ALBERT HAMPAKO v NATIONAL HOUSING AUTHORITY (1988 - 1989) Z.R. 61 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND CHAILA, AG. J.S.
6TH SEPTEMBER, 1988
(S.C.Z. JUDGMENT NO. 11 OF 1988)

Flynote
Landlord and Tenant - Rent in arrear - Deposit - Whether deposit pre-payment of rent.

Headnote
The appellant was the tenant of the respondent in terms of an agreement whereby the rent was to be paid one month in advance. The respondent applied to the Court for an eviction order under section 32A of the Rent (Amendment) Act of 1974 alleging that the respondent was in arrears of rent for a period of not less than three months.

The trial Court found as a fact that the respondent was in arrears for the months of December, January and February and made an order for possession. The tenant appealed and argued that a tenant could not be in arrears of rent in respect of a period in the future where the rent is payable in advance. He also contended that as he had paid an initial deposit of one month's rent he did not owe three months arrears but only two months arrears.

Held:
Where any rent is payable in advance it becomes in arrears the minute it is not paid on the due date. A deposit is not payable as pre-payment of rent for a month and the payment of such deposit does not in any way relieve the tenant of his obligations under the agreement to pay rent in advance monthly.

Legislation referred to:
Rent (Amendment) Act (No. 12) of 1974, s. 32A
Rent Act, Cap. 438.

For the appellant: M.M. Imasiku, Messrs Lisulo and Company.

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For the respondent: K.M. Maketo, Messrs Christopher Russel, Cook & Company.

Judgment
NGULUBE, D.C.J.: delivered the judgment of the Court.

For convenience we will refer to the appellant as the plaintiff and the respondent as the defendant which is what they were in the action.

This is an appeal by the plaintiff against the dismissal of his action in which he claimed damages for breach of a tenancy agreement made between the two parties regarding a house in the Kabwata Estates. By his statement of claim, the plaintiff alleged that the defendant had carried out an illegal eviction and in the process the defendant had failed to look after the plaintiff's property which was removed from the house and which was later found to be either missing or damaged. The defendant had carried out the eviction by virtue of the statutory powerrs contained in section 32A of the Rent (Amendment) Act, (No. 12) of 1974, which amended the Rent Act, Cap. 438 which reads:

"32A (1) Notwithstanding anything to the contrary contained in this Act or any other law, a local authority or the National Housing Authority, as the case may be, shall have power:

> (a) to evict a tenant from the premises let to him by the Local Authority or the National Housing Authority, as the case may be, without having to institute proceedings in Court in that behalf, if the tenant is in arrears of rent for a period of not less than three months.'

One issue which arose at the trial and which arises here is whether or not the plaintiff was in arrears for the requisite period of three months. There was evidence that, in terms of the tenancy agreement, the rent had to be paid a month in advance and it was found as a fact by the learned trial Judge that the plaintiff - as at 1st February, 1978 when the eviction notice was issued - was in arrears of three months' rent, namely, rent for the months of December 1977, January and February 1978.

On behalf of the appellant, Mr *Imasiku* has argued that, on a correct reading of the section which we have quoted, a tenant could not be in arrears of rent in respect of a period in the future even where the rent is payable in advance. He submits that the correct meaning to be attached to this section is that the tenant must actually have occupied the premises for a period of at least ninety days without payment of any rent in respect thereof. His opponent, Mr *Maketo*, has argued that where rent is payable in advance it is in arrears as soon as the time for payment has passed. We have considered these arguments and we have no doubt in our minds that Mr *Maketo's* understanding of the meaning of this section is the correct one. We have examined the language of the section relied upon and we agree that where any rent is payable in advance it becomes in arrears the minute it has not been paid on the due date. It is not correct to suggest that the I meaning of the law as contained in the section quoted is that which is asserted by Mr *Imasiku*. We do not uphold the argument by Mr *Imasiku.*

In the alternative, it was argued that, because the plaintiff had paid an initial deposit of K40 which was expressed to be the equivalent of one month's rent, then as a matter of fact the plaintiff did not owe three but

only two months' arrears. Once again we have no difficulty in rejecting that argument. We have examined the tenancy agreement and we have observed that the deposit was not payable as pre-payment of rent for a month and that the payment of such deposit did not in any way relieve the tenant of his obligation under the agreement to pay rent in advance, monthly. It follows from what we have said that none of the submissions under the first ground argued can be accepted.

The second point raised in this appeal concerns a lounge suite and two lamp stands which were

taken by way of distress for the payment of the rent arrears then outstanding. It has been argued by Mr *Imasiku* that to take all that property in order to cover a debt which was only K80 (after the deposit of K40 was taken into account) amounted to an excessive execution or, in the alternative, excessive distress. We wish to observe, as it has been pointed out by Mr *Maketo*, that there was in fact no claim concerning this and that the only claim regarding any property related to the damaged or missing items which claim was, of course, not accepted by the learned trial Judge. The Court below found that there was no wrongful eviction in this case and that the defendant had exercised its right to distrain for the unpaid rent. In this connection, the learned trial Judge declined to make an order against the plaintiff for the payment of K80 due, so long as defendant was in possession of the plaintiff's property which had been taken in exercise of the right of distress, which is a sort of self-redress. We cannot now speculate or assume that the parties have exhausted their rights under the distress and we certainly cannot see any good reason why the parties did not attempt, after the judgment below, to take the matter to its logical conclusion. We mention only in passing (since it is not necessary at this stage to make a positive finding) that the plaintiff undoubtedly has the right to replevy the goods distrained by the defendant, and should it be discovered on such effort being made that there was anything the matter with the way the distress has been handled by the defendant, that would be the subject matter of a cause of action which does not presently arise. In view of what we have said, the second ground argued before us can also not be entertained. The result is that the whole of the appeal fails; the costs follow the event.

Appeal dismissed.
