BRIDGET MUTWALE v PROFESSIONAL SERVICES LIMITED (1984) Z.R. 72 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, J.J.S
20TH JULY AND 3RD OCTOBER, 1984
(S.C.Z. JUDGMENT NO. 13 OF 1984)

Flynote
Land law - Land (Conversion of Titles) Act, 1975 - Presidential consent - Failure to obtain prior to sub-leasing premises - Efforts of.

Headnote
Without prior Presidential consent, a landlord sublet a flat to a tenant who throughout defaulted in paying rent.
When the landlord sued for arrears the High Court entered judgment for the landlord for the sum claimed, saying that the failure to obtain Presidential consent could not nullify the agreement. The tenant appealed.

Held:
If prior Presidential consent is not obtained for a sub-lease, the whole of the contract including the provision for payment of rent is unenforceable.

Cases cited:
1. Mahmoud and Ispahani [1921] 2 K.B. 716.

Legislation referred to:
Land (Conversion of Titles) Act, 1975, s. 13 (1).
Lands and Deeds Registry Act, Cap. 287, s. 6.

Other Works referred to:
Chitty on Contracts, (25th Edn.), para. 1147 (2).
Craies on Statute Law, (7th Edn.), pp. 339 and 340.

For the appellant: D.A. Kafunda, Manek and Company.
For the respondent: L.P. Mwanawasa and Company.

Judgment
GARDNER, J.S.: delivered the judgment of the court.

This is an appeal against a judgment of the High Court awarding the respondent K5,000.00 in respect of arrears of rent for a flat in Ndola.

The facts adduced on behalf of the respondent comsisted of the evidence of PW.1 the General Manager of the respondent company who said that in December, 1978, he was approached by one Lufungulo, First Secretary at the Zairean Consulate, with a request to rent a flat for a friend. On behalf of his company PW. 1 agreed to sublet one of the flats which the respondent company held as tenants from a superior landlord. PW. 1 said that the agreed rental was K200 per month subject to three months notice and the rent was to be paid to Motza Limited, rent collectors. PW. 1 gave evidence that Lufungulo assured him that the tenant would be responsible for payment of the rent but he, Lufungulo would ensure, that the rent was paid regularly. The appellant

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took possession of the flat in December 1978, until she vacated it in January 1981, and no rent was ever paid. PW. 1 in his evidence said he was under the impression that rent was being paid to the rent collector and it was only when a claim was made against the respondent company that he realised that no rent was being paid. He said that he first realised this in November, 1980, and a letter was then written from the respondent company to the appellant requesting her to vacate the flat due to non-payment of rent. Correspondence then ensued, including a letter from the Zairean Consulate, and the appellant vacated the premises at the end of January, 1981, without having settled the claim for arrears or rent.

PW. 1 stated that he agreed to sublet the flat on behalf of the respondent company and he did not obtain consent from the State for the subletting because, he said, the agreement was not supposed to be permanent.

The appellant gave evidence which confirmed she had occupied the flat because Lufungulo was her husband. There was some discrepancy in the appellant's evidence as to whether Lufungulo had told her that no rent was payable for the flat because he was a friend of PW. 1, or whether Lufungulo told her that he had paid rent in advance for two years. From the general evidence the learned trial judge came to the conclusion that the appellant was the girl friend of Lufungulo who was married to another woman.

In her Defence the appellant did not raise the question of the lack of consent to the subletting; but it was argued before the learned trial judge, who held that, as the Land (Conversion of Titles) Act 1975 did not state that any dealing in land made without the President's consent would be void and unenforceable, he was unable to agree that the agreement was void ab initio.

The grounds of the appellant's appeal related to the question of whether Lufungulo was her agent who entered into the tenancy on her behalf, whether she accepted liability for the rent by any correspondence she had written or instigated and whether a contract for payment of rent could be enforceable in view of the fact that no consent had been obtained from the President in accordance with section 13 (1) of the Land Conversion of Titles Act 1975.

Mr Kafunda on behalf of the appellant argued the last point as to lack of consent first.

Section 13 (1), of the Land Conversion of Titles Act reads as follows:

> "13. (1) Notwithstanding anything contained in any law or in any deed, instrument or document, but subject to the other provisions of this Act, no person shall subdivide, sell, transfer, assign, sublet, mortgage, charge, or in any manner whatsoever encumber, or part with the possession of, his land or any part thereof or interest therein without the prior consent in writing of the President."

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Mr Kafunda maintained that the legislation was intended to prohibit the exploitation of tenants by requiring that all tenancy agreements must have Presidential consent and that, a contract without consent amounted to a contract to commit an illegal act and was therefore unenforceable. He referred the court to the case of Re. *Mahmoud and Ispahani* (1), in which case the plaintiff agreed to sell and the defendant to buy linseed oil. By a statutory order then in force, it was illegal to buy or sell or otherwise deal in linseed oil unless both parties had a licence. The defendant did not have a licence and it was held that, irrespective of the parties' state of knowledge about the existence of a licence, the contract was illegal and unenforceable by either, since both were prohibited from making it and the prohibition was for the benefit of the public.

Mr Mwanawasa on behalf of the respondent argued that the contract for the subletting was not void ab initio and the agreement as to payment of rent was enforceable. He drew the court's attention to the fact that section 13 (1) reads in part:

> ". . . no person shall subdivide et cetera his land without the prior consent in writing of the President . . ."

It was Mr Mwanawasa's contention that the reference to "his land" referred to the land of a beneficial owner and not to a tenant who was effecting a sub-tenancy. In the present case it was argued that the respondent company is itself a sub-tenant of a superior landlord and the flat was not the respondent's land but the land of the superior landlord.

Mr Mwanawasa further argued that there were criminal consequences for breaches of the Act and it would be proper to impose criminal sanctions where necessary rather than to find that the contract was void ab initio, which was not the intention of the parties. It was further pointed out that section 15 of the Act contains a provision that all agreements et cetera made before the publication of the Act but not registered before the 1st of July, 1974, shall insofar as they relate to land be null and void ab initio. This, said Mr Mwanawasa, indicated that the legislature in one section intended to provide that certain agreements would be void ab initio and the omission of any such provision in section 13 (1) was an indication that the legislature had no such intention in respect of that section. Mr Mwanawasa relied on the guide to construction:

> "expressio unis est exclusio alterius."

In arguing that the Act is meant for the security of the public and not the security of the individual tenant, Mr. Mwanawasa submitted that, when a statute is passed which touches on some common law principle "there is no presumption that the statute is intended to override the common law" and

"it is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of common law". (Cited from Craies on Statute Law (7th Edition) at pp. 339 and 340).

In connection with Mr Mwanawasa's argument that the prohibition against subletting without consent related solely to beneficial owners of

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property, he defined beneficial owner for the purpose of such argument as a leassee holding direct from the State or an assignee of such a lease. Apart from the wording of the statute there is no external aid to the construction of the section in favour of Mr Mwanawasa's argument. We cannot see that it is an abuse of the language for land held by a subleassee to be referred to during the term of the sublease as "his" land. On the contrary, to limit the effect of the section as suggested by Mr Mwanawasa would defeat the object of the section. Whatever the ultimate object of the section may be, it is clear that it is intended that, after the passing of the Act, the State shall have control of transactions relating to land. If it were possible for a first lessee to obtain consent to sublet property to a limited company controlled by himself or indeed to any third party, and thereafter for such company or third party to be at liberty to sublet the property to whomsoever and at whatsoever rental they desired without obtaining Presidential consent, the provision that the original subletting required consent would be pointless. We have no hesitation in finding that the word "his" in section 13 (1) of the Act refers to any person having any legal estate in land at the time of a proposed transfer of parting with possession.

So far as Mr Mwanawasa's argument that criminal consequences for breaches of the Act would be more appropriate than regarding transactions as void and unenforceable is concerned we observe that no criminal sanctions are provided for by the legislation, and can find no authority for the proposition that, in civil transactions governed by statute, penal remedies are preferable to civil ones. This argument does not assist Mr Mwanawasa's desired construction of the section.

So far as the reference to the common law is concerned we entirely agree with Mr Mwanawasa and the authorities to which our attention has been drawn that there is no presumption that a statute is intended to override the common law and that it is a sound rule to construe a statute in conformity with the common law. The latter part of this proposition is of course qualified as Mr Mwanawasa fairly pointed out by the words in Craies "except where and so far as the statute is plainly intended to alter the course of common law." There is no doubt that the common law allows parties to enter into contracts concerning land, provided that they are not illegal or immoral, but the Act with which we are dealing expressly forbids dealing with land without Presidential consent and to this extent is plainly intended to alter the course of common law.

With regard to the argument that section 15 of the Act contains a specific provision that certain agreements relating to land shall be null and void ab initio, whereas no express words are included in section 13 it is noted that section 15 relates to agreements which were not legally forbidden before the 1st of July, 1975, and it was necessary for the legislature to make special provision for such previously legal agreements. In the same way the Land and Deeds Registry Act (Cap. 287) by section 6 provides that any document not properly registered within the time

specified shall be null and void. In that case, prior to the passing of the Land (Conversion of Titles) Act, perfectly legal contracts could be entered into, but if they were not registered within a specific time limit they were statutorily held to be void. The same situation does not arise with contracts relating to land which are entered into without the prior consent of the President. No such contracts could at any time be legal and it would be otiose for the legislature to provide that contracts which by law must not be made will be null and void if they are made.

We bear in mind the comments made by the learned authors of Chitty on Contracts (25th Edition) at paragraph 1147 (2) were it is said:

> "1147 (2) The courts have also been reluctant to find contacts unenforceable because the illegality doctrine operates in an all or nothing way and there is no proportionality between the loss ensuring from non-enforcement and the breach of statue. . .

and in the same paragraph-

> The courts have also been sensitive to the fact that non-enforcement may also result in unjust enrichment to the party to the contract who has not performed his part of the bargain but who has benefited from the performance by the other party . . . "

The apparent injustice that might in some cases ensue is mitigated by the fact that a person who unwittingly breaches a statute as a result of the fraud of another party, may have an alternative cause of action for breach of warranty or deceit as the case may be. No such circumstances exist in this case. The failure to obtain consent was solely because apparently the respondent company did not think that it was legally necessary to do so.

We find therefore that as the purported subletting by the respondent was without prior Presidential consent as required by section 13 (1) of the Land (Conversion of Titles) Act 1975, the whole of the contract, including the provision for payment of rent, is unenforceable. The appellant having succeeded on this ground there is no need to consider the other grounds of appeal.

The appeal is allowed with costs to the appellant in this court and in the court below.

Appeal Allowed
