MINOS PANEL BEATERS LTD v B. CHAPASUKA (1986) Z.R. 1 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, JJS
11TH DECEMBER, 1985 AND 11TH MARCH, 1986
(S.C.Z. JUDGMENT NO. 1 OF 1986)

Flynote
Landlord and Tenant - Application for new tenancy - Tenant served with a notice to quit - Eligibility to apply for new tenancy.
Landlord and Tenant - "Term of years certain " - Meaning of

Headnote
The appellant was for a long time a tenant of the respondent's business premises. The tenancy agreement being for a monthly tenancy. The landlord served a notice to quit. The appellant applied to the High Court for a grant of new tenancy. The High Court refused the grant on the grounds that the tenancy, was not for a "term of years certain", and that the tenant having been served with a notice to quit, had no right to apply for a new tenancy.

Held:
(i) A monthly tenancy is a tenancy for a term of years certain
(ii) Section 4 of the Landlord and Tenant (Business Premises) Act specifically provides that a tenant who has been served with a notice to quit may apply to the court for a new tenancy. Section 6 does not refer to such a case.

Cases cited:
(1) Musingah v Daka (1974) Z.R. 37
(2) S. J. Patel (Zambia) Ltd. v Bancroft Pharmaceuticals Ltd. (1974) Z.R. 270
(3) Lusaka Auctioneers & Estate Agents Ltd. v Morton Estates Limited (1977) Z.R. 92

Legislation referred to:
Landlord and Tenant (Business Premises) Act Cap. 440 ss. 3 (2) (g) (ii)

For the appellant: G. Kunda, Messrs Cave Malik & Co.
For the respondent: H. Mbushi, City Chambers

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

On 11th December, 1985, we allowed this appeal, reversed the judgment appealed against and entered judgment for the appellant. We ordered the grant of a new tenancy for a period of two years with effect from 11th December, 1985, as agreed between the parties. We said then that our detailed

judgment containing the reasons for the decision would be delivered later and this we now do.

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This is an appeal against the refusal by the High Court to grant a new tenancy to the appellant on their application for one under section 4 (1) (a) of the Landlord and Tenant (Business Premises) Act, cap. 440 (hereinafter called the Act). The appellant was a tenant since 1972 of the business premises in issue which were held of the respondent, their landlord. It was not in dispute that at the time of the events leading to this litigation and at all material times the appellant held a periodic tenancy from month to month. The landlord served a notice to quit under section 5 of the Act, stating that he would oppose the grant of a new tenancy on the ground specified under section 11 (1) (f) of the Act in that he intended to demolish and reconstruct the premises into a hotel. The tenant duly applied to the court under section 4 for a new tenancy and the landlord's opposition to the application based on section 11 (1) (f) was unsuccessful. Despite the failure to oppose successfully judgment was entered for the landlord on two grounds: The first was that the monthly tenancy was not one for a term of years certain in terms of the definition of the word "tenancy" in section 2 of the Act and was therefore not a tenancy protected by the Act. The second was that a tenant cannot apply to the court for a new tenancy after the landlord has served a notice to quit.

The appellant has contended, through Mr Kunda his advocate, that the learned trial judge misdirected himself on both grounds. As to the monthly tenancy being a term of years certain he relies on *Musingah v Daka* (1) and *S J Patel (Z) Limited v Bancroft Pharmaceuticals Limited* (2) both of which were High Court decisions and both of which discussed the question of what is a term of years certain. In *Musingah* (1), Doyle, C.J., held that even a term of eleven months was a terms of years certain because, in the context of the Act (the language "term of years certain" meant a term certain not exceeding twenty-one years. In *S.J. Patel* (2) Moodley, J., was able to find, on facts very similar to those obtaining here, that a monthly tenancy which had run from month to month over a period of twelve years was, by virtue of section 3 (2)(g) (ii) of the Act, a protected tenancy. He relied on *Musingah* (1) to find that a term certain of less than a year was a term of years certain within the definition of the word "tenancy" in section 2 of the Act. He also relied on the definition of the phrase "term of years absolute" set out at page 144 of the Third Edition of the Law of Real Property by Megarry and Wade which reads:

> " 'Terms of years absolute'
> 'Terms of years' is defined as including a term of less than a year, or for a year or years and a fraction of a year, or from year to year. In effect 'term of years' seem to mean a lease for any period having a fixed and certain duration as a minimum. Thus in addition to a tenancy for a specified number of years (e.g. to x for g years), such tenancies as a yearly tenancy or a weekly tenancy are 'terms of years' within the definition for there is a minimum duration of a year or a week respectively."

We must point out that in relying on the definition which we have

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just quoted, Moodley, J., misdirected himself since it is obvious that the definition relied upon is

one contained in the Law of Property Act, 1925, which is not one of the English statutes applying to this country in terms of the British Acts Extension Act Cap. 5 as well as the English Law (Extent of Application) Act Cap. 4. However, we find that, despite the misdirection, Moodley, J., still came to the correct conclusion when he argued to the effect that, as the original term in a monthly tenancy was for a month certain, that tenancy had been one for an otherwise unprotected term certain, of less than three months within the meaning of section 3 (2) (g) of the Act; but that, as the tenant had been in occupation for a period in excess of six months the tenancy became protected by virtue of sub-paragraph (ii) of section 3 (2) (g).

We must allude to the remarks which were made, obiter, by Baron, D.C. J., in *Lusaka Auctioneers & Estate Agents Limited v Morton Estates Limited* (3) when he said from page 100:

> "The English Landlord and Tenant Act, 1954, applies by definition to all tenancies, whether periodic or for fixed terms. Our Act applies to tenancies 'for a term of years certain not exceeding twenty-one years'. Doyle, C.J., in *Musingah v Daka* (1) construed 'term of years certain' as meaning a term certain and held that the Act applied to a term certain of eleven months, a decision with which I respectfully agree; the same reasoning would make the Act applicable to even shorter terms certain. But it would be quite another matter to construe 'term certain' as including a periodic tenancy. It may be argued with some force that there is no practical difference between a tenancy 'for three months and thereafter from quarter to quarter' and 'a quarterly tenancy'; but English law has always drawn a distinction, and the courts cannot pretend that it does not exist."

It is evident that the learned trial judge in this case felt constrained to construe the expression "term of years certain" in relation to the monthly tenancy in the manner Baron, D.C.J., feared it might be. Moodley, J., as already seen, came to a different conclusion. We respectfully wish to endorse the reasoning which Moodley, J., adopted when he referred to the initial term of one month as a term certain. In any periodic tenancy such as monthly or weekly or quarterly and so on, it is obvious that the initial or original period with reference to which the tenancy itself comes to be described or reckoned must be a definite period of fixed duration such as one month and so on. In a monthly tenancy, therefore, the letting can only be in the first place for one month and thereafter from month to month. As the initial tenancy was for a term certain of one month, it was a term certain not exceeding three months as contemplated by section 3 (2) (g) of the Act. Continued occupation beyond six months brought the tenancy under the protection of the Act in terms of the exception in sub-paragraph (ii). Of course, we do not seek to pretend that there is no distinction between a periodic tenancy as such and one simply for a term certain - the latter has a definite and fixed duration while the former is reckoned by the period agreed or implied (such as by the conduct of the parties) and does not

expire without notice at the end of the period or at the end of each succeeding period. The critical point here is that there is in fact an initial definite period and the springing interest which arises at the beginning of the next period results in the tenant remaining in occupation, as envisaged by section 3 (2) (g) (ii) which can reasonably be interpreted in this vein if it is to be given any effect at all. In any case, if the legislature intended to exclude such periodic tenancies, it would have plainly

said so. In which event, there would have been no need to make any reference to "a periodical tenancy" under the definition of "notice to quit" in section 2.

The courts have endeavoured, in the cases to which we have referred, to draw attention to the difficulties created by the language used in describing the tenancies intended to be protected by or excluded from the protection of the Act. Prima facie, therefore, section 3 (1) intends that the Act should apply to all tenancies except those mentioned in sub-section 2 of section 3. The provision which arise in this case and which necessarily extend the scope of tenancy to be protect are those in section 3 (2) (g) (ii) which reads:

> "3 (2) This Act shall not apply to -
> (g)Premises comprised in a tenancy granted for a term certain not exceeding three months; unless -
> (ii) the tenant has been in occupation for a period which, together with any period during which any predecessor in the carrying on of the business carried on by the tenant in occupation, exceeds six months."

The reference in sub-paragraph (ii) to the fact that mere occupation beyond the period of a tenancy initially granted for a term certain not exceeding three months will bring about protection if the occupation exceeds six months is surely a good indication that the legislature cannot have intended to deprive persons in the appellant's position of such protection. Where in fact it is possible to find an initial term certain of fixed and definite duration and either such term certain is sufficiently long on its own to fall within the Act or, if it is of insufficient duration, it is coupled with the requisite period of occupation referred to in sub-paragraph (ii), which we have quoted, then it is plainly the court's duty to give effect to the true intention of the legislature which was the protection of tenants against unwarranted evictions.

To summarise, we find that as a monthly tenancy, though periodic, begins with a month certain and as section 3 (2) (g) of the Act extends protection to such a short term certain if there has been the appropriate period of occupation (as there was in this case) the tenancy was one to which the Act applies. We should also mention that Mr Mbushi conceded to the ground of appeal in this respect.

As to the finding that a tenant served with a notice to quit cannot apply to the court, the appellant's submission, which is entirely correct,

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is that the learned trial judge erroneously confused an application to the court with a request to a landlord under section 6 in particular its sub-section (4). No such request can be made by a tenant to his landlord after the latter has served notice to quit. On the other hand section 4 specifically provides for application to the court after a notice to quit where tenant indicates that he will not give up possession or after a request has been made to a landlord who does not accede to such a request. The sub-section under section 6 which the learned trial judge misread as barring an application to the court has in fact no bearing upon and does not arise in this case. Mr Mbushi, who had originally intended to argue against this ground of appeal on the same basis as the learned trial judge had dealt with the case, quite properly abandoned his argument when he saw that, had the learned trial judge not misapprehended the two situations envisaged under these two sections - which are distinct and separate, he could not have held as he did.

It was for the foregoing reasons that we upheld the appeal, reversed the judgment below and granted the new tenancy. The appellant will have his costs to be taxed in default of agreement.

Appeal upheld
