

**CLEOPAS MAGUMA**

**Versus**

**CITY OF KWEKWE**

**And**

**MINISTER OF LOCAL GOVERNMENT,  
PUBLIC WORKS AND NATIONAL HOUSING ((NO)**

**And**

**SHERIFF OF HIGH COURT OF ZIMBABWE (NO)**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 12 NOVEMBER 2021 & 13 JANUARY 2022

**Opposed court application**

- A. *Sibanda*, for the applicant
- B. *Matatu*, for the 1<sup>st</sup> respondent

**DUBE-BANDA J:** This is a court application with the title “court application to compel.” In the main, applicant is seeking the following relief: that 1<sup>st</sup> respondent (council) be directed to comply with the directive of the 2<sup>nd</sup> respondent (Minister) issued in the Minute titled “Local Authorities Circular No 1 of 201” and transfer to the applicant stand 1563 Que Que Township, known as 31 Josiah Tongogara Avenue, Newtown Kwe kwe (property). In the alternative, that 1<sup>st</sup> respondent be directed to cause the property to be valued and thereafter to make a written offer to the applicant to purchase the said property at the valuation price. The application is opposed by the 1<sup>st</sup> respondent. 2<sup>nd</sup> and 3<sup>rd</sup> respondent did not file opposing papers and I understand their position to be that they are content to abide by the order of this court, whatever it is.

**Factual background**

This application will be better understood against the background that follows. In January 1991, applicant got employed by council as a Chief Fire officer. On the 11 January 1991, applicant and council signed a lease agreement in respect of the stand 1563 Que Que. On

the 28 April 2018, applicant left employment on retirement, but continued residing at the property as a tenant in terms of the lease agreement between the parties.

Applicant avers that sometime in September 2018, i.e. when he was already on retirement, he came to know that on the 13 April 2015, 2<sup>nd</sup> respondent (Minister) issued the Local Authorities Circular No. 1 of 2015 (Circular). The Circular reads:

Local Authorities Circular Minute No. 1 of 2015  
All Town Clerks / Secretaries  
All Provincial Administrators  
Subject: Title Deeds for Home Ownership Schemes

Upon the attainment of Independence in 1980, Government inherited a scenario where most indigenous people did not own property in urban areas. The Government then crafted a deliberate housing policy aimed at empowering the majority by granting title to those who resided in urban areas throughout the country. As a result, in the early 1980s some residential properties which were administered by urban local authorities as rented accommodation were converted to ownership schemes. However, local authorities were allowed a discretion to retain a certain percentage to be maintained and managed as institutional or rental houses, depending on the housing units available on stock.

The intention of Government was that sitting tenants would benefit and be granted title deeds to guarantee security of tenure and absolute ownership of the property. The properties were offered to sitting tenants who, at the time, did not own a house / flat in any urban area in Zimbabwe.

In terms section 313 of the Urban Councils Act [Chapter 29:15]; the Hon. Minister of Local Government, Public Works and National Housing directs that all local authorities facilitate issuance of title deeds to genuine and deserving tenants who have rented council accommodation for a period of more than 20 years. Councils may consider converting other housing schemes into home ownership schemes. The scheme should be extended to those rented houses whose tenancy has been passed on to kith and kin because of varying circumstances.

In an effort to update our records, each council is hereby requested to submit a return in the attached format to reach the Principal Director Urban Local Authorities Division by 30<sup>th</sup> April 2015.

Dr. I.M.C. Chombo (MP)  
Minister of Local Government, Public Works and National Housing

Armed with this Circular applicant demanded that the property be transferred to him as a sitting tenant. His request was declined. Council contending that he does not qualify to benefit in terms of the Circular, in that he was leasing the property as an employment benefit. It is against this background that applicant has launched this application seeking the relief mentioned above.

### **Preliminary objections**

Other than resisting the relief sought on the merits, council took two preliminary objections which were also a subject of argument in this matter. It took the following preliminary points, *viz* that applicant's claim has prescribed, and that this is an application for review disguised as a *declaratur*, to side step the peremptory requirements of a review application. I now deal with these preliminary points.

### **Prescription**

Council contends that applicant's claim has prescribed. The objection is that the Circular was issued on 13 April 2015, and applicant first had knowledge or must be deemed to have had knowledge of it in 2015. It is argued that this application should have been filed within three years from 13 April 2015, i.e. by 13 April 2018. This application was filed on the 3<sup>rd</sup> September 2020. It is then submitted that in terms of the Prescription Act [chapter 8:11] the claim is prescribed, and the application must be dismissed without a consideration of the merits.

*Per contra*, in the founding affidavit applicant avers that he had knowledge of the Circular on or about September 2018. Mr *Sibanda* counsel for the applicant contends that council is merely making bold allegations of prescription not supported by evidence. It is contended that it is council that must prove prescription by means of evidence and it has not adduced evidence to prove such prescription. It is argued that the contention that the applicant's claim has prescribed has no merit and must be dismissed.

In a plea of prescription the *onus* is on the defendant to show that the claim is prescribed. When one speaks of the need to discharge an *onus*, it immediately becomes clear that there is

an evidentiary burden that must be met. See: *Van Brooker v Mudhanda & Another AND Pierce v Mudhanda & Another* SC 5 / 2018. Applicant adduced evidence that he had knowledge of the Circular on or about September 2018. According to his version, prescription would take effect in September 2021, and this application was filed on the 3<sup>rd</sup> September 2020 i.e. prior to the expiration of the prescription period. The only relevant evidence relating to prescription that is before court has been adduced by the applicant. Council had an opportunity to raise the issue of prescription in its opposing affidavit, it did not do so, and the issue was only raised in heads of argument. Bold assertions made in heads of argument and oral submissions in this court do not amount to evidence. What is required is evidence. Council did not even begin to discharge the *onus* to prove that the applicant's claim has prescribed. I cannot find that applicant's claim has been extinguished by prescription. The preliminary objection that applicant's claim has prescribed has no merit and is dismissed.

### **Wrong procedure**

Further the application is attacked on the basis that it is a review disguised as a *declaratur*. It is argued that this is an attempt to seek a review of the council's decision *via* the back door by disguising this application as a *declaratur*. Indeed some of applicant's complaints are akin to grounds for review. However on the overall facts of this case I find that this is not an application for review. It is on this basis that I take the view that this preliminary point has no merit and must fail.

### **The merits**

For the applicant it is argued that at the time the Circular was issued he was a sitting tenant at the property. He had a lease agreement with council. It is contended that the minimum threshold for a sitting tenant to benefit in terms of the Circular is that he should have been a tenant at the property for a minimum of twenty years. At the time the Circular was issued applicant had been a tenant in the property for twenty four years. It is argued that it does not matter whether council subsidised applicant's rentals, the bottom line is that he is a sitting tenant and his rights in the property are located within the four corners of the lease agreement. Further it is contended that the lease agreement makes no mention of applicant's employment

with council. It is argued that the subsistence of the lease did not depend on the employment relationship between the parties, but on the lease agreement alone.

Mr *Sibanda* counsel for the applicant submitted that applicant being a sitting tenant in the property is entitled to be issued with Title Deeds in terms of the Circular. It is contended that council violated section 3 of the Administrative Justice Act [Chapter 10:28] by showing reluctance to accord applicant the right to acquire the property: in that it failed to act lawfully; reasonably and in a fair manner; and that it failed to act within a reasonable period of time after the issue of the Circular; alternatively that it failed after the 24<sup>th</sup> September 2018 when applicant made a written request for the transfer of the property into his name.

Further it is argued that in failing to transfer the property to the applicant, 1<sup>st</sup> respondent committed or omitted to act as directed by the Circular in violation of section 5 of the Administrative Justice Act [Chapter 10:28], in that it made an error of law or fact in finding that applicant occupied the property by virtue of his employment, showed disfavour to the applicant, acted in bad faith, acted unreasonable, and took into account an irrelevant matter of employment. It is contended that 1<sup>st</sup> respondent has no discretion in the matter, it just has to comply with the Circular and transfer the property to the applicant.

Mr *Matatu* counsel for the council took a number of arguments which can be summarised as follows, that the Circular is a policy directive and is not binding on council. It is argued that since the Circular is not binding, council had a discretion to determine who are genuine and deserving tenants and the court can only interfere with such discretion if it is so unreasonable that no reasonable authority could have come to it. It is contended that applicant did not allege that council exercised its discretion unreasonable in determining who the genuine and deserving tenants are. Further it is argued that council's discretion cannot be assailed and that the discretion bestowed on council cannot be interfered with in the absence of illegality, irrationality or procedural impropriety.

The immediate question is whether the Circular has force of law. I asked Mr *Sibanda* whether applicant could ground a cause of action on the Circular. Counsel's submission was that the Circular was made in terms of legislation and it has force of law and applicant could mount a cause of action on it.

The Circular was issued by the Minister in terms of 313 of the urban Councils Act [Chapter 29:15]. In *Community Water Alliance Trust & Anor v City of Harare & Anor* HH 194 of 2020 the court held thus:

So, obviously the first question is: what is the status of such ministerial circulars *vis a vis* s 313 of the Act? The section reads:

313 Minister may give directions on matters of policy

(1) Subject to subsection (2), the Minister may give a council such directions of a general character as to the policy it is to observe in the exercise of its functions, as appear to the Minister to be requisite in the national interest.

(2) Where the Minister considers that it might be desirable to give any direction in terms of subsection (1), he shall inform the council concerned, in writing, of his proposal and the council shall, within thirty days or such further period as the Minister may allow, submit to the Minister, in writing, its views on the proposal and the possible implications on the finances and other resources of the council.

(3) The council shall, with all due expedition, comply with any direction given to it in terms of subsection (1).

Section 313 above is in three parts. The first part, sub-section (1), and part of sub-section (2), empowers the Minister to issue policy directions in the national interest. It is merely a proposal or an invitation to council to endeavour to comply with any such policy directions. This cannot be binding because the second part of sub-section (2) gives the council thirty days or more to submit its own views and make any counter proposals. It is the third part, or sub-section (3), which undoubtedly has the force of law. It states in peremptory terms that the council *shall comply* with due expedition with any policy directions given in terms of sub-section (1). What then does one make of this?

Plainly, s 313 aforesaid has to be read as a whole, not disjunctively. It must then be applied to the facts of the matter as a single provision. In my view, the ministerial circular issued in terms of s 313 of the Act is binding if the Minister has given a council the opportunity to make its own counter proposals which he must consider. The policy direction is only binding after this step has been taken. In the present case, I have no information concerning the issuing of the 2013 ministerial circular.

In *casu* I have no evidence regarding the issuing of the Circular. Applicant did not adduce such evidence before court. The Circular can only be binding if the Minister has given

a council the opportunity to make its own counter proposals which he must consider. The policy direction is only binding after this step has been taken. Applicant did not adduce such evidence before court. I take the view that the Circular 1 of 2015 is not binding and has no force of law. Applicant cannot anchor a cause of action on such a Circular.

Again I also note that the Circular is from the Minister and directed to local authorities, not to the applicant. Applicant is a third party to this Circular. The Circular did not create a legal relationship between applicant and the council. Even if the Circular had force of law, it cannot be for applicant to anchor his cause of action on it. This brings us to the doctrine of privity of contract. The privity of contract is the general proposition that an agreement between parties cannot be sued upon by a third party even though such third party would benefit from its performance. See: *TBIC (Private) Limited & Another v Mangenje & 5 Others* SC 13/18. The doctrine of privity of contract excludes applicant from suing for the enforcement of the Circular.

A finding that Circular 1 of 2015 is not binding and has no force of law implies that applicant has no cause of action in this matter. This should really mark an end to this inquiry, it is dispositive of this matter, but for the sake of completeness and clarity there is need in passing to look at the argument by Mr *Sibanda* that council has no discretion, it just has to comply with the Circular and transfer the property to the applicant. The Circular itself provides in clear and unambiguous language that:

Local authorities were allowed a discretion to retain a certain percentage to be maintained and managed as institutional or rental houses, depending on the housing units available on stock.

Nothing can be clearer than this statement. In terms of the Circular council has a discretion whether or not to transfer property to a sitting tenant. Whether a sitting tenant is genuine and deserving is a matter for council to decide. The Circular vests the discretion to council. It is within the discretion of council to decide to transfer a rented property to a sitting tenant or decline to do so. Even if this court were to disagree with the decision of council it cannot merely interfere with it. This court cannot just usurp the function of Council. This is

what is called judicial deference. This court can only interfere with council's exercise of discretion only on the basis of a well-founded case, and this is not such a case.

Again for the sake of completeness, the alternative order sought by applicant is equally incompetent, this court cannot direct council to cause the property to be evaluated and then make a written offer to the applicant to purchase such property. Christie in *The Law of Contract* (2<sup>nd</sup> Ed. Butterworths 1991) p. 29-30 defines an offer as a proposal made with an intention that by its mere acceptance and without more a contract should be formed. A contract is generally defined as an agreement between parties creating mutual obligations enforceable by law. The basic elements required for the agreement to be a legally enforceable contract are: mutual assent and expressed by a valid offer and acceptance. In general a court cannot compel a party to make an offer and to enter into a contract with another. Such a "contract" would not have an important element of a contract i.e. mutual assent. Therefore this court cannot order council to enter into a contract with applicant. Such is unattainable.

My view is that from whatever perspective one considers this matter, the result is the same and is that applicant has just not made a case for both the relief and the alternative relief he is seeking. It is for these reasons that I find that this application has no merit and must fail.

The general rule is that the costs follow the result. There is no reason why this court should depart from such rule in this case. The Applicant is to pay council's costs on the scale as between party and party.

### **Disposition**

In the premises applicant has not made a case for both the relief and the alternative relief he is seeking. In the result, this application is dismissed with costs.

*Matatu and Partners*, applicant's legal practitioners  
*Mhaka Attorneys*, 2<sup>nd</sup> respondents' legal practitioners

