

JASUBER R. NAIK AND NAIK MOTORS LTD. v AGNESS CHAMA (1985) Z.R.
227 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S
11TH JUNE AND 10TH DECEMBER, 1985
(S.C.Z. JUDGMENT NO. 28 OF 1985)

Flynote

Land Law - Land (Conversion of Titles) Act - Presidential consent - Failure by landlord to obtain consent to lease - Application for new lease under the Landlord and Tenant (Business Premises) Act - Protection of tenant's rights.

Headnote

The tenant applied for the granting of new tenancy of business premises. When the application was heard by Senior Resident Magistrate a preliminary point was raised that no Presidential consent had been obtained as required by s.13 of the Land (Conversion of Titles) Act when the original tenancy was granted. The Magistrate ordered the landlord to validate the original lease by obtaining Presidential consent before a new lease could be granted. The landlord appealed.

Held:

(i) The prohibition against letting premises without Presidential Consent applies primarily to the landlord in the absence of any wrong doing on the part of the tenant, and it is therefore for the landlord to obtain consent and to suffer from any illegality arising from failure to obtain such consent. A tenant who is not in default himself does not lose the protection of the Rent Acts as result of a landlord's failure to obtain Presidential consent;

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(ii) Tenants who have the protection of the Landlord and Tenant (Business Premises) Act may rely on such protection and may apply for new tenancies despite the default of landlords in failing to obtain Presidential Consent.

Cases cited:

- (1) Mutwale v Professional Services Ltd. (1984) Z.R. 72.
- (2) Marles v Philip Trant and Sons Ltd. [1953] 1 All E.R. 645.
- (3) Ailion v Spiekernab and Ors (1976) 1 Ch.158.

Legislation referred to:

Land (Conversion of Titles) Act, Cap. 289, s.13 (1).
Landlord and Tenant (Business Premises) Act, Cap.440.

For the appellants: R.S.M. Mwape, of Mwape and Company.

For the respondent: L. P. Mwanawasa, of Mwanawasa and Company.

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

On 11th June, we heard this appeal and ordered that the application for a new tenancy should be sent back to the Senior Resident magistrate for hearing. We indicated that we would give our reasons later and we now give those reasons.

This is an appeal from an order by the Senior Resident Magistrate at Ndola that the appellants should apply for Presidential consent under section 13 of the Land (Conversion of Titles) Act therein after referred to as "the Act") for the granting of a tenancy of premises to the respondent so that the respondent could apply for a new tenancy under the provisions of the Landlord and Tenant (Business Premises) Act.

The respondent applied to the Senior Resident Magistrate for the granting of a new tenancy of business premises which she claimed had been let to her by the second appellant by a tenancy agreement commencing in or about the month of August 1979. The respondent had received notice to quit from the advocates for the first appellant and there was a dispute as to whether the premises were let to the respondent by the first or the second appellant. That dispute does not come to be decided in this appeal and for convenience we will refer to both appellants as the "appellants" to indicate that one or the other is the Landlord.

When the application for the granting of a new tenancy came for hearing before the Senior Resident Magistrate a preliminary point was taken by the advocate for the appellants and that is that in view of the Act that no consent for the tenancy had been obtained from the President under the provisions of section 13 of the Act, the tenancy was illegal, the tenant was a trespasser and no application for a new tenancy could be

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made. The advocates for the respondent argued that it was the duty of the landlord to obtain Presidential consent and the landlords could not rely on their own default. The senior Resident Magistrate considered that the relationship should be regularised and ordered the appellants to put the matter right by obtaining consent from the President. It is against that order that the appellants now appeal.

Mr Mwape on behalf of the appellants argued that the tenancy was null and void as a result of section 13 of the Act in accordance with the judgment of this court in the case of *Mutwale v Professional Services Limited* (1). He also argued that although the appellants had not applied for Presidential consent it was the duty of counsel to draw the attention of the court to the illegality of the contract, and once the contract was illegal the courts could not enforce it. Mr Mwanawasa on behalf of the respondent argued that the appellants could not take advantage of their own default in failing to obtain consent and that the Senior Resident Magistrate was therefore right in ordering that consent must be obtained by the appellants in order to legalise the position. Section 13(1) of the Act reads as follows:

"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, or 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."

In the case of *Mutwale v Professional Services limited*, (1) the facts were that a landlord agreed to let a flat to a certain man and no consent to the letting was obtained under section 13(1) of the Act. No rent was ever paid although the premises were occupied by the purported tenant's girlfriend for two years. This court held that because section 13 (1) prohibited any person from letting premises without consent, the whole of the contract including the provision for payment of rent was unenforceable. It would appear from that judgment that we were saying that neither the landlord nor the tenant could enforce the contract, and it is on that reading of our judgment that Mr Mwape relies when claiming in this case that the respondent has no right under a tenancy which was illegal because it lacked consent.

In the case of *Mutwale v Professional Services Limited* (1), we were dealing with a landlord's claim for rent and we were not called upon to consider the effect on a tenant of non-compliance with section 13(1) of the Act. In order to consider such effect we must endeavour to ascertain the intention of the legislature. The Act itself does not provide what will be the result of a failure to comply with its terms. There is merely a prohibition under section 13 against the alienation of land without consent. It is therefore left to the courts to decide what the legislature intended should be the effect when no consent is obtained. It is clear that the purpose of this statute was for the protection of the public.

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That is that the cost of acquiring land whether by purchase or rental should not be excessive due to the scarcity of suitably developed land or habitable premises. In the latter respect the purpose of the law was to protect tenants. However, there was already in existence other legislation for the protection of tenants, and, pertinent to this particular case there was, and is the Landlord and Tenant (Business Premises) Act. That Act provides, inter alia, that existing tenants of business premises are entitled to renewal of their tenancies unless such premises are required by the Landlords for certain specific reasons which must be enquired into by a court. The respondent in this case claims to be a tenant entitled to renewal of a tenancy under such provisions, and the appellants claim that she has lost her rights because of the enactment of the Land (Conversion of Titles) Act and the failure by the appellants themselves to comply with the provisions of that Act. As we have said, the purpose of the Act was to protect tenants, and it would of course be quite contrary to such purpose if the protection of tenants provided for in another Act was thereby taken away. There may be circumstances where a tenant himself is in default, for instance, if he assures a Landlord that he himself will obtain the necessary consent to a tenancy, in which event his own default, if inexcusable, might well deprive him of protection. But if there are no such circumstances we are quite satisfied that it was not the intention of the legislature to allow a landlord who is in default under section 13 of the Act to plead such default in order to deprive a tenant of the protection of another Act.

In the case of *Marles v Philip Trant and Sons limited* (2) sellers of seeds failed to deliver a statement of particulars of the seeds as required by section 1(1) of the Seeds Act, (1920). The seed was unsuitable and loss was suffered by the purchaser. In the Court of Appeal it was held that failure to deliver the statement of particulars was an illegal performance of the contract precluding the sellers from taking advantage of the contract, but, in view of the provision under the Seeds Act that the liability of the sellers to a fine for their own failure to deliver a statement was "without prejudice to any civil liability", the illegal performance did not relieve them of their obligation to the buyer, who was therefore entitled to damages. In that case there was a specific penalty section making the sellers liable to a fine, and a specific provision as to civil liability, but the ratio decidendi of the case that the sellers' default did not affect the innocent purchaser's rights.

Further, in the case of *Ailian v Spiekerman and Others* (3) a vendor agreed to assign the lease of a flat which he occupied as a protected tenant and the purchasers agreed to pay him 3,750 pounds for certain furniture. The furniture to the knowledge of the parties was of much less value than the agreed price and therefore the vendor was requiring a premium contrary to sections 86 and 89 of the Rent Act 1898. The purchasers went into possession but failed to pay the purchase price on the day fixed. The vendor claimed rescission of the contract and possession of the premises and the purchasers counter-claimed for specific performance on

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payment of a reasonable price for the furniture. It was held in favour of the purchasers that the demanding of a premium did not render the whole contract illegal. In that case the court refused the vendor an order for possession and granted the purchasers specific performance but without payment of the illegal premium represented by the excess purchase price over and above the true value of the furniture.

In the latter case it is appropriate to note that the purchasers were not entirely innocent in that they were aware that the price of the furniture was excessive. The attitude taken by the court in that case was that the purchasers were to be protected from being persuaded into such an illegal contract, and, when they had been so persuaded the court would enforce the intention of the legislature, which was that the vendor should have no rights under an illegal contract but the purchaser's should not lose the protection of the statute which was designed to protect them. We would apply the principles set out in the two cases to which we have referred and hold that by the specific wording of section 13(1) of the Act the prohibition against letting premises without Presidential consent applies primarily to the landlord in the absence of any wrong doing on the part of the tenant, and it is therefore for the landlord to obtain consent and to suffer from any illegality arising from failure to obtain consent. A tenant who is not in default himself does not lose the protection of the Rent Acts as a result of landlord's failure to obtain Presidential consent to a letting.

The result of such finding is that innocent tenants who have the protection of the Landlord and Tenant (Business Premises) Act or any other such Act may rely on such protection and in the case of business premises they may apply for new tenancies. We should make it clear that in this judgment we are dealing with nothing other than the effects of a landlord's non-compliance with section 13(1) of the Act, we are not saying that the Act should in any way be ignored. The consequence is that, if a new tenancy is granted by a court, consent must also be obtained under

section 13(1) of the Act. It is to be hoped that this will be a mere formality, and, as the question does not arise at this stage, we do not propose to comment on what would be the result of a conflict between a court order and a consent, or lack of it, under section 13(1) of the Act.

So for as this appeal is concerned it follows that there was no necessity for the Senior Resident Magistrate to make an order that the appellants should obtain consent. We doubt very much whether he had power to make such an order but that is immaterial. We would point out however that it is in the appellants' interest to obtain consent because if they do not they cannot sue for any rent.

The appeal is allowed, the order of the Senior Resident Magistrate is set aside and it is ordered that the application be sent back to the Senior Resident Magistrate for hearing.

Appeal allowed
