LAIZA CHIDE
versus
CHITUNGWIZA MUNICIPALITY

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 14 September 2023 & 25 November 2024

Opposed-Application for a *mandamus*

Mrs *K Madzika,* for the Applicant
Mr *A T Nobela,* for the Respondent

MUSITHU J: The applicant sought an order compelling the respondent to deliver a lease agreement signed between the parties in respect of a property known as stand number 32393 Unit K. After hearing arguments from parties and having considered documents filed of record, the court granted the following order after handing down a brief *ex tempore* ruling:

IT IS ORDERED THAT

1. The application be and is hereby granted.
2. The respondent is hereby ordered to deliver the lease agreement of the stand number 32393 Unit K to the applicant within 10 days of the Court's Order.
3. The respondent shall pay the applicant's costs of suit.

Aggrieved by the court's decision, the respondent wrote directly to the registrar requesting reasons for the judgment. The case was heard and concluded before the advent of the Integrated Electronic Case Management System (IECMS). Because of the transition from the physical records to the electronic case management system, the request for reasons, which were also made outside the system then must have been misfiled and lost and never brought to my attention. It was only recently that the said request was brought to my attention through the respondent's legal practitioners. The delay in furnishing the requested reasons is sincerely regretted. Be that as it may, the reasons are detailed hereunder.

Background and the applicant's case

The applicant's founding affidavit was deposed to by one Precious Sibanda in terms of a General Power of Attorney granted to her by the applicant on 3 July 2012. The founding affidavit sets out the applicant's case and the factual background as follows. Sometime in 1980, the applicant was allocated a corner stand to build a cornershop by the respondent on a lease basis. That property is identified in the papers before the court as Stand Number 32393 Unit K Seke (hereinafter referred to as the property). The applicant proceeded to construct a small structure and remitted rentals to the respondent. Sometime in February 2010, the applicant made an application for acquisition of the same stand and in response was given an offer letter. The application was made through the completion of the respondent's Form HCS/35. That application form showed that the property was going to be utilized for business purposes.

In response to the application, the applicant claims that the respondent issued her with an offer letter. The letter which was addressed to the applicant reads in part as follows:

> "**ALLOCATION OF ACCOMODATION IN LOCAL GOVERNMENT AREAS: CHITUNGWIZA MUNICIPALITY**
>
> 1. The following premises are now available for allocation in *SEKE SOUTH ADMIN CHITUNGWIZA MUNICIPALITY* Local Government Area.
> House Number*: 32393 UNIT K* Stand/Account Number: *32393 'K'*
> Number of children declared: *N/A* Number of Rooms: *STAND*
> 2. You are required to report to the Director of Housing and Community Services within (4) days from the date shown below, and you will be required to bring with you and produce for examination the following:-
> (a) This form;
> (b) Your Registration Certificate/Identity Card/National Identity Card: and
> (c) Your Marriage Certificate (if you have it).
> ……."

That letter was signed by the respondent's Director of Housing and Community Services. The applicant claims that she was advised by the respondent that the said property was being further extended. On her part, she had plans to develop the property to fully utilize into a business venture. She made attempts to prepare the requisite plans for the property, but her efforts were futile as she was not in possession of a lease agreement. Sometime in 2012, the applicant was invited at the offices of the respondent's Director of Housing and Community Services within seven days in connection with the property. That letter stated that the invitation was in connection with the 'lease'. The applicant claims that she proceeded to sign a lease agreement that gave her an option to buy the property. She exercised that option.

According to the applicant, after the signing of the lease agreement, she surrendered it to the respondent for further management. The respondent, thereafter, refused to furnish the applicant with the signed lease agreement, despite the same having been signed in 2012. The applicant only had in her possession the cover page of the lease agreement. In a bid to obtain the aforesaid lease agreement, the applicant, through her daughter made several attempts to secure the release of the signed lease, but all was in vain. It was the applicant's position that sometime in 2020, she was requested by the respondent to make a payment towards the respondent's handling fees for her to be furnished with the signed lease agreement. That payment was duly made, but the signed lease agreement was not released.

The applicant also averred that requests for payment of rates have been coming in her name and she has been making the required payments, with the respondent accepting these payments thereby acknowledging that the property indeed belonged to her. It was because of the respondent's refusal to furnish her with the signed lease agreement that the applicant was left with no option but to approach this court for an order to compel the respondent to release the signed lease agreement to her.

The respondent's case

The respondent denied that it offered the property to the applicant as alleged. It averred that the property was allocated to one Prisca Chide on a rental basis and that the alleged offer letter attached to the applicant's application was not an offer letter but an allocation letter for tenancy and not ownership. Further according to the respondent, the lease agreement was signed by the applicant but it was not approved due to inconsistences surrounding the purported allocation. It was further averred that the reasons for the non-approval of the lease agreement were communicated to the applicant.

The respondent also averred that the reason why the property was being billed in the applicant's name was because the account was created to enable her to make the relevant payments once the lease agreement was signed. That did not however, amount to an acknowledgement of ownership by the respondent. The property remained the respondent's property, and it could not be sold or offered to anyone without following the necessary procedures. The respondent averred that the lease agreement was not approved as all the procedures were not followed.

The Submissions

At the commencement of the hearing, Ms *Madzika*, for the applicant abandoned the preliminaries that had been raised by the applicant in her answering affidavit. The first concerned the absence of authority by the person who deposed to the respondent's opposing affidavit. The second was concerned with the respondent's failure to comply with r 58(1)(c) of the High Court Rules, 2021.

Ms *Madzika* submitted that in para 3.1 of its opposing affidavit, the respondent accepted that the lease agreement was indeed signed. The applicant was also in occupation of the property, and she was paying the respondent's bills from 2012 to date. Ms *Madzika* submitted that the utility bills which came in the applicant's name were an acceptance that a contractual relationship existed between the parties.

In response, M*r Nobela* for the respondent submitted that there were two forms of applications, one for a *mandamus* and another for specific performance. If the application was for a *mandamus*, the applicant was required to establish three factors on a balance of probabilities. Counsel further submitted that the remedy of specific performance arose out of a contract. In support of his submission, Mr *Nobela* relied on the authority of *Nebula Agencies (Pvt) Ltd v French & Smith T/A Customs Services* HH 798/22. Mr *Nobela* also submitted that no tenancy relationship was proved to exist between the parties.

In reply Ms *Madzika* submitted that the present application was meant to compel the release of the lease agreement. It was one for a *mandamus*. Counsel submitted that the applicant's clear right emanated from the fact that she signed the lease agreement. Further, para 2 of the lease agreement spoke to the possibility of an extension of the lease agreement. The applicant could however, not exercise her rights without being furnished with the signed lease agreement. Ms *Madzika* further submitted that the applicant had tried other alternative remedies without success. Counsel further submitted that the matter wouldn't have come before the court but for the respondent's failure to cooperate. An order of costs on the punitive scale was therefore justified.

The analysis

From a consideration of the submissions of counsel and the pleadings, it was clear to the court that the application before the court was one for a *mandamus*. In *CRG Quarries v (Pvt) Ltd v The Provincial Mining Director Mashonaland East Province N.O & 2 Ors* HH 700/20 a *mandamus* was defined as follows:

> "A *mandamus* or mandatory interdict as it is commonly known is a judicial remedy that compels a respondent to perform an act which it is at law obliged to perform."

In *Sibanda v City of Victoria Falls*[1], BUBE-BANDA J had this to say about the remedy of a *mandamus*:

> "The object of a mandamus is to compel an administrative organ to perform some or other statutory duty. It is a judicial remedy available to enforce the performance of a specific statutory duty or remedy the effect of an unlawful action already taken. See *Oil Blending Enterprises (Pvt) Ltd v Minister of Labour* 2001 (2) ZLR 446 (H) at 450. The requirements to access this judicial remedy were spelt out in the case of *Setlogelo v Setlogelo* 1914 AD at 227."

The court further stated that a *mandamus* was only granted in circumstances where the public or administrative body had a clear duty to perform the action sought.

In the case of *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S) the requirements of a *mandamus* were set out as follows;

(1) a clear or definite right-this is a matter of substantive law.

(2) an injury committed or reasonably apprehended-an infringement of the right established and resultant prejudice.

(3) the absence of a similar protection by any other ordinary remedy. The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection.

The applicant premised her claim on the lease agreement signed between the parties in 2012. She averred that sometime in 2010 she was offered the property by the respondent and followed the requisite processes. She signed the lease agreement at the instance of the respondent and exercised her option to purchase the property.

The respondent refuted the claims made by the applicant she was allocated the property in question. It averred that the applicant was only given an allocation form for tenancy. It was

[1] HB 24/24 at p 5

submitted on behalf of the applicant that her clear right emanated from the fact that she signed an agreement. Further, in 2020 the applicant was requested to pay handling fees, and she complied in a bid to be furnished with the lease agreement. The applicant has also been paying rates for the property with the payments having been accepted by the respondent.

The court determines that the applicant managed to establish the requirements of the *mandamus* on a balance of probabilities. It is the respondent that invited the applicant to come and sign for the offer of the property to her, and the applicant duly accepted the offer. It was the same respondent that prepared the lease agreement which the applicant also signed. The respondent went further to invite the applicant to pay what it called handling fees, and again the applicant complied. The applicant continued to bill the applicant for rates in her name.

The respondent's explanation for the failure to furnish the applicant with the signed lease agreement is far from being satisfactory. The respondent does not deny that it invited the applicant to sign the lease agreement. It does not deny that the applicant is currently in possession of the property. It does not deny that it is billing the applicant and accepting payments for rates from the applicant. In any event the respondent's conduct of continuing to receive rates from the applicant is not consistent with that of a party desirous on invalidating the lease agreement. In the court's view the respondent's conduct was consistent with that of a party that acknowledged the existence of some contractual relationship with the applicant.

The procedures that the respondent claims to have been violated were not explained in the opposing affidavit. Reference was also made to some 2021 investigations report which was addressed to the Acting Chamber Secretary by the Chief Security Officer in connection with the property. Nothing much turns on that report. There is no affidavit by the Chief Security Officer before the court explaining the findings and the outcome of that investigation. At any rate, that communication was internal. There is nothing on record to show that the outcome of that investigation was shared with the applicant.

The purpose of an investigation is to enable the respondent as an administrative authority to make an informed decision. It enables the respondent to furnish the reasons for whatever decision it makes. That decision must be communicated to the interested party. There is nothing on record to show that any decision was communicated to the applicant. There is no point in commissioning an investigation which affects an interested party, when the outcome of that

investigation is not shared with the affected party. In any case, the respondent could not seek to hide behind a 2021 report to explain its failure to comply with a request that had been made some ten years earlier. There is evidence of follow ups being made for the release of signed lease agreement from 2012 right until the applicant filed this application.

In the final analysis, the court determines that the respondent failed in its discharge of its mandate as an administrative authority. It has failed to provide a justification for its failure to furnish the applicant with the signed lease agreement, when circumstances on the ground point to the existence of a lease between the parties.

It was for the foregoing reasons that the court granted the above order.

MUSITHU J……

Munangati & Associates, legal practitioners for the applicant
Matsikidze Attorneys-At-Law, legal practitioners for the respondent