NIP LIMITED v ZAMBIA STATE INSURANCE CORPORATION LIMITED (1994) S.J. 1 (S.C.)

SUPREME COURT
GARDNER, SAKALA AND CHIRWA, JJ.S.
14TH OCTOBER, 1993 AND 5TH JANUARY, 1994
S.C.Z. JUDGMENT NO. 1 OF 1994

Flynote

Tenancy agreement - Termination of - Damages for wrongful deprivation of right to occupy flat

Headnote

The appellant was the tenant of the flat owned by the respondent. In or about June 1992 the appellant allowed one Mainga Mwaanga to occupy the flat and on the 15th of September 1992 the respondent gave notice of termination of the tenancy on the ground that the appellant had sublet the property to a third party. Thereupon the respondent entered into a tenancy agreement with the employers of Mwaanga.When the appellant brought an action against the respondent the High Court seeking a declaration that the appellant was entitled to the tenancy of a flat on lease from the respondent, the court found for the respondent. The court further refused to award the appellant damages for wrongful deprivation of the right to accupy the flat. On appeal by the appellant, it was

Held:

(i) The appellant did not sublet the premises within the terms of S.13 (1) (g) of the Act

(ii) The purported termination of the tenancy agreement by the respondent was null and void

For the appellant: E B Mwansa of EBM Chambers
For the respondent: M M Mundashi of Zambia State Insurance Corporation Limited.

Judgment

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

This is an appeal from a judgement of the High Court refusing a declaration that the appellant was entitled to the tenancy of a flat on lease from the respondent, and refusing the grant of damages for wrongful deprivation of the right to accupy the flat.

The facts of the case are that the appellant was the tenant of the flat owned by the respondent. In or about June 1992 the appellant allowed one Mainga Mwaanga to occupy the flat and on the 15th of September 1992 the respondent gave notice of termination of the tenancy on the ground that the appellant had sublet the property to a third party. Thereupon the respondent entered into a tenancy agreement with the employers of Mwaanga.

In his affidavit in support of the orginating notice of motion, one Panchal, the Managing Director of the appellant company, maintained that he had not sublet the flat, but had allowed Mwaanga to occupy the flat as a friend because his wife had just delivered a child and needed shelter for at least a month. Exhibited to the affidavit was a letter written by Mwanga reading as follows:

To Nip Ltd.,

Dear Mr. Panchal,

This is to confirm that flat No. 1 Premium Court has been given to me on a temporary basis for a month during the time I had no accommodation. I had not been subletting from him. I thank you for your assistance.

Mainga Mwaanga
Signed

And in an affidavit sworn in opposition to the application there was exhibited a further letter written by Mwaanga, which was in contradiction of the first letter, as follows:

Zambia State Insurance Corporation Limited
P O Box 30894
LUSAKA
6th November, 1992

Curray Ltd.,
P O Box 30661
LUSAKA

Dear Sir,

I am writing to you to clarify why I wrote the contradictory letter to Mr Panchal of NIP LTD saying that I did not pay him any money for staying in his flat. I wrote this letter because Mr Panchal had asked me to as a favour, because he did not want NIP LTD to know that he had received money from me for the flat. The truth of the matter is that he was subletting the flat to me at sixty five thousand kwacha a month (K65,000.00) and I paid him this amount for three months before this matter came to your attention. I hope this will clear the air on why I wrote the letter to Mr Panchal.

Yours faithfully

Mainga Mwaanga

At the hearing before the High Court Panchal gave evidence that he had only helped Mwaanga temporarily, that he had received no money from him and that he had left all his furniture in the flat. In reply, for the respondent, Mwaanga gave evidence that he was allowed to rent the flat for sixty five thousand kwacha per month and Panchal had told him to write the first letter saying that he was not a subtenant in order to prevent the respondent corporation from

alleging that there has been a subletting. He then decided to become a direct tenant of Zambia State Insurance Corporation Limited because the appellant was overcharging him, that is to say, he was charging him sixty five thousand kwacha per month instead of twenty seven thousand kwacha per month which was being paid by the appellant to the respondent. In his evidence Mwaanga confirmed that the flat was fully furnished.

There was evidence from a representative of the respondent corporation confirming that the premises had been let to the appellant but the witness could not recall whether there was any witten lease. There was no evidence that there was any covenant against subletting with or without consent, but the witness said that the tenancy was terminated because there had been a breach of a clause of the tenancy agreement by subletting the flat to someone unknown to the respondent corporation. The witness said that the flat had now been let to the employers of Mwaanga because the corporation preferred to deal with limited companies as tenants. We were informed by counsel that the new letting was at the rate of sixty five thousand kwacha per month.

The learned trial judge found that Panchal had not told the court the truth when he said that he allowed Mwaanga to use the flat and his household goods free of charge. He therefore believed that Mwaanga was a tenant of the appellant for three months. The learned trial judge then held that this meant that under section 13(1) (g) of the Rent Act the Plaintiff was subletting the flat. For this reason the learned trial judge refused to order that the appellant's tenancy should continue.

On appeal, Mr Mwansa asked this court to find that Mwaanga should not had been believed when he said that he had paid sixty five thousand kwacha per month. He further argued that before the respondent repossessed the flat there should have been a court order for such reposession.

Mr Mundashi on behalf of the respondent replied that the learned trial judge was entitled to believe Mwaanga's evidence that he had paid thirty five thousand kwacha per month. Mr Mundashi further very fairly conceded that the mlearned trial judge had implicitly accepted that the appellant nhad allowed Mwanga to accupy the flat temporary because his wife had just had a baby, and that the intention was that the accupation was to be temporary, even though it was to be paid for. Mr Mundashi, in answer to a question by the court maintained that even if it was to be a temporary arrangement it was a subletting and not a licence.

We note from a record of evidence that apart from a statement in cross-examination that he allowed Mwanga to use all the furniture and utensils free of charge Panchal was not cross-examined in connection with his statement in his evidence in chief that he did not receive any money, nor about the allegation by Mwanga that he had paid sixty-five thousand Kwacha per month. In contrast Mwanga was cross-examined quite strongly about the arrangement he had with Panchal and as a result of that he answered thjat no one persueded him to wrote either of the two letters. It follows from this, as was argued by Mr Mwansa, that Mwaanga was under no coercion to write the first letter in which he said that the flat was given to him on a temporary basis and that there had been no subletting. On this evidence it is difficult to understand on what grounds the learned trial judge preferred Mwaanga's evidence concerning the payment by him of rent. Be that as it may, it appears that all the parties and the learned trial judge assumed that any payment received by Panchal for occupation of the flat would render the transaction a subletting and make it impossible for the transaction to be a licence. We accept that from the tone of the learned trial judge's judgment he did not disbelieve

Panchal when he said that it was his intention to do Mwaanga a favour for a limited period only.

We are alive to the need for the courts to guard against the possibility that

parties may endeavour to avoid the control of the Act by granting a licence instead of a tenancy. However, it is not the intention of the courts to construe agreements freely made between two parties in any way that will defeat the honest intention of the parties.

In this case no evidence of terms of appellant's tenancy agreement could be given by the witness for the respondent although he said that the tenancy was terminated because the appellant was in breach of a covenant against subletting, he conceded that the agreement may have been oral, in which event it is unlikely that such a covenant would have been mentioned, and, in any event, his evidence that the terms of the tenancy agreement were not within his own knowledge made it impossible for him to say that there was a covenant against subletting. That being the case, the only provisions relating to subletting without consent are statutory, and the appellant argues that they are inapplicable because the grant of the permission to Mwaanga to occupy the premises temporarily was a licence and not a subletting. We would comment here that the appellant, being a company, cannot occupy the premises physically and has to allow some individual person to occupy on its behalf.

Megarry, in the Rent Act (9th Edn) at page 52 has this to say:

> "The fact that a licence is outside the Acts may be some grounds for inferring that the grantor never intended to grant a tenancy, yet it is uncertain how far the grantor's intention will altimately prevail. On one view, if the intention of the grantor, accepted by the grantee, is to create a licence and no tenancy, it would be wrong for the court to extract from the grantor an estate or interest in land in the teeth of the intention of the parties, at all events if the words or document by which the transaction was effected are apt for a licence and not for a tenancy. On the other hand, if by being sufficiently careful in their drafting and explicit in their refusal to grant tenancies landowners could escape the Acts with ease, the social consequences would be grave. There have hitherto been enough flaws in the drafting or uncertainty in the surrounding circumstances to enable the courts to hold that tenancies have been created in all the reported cases were such a result seemed proper. The court will certainly scrutinise with great care any document or transaction, the sole object of which is to avoid the Acts."

In Facchini v Bryson (1952) I. T. L. R. 1389 p. 1389, Denning L. J. said:

> "In all cases were an occupier has been held to be a licencee there has been something in the circumstances, such as a family arrangement, an act or friendship or generosity, or such like, to negative any intention to create a tenancy."

The above quotation appears on page 50 of Megarry. And on page 51 it is made quiet clear that the payment of a consideration for such ocupation will not of itself prevent the transaction from being a licence. The authorities indicate that the surrounding circumstances must be looked at also. In this case, when

Mwaanga was introduced by a mutual firend, he was in desparate straits because his wife had just given birth to a baby and he had no accommodation whatsoever. The fact that Panchal left all his own furniture, bedding and utensils in the flat can be regarded as an indication that he did not intend to part with the possession of the flat within the terms of the definition of a lease in section 2 of the Rent Act. If the appellant did not intend to part with the possession of the flat in those tems then the occupation by Mwaanga would not come within the terms of section 13(1) of the Rent Act, that is, subletting or parting with possession without the consent of the landlord.

Part of the surrounding circumstances in the case was that Panchal had a mistress who had been occupying the flat but who had gone to Kenya, and it was suggested that it was only because she returned and reconciled with Panchal that he required to regain the flat from Mwaanga. However, the question of whether or not the return of the mistress was unexpected or whether or not there has been a reconciliation was not put to Panchal in cross examination and there is nothing in those circumstances to suggest that when Mwaanga was allowed to go into occupation Panchal did not anticipate any further need for the flat.

Taking into consideration the whole of the surrounding circumstances we are quite satisfied that it was obviously the intention of the parties that Mwaanga was to be allowed only temporary occupation of the flat because of his desparate plight, and, whether or not payment was made by Mwaanga for such occupation, there was never an intention between the parties to grant anything other than a licence to occupy the premises for a short period.

We have considered s.26 of the Act which provides for sublettings of less than six months, and, although the appellant could have sublet under this section by asking permission from the landlord or the court, there was nothing to prevent him from choosing to grant a licence instead.

We have also considered S.13 (1) (d) of the Act and, as, we are satisfied that, the grant of a right of occupancy was no more than a licence, that section does not apply.

We find that the appellant did not sublet the premises within the terms of S.13 (1) (g) of the Act. The appeal is allowed and the appellant is entitled to a declaration that the purported termination of his tenancy was null and void.

The appellant's tenancy of the flat in question from the respondent shall continue at the.............. before the purported repossession, unless the standard rent is increased in accordance with the provisions of the Act. In order to avoid further litigation and in order to put this order into effect we order that the respondent deliver up possession of the flat to the appellant within months from the date of this order.

The appellant claimed damages for the cost of renting alternative accommodation at the rate of K165,000.00 per month from 15th September, 1992. No evidence was led by the respondent to suggest that this claim is unreasonable, and the appellant is awarded damages of the difference between the rent he was paying and that sum, namely, K138,000.00 per month from the 15th September, 1992 until possession of the flat is returned to him.

Costs of this appeal and in the court below to the appellant.

We would mention that, had the law of Property Act 1925 applied in this country, the respondent would have had to give notice to the appellant drawing attention to the alleged breach and requiring it to be remedied. The occupant could then have been removed, or the temporary nature of the occupation explained to the respondent, and the resultant damages would not have been incurred.

We would also mention that the present provisions for increasing the standard rent completely ignore the present rate of inflation and the learned law officers of the may consider that alterations in the low are appropriate.

Appeal allowed.