IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mbulu v. Wu,*
2024 BCSC 60

Date: 20240112
Docket: S237350
Registry: Vancouver

Between:

Henri Mukasa Mbulu

Petitioner

And

Xuanming Wu, Chunming Zhang and Jin Gu

Respondents

On judicial review from: Decisions of the Residential Tenancy Branch,

dated October 12 and 18, 2023.

Before the Honourable Justice K. Loo

Reasons for Judgment

Appearing on his own behalf:	H. Mbulu
Counsel for the Respondents:	T. Bahuch
Place and Date of Hearing:	Vancouver, B.C. January 8, 2024
Place and Date of Judgment:	Vancouver, B.C. January 12, 2024

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[1] This is a petition for judicial review in which the petitioner, Henri Mbulu (the "Tenant"), seeks to set aside two decisions made by the Residential Tenancy Branch ("RTB"). The first decision is by Adjudicator S. Campbell on October 12, 2023 (the "Ten-Day Notice Decision") and the second by Adjudicator J. Doyon on October 18, 2023 (the "Review Decision").

[2] The respondent, Xuanming Wu, is the owner of the rental property (the "Property") and the respondent, Chunming Zhang, is his brother. Mr. Wu lived overseas during the relevant time while Mr. Zhang lived in the Property and managed it on Mr. Wu's behalf. The respondent, Jin Gu, is an agent of Mr. Wu. In these Reasons, I will refer to the respondents collectively as the "Landlord", unless the context requires otherwise.

[3] The Property is a house on Blundell Road in Richmond in which eight rooms are rented to tenants. The Tenant has been renting one of the rooms from the Landlord since January 2020. Since he moved in, he has paid $650 per month in rent for a single room.

[4] In September 2023, the Landlord delivered a ten-day notice to the Tenant under s. 46(1) of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*]. The Tenant did not take any steps to dispute the notice at that time. On October 12, 2023, Adjudicator Campbell issued the Ten-Day Notice Decision, granting an order of possession to the Landlord.

[5] The Tenant advanced various arguments at the hearing, but his primary and most forceful argument was that his rent had been paid when the ten-day notice was delivered to him. These reasons will primarily focus on that argument, and whether the Tenant is precluded from making it because he did not raise it before the RTB.

Standard of Review

[6] Pursuant to ss. 5.1 and 84.1 of the *RTA*, certain provisions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*], including s. 58, apply to

adjudicators governed by the *RTA*. Specifically, s. 58(2) of the *ATA* sets out the standard of review applicable to decisions of the RTB:

> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and ...

[7] In *Ahmad v. Merriman,* 2019 BCCA 82, leave to appeal to SCC ref'd, 38655 (26 September 2019) the Court of Appeal held:

> [37] Section 58(2)(a) of the *ATA* requires that a decision of an expert tribunal, such as the RTB, may not be interfered with unless it is patently unreasonable. The standard of patent unreasonableness requires the decision under review be accorded "curial deference, absent a finding of fact or law that is patently unreasonable": *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority,* 2016 SCC 25 at para. 29. Stated otherwise, it must be "clearly irrational" or "evidently not in accordance with reason": *Canada (Attorney General) v. Public Service Alliance of Canada*, 1993 CanLII 125 (SCC), [1993] 1 S.C.R. 941 at 963–64. A patently unreasonable decision is one that is "so flawed that no amount of curial defence can justify letting it stand": *Ryan v. Law Society (New Brunswick),* 2003 SCC 20 at paras. 52–53.

The *Residential Tenancy Act*

[8] Section 46 of the *RTA* provides:

> **Landlord's notice: non-payment of rent**
>
> 46 (1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.
>
> (2) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
>
> (3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.
>
> (4) Within 5 days after receiving a notice under this section, the tenant may

> (a) pay the overdue rent, in which case the notice has no effect, or
>
> (b) dispute the notice by making an application for dispute resolution.
>
> (5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
>
> (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
>
> (b) must vacate the rental unit to which the notice relates by that date.

[9] Although s. 46(5)(a) provides that a failure to pay the outstanding rent or to dispute the ten-day notice is conclusive against an order for relief from forfeiture, it is not conclusive against a judicial review: *Seignoret v. Bakonyi Holdings Ltd.*, 2019 BCCA 105 at para. 51.

[10] On a review application, the grounds for reconsideration as enumerated under s. 79 of the *RTA* are narrow:

> **Application for review of director's decision or order**
>
> 79 (1) A party to a dispute resolution proceeding may apply to the director for a review of the director's decision or order.
>
> (2) A decision or an order of the director may be reviewed only on one or more of the following grounds:
>
> (a) a party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control;
>
> (b) a party has new and relevant evidence that was not available at the time of the original hearing;
>
> (c) a party has evidence that the director's decision or order was obtained by fraud.

Analysis

The Issue of Unpaid Rent

Evidence and Factual Findings

[11] As stated, the Tenant was served with a ten-day notice under s. 46(1) of the *RTA* in September 2023. The exact date of service is unclear from the materials, as

the Ten-Day Notice Decision states that the Tenant was served on September 24, 2023, yet refers to a proof of service form which states that the notice was sent on September 5, 2023.

[12] The ten-day notice asserted that the Tenant's rent for August 2023 had not been paid. It is clear on the evidence that rent was generally paid on the 26th or 27th of the previous month.

[13] The Tenant did not take any steps to dispute the notice under s. 46(4)(b). On October 12, 2023, Adjudicator Campbell held (without a hearing):

> I accept the evidence before me that the Tenant has failed to pay the unpaid rent owed in full within the five days granted under section 46(4) of the Act and did not dispute the 10 Day Notice within that five-day period.

[14] The Tenant's evidence given on this petition, which I accept, was that the Tenant paid the August rent in issue to the Landlord by Interac e-transfer on July 26, 2023.

[15] In this regard, the Tenant advanced evidence by way of online banking documents that showed that the August rent had been sent to the Landlord by e-transfer in July 2023 and then subsequently returned to the Tenant's account. He also produced an automated message from his financial institution which was sent to him on August 25, 2023, stating:

> Martin Zhang did not deposit the $650.00 (CAD) you sent on July 26, 2023. As a result, the money transfer has expired and the funds have been deposited back into your bank account at Simplii Financial.

[16] In addition, the Tenant advanced evidence comprised of excerpts from the Landlord's August 4, 2023 written submission (the "Landlord's Submission") in support of a separate one-month notice under which the Landlord sought to end the Tenant's tenancy for cause.

[17] In the Landlord's Submission prepared by Mr. Zhang, Mr. Zhang stated that he wanted to "expel Henri [Mbulu] at all costs". He suggested that the Landlord might end the free provision of utilities to the tenants to persuade the Tenant to

leave, and he asked the adjudicator to “free us from the mental torment created by Henri”. He complained that “evicting rogue tenants in B.C. is hard”.

[18] Critically, in the Landlord’s Submission, Mr. Zhang stated that “in order to avoid Henri’s excuses, we have refused Henri’s rent for August”.

[19] In my view, this evidence clearly demonstrates that, due to other conflicts between the Landlord and Tenant, the Landlord was looking for a way to rid the Property of what the Landlord considered to be a “rogue” tenant. To this end, the Landlord intentionally declined to accept the Tenant’s rent for August 2023 and then delivered the ten-day notice asserting that the August rent had not been paid.

Whether the Tenant is Precluded from Raising the Rent Argument

[20] Given the factual conclusion stated above, this Court must next consider whether the Tenant was entitled to advance the evidence and arguments in support of that conclusion on this petition.

[21] The record before Adjudicator Doyon on the review application included the online banking statement showing that the August rent had been sent to the Landlord by e-transfer and then subsequently returned to the Tenant’s account. That record also included the Landlord’s Submission, which contained Mr. Zhang’s statement that the Landlord had deliberately “refused Henri’s rent for August”.

[22] On the review application, the Tenant did not argue that the rent had been paid. However, he did check the box on the review application form asserting that this case fell within s. 79(2)(c) of the *RTA* – that he had evidence that the director’s decision or order was obtained by fraud.

[23] Obviously, the Tenant did not advance any of these arguments or supporting evidence in relation to the Ten-Day Notice Decision because he did not respond to the ten-day notice.

[24] In considering whether the Tenant ought to be able to advance the arguments on this petition despite not responding to the ten-day notice or making those

arguments on the review application, the following comments from the recent decision of the Court of Appeal in *Athwal v. Johnson*, 2023 BCCA 460 are apposite:

> [63] It is easy to forget, as lawyers and judges, how intimidating and foreign the adversarial dispute resolution process can be. While trained counsel could perhaps be expected to contemporaneously identify and raise a procedural fairness issue, I do not think the same expectation should be constructively imposed, to serious detriment, on the appellants in these circumstances.
>
> [64] As this Court explained in *R.N.L.*, the principle that a party should raise all issues at first instance is not a hard and fast rule: *R.N.L.* at para. 74, citing *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387. The court may exercise its discretion to allow a party to raise a new issue on judicial review, especially if the party was practically precluded from raising the issue at first instance and there is no prejudice to the other party.
>
> [Emphasis added.]

[25] In my view, there is no principled reason to confine the Court of Appeal's statements to procedural fairness issues. In my view, these statements confirm that this Court has the discretion to relieve a party – in particular, a self-represented party – from the obligation to raise all issues at first instance in appropriate circumstances.

[26] In judicially exercising that discretion, it is my view that this Court should look to factors such as the reasonableness of the self-represented litigant's conduct and the merits of the claim which could have been argued earlier but was not. The Court might ask, broadly, whether it is in the interests of justice that the self-represented litigant ought to be permitted to raise the issues not raised before the tribunal.

[27] In this case, the Tenant is far from blameless. The Tenant does not deny that he received the ten-day notice and that he did not respond to it. His explanation is that he had paid the rent so he did not believe that he was required to respond. He could have, and ought to have, submitted a dispute notice stating that he had in fact paid the rent.

[28] It is also clear from the Tenant's bank account statements that the July 26, 2023 payment was returned to his account on August 25, 2023. Therefore, by the time he received the ten-day notice in September 2023, and by the time of the

review application before Adjudicator Doyon, he should have known that the August rent payment had not been deposited by the Landlord.

[29] Further, he was in possession of the Landlord's Submission by the time that he received the Ten-Day Notice and by the time of the review application.

[30] The first time that he asserted to any presider that he had already sent the August rent to the Landlord was on this petition.

[31] On the other hand, the Landlord intentionally declined the August rent payment in order to cause the rent to be in arrears so that the ten-day notice could be delivered for the very payment that had been declined. The Landlord then filed the ten-day notice form without revealing that the Tenant had sent the rent payment.

[32] In my view, this Court's finding that the Landlord knowingly filed a misleading ten-day notice form overcomes the deficiencies in the Tenant's conduct. I conclude that this Court ought to exercise its discretion in favour of hearing the Tenant's argument regarding the declined rent payment, which could have, and ought to have, been made on the review application: *Athwal* at para. 64.

The Review Decision - Section 79(2)(c) of the RTA

[33] In my view, there is no valid attack in this proceeding directly against the Ten-Day Decision. The Tenant was properly served with the ten-day notice, and Adjudicator Campbell made the correct decision based upon the evidence submitted to the RTB in support of that notice.

[34] The core issue to be determined is whether the Review Decision was patently unreasonable. With respect to a review under s. 79(2)(c) of the *RTA*, the *Residential Tenancy Policy Guideline* states under the "Fraud" heading that:

> A review may proceed on this ground if the applicant provides sufficient evidence that:
>
> - information presented at the original hearing was false or material information was withheld on the original hearing;

- there is a reasonable possibility the party submitting the information would have known that it was false or that the information withheld was material; and
- the false or withheld information could have affected the outcome of the benefit of the party who submitted or withheld it (that it probably or may reasonably have tipped the scale in the party's favour is sufficient).

[35] In my view, the Landlord's conduct fell within these criteria. The Landlord made a misleading statement in the ten-day notice materials by asserting that the August rent had not been paid, and the Landlord made that statement with knowledge that it was misleading.

[36] Although this issue was not brought to Adjudicator Doyon's attention at the time, I conclude that the Review Decision was patently unreasonable for not taking into account the Tenant's attempt to pay the August rent and the Landlord's intentional decision to decline the rent payment so that it could file the ten-day notice to evict the Tenant.

Other Arguments Advanced by the Tenant

[37] The Tenant advanced two further grounds in support of his application for judicial review. Although it is not necessary for me to do so given my conclusion above, I will address them briefly.

[38] First, the Tenant argues that the Ten-Day Notice Decision was invalid because Adjudicator Campbell referred to a signed tenancy agreement in the Ten-Day Notice Decision when the copy of the agreement was in fact unsigned. In my view, this ground has no merit since the Tenant conceded during the hearing that the signed copy of the tenancy agreement did not differ in substance from the unsigned one submitted to the adjudicator. The adjudicator's error in this regard was immaterial, and it did not make the Ten-Day Notice Decision patently unreasonable.

[39] Second, the Tenant argues that Mr. Gu's participation in this matter somehow invalidated some of the Landlord's actions. Mr. Gu appears to have instructed counsel and filed a document in connection with the writ of possession. However, I

am not aware of any legal principle which would support this argument and, in any event, Mr. Gu's participation did not affect the issues on this judicial review. Moreover, Mr. Gu fell within the meaning of "landlord" under s. 1 of the *RTA*:

> "landlord", in relation to a rental unit, includes any of the following:
>
> (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
>
> (i) permits occupation of the rental unit under a tenancy agreement, or
>
> (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement; …

The Tenant's Failure to Pay Rent Since August 2023

[40] It came to the Court's attention during the course of the hearing that the Tenant never re-paid the August rent that had been declined by the Landlord, and he has not paid any rent to the Landlord since August 2023.

[41] I note that on November 24, 2023, a judge of this Court granted the Tenant an extension to a then-extant stay of proceedings on the condition that $2,600 in rent arrears be paid within two days, but no such payment was made. On December 6, 2023, another judge of this Court made another order granting a further extension, without any reference to the payment condition.

[42] It is somewhat troubling that the Tenant did not comply with the terms of the conditional extension granted on November 24, 2023, and that he has been able to live in the Property for the duration of the events giving rise to this judicial review without paying any rent.

[43] The Landlord asked this Court to make any order setting aside the RTB's decision conditional upon the Tenant's payment of the rent arrears, but I am aware of no legal basis on which I am entitled to impose such a term. Further, there is no application before this Court for an order that the Tenant pay the rent arrears.

[44] I also note that it was open to the Landlord to file subsequent ten-day notices after September 2023, when the Tenant failed to make any further rent payments.

Further, these Reasons would not preclude the Landlord from filing a ten-day notice now in respect of the present rent arrears. In those circumstances, I do not consider that including a payment condition in this Court's order is necessary. Delivering a ten-day notice now would require any rent arrears which are properly due and owing to be paid within five days, absent a valid dispute notice from the Tenant.

Remedy

[45] In light of my decision above that the Review Decision was patently unreasonable, I am required to decide whether both RTB decisions in this matter ought to be set aside, or whether the matter should be remitted to the RTB for reconsideration.

[46] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at para. 142, the Court held that, as a general rule, courts should respect the legislature's intention to entrust the matter to the administrative decision-maker. However, the Court also held that:

> … there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167, at paras. 18-19. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, at paras. 54 and 88. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

[Emphasis added.]

[47] I have concluded that this case falls within the exception to the general rule described above.

[48] In my view, the outcome is close to being inevitable. Given the evidence and this Court's findings regarding the Landlord's intentional conduct to decline the August rent payment, it is very unlikely that the RTB would uphold the order of possession on reconsideration.

[49] More importantly, in my view, the Tenant has now failed to pay rent for five months. Whether his tenancy was properly terminated as a result of the non-payment of the August rent has since been overtaken by other events. In my view, it would be reasonable for the parties' efforts and the resources of the RTB to be directed towards determining whether the present rent arrears will be paid rather than reconsidering the Ten-Day Notice Decision for which the outcome, as I have found, is very likely to be determined against the Landlord. In this regard, the costs to the parties and the efficient use of public resources weigh heavily against remitting the matter to the RTB. It would make little sense to expend the resources of the parties and the RTB on a reconsideration hearing which is likely to be of little practical utility.

Conclusion

[50] I grant the order sought by the Tenant. The Review Decision is patently unreasonable. Both the Ten-Day Notice Decision and the Review Decision are set aside and the order for possession is quashed.

[51] Both parties sought costs of this proceeding but, in my view, the conduct of both parties made this hearing necessary.

[52] The Landlord caused this proceeding by declining the August rent payment and then submitting a misleading ten-day notice application. On the other hand, the Tenant failed to take any steps to submit a dispute notice upon receipt of the ten-day notice. Further, I have considered the fact that the Tenant has failed to pay rent

arrears in accordance with this Court's November 24, 2023 order and has failed to pay rent for every month since August 2023. Given all of these circumstances, there shall be no costs payable to any party.

"The Honourable Justice K. Loo"