

HILARY BERNARD MUKOSA v MICHAEL RONALDSON (1993 - 1994) Z.R. 26 (S.C.)

SUPREME COURT
GARDNER, CHAILA AND MUZYAMBA, JJ.S.
17TH AND 24TH JUNE, 1993.
(S.C.Z. JUDGMENT NO. 7 OF 1993)

Flynote

Injunction - When granted - Only to plaintiff who has a good arguable claim - Effect of clause 13A of Lands (Conversion of Titles) Act.

Headnote

The appellant appealed from an order of a High Court judge who had granted an interim injunction the effect of which was to restrain the appellant from parting with possession of property occupied by the respondent. It was the respondent's contention that he was a protected tenant. The Court drew counsels' attention to the provisions of Act 16 of 1985 which amended the Lands (Conversion of Titles) Act by the insertion of clause 13A which prohibited the transfer, alienation or letting of land to non-Zambians except on certain conditions. It was averred that the respondent was a Malawian. Counsel for the respondent argued that it should be presumed that the parties had a legal intent and intended to obtain an exemption under s.13A(2) on the ground that the respondent was an investor in Zambia.

Held:

That the respondent required a special exemption without which he was debarred from purchasing the property: there had been no averment that he was a person who was approved as an investor in accordance with the law. An injunction would only be granted to a plaintiff who established that he had a good and arguable claim to the right which he sought to protect. In the instant case, to establish a good and arguable case he had to show that he was at least eligible for exemption under s.13A(2). The appeal was upheld and the injunction discharged.

Cases referred to:

- (1) Mundanda v Mulwani and Others (1987) Z.R. 29.
- (2) Kulamma v Manadan [1968] A.C. 1062.

Legislation referred to:

1. Lands (Conversion of Titles) Act 16 of 1985.

For the appellant: K. M. Maketo, Christopher Russell and Cook.
For the respondent: G. H. Silweya, H. Silweya and Co.

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

On 17th June, 1993, we allowed this appeal and said that we would give our reasons later. We now give those reasons.

This is an appeal from an order of a High Court judge granting an interim injunction. The notice of appeal refers to an appeal against the order of the learned judge given on the 16th day of December, 1992. The record of proceedings indicates that the actual order of the learned judge was:

"I accordingly allow the injunction to persist."

The injunction to which the learned judge referred was an *ex parte* interim injunction dated 1st July, 1992, restraining the appellant from evicting the respondent from the property.

During the proceedings leading to the learned judge's order Mr Silweya had argued that he was asking for an order restraining the appellant from parting with possession of the property. Mr Maketo has argued that in

p27

those particular proceedings 1992/HP/1607, which related to a claim by the respondent for a declaration that he was a protected tenant, such an order could not be made.

The advocates for the respondent drew an order of injunction which provided that the *ex parte* order of 1st July, 1993, was confirmed and that the appellant was restrained from parting with possession of the property. This was not in accordance with the judge's verbal order, which was merely that the *ex parte* order should persist; but, nevertheless, the learned judge signed the order as drawn and dated it 6th January, 1993.

At the time of the order there was a continuing action in cause No.1992/HP/1588 in which the respondent was claiming specific performance of a contract for sale of the property to him and it appears that the learned judge considered the arguments relating to that action when deciding that there should be an injunction.

When the hearing of this appeal commenced, we overlooked the fact that the order of injunction which was the subject of the appeal confirmed the *ex parte* injunction which restrained the appellant from evicting the respondent. We were under the impression that the appeal arose out of cause No.1992/HP/1588 which related to a claim for specific performance.

Of our own motion we drew the attention of Mr Silweya to the provisions of Act No.16 of 1985 which amended the Lands (Conversion of Titles) Act by the insertion of clause 13A which reads as follows:

- "(1) No land in Zambia shall, as from 1st April, 1985, be granted, alienated, transferred or leased to a non-Zambian;
Provided that nothing herein shall be so construed as to affect any interest or right acquired by any person prior to that date.
- (2) Subject to complying with any other provisions and procedures relating to the alienation of land or the obtaining of the consent of the President, a non-Zambian shall be exempt from the provisions of ss. (1) under the following circumstances:

- (a) if it is a person who has been approved as an investor in accordance with the Industrial Development Act or any other law relating to the promotion of investment in Zambia;
- (b) if it is a non-profit making charitable, religious, educational or philanthropic organisation or institution which is registered and is approved by the Minister for the purposes of this section;
- (c) if the interest or right in question arises out of a lease, sub-lease, or under-lease, for a period not exceeding five years, or a tenancy agreement;
- (d) if the interest or right in land is being inherited upon death or is being transferred under a right of survivorship or by other operation of law;
- (e) if the President has given his consent in writing under his hand."

In his affidavit in support of his application for an interim injunction the respondent averred that he was a Malawian and we asked Mr Silweya how he could succeed in his action for specific performance. Mr Silweya said that on the authority of our judgment in *Mundanda v Mulwani and Others* [1] he would argue that the Court should presume that the parties had a legal intent and intended to obtain an exemption under s. 13A(2) on the ground that the respondent was an investor in Zambia.

In the *Mundanda* case the parties had agreed to the transfer of property at a price of K20, 000. The agreement provided that the purchase price would be K20, 000 regardless of whether the property was valued at a

p28

lesser amount by the Government valuer in the presidential consent. We held that, as it was possible valuation being K20,000 or more, the contract could be the subject of an order for specific performance. In arriving at that decision, we referred to *Kulamma v Manadan* [2]. That was a Privy Council decision in a case where the personal representatives of a lessor sought, on the grounds that the contract was illegal, to avoid performance of a lease because the lease contained an option to purchase which could not proceed without the consent of the Board of Trustees of Native Land, and the relevant ordinance provided that it should not be lawful to alienate land without such consent. The Court in that appeal held that the parties should be presumed to contemplate a legal rather than an illegal course of proceedings and that nothing in the agreement led to the conclusion that consent would not be obtained.

That case is more in line with the facts of this case than the *Mundanda* case because it dealt specifically with the obtaining of consent; but it was decided on other grounds, namely also it was primarily a contract for a lease and employment of the lessee to farm the land. The option to purchase was found to be a minor issue.

In the case at present before us what is required is not the type of consent which is required of and normally available to everyone, such as the presidential consent required by s.13 of the Land (Conversion of Titles) Act or the consent required in the *Kulamma* case. The respondent requires a special exemption without which he is debarred from purchasing the property. The respondent applied for an injunction and, although he swore affidavits in support of his application averring that he was of

Malawian nationality, at no time did he aver that he was a person who had been approved or who had even applied to be approved as an investor in accordance with the Industrial Development Act or any other law. Nor did he give any other reason for exemption.

An injunction will be granted only to a plaintiff who establishes that he has a good arguable claim to the right he seeks to protect. We accept that the respondent is presumed to intend to proceed legally; but in order to establish a good arguable case he must show at least that he is eligible for exemption under 13A(2). There can be no presumption about this. On the evidence before the Court below and ourselves the respondent is prima facie prohibited from purchasing land in Zambia and no injunction restraining the appellant from parting with possession of the land should have been granted.

For the reasons we have given the appeal is allowed and the injunction restraining the respondent from parting with possession of the land is discharged. In view of the fact that the question of nationality was raised on this Court's own motion we make no order as to costs.

We have not yet heard argument relating to the continuation of the ex parte order of injunction restraining the appellant from evicting the respondent, and that injunction continues until further order.

Appeal allowed.