granted a new tenancy on equitable grounds in the circumstances of this case. The appellant's appeal in this respect, therefore, fell away and Mr. *Mukelabai* on behalf of the appellant, therefore, had only to answer the cross-appeal.

There was a considerable amount of argument by Mr *Mukelabai* as to who was the actual owner of the property, but at one stage in his argument he maintained that he had no intention of abandoning his claim that ZIMCO Limited was the owner of the property and needed the property for its office use. Mr *Mukelabai* then went on to explain to the court why he claimed that the owner of the

property was entitled to the possession of the property to let to the respondent. He argued that in section 11 (1) (e), in addition to a requirement by a landlord of possession for the purpose of letting the whole of the premises, the subsection refers to 'or otherwise disposing' of the property as a whole. On this basis he argued that, so long as the landlord of the whole of a block of property of which the disputed premises were part could prove that the property required was for occupation by its employees, the conditions of Section 11 (1) (e) were satisfied and that there was no need for there to be a superior landlord or a proof that a subletting of the whole of the premises would be economically more beneficial. Following this argument Mr *Mukelabai* maintained that, as ZIMCO Limited was the new owner of the property and the new landlord in relation to the respondent, that company had proved its entitlement to possession. When pressed by the court Mr *Mukelabai* agreed that he was arguing that, if a purchaser of the whole of a block of property wanted vacant possession for himself, a vendor could obtain possession under section 11 (1) (e) in order to dispose of the premises as a whole. It was at this stage that Mr *Mukelabai* realised from his original claim that ZIMCO Limited was now the owner of the property and instead maintained that there had been no change of landlord since the service of the notice to quit and that although the property was in the process of being transferred to ZIMCO Limited the appellant was still the landlord in view of the absence of the certificate of title in the name of ZIMCO Limited.

Mr *Mitchley* argued that there were two principles to be applied in this case. The first was that the landlord is restricted from opposing a new tenancy on any ground other than that set out in the notice to quit. The other was that section 11 (1) (e) could only apply when there was a

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superior landlord and when there was proof that a letting of property as a whole would be economically beneficial.

In support of his first point Mr *Mitchley* drew the court's attention to *Woodfall's Law of Landlord and Tenant*, Vol. 2 paragraph 2-0573. This paragraph deals with sections in the Landlord and Tenant Act 1954, which are practically identical with sections in the Landlord and Tenant (Business Premises) Act, Cap. 440.

Having set out that a notice to terminate a tenancy is invalid unless it states whether the landlord would oppose an application to the court for the grant of a new tenancy, and if so, also states on which of the grounds mentioned in section 11 he would do so, the paragraph goes on to say that this matter should be considered with care since what is stated in the notice binds not only the landlord but also his successors and may well in some circumstances preclude any effective opposition to an application for a new tenancy, save as regards the terms thereof. We would comment here that the reference to a landlord's successors is in conformity with the principle set out by this court in the case of *Apollo Refrigeration Services Co. Ltd v Farmers House Ltd* (1), where we said that a landlord's successors requiring possession may adopt the reasons set out in the landlord's notice to terminate the tenancy. There are comments in the paragraph to which we refer to the effect that the notice by a landlord should be liberally construed, and, provided that the notice makes clear an intention to rely on any particular paragraph of section 11 the landlord can rely on any facts falling within that paragraph or a portion of it. Whatever liberal a construction is allowed, however, the effect of the principle is that a landlord is restricted from opposing the grant of a new tenancy on

any ground other than that set out in the notice.

Applying that principle to Mr *Mitchley's* second argument, it is necessary to consider the relevant paragraph in our law. Section 11 (1) (e) reads as follows:

"(a) Where the current tenancy was created by the subletting of part only of the property comprised in a superior tenancy and the landlord is the owner on the termination of the superior tenancy, that the rents reasonably obtainable on separate lettings of the holding and the remainder of the property would be substantially less than the rent reasonably obtainable on a letting of the property as a whole, that on the termination of the current tenancy the landlord requires possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole, and that in view thereof the tenant ought not to be granted a new tenancy."

Mr *Mitchley* drew our attention to the same volume of *Woodfall* at paragraph 2-0716 which refers to an identical subsection in the English Act and states that it is of no application where the competent landlord is also the immediate landlord and applies where the landlord is a superior landlord whose interest extends to a large unit of property of which the tenant's holding is part only. *Woodfall* goes on to explain the provision by saying:

"If such a superior landlord can show that a better rental yield will be got by letting the property as a whole, and that he requires possession of the holding for the purpose of letting or otherwise disposing of the property as a whole, the

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court has discretion to decide that in view thereof, the tenant, ought not to be granted a new tenancy."

Mr *Mitchley's* argument was that as the appellant is the immediate landlord in this particular case, the paragraph relied on can have no application. His further argument was that, in any event, there was no evidence put before the trial court that a better rental yield would be got by letting the property as a whole, and the appellant had failed to prove that it's claim came within the terms of section 11 (1) (e). Finally Mr *Mitchley* referred us to subsection 2 of Section 11 which reads as follows:

"(2) The landlord shall not be entitled to oppose an application on the ground specified in paragraph (g) of subsection (i), if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy, and at all times since the purchase or creation thereof the holding comprised in a tenancy or successive tenancies has been occupied wholly or mainly for the purposes of carrying on business thereon."

It was argued that, as the interest of ZIMCO Limited in the property had been created, on the evidence, either on 1st April 1988 or on a later date when the property was formally registered in its

name, that company could not oppose an application for a new tenancy for the purpose of occupying the premises for its own business until the expiry of five years from the relevant date of acquisition.

On the grant of a new tenancy, Mr *Mitchley* argued that it did not matter who was now landlord of the property because, on the failure of either the appellant or ZIMCO Limited to prove that they have a valid right to oppose under section 11 (1), the court had no alternative but to grant a new tenancy as applied for.

In reply Mr *Mukelabai* argued that the purpose of Section 11 (2) would not be defeated by granting an order of possession because ZIMCO Limited did not intend to carry on a business but only intended to use the premises for office purposes. We will deal with this last point immediately and say that the definition of 'business' in Section 2 of Cap. 440 quite clearly includes the use of premises for office purposes.

As we have already indicated we accept Mr *Mitchley's* contention that a landlord when opposing the grant of new tenancy is bound by the reasons given in his notice of termination. The reason for this, as suggested by *Woodfall*, is that the notice of termination is in the nature of a pleading. The only difference is that such notice cannot be amended, and if a landlord wished to advance some other reason for opposing a grant of a new tenancy, the original notice would have to be withdrawn and a new one served. In this case the notice, although it referred to section 11 (1) (e) did not set out any of the reasons set out in the paragraph but only the reason that the appellant wished to dispose of the property to ZIMCO Limited. It is necessary, therefore, to deal with Mr *Mukelabai's* argument that the use of the words 'or otherwise disposing of' in paragraph (e) meant that there was no need to consider the existence of a superior landlord or subletting or the question of obtaining a better rental yield by letting the whole of the property. We have considered the wording of

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paragraph (e) and we are satisfied that the various parts of the paragraph are not in the alternative and that all the provisions set out therein would have to be proved before a landlord could successfully oppose the granting of a new tenancy for the reasons set out in the paragraph. With regard to the question of whether or not in Zambia there could be a superior landlord within the terms of the paragraph, we do not agree with Mr *Mukelabai* that because the State or the President is the only superior landlord in Zambia these provisions of the paragraph cannot apply. Despite the provisions of the Lands (Conversion of Titles) Act Cap. 289 there is no reason why in this country there should not be a succession of landlords some of whom would come within the definition of superior landlords. We find, therefore, that in order to satisfy the provisions of Section 11 (1) (e) a landlord would have to show the existence of a superior tenancy (other than that from the State) and that the landlord is the owner of the property at the termination of such superior tenancy and that a better rental yield would be got by letting the property as a whole and that on termination of the current tenancy such landlord requires possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole. It will be seen, therefore, that we construe, as does *Woodfall*, the word 'landlord' in the paragraph as meaning a superior landlord and not the immediate landlord. We say this because the words of the paragraph specifically refer to the landlord as being the owner on the termination of a superior tenancy.

Despite Mr *Mukelabai's* argument we are of the opinion that to treat a transfer to a holding company for the purpose of allowing that company to oppose the grant of a new tenancy on the ground that it needed to accommodate its employees in the premises, before the expiration of five years from the date of such transfer, would defeat the object of section 11 (2).

It follows that in considering the provisions of section 11 (1) (e) we agree with Mr. *Mitchley's* argument that the appellant did not produce any evidence to bring itself within the provisions of paragraph (e). Even if the paragraph referred to the requirements of an immediate landlord, which we have found it does not, there was no proof whatsoever of an intention to let or otherwise dispose of the property as a whole in order to obtain a better rental yield. We are satisfied that the purpose of obtaining a better rental yield goes to the root of the provisions of paragraph (e), and such evidence thereof is absolutely vital to a successful opposition under that paragraph to the grant of the new tenancy.

For the reasons we have given the cross-appeal succeeds and we find that the appellant had no valid claim to oppose the grant of a new tenancy to the respondent. The appellant's own appeal, therefore, falls away. As to who is or should be the appropriate landlord to grant such a new tenancy we do not consider it proper for this court to decide; especially having regard to the contradictory assertions made by Mr *Mukelabai*, who claims to appear before us both on behalf of the appellant and on behalf of ZIMCO Limited. As we have found, the respondent is entitled to the grant of a new tenancy. It is for the parties to agree to the terms thereof under the provisions of section 15, 16 and 17 of Cap. 440, and in default, such terms must be put before another judge of the High Court for

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approval. In default of such agreement we send this case back to another judge of the high Court with directions that he make a declaration as to who is the appropriate landlord to grant a new tenancy to the respondent and thereafter to grant a new tenancy to the respondent on such terms as he may deem fit. Costs in this court and in the court below to the respondent. The costs of the application to the High Court reserved to the High Court.
