

Judgment No. SC 16/10  
Civil Appeal No 239/08

EDGAR ARNOLD RATCLIFFE-SMITH v GIFT TSINGANO

SUPREME COURT OF ZIMBABWE  
MALABA DCJ, ZIYAMBI JA & GARWE JA  
HARARE MAY 4, 2009 & SEPTEMBER 27, 2010

*N M Willsmer*, for the appellant

*E Hamunakwadi*, for the respondent

MALABA DCJ: This is an appeal from a judgment of the Administrative Court dismissing an appeal against a decision of a Rent Board granting the respondent a certificate of ejection of the appellant from the occupation of residential premises known as No 707 Warwick House C, J Chinamano Avenue Harare (“the premises”).

The facts are these. The respondent who owns the premises, entered into an agreement of lease with the appellant on 1 March 2006 in terms of which he let the premises to the latter at a monthly rent for a period of twelve months with a right of an option to renew for a further period of twelve months under the same terms and conditions. The lease was to expire on 28 February 2007. Under Clause 28 the parties provided that the lease was terminable by either party on two calendar months’ notice. Clause 3 provided that unless notice was given by either party at least two calendar

months before the end of the original period or the renewed period, the occupation of the premises would be continued subject to two calendar months notice in writing on either side and on the same terms and conditions with the exception that the rent review would have to be adjusted quarterly.

On 4 December 2006 the respondent's estate agent, acting on his instruction, gave the appellant notice to vacate the premises on 28 February 2007. The letter giving the notice reads:

“Please note that the Lessor has instructed us to notify you that your lease is expiring on the 28 February 2007 and the lease is not going to be renewed. So, we are now giving you two months notice in line with s 28 of the lease agreement with effect from 1 January 2006. The Lessor would like to repossess his property. As such please note that we require vacant possession of the property on the 28 February 2007.”

On 5 December 2006 the appellant responded to the notice, through his legal practitioner, saying that he had no intention of vacating the premises on 28 February 2007. He said he would remain in occupation of the premises as a statutory tenant.

On 28 February 2007 the appellant's legal practitioner sent a letter to the respondent's estate agent to the effect that the appellant was exercising the option to renew the lease for twelve months. There was no response from the estate agent. Instead, the respondent issued summons out of the High Court on 2 March, claiming an order of eviction against the appellant and all those claiming occupation of the premises through him.

The defence raised by the appellant to the action in the High Court was that the notice to vacate given by the estate agent on 4 December 2006 was invalid because the lease was renewed on 28 February 2007. In the alternative, it was contended that the notice was invalid for non-compliance with the requirements of s 30(3)(a)(i) and (ii) of the Rent Regulations Statutory, Instrument (S.I) 626 of 1982 (“the Regulations). It was further contended that the High Court was, in any case, barred from granting an order of eviction of a statutory tenant by s30(4) of the regulations.

In its material parts s 30 provides that:

“(2) subject to the provisions of this section, no order for the recovery of possession of a dwelling or for the ejectment of a lessee there from which is based on the fact of the lease having expired, either by effluxion of time or in consequence of notice duly given by the lessor, shall be made by any court as long as the lessee continues to pay the rent due within seven days of due date and performs the other conditions of the lease, unless in addition ...

(a) ...

(b) ...

(c) The lessor has given the lessee not less than two months written notice to vacate the dwelling on the ground that the dwelling is required ...

(i) by the owner or;

(ii) where the lessee is a sublessee by the person letting the dwelling to the sublessee;

for his personal residential occupation or the personal occupation of his parent, child or employee.

(d) ...

or

(e) the appropriate board has issued a certificate to the effect that the requirement that the lessee vacate the dwelling is fair and reasonable on some other ground stated therein and the date specified in the certificate for the vacation of the dwelling has passed.

(3) No notice to vacate a dwelling given by a lessor for the purpose of ...

(a) paragraph (c) of subsection (2)

shall be of any force or effect ... .

(i) if it does not specify the person for whose personal occupation the dwelling is required; and

(ii) if it is given by a person who is not the owner or lessee who sublets the dwelling, unless the person giving such notice has previously been furnished with a request in writing to give such notice by the owner or lessee who sublets, as the case maybe.

(b) ...

(4) No order for the ejectment of a lessee from a dwelling shall be made on the grounds referred to in para (2) unless the appropriate board has on the application of the lessor, issued a certificate to the effect that the requirement that the lessee vacate the dwelling is fair and reasonable and the date specified in the certificate for the vacation of the dwelling has passed.”

Upon realizing that he had not complied with the requirements of para (e) of subs (2) of subs (4) of s30 of the regulations, the respondent withdrew his action from the High Court and made an application to the Northern Region Rent Board (“the Rent Board”) for a certificate of ejectment. *Fletcher v Three Edmunds (Pvt) Ltd* 1998(1) ZLR 257 at 263C. In the founding affidavit the respondent said that he had given the appellant the notice to vacate the premises on 4 December 2006 because he required it for residential occupation by himself and his wife. He said as their children were now adults who lived outside the country, the three bedroomed flat was convenient for the two of them to live in.

The appellant did not oppose the application on the ground that the notice to vacate did not comply with s 30(3) of the regulations, as he had done in the defence to the action in the High Court. He said that the notice to vacate was premature because he had a right of an option to renew the lease. He argued that the application for the certificate of ejectment was premature because he had renewed the lease. More importantly, the appellant challenged the truthfulness of the assertions by the respondent that he required the premises for residential occupation by himself and his wife. He said the couple had a perfectly good house they lived in at No 111 Golden Close Good Hope Road Harare. He believed that the respondent wanted him to vacate the premises so that he could let it out to some one else at a higher rent.

On 6 December 2007 the Rent Board found that the requirement that the appellant vacate the premises on the grounds stated by the respondent in the founding affidavit was fair and reasonable. It granted the application for the certificate of ejectment and endorsed thereon that the appellant was “to move out by 31 December 2007.” The chairman who wrote for the Board said:

“It is clear from the facts of the matter that tenant was given notice as early as 4 December 2006. That notice advised tenant that his lease agreement would not be renewed. Further the applicant needed to use the flat for himself. His reasons for that are also plausible. On the other hand, the tenant opposes the application. His reason for such opposition is that he disbelieves applicant needs the place for himself because he has other properties. We found that untenable and unreasonable. The tenant further speaks of the lease expiring in February 2008. It would have been unreasonable to write about the renewal on 4 December 2006.”

So, two issues only were placed before the Rent Board for determination. The first was whether there was a valid renewal of the lease following a notice by the respondent on 4 December 2006 that he was not interested in the renewal of the lease when it expired by the effluxion of time on 28 February 2007. The second issue related to the credibility of the parties. It was whether the respondent was believable when he said that he required the dwelling for residential occupation by himself and his wife.

On both issues the Rent Board decided against the appellant. On the first question, it held that there could not have been a valid exercise of the right of the option to renew the lease by the appellant on 28 February 2007 as the respondent had withdrawn the offer of the option by the letter of 4 December 2006 in which he indicated that the lease would not be renewed when it expired by the effluxion of time. In the light of the acceptance, by the appellant, of the effect of the notification and the declaration on 5 December 2006 that he would become a statutory tenant when the lease expired on the 28 February 2007, the determination of the Rent Board cannot be faulted.

On the second issue the Rent Board believed the respondent and disbelieved the appellant. It held, in effect, that the requirement that the appellant vacate the dwelling on the ground that the respondent required it for residential occupation by himself and his wife was fair and reasonable in the circumstances. The determination was supported by evidence. The notice of 4 December 2006 had indicated that the premises were required by the respondent who was known to the appellant as the owner of the premises. The notice clearly stated that the estate agent was acting on a previous

instruction from the owner of the premises to give the notice to vacate. The appellant did not put in issue at the hearing of the application, the form in which the instruction was given to enable the respondent to show whether it was in writing or not. The validity of the notice was not an issue for determination by the Rent Board. In any case, the Rent Board did not have to act on the basis of a notice given in terms of para (c) of subs (2) for purposes of a certificate given under para (e) of subs (2) of s 30 of the regulations, provided there was a notice to vacate which put the appellant into the position of a statutory tenant, followed by an application for the certificate of ejectment.

The appellant appealed to the Administrative Court against the decision of the Rent Board in terms of s 35(1) of the regulations. In addition to the two grounds that the Rent Board erred in granting the certificate of ejectment before the expiry of the renewed lease and that it erred in believing the respondent's averment that he required the premises for residential use by himself and his wife, the appellant raised grounds of appeal on matters that had not been raised for determination by the Rent Board. It was alleged, for example, that the Rent Board erred in holding that the notice of 4 December 2006 constituted due notice of requiring of the dwelling for personal occupation for purposes of s 30 (3)(a)(i) of the regulations when it failed to specify the person for whose personal occupation the dwelling was required. It was also alleged, as a ground of appeal, that the notice was of no force or effect because it was given by the respondent's agent without having been preceded by a written request as required by s 30(3)(a)(i) of the regulations.

Section 37(1) of the regulations provides that an appeal to the Administrative Court has to be an appeal on the record. Although the learned President of the Administrative Court considered the grounds of appeal relating to the alleged non-compliance of the notice to vacate with the requirements of s 30(3)(a)(i) and (ii) of the regulations and rejected them, he did not have to consider them because they related to matters that were not raised for determination by the Rent Board. They were not matters that formed part of the record of proceedings before the Rent Board. The Rent Board could not be accused of having misdirected itself on matters in respect of which it was not asked to address its mind.

The observation affects the grounds of appeal to this Court against the judgment of the Administrative Court. They are set out as follows:

- “(1) The Administrative Court erred in law by making a finding that the respondent had complied with the requirements of s 30(3) of the Rent Regulations S.I 32/07.
- (2) The Administrative Court erred in making a finding that the certificate of ejection had been properly issued by the Rent Board.
- (3) The Administrative Court erred and misdirected itself by failing to make a finding that the respondent did not genuinely require the premises for his own use but was only motivated by a desire to increase rentals”.

On the first ground the learned President referred to S.I 626 of 1982 and not S.I 32 of 2007. Statutory Instrument 626 of 1982 contained the regulations which governed the rights and obligations of the parties at the time. As pointed out earlier the first ground of appeal was misplaced. The appellant did not raise the issue of the validity of the notice to vacate before the Rent Board. As a result, the Rent Board, considered the

issue as having been whether the respondent was being truthful when he said that the dwelling was required for residential occupation by himself and his wife.

The appellant accepted as a fact that the respondent had stated as the ground for requiring the dwelling that it was for his and his wife's personal occupation. The Rent Board, having addressed its mind to the question of the credibility of the parties, concluded that the respondent was being truthful and that the requirement of the dwelling for residential occupation by himself and his wife was fair and reasonable. It was entitled to make that determination in terms of s 30(2)(e) of the regulations. See *Fletcher's case (supra)* at 262 C-263B.

The second ground of appeal lacks clarity and precision. It is not said in what way the Administrative Court erred in making the finding that the certificate of ejectment was properly issued. In argument *Mr Willsmer* made reference to the allegation that the certificate ought not to have been granted because the lease had been renewed. He argued on the basis of an assumption that it was a fact that the lease was renewed. The court *a quo*, however, found that there was no valid exercise of the right of the option to renew the lease because the appellant had been made aware of the fact that the respondent had no intention of maintaining the offer of the option to renew the lease.

The appellant accepted, in the letter of 5 December 2006, that the respondent had effectively terminated the lease, in which the term granting the option was contained, by the notice of 4 December given in terms of Clause 28 of the

agreement. He said that when the lease terminated on 28 February 2007 in terms of the notice, he would become a statutory tenant. He could become a statutory tenant only because the contractual tenancy would have been brought to an end by effluxion of time or as a consequence of a notice duly given by the respondent in terms of Clause 28 of the agreement. He did not say that he would be entitled to remain in occupation of the premises by reason of the exercise of the option to renew granted to him under the lease.

The third ground of appeal is without merit. It relates to the credibility of the parties over which the Rent Board had a discretion to exercise. It was not alleged before the Administrative Court that the Rent Board misdirected itself in the exercise of its discretion in the assessment of the credibility of the parties. The Administrative Court, as an appellate court could, interfere with the decision of the Rent Board, if it was alleged and proved that the assessment of the credibility of the parties, on the question whether the respondent required the premises for residential occupation for himself and his wife was, on the facts, objectively irrational.

The learned President of the Administrative Court found that the respondent had established his *bona fide* intention to utilize the premises for his own purposes. In other words the respondent had shown that he reasonably required the leased premises for personal occupation. He said:

“There is no evidence to rebut the respondent’s assertion that his children have grown up and left the house leaving him and his wife in the house. It is reasonable for a couple whose children have left home to want to move into a smaller house or premises. There is no evidence to rebut this assertion and there is nothing unusual about this proposition. The Rent Board was correct in finding in favour of the respondent.”

In accepting the correctness of the finding by the Rent Board that the respondent was a credible witness and accepting his assertion that he required the premises for residential occupation by himself and his wife, the learned President of the Administrative Court endorsed the proper exercise of discretion by the Rent Board in disbelieving the appellant and rejecting his assertion that the respondent required the dwelling for purposes of letting it out to someone else for higher rent. No basis was shown on which it could be said that the learned President of the Administrative Court misdirected himself on the question of the credibility of the parties.

The appeal is accordingly dismissed with costs.

ZIYAMBI JA: I agree

GARWE JA: I agree

*Wintertons*, appellant's legal practitioners

*Maunga, Maanda & Associates*, respondent's legal practitioners





