LILY DRAKE v M.B.L. MAHTANI AND PROFESSIONAL SERVICES LIMITED
(1985) Z.R. 236 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S
11TH JUNE,1985 AND 11TH DECEMBER, 1985
(S.C.Z. JUDGMENT NO.31 OF 1985)

Flynote
Civil Procedure - Rent Act - Application for possession - Originating Simmons - Propriety of.
Landlord and Tenant - Possession - Application for - Originating summons - Propriety of.
Landlord and Tenant - Rent Act - Notice to quit - Requirement of premises for landlord's wife, children or employees - Validity of notice giving no specific reason for requirement of possession.
Landlord and Tenant - Rent Act - Premises required for employees of landlord's group of companies - No evidence as to particular company - Necessity for complete identity between the employer and the landlord.
Landlord and Tenant - Rent Act - Protection of Tenant - True purpose of Act.

Headnote
The respondents obtained from the High Court an order for possession of a flat let to the appellant on the grounds that the premises were required by the landlord for occupation by the landlord's employees under s.13 (1)(e) of the Rent Act. At the trial the Managing Director of the second respondent, who was proved to be the owner of the premises, gave evidence that the premises were required for occupation by unspecified employees of unspecified companies which were members of a group of companies to which the second respondent belonged. There was no evidence that the premises were required for an employee or employees of the second rospondent company itself. The action was commenced by a Writ of Summons for possession and was argued on behalf of the tenant that it should have been commenced by originating notice of motion. It was also argued that the notice to quit was invalid because it did not specify the reason why the landlord required possession. The trial judge commented adversely on the appellant's claim to the protection of the Rent Act and referred unfavourably to her asking the Court "to grant her the valuable status of irremovability by reason of her inadequate income."

Held:

(i) Applications to the Court for possession of premises which were subject of the Rent Act must be by originating summons; but it has always been the practice of the courts to allow amendment of proceedings which have been incorrectly commenced so long as no injustice is done to the parties;

(ii) A notice to quit by landlord requiring possession for the reasons set out in s.13 (1) (e) of the Rent Act need not set out such reasons;

(iii) Where premises are required by a landlord for occupation by an employee such employee must be employed by that particular landlord; there must be complete identity between the employer and the landlord;

(iv) The true purpose of the Rent Act is to protect tenants, and, even when landlord provides proof that his case comes within the provisions of s.13 (1) (e), it is still incumbent upon him to prove that the premises are reasonably so required.

Cases cited:

(1) Appollo Refrigeration Services Company v Farmers House Ltd S.C.Z. Judgment No.19 of 1985 (reported at p.182 of this volume)
(2) Gridmond v Duncan [1949] S.C. 195.
(3) Curl v Angelo [1948] 2 All E.R. 189.

Legislation referred to:

Rent Act, Cap. 438, s.13 (1)(e)

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

Judgment

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

On the hearing of this appeal we gave judgment for the appellant and indicated that we would give our reasons later. We now give our reasons.

This is an appeal against judgment of the High Court giving to the second respondent an order for possession of Flat No.11 Madhur Court, Ndola. There was evidence that in May ,1967, one L.T. Mahtani let the premises to the appellant and after the death of Mr L.T. Mahtani the first respondent served a notice to quit on the appellant and all the other talents on the 15th of June, 1974, with an offer of new tenancy at increased rents. The offer of a new tenancy was refused by the appellant but she continued to occupy the premises under the Rent Act Cap. 438. In passing we would comment that the term "Statutory tenant" has been criticised on the grounds that former tenant holding over under the protection of the Rent Acts is not tenant but a person with a personal right to continue to occupy the premises. This is a valid criticism but no one is misled by this commonly used term and it is appropriate in this case to say that after the first notice to quit the appellant continued to occupy the premises a statutory tenant.

On the 6th September, 1976, a further notice to quit was served on the appellant by the first respondent requiring her to vacate the premises and a writ was issued by the first respondent in the High Court claiming possession of the premises. Subsequently leave was given for an amendment of the writ by adding the second respondent on the grounds that the premises had been assigned by the first respondent to the second respondent on the 23rd October, 1980.

In the Statement of Claim it was pleaded that the notice to quit was in accordance ninth section 13 (1)(e) of the Rent Act. This section reads as follows:

> "13 (1) No order for the recovery of possession of any premises or for the ejectment of a tenant therefrom shall be made unless - (e) the dwelling-house is reasonably required by the landlord for occupation as a residence for himself or for his wife or minor children or for any person bonafide residing or intending to reside with him, or for some person in his

whole-time employment or for the occupation of the person who is entitled to the enjoyment of such dwelling-house under a will or settlement, and the landlord has given to the tenant not less than twelve months notice to quit; and in such case the court shall include in any order for possession a requirement that the landlord shall not without its prior approval let the premises any part thereof within three years after the date on which the possession is to be given."

At the trial Mr R. L. Mahtani the General Manager of the second respondent gave evidence. In the record such evidence appears as follows:

p239

" *Q:* Mr Mahtani why did you need the premises?
A: To house employees of the group companies my Lord.
Q: For the employees of the plaintiffs?
A: Yes my Lord of companies where the plaintiff have an interest."

The following extracts appear in the record of the cross-examination of this witness:

"*Q:* You are saying that there was an assignment of this property to Professional Services Limited?
A: That is true my Lord it was sometime in October, 1980.
Q: That was after you issued the notice to quit to the defendant?
A: That is true my Lord.
Q: Is it not true that in fact the other flats you are referring to are in fact rented to ZCBC.
A: There is one or two flats I think rented to ZCBC on the under standing that a group company Copper Harvest producing goods for ZCBC but for Copper Harvest it is all within the group - group companies of Mahtani."

After hearing the evidence the learned trial judge in his judgment said:

"The reason given by the defendant for her refusal to move is that her income is inadequate. In other words because of her inadequate income she is asking the court to grant her that valuable status of irremovability. That in my view would be far-reaching. Such reason does not truly convince the court that her contractual tenancy cannot be terminated."

The learned trial judge then made an order for possession of the premises in favour of "the plaintiff", without saying which one, and said "for these reasons I hold that the defendant is not protected by section 13 (1)(e) of the Rent Act." It is against that order that the appellant now appeals.

At the outset of the appeal Mr Kafunda on behalf of the appellant raised a preliminary objection to the form of the proceedings to commence the action. This objection was not raised before the trial in the High Court nor was it one of the grounds of appeal in the memorandum of the appeal and the heads of argument. However, we allowed Mr Kafunda to argue this objection and he drew our attention to the provisions of the Rent Rules 1973 made under the Rent Act. Rule 3 provides that a

complaint or application to the court under the Act shall be commenced by an originating notice of motion. Furthermore Mr Kafunda pointed out that the definition in the Rent Act of "court" reads:

p240

" (a) In relation to premises for which the rent demanded exceeds K3,600 per annum the High Court:
(b) In relation to all other premises a Subordinate Court of the first class to be presided over by a senior resident magistrate or a resident magistrate."

In this case the premises were let at a rental of K60.00 per month and therefore, Mr Kafunda argued, the action should not have been commenced in the High Court. Mr Mwanawasa on behalf of the respondent maintained that he was not making an application under the Rent Act but was merely claiming possession. And that Order 6 Rule 1 of the High Court Rules provides that except as otherwise provided by any written law or by the Rules every action in the Court shall be commenced by writ of summons.

We have compared the provisions of the Rent Act and its Rules with those of the Landlord and Tenant (Business Premises) Act Cap.440 which are in similar terms as to the making of applications by originating notice of motion. As we pointed out in the case of *Appollo Refrigeration Services Limited v Farmers House Limited* (1) none of the applications mentioned in the Landlord and Tenant (Business Premises) Act provides for an application for possession. Consequently a claim for possession of business premises must be commenced by writ. In the Rent Act, however, sub-sections (6) and (7) of section 13 both refer to landlords obtaining orders for possession "under this section." The use of these latter words envisages applications for possession under section 13 despite the fact that at first sight the section appears to be a prohibition section and not an enabling section. In view of the fact that applications for possession are envisaged under that section Rule 3 relates to such applications. Consequently as that rule provides for the commencement of applications by originating notice of motion the exception to Order 6 Rule 1 applies and the matter is not to be started by writ of summons. We appreciate that these technicalities may not always be clear and for that reason it has always been the practice of this court to allow amendment of proceedings which have been incorrectly commenced so long as no injustice is done to the parties. In this case no injustice will be done to the appellant by allowing the respondents to amend their form of action to one of originating notice of motion. We accordingly allow such an amendment.

With regard to Mr Kafunda's argument that in any event the matter should have been started in the Subordinate Court and not in the High Court, this is a matter which goes only to the question of costs. The appellant was entitled to make an application to transfer the case to the Subordinate Court if she so desired, but the respondents must bear the consequences of their choice to commence the proceedings in the High Court so far as costs are concerned. If they are successful, subject to any argument as to the complexity of the case justifying increased costs, the costs should be awarded at no more than the Subordinate Court scale. If they are unsuccessful however, the costs should be awarded against them on the High Court scale.

p241

The first ground of appeal put forward by Mr Kafunda was that the notice to quit served on the 6th September, 1976 did not indicate the reasons why the respondents required the premises, that is for occupation by their employee. Mr Mwanawasa argued that as twelve months notice to quit was given and sub-section (e) of section 13(1) is the only sub-section requiring twelve months notice, it should have teen clear to the appellant what were the grounds of the application. In view of the fact that the subsection allows a landlord to obtain possession if the premises are reasonably required by the landlord as a residence for himself or his wife or minor children or for an employee, we would not agree that the giving of twelve months notice drew the attention of the tenant to the precise reason for the landlords requirement.

However, we are satisfied that the situation is not the same as in the case of the Landlord and Tenant (Business Premises) Act, in which a landlord requiring possession must give a notice in the form set out under the Rules made under that Act, which provides for the landlord to set out the grounds on which he would oppose an application for a new tenancy. Under the Rent Act, section 13(1) (i) is a provision enabling the landlord to obtain possession when he requires the premises to enable reconstruction or rebuilding thereof to be carried out. The sub-section provides that a landlord may exercise such right when he has "given to the tenant not less than six month's notice in writing of such requirement." Those last words are not included in section 13(1)(e). There is therefore no requirement that a landlord requiring possession under the latter sub-section must give his reason for such requirement and the notice to quit in this case was not ineffective by reason of the fact that no grounds were given for requiring possession. There is no merit in the appellant's complaint about the contents of the notice to quit and this ground of appeal must fail.

We would further point out that it is the duty of a plaintiff to indicate in his Statement of Claim the reason for requiring possession. In this case clause 6 of the respondent's Statement of Claim reads: "the notice to quit and the termination of the tenancy were done in accordance with section 13(1)(e) of the Rent Act." As we have pointed out, that subsection provides for a landlord's requiring possession for himself, his wife, his minor children or an employee and, as drawn, the Statement of Claim gives no indication of the precise reason for the landlords' requiring possession. This should have been done, but as the appellant did not raise the issue the point is not material in this case.

We come now to the argument that there was no evidence that the employees of the second respondent were to be accommodated in the premises. The record shows that the evidence was only that the premises were required for employees of the respondent's group of companies. It is clear that nowhere did the General Manager of the second respondent claim that the premises were required for employees of his particular company, that is Professional Services Limited. We are satisfied that the premises were assigned to the second respondent who became the landlord for the purposes of section 13 (1)(e). There is no

doubt that the second respondent is an entirely separate legal entity from the first respondent and it is essential, to satisfy requirements the of section 13(1)(e) as to persons in employment, that such persons must be in the employment of the particular landlord. In the Scottish case of *Grimond v Duncan* (2) under the Rent and Mortgage Interest Restriction (Amendment) Act 1933, the provisions of which were to all intents and purpose indentical to section 13(1) (e) of the Rent Act, a

landlord brought an action of summary ejection against tenant. She averred that the house was reasonably required by herself and her two sisters for occupation by a ploughman who was in the whole time employment of herself and her two sisters. It was held in that case that the ploughman was not in the whole-time employment of the landlord, his engagement being either with the partnership or joint venture consisting of the three sisters as separate individuals. We agree with the principle set out in that case and the comment in Megarry's Rent Acts (9th Edition) at page 253: "There must be complete identity between the employer and the landlord." In this case therefore in order to take advantages of the provisions of section 13(1)(e) of the Rent Act, the second respondent would have had to bring evidence that the promises were required for an employee of its own and not generally of a family group of companies. This the second respondent did not do and there was no proof to satisfy the provisions of section 13(1)(e).

There were further arguments by both parties concerning the intention of the legislature as to the interests of landlords and tenants. In this connection the learned trial judge said that the appellant was asking the court to grant her the valuable status of irremovability by reason of her inadequate income. The learned trial judge commented adversely on this claim and it appears that he did not appreciate the true purpose of the Rent Acts - that is to protect tenants. As Lord Green M.R. said in the case of *Curl v Angela* (3). The "real fundamental object" of the Acts is "protecting the tenant from being turned out of his home." We agree with that dictum and we would emphasise that, even when a landlord provides proof that his case comes within the provisions of section 13(1)(e), it is still incumbent upon him to prove that the premises are reasonably so required.

For the reasons we have given we allowed this appeal.

Mr Mwanawasa argued that the appellant has not succeeded on any of the grounds put forward on her behalf and should therefore not be entitled to costs. It is correct to say that the question as to proof that the premises were required for an employee of the landlord was raised by this court and not by the appellant's counsel but in our view that is not a sufficient reason for depriving the successful appellant of her costs. Accordingly we order that the costs both in this court and in the court below shall be the appellant's.

Appeal allowed
