IN THE SUPREME COURT OF SEYCHELLES

Civil Appeal No. CA 19/2017

[2018] 336

ROSE-MARIE BREUNING

Appellant

V

UWE KASTNER

Respondent

Heard: 29th November 2017

Counsel: Mr. Rajasundaram representing Appellant
Mr. Durup representing Respondent

Delivered: 28th day of March 2018

JUDGMENT

Govinden S-J

[1] This Judgment arises out of an appeal against the Ruling of the Rent Board of the 30th May 2017 ("Rent Board Ruling") wherein the application of Rose-Marie Breuning ("Appellant") was to order the Respondent to vacate her house situated on Title Nos. H 1196 and H 1197 and was dismissed by the Rent Board.

[2] The Appellant's grounds of appeal are in a gist, that, *the Rent Board failed to appreciate legal incidents following the admission of the Respondent (both in pleadings and in oral evidence) in respect of landlord and tenant relationship between the Appellant and the Respondent respectively, that the Rent Board failed to take note of any denial of the*

Respondents as to the propriety right of the Petitioner receiving rents, consequently the rights of eviction against the Respondent, that the Rent Board completely ignored the uncontroverted lease agreement available before it hence it wrongly concluded as if the Petitioner was not entitled to receive any rents from the Respondent, that the Rent Board failed to appreciate that the Power of Attorney as supported by an instrument could enable adducing of evidence on behalf of the Principal in any legal forum and that evidence were not contested by the Respondent; and that the Rent Boards' major reasons if not at all, for its decision are clearly ultra petita.

[3] As a result of the above grounds, the Appellant seeks that the Rent Board's Ruling be set aside and Respondent be ordered to quit and vacate the premises.

[4] Both Learned Counsels have filed written submissions in this case and of which contents have been duly considered for the purpose of this Judgment.

[5] I will proceed to first and foremost consider the time frame in which this appeal was filed.

[6] It is the Respondent's submission that the appeal was filed out of time. In the Respondents written submission, the Respondent states that the Rent Board's Ruling was delivered on the 30th day of May 2017 and written notice of appeal was delivered on the 20th day of June 2017 and hence accordingly, it was well above the 14 days limit prescribed by section 22(2) of the Control of Rent and Tenancy Agreement Act.

[7] In that regards, is established law that all intervening weekends (holidays) and public holidays are excluded in computing the time limit as regards the filing of legal documents. The Appellant submitted that she was well within the time frame in that the Rent Board's Ruling was delivered on the 30th day of May 2017 and therefore appeal ought to have been filed by the 13th day of June. However, intervened weekdays fell on the 3rd, 4th, 10th, 11th, 17th and 18th and an intervened public holiday on the 19th day of June. Altogether total exclusion days amount to 7 days. Therefore the appeal was rightly filed and I find it to be so after doing the calculations.

[8] As to the other grounds of Appeal as illustrated [Paragraph 2 refers], the Appellant sought to have the Respondent evicted from the rented premises being, ***'a four bedroom villa at Machabee, known as villa Valetta, owned by Rosemarie BreuninG (situatde on property H 1196, H 1197)***. With that, she submitted before the Rent Board a number of documents to show that prove ownership of the property in question. A lease agreement was produced between her and the Respondent, a letter in which she wrote to the Public Utilities Corporation to effect change of customer Number on the 9th of January 2015, a letter of eviction all signed in her personal capacity. It is also well established that the Appellant is Director of the Machabee Development Company Ltd registered owner of the cited Title Numbers on which leased premises is situated and this does not it itself prove that the Appellant cannot be owner of the rented premises. The Rent Board it transpires based its whole Ruling dismissed the Appellant's Application, on the basis of a certificate of Official Search from Land Registration Division as to ownership of the above-cited Title Numbers hence on the basis of misrepresentation and that the Appellant thus *lacked locus standi* as a result. With respect, this court clearly fail to understand this reasoning.

[9] It is trite that the onus in a civil matter is for the Appellant to prove his or her case on a balance of probability. This principle has been articulated in a plethora of Authorities such as: (***Ebrahim Suleman & Others v Marie-Therese Joubert & Others SCA no7 of 2010)*** and many others. In the case of (***Ernst Pindur v Benoiton Construction Company Ltd & Another (2014) SCSC 124)***, *Chief Justice Egonda Ntende* (as he was then), quoted in paragraph 27 of his judgment the following:

"This burden of proof is explained by Planiol Civil Law Treatise [An English Translation by the Lousiana State Law Institute] at Page 51 as follows:

'He who alleges a fact contrary to the acquired situation of his adversary must establish its verity. As a consequence when a person exercises an action to obtain a thing which he has not, either a payment if he claims to be a creditor, or the delivery of an object, or the enjoyment of property which he has not in his possession, such person is bound to establish his credit or his right to the thing. This the meaning of the old adage: "Onus probandi incumbitactori" When the plaintiff has furnished proof, he has won his case, at least unless

the defendant had made good against him an "exception" or a means of defense on the merits, which he in his turn must establish. The burden of proof in that case passes to the defendant, as is indicated by another adage: "Reus in exceptione fit actor." In his turn the plaintiff may have an answer to make, which may destroy the defence; the defendant perhaps will reply to that, and the burden of proof passes thus from one to the other, for all their reciprocal answers. In order to express this effect with the aid of a formula which in turn can apply to both parties, they often generalize the above mentioned formula by saying: "the burden of proving incumbs on him who alleges." (Comp. Art. 1315). That is a rule of law which should be respected by the judge"

[10] In the above regards, the Rent Board failed to consider an elementary and essential issue namely, the existence of a lease agreement between the Appellant and the Respondent which remained uncontested by the Respondent in his pleadings. The Respondent in his defence dated 31st March 2017 clearly admits that he was a tenant of the Appellant. Further, the Respondent never challenged the Appellant's status in the lease agreement and as such cannot now claim otherwise. It is clear that the lease agreement constitutes the relationship of landlord and tenant and further confers the right to receive rent which is more than sufficient to maintain an application of eviction by the Appellant by virtue of the provisions of Control of Rent and Tenancy Agreement Act. The Respondent admits that he paid his rentals until end of March 2017 to the Appellant. He further claims that only two months of rent at that time was outstanding.

[11] It is further additionally, clear and uncontested that the Appellant is a Director of Machabee Development Company registered owner of land parcel H1196 and H1197. This comes out clear in all the documents produced before the Rent Board as well as Paragraph 1 of the Eviction Application. The lease agreement is in her name and all other documentation depicts her as landlord.

[12] As it would transpire from the Application before the Rent Board, the main ground for eviction is that the lease expired on the 31st of December 2015 while the eviction application had been filed only on 31st May 2016, thus the Respondent was holding over the property

even after its expiry. An attempt has been made by the Respondent to explain this, citing that his spouse had entered into a sale agreement. The rule as stated above and stressed in many cases is that he who avers must prove. There was no documentation before the Rent Board to prove that there was an agreement between the Appellant and Respondent to the effect that the Appellant wished to sell her property to the Respondent or the converse that Machabee Development Company Ltd contacted the Respondent on the desire to sell the said property. Further to that no proof has be adduced to show any payment made to the Appellant or the supposed owner of the property Machabee Development Co. Ltd. This argument therefore bears no proof at all on the record of proceedings.

[13] In the Rent Board's Ruling, it made the following statement, *"further, this Board takes note that the Applicant was not present before the Board but was represented by her lawful Attorney, Lynda Labrosse who had only general knowledge of this matter."* The written submissions of the Respondent re-emphasize this point as though to say that the absence of the Appellant was fatal to her case. It should be noted in that regards, that by an instrument of Power of Attorney, a principal could be legally represented and this should carry the necessary weight needed under the laws of evidence. One who holds the Power of Attorney could adduce evidence on behalf of the Principal in any legal forum and most importantly her evidence was not contested by the Respondent.

[14] Based on the above observations and findings, it is clear that the Rent Board's Ruling is *ultra petita* in respect of the status of the Appellant in maintaining the eviction Application. The Respondent while admitting his relationship with the Appellant (as that of the Landlord) by virtue of the lease Agreement as adduced in evidence, does not raise any legal issue that she does not have any proprietary right to maintain the eviction Application with respect to the rented premises as evidenced by the lease agreement. The Rent Board I will venture to state in that regards, "invented the proposition" that the Appellant did not have the right to file the eviction Application.

[15] Now, it follows, that in the absence of any converted challenge of the lease agreement *(Exhibit A2)*, the status of the Appellant in the eviction application *(which was based on the*

lease agreement) ought not to have been questioned by the Rent Board. Moreover, there are clear admissions both in pleadings and in the testimony of the Respondent that he signed a lease agreement with the Appellant and made payments to the Appellant. It is the lease agreement *(Exhibit A2)* produced before the Rent Board and the supporting admitted facts/testimony as to the Landlord and Tenant relationship that determine the maintainability of the eviction Application. If the lease agreement was challenged in respect of the Appellant's right to receive rent, the Board could justify its finding but as this case was, the Respondent's Counsel never challenged any document or facts raised that he might have deemed unacceptable.

[16] It is thus the conclusion of this Court that the Rent Board improperly took it upon itself to raise matters that were not raised in the pleadings. This is a conspicuous error on its part. The Rent Board without looking into the legal aspect of the above dismissed the eviction Application albeit admitted evidence being available before it as to the Landlord/tenant relationship and the payment of rent. Furthermore, I find that it was not within the ambit of the Rent Board to make a Ruling on whether the Appellant was the rightful person to receive Rent as the Appellant's right to receive rent was never challenged or questioned by the Respondent.

[17] Moreover, Section 34 of the Companies Act 1972 states:

"The Directors of a Company ***shall have power to do all acts on its behalf*** *which are necessarily for or incidental to the promotion and carrying on of its business as stated in its memorandum, or the achievement of the purpose there stated, and all persons dealing with the company whether shareholders or not* ***may act accordingly****."*

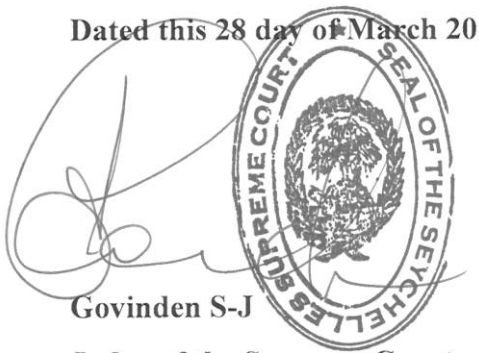
[18] This section allows the Appellant as director to have filed an eviction Application as long as it was necessary for the promotion and carrying out of the business, whether owner or not.

[19] In the case of: (**Dugasse v SHDC 2006 SLR 149)**, the Supreme Court held that "*the Rent Board is to construe the provisions of the Act (Control of Rents and Tenancies Act) so as not to penalise the Landlord and to ensure that the tenants fulfil their obligations.*"

[20] This is a case to my mind, which clearly illustrates that the Appellant and Respondent entered into a tenancy agreement by virtue of its definition in the (Interpretation Section) of the control of Rent and Tenancy (Agreement Act) namely in that: *"Lessor means any person who receives or is entitled to rent in respect of the letting or sub-letting, as the case may be, of a dwelling house, and also includes any persons who allows another person to enjoy the use and occupation of a dwelling house for which an indemnity is payable or not, a sub lessor and any person deriving title from the original lessor.".* The tenancy expired and the Respondent requested to vacate the premises. The Rent Board ought to have exclusively decided the matter on the information before it rather than re-inventing the evidence.

[21] I find thus based on the above analysis, that since the Rent Board erred in dismissing the Appellant's Application on the ground of lack of *locus standi,* in the interest of justice, this appeal succeeds and the matter is referred back to the Rent Board to be re-considered on the merits.

Dated this 28 day of March 2018.



Govinden S-J
Judge of the Supreme Court