REPORTABLE ZLR (15)

Judgment No. S.C. 37/98
Civil Appeal No. 643/97

GRAHAM DUNCAN PRYSE IRVINE v

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA & MUCHECHETERE JA
HARARE, MARCH 16 & 26, 1998

R Y Phillips, for the appellant

S Moyo, for the respondent

GUBBAY CJ: At all times relevant to this appeal the respondent has owned Stand 1656, Salisbury Township, upon which the Canadian diplomatic mission is located. Since 1 June 1986 the appellant has been in occupation of an old dwelling house erected on the contiguous property, being Stand 1657, Salisbury Township, from where he has conducted the practice of a dental surgeon. The property was owned previously by Medview Investments (Private) Limited ("Medview") and the appellant derived his right of occupation under an agreement of lease entered into with Medview. After the expiration of that lease on 31 May 1989, the appellant became a statutory tenant in terms of the Commercial Premises (Rent) Regulations 1983 (Statutory Instrument 676 of 1983).

During the latter half of 1989 the respondent applied in terms of s 4 of the Foreign Missions and Agencies (Premises) Act [*Chapter 3:01*] for the approval of

the Minister of Local Government, Rural and Urban Development ("the Minister") to purchase Stand 1657; it being a requirement of s 3(1) of the Act that no mission may purchase any premises (that is, immovable property) otherwise than in accordance with the approval of the Minister.

On 12 December 1989 the Minister approved the purchase of Stand 1657, by the respondent, "for the Decentralised Assistance Programme". Such approval, which was confirmed in writing by the Ministry of Foreign Affairs four days later, was made subject to the following conditions:-

> "(i) no development, as defined in the Regional, Town and Country Planning Act, 1976 may take place on the said premises without prior consent of the Minister of Local Government, Rural and Urban Development;
>
> (ii) the said premises shall not be leased, sold or otherwise disposed of by the Canadian Government without prior consent of the Minister of Local Government, Rural and Urban Development;
>
> (iii) all development shall be in conformity with the relevant by-laws of the Harare City Council."

The reference to the Decentralised Assistance Programme concerned a programme carried on under the auspices of the Canadian International Development Agency ("CIDA"). The Government of Canada was creating a Southern African centre for CIDA, which is that Government's development wing, to be based in Harare. The intention was to assemble the several local offices of the respondent at one place. The implementation of the programme thus necessitated the demolition of the existing dwelling house on Stand 1657 and the construction of a prestigious three storey building to accommodate the many employees of CIDA.

Having obtained the approval sought, the respondent concluded the purchase of Stand 1657 from Medview on 26 January 1989. Transfer of title to the property was registered in the respondent's name on 6 April 1990, and the appellant was advised of the resultant change in ownership.

On 24 October 1991 the respondent served upon the appellant a notice to vacate Stand 1657 by 31 December 1991 so as to enable her to take occupation on the following day. The appellant had been informed in an earlier letter that it was the respondent's intention to demolish the existing building on the property in order to construct a three storey office block for CIDA.

The notice to vacate elicited the response that the appellant required a period of between six and nine months to relocate his dental practice in alternative premises. More significantly it was contended that Stand 1657 was zoned for surgeries, dwelling houses and residential buildings by virtue of the City of Harare Phase I Second Re-submission Town Planning Scheme, and not for office accommodation. The gravamen of this contention, as clarified in subsequent correspondence, was that the approval given by the Minister constituted no more than permission to purchase Stand 1657. It was not a permit to alter the character or the use of that property for office or business purposes. And that until the respondent was able to produce a permit authorising her to put the land or the existing building to the use she proposed, she could not claim to have good and sufficient grounds for requiring the eviction of the appellant. Not unexpectedly, the submission failed to find favour with the respondent.

On 10 October 1996 the City of Harare, as the local planning authority, acting in terms of s 40 of the Regional, Town and Country Planning Act [*Chapter 29:12*], authorised the consolidation of Stands 1656 and 1657 into one property, henceforth to be referred to as Stand 18540 Harare Township.

Eventually, on 24 January 1997, the respondent issued another notice to the appellant to vacate by 30 March 1997. His persistent refusal to yield possession compelled the respondent to institute proceedings in the High Court for an order for his eviction. This was granted with costs on 10 September 1997.

Before this Court Mr *Phillips*, who appeared for the appellant, accepted that if the learned judge was correct in deciding that the Minister had approved the proposed development upon Stand 1657, it necessarily followed that good and sufficient cause had been shown in terms of s 22(2) of the Commercial Premises (Rent) Regulations. The argument he advanced was to this effect: The letter of 12 December 1989 was merely an expression of approval by the Minister for the purchase by the respondent of Stand 1657. It went no further than that. In fact, it specifically prohibited any "development" of the property without the Minister's prior consent. And as the altering of the character of the use of the land or building thereon from a surgery to a three storey office block would constitute development in terms of s 22(1)(b) of the Regional, Town and Country Planning Act, it was incumbent upon the respondent to submit an application to the Minister pursuant to s 8 of the Foreign Missions and Agencies (Premises) Act. This she had omitted to do. Any such development was therefore prohibited by s 24(1) of the Regional,

Town and Country Planning Act. This argument, which was attractively advanced, warrants close scrutiny.

Section 8 of the Foreign Missions and Agencies (Premises) Act, under which the Minister assumes the function of the local authority, provides that:-

> "Notwithstanding the provisions of the Regional, Town and Country Planning Act [*Chapter 29:12*], where, in terms of that Act, permission to carry out development on the premises of a mission or agency or any other permission or authority is required in relation to such premises, application for such permission or authority shall be submitted to the Minister, who may grant or refuse such permission or authority on such terms and conditions, if any, as he may think fit to impose."

Obviously this section must be read in conjunction with s 22(1)(b) of the Regional, Town and Country Planning Act, which, in turn, provides:-

> "Any reference in this Part to development in relation to any land or building means any of the following –
>
> ……
>
> (b) the altering of the character of the use of any land or building, other than –
>
> (i) (inapplicable);
>
> (ii) (inapplicable)".

Permission to carry out development on the premises (the immovable property) of a mission or agency relates, in my opinion, to the alteration of the character of the use of the land or building "other than" as a mission or agency to

another use. It is an alteration of the use of the land or building from a mission or agency to something different.

In making the application to purchase, the respondent was required by s 4(c) of the Foreign Missions and Agencies (Premises) Act to specify the use to which it was proposed to put Stand 1657. This was done by expressing an intention to use the land for the Decentralised Assistance Programme; to extend the mission established on Stand 1656 to the adjoining Stand 1657. That was the approval sought of the Minister; and that was precisely what was approved by him under s 5(1)(a) of the Act. It was not an approval restricted to the purchase of Stand 1657.

True the approval was granted subject to the condition that no development, as defined, should be carried out before the consent of the Minister was obtained. But I agree with the learned judge that the condition, construed in the context of the letter of approval, refers to forms of development other than the alteration of the character of the use of the land from surgeries, dwelling houses and residential buildings, to a mission; for, in the preceding paragraph, approval to use Stand 1657 as a mission was granted simultaneously with approval to purchase it.

Consistent with this view is the later permission granted to the respondent by the local planning authority to consolidate Stands 1656 and 1657 into one property, to be known as Stand 18540 Harare Township; and by the intimation that the previous use put to Stand 1656 as a mission "can still be enjoyed on Stand 18540".

In the result I respectfully share the conclusion of the court *a quo* that an eviction order against the appellant was justified. The appeal is accordingly dismissed with costs.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners