W MATAKE

And

A MUTAMADIKI

And

C K MASUKU

And

N MAKEKERA

And

E SIBANDA

And

P CHIKUNI

And

M MACHISA

And

M MAKEKERA

And

T H CHATUMBA

And

C SAGONDA

and

A V NGWENYA

And

R CHIREMBA

And

A KANDAMI

And

Z VHOVHA

And

E CHIVASA

And

M BROUND

And

V MBERENGWA

And

K MUSHORE

Versus

MINISTRY OF LOCAL GOVERNMENT & NATIONAL HOUSING

And

MINISTRY OF HIGHER & TERTIARY EDUCATION

And

DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 16 MAY 2006 AND 13 SEPTEMBER 2007

B Dube for the applicants
K I Phulu for the respondents

Opposed application

NDOU J: The applicants are former government employees based at Gweru Teachers College. Gweru Teachers College has now been succeeded by the

Midlands State University. During the applicants' tenure as civil servants, they were in occupation of houses in Senga Township which were specifically reserved for employees of Gweru Teacher's College. In fact most of them have been occupying such properties for over twenty-four (24) years. These are the affected properties:

W MATAKE	GP 1224/20 Senga
A MUTAMADIKI	GP 1224/1 Senga
C K MASUKU	GP 1224/4 Senga
N MAKEKERA	GP 1224/5 Senga
E SIBANDA	GP 1224/6 Senga
P CHIKUNI	GP 1224/7 Senga
M MACHISA	GP 1224/8 Senga
M MAKEKERA	GP 1224/9 Senga
T H CHATUMBA	GP 1224/10 Senga
C SAGONDA	GP 1224/11 Senga
A V NGWENYA	GP 1224/12 Senga
R CHIREMBA	GP 1224/13 Senga
A KANDAMI	GP 1224/14 Senga
Z VHOVHA	GP 1224/15 Senga
E CHIVASA	GP 1224/18 Senga
M BROUND	GP 1224/19 Senga
V MBERENGWA	GP 1224/21 Senga
K MUSHORE	GP 1224/24 Senga

Sometime in 2000, the 2nd respondent sub-contracted private companies to provide catering and cleaning services thus rendering the applicants redundant as their core business was rendering these services. The applicants were retrenched. Upon retrenchment the applicants through their Workers Committee, approached the Principal of Gweru Teachers College requesting him to assist them in purchasing the above-mentioned properties. On 29 October 2000, the Acting Principal, Gweru Teachers College wrote to the Secretary for the second respondent in, *inter alia*, the following terms:

> **Re: Application by sitting tenants to be given preference in the purchase of college houses in Senga**

It is now common knowledge that Ministry has sub-contracted/privatised grounds and catering and will do the same in the case of cleaning in January 2001. Most government employees affected by this exercise were residing in government houses placed under the care of the Ministry by the Ministry of National Housing and Construction. Some of these employees have occupied the houses for up to 30 years. They have known no other home and have been paying rates for these properties from as far back as July 1983.

These sitting tenants are requesting that they be allowed to purchase these houses. Some of them are expected to vacate these houses at the end of November 2000 and

have nowhere to go.

Your urgent attention to this matter will be greatly appreciated." (emphasis added)

What can be gleaned from the papers is that the matter was eventually referred to the 1st respondent who responded by a minute dated 25 April 2002 addressed to the 2nd respondent in the following terms:

> **"Re: Sale of Senga houses to sitting tenants: Former Gweru Teachers College**
>
> Reference is made to minute dated 4 march 2002 concerning the above stated houses.
>
> Please be advised that the Ministry is in the process of formulating a policy on the disposal of rented accommodation to sitting tenants. As such, you will be advised accordingly when the matter is finalised." (emphasis added)

The next correspondence the applicants received were "Notices to vacate Government Houses" from the office of the provincial Administrator, Midlands Province. These were followed by letters of threats of arrest issued by a magistrate in Gweru. Suffice to say the magistrate did not have authority to issue such letters and I will ignore them for the purpose of the judgment. The applicants complained about the eviction notices to the Secretary of the 1st respondent through a letter authored by a legal practitioner dated 28 July 2003. This letter prompted the 1st respondent to respond to the applicants' request. The Secretary of 1st respondent responded to 2nd respondent in a minute in the following terms:

> **"Dereservation of houses: Senga Teachers College**
> I refer to your minute C/9/4 addressed to the Pro-Vice Chancellor of Midlands State University.
>
> Please be advised that we have dereserved the houses as requested but we are not offering them for sale to the sitting tenants. There is an acute shortage of Government housing in Gweru and the houses have thus been placed in the pool. They will be allocated by the Ministry of Local Government, Public Works and National Housing official in Gweru.
>
> All sitting tenants who are civil servants should approach our offices for fresh leases. Those who are not longer civil servants will be required to vacate the accommodation within three months." (emphasis added)

Subsequently, the Secretary of 2nd respondent informed the applicants by letter dated 15 September 2003 in, *inter alia*, the following terms:

> " … I refer to your minute dated … pertaining to the above subject. Please be advised that the Secretary of Local Government … and National Housing has turned down your request to purchase the houses as per Secretary for Higher and Tertiary Education's recommendations. Attached hereto …" (emphasis added)

The applicants did not move out or seek a review of the decision, instead at the expiry of the three months they filed and obtained a provisional order which stayed their eviction in the interim. They now seek the confirmation of this order in the following terms:

> **"Terms of Final Order made**
> That you show cause to this honourable court why a final order should not be made in the following terms:
>
> 1. That 1st ad 2nd respondents be and are hereby ordered to sell the following properties GP 1224/20 … and GP 1224/24 to the respective applicants.
> 2. That the respondents pay the costs of this application.
> 3. That the order shall remain binding notwithstanding the notice of appeal."

The 1st respondent's case is briefly the following. Government policy does not stipulate that every house will eventually be sold to sitting tenants. Government houses fall in two different categories. These are the Housing and Guarantee Fund and the Rental Accommodation or pool houses. Only the Housing and Guarantee Fund can be sold to sitting tenants since these are classified as "rent to buy" which gives the sitting tenant the option to purchase the house. Rental accommodation or pool houses are specifically meant to cater for serving civil servants, and the houses occupied by the applicants fall into this latter category. The applicants, in their answering affidavit do not dispute this position. Instead, they rely on what they term "a solid promise and undertaking that the Senga houses will be sold to sitting tenants." The following words cited above are said to constitute this solid promise and undertaking:

> "Please be advised that the Ministry is in the process of formulating a policy on the disposal of rented accommodation to sitting tenants. As such, you will be advised accordingly when the matter is finalised."

Is this a promise or undertaking? Does this conduct of 1st respondent give rise to a legitimate expectation to the applicants that these houses will be sold to them? These

are the issues for determination.

In considering what conduct would give rise to a legitimate expectation CORBETT CJ in *Administrator, Transvaal* v *Traub* 1989 (4) SA 731(A) at 756 I, cited the following passage from the speech of Lord Fraser of *Tullybelton in Council of Civil Service Unions* v *Minister of the Civil Service* [1984] 3 ALL ER 935 (HL) 944a-b:

> "Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

This doctrine was approved by the Supreme Court in our jurisdiction in *Metsola* v *Chairman, Public Service Commission & Anor* 1989(3) ZLR 147 (S); *Health Professions Council* v *McGown* 1994(2) ZLR 329 (S); *Taylor* v *Minister of Education & Anor* 1996(2) ZLR 772(S); *Mawenga* v *PTC* 1997(2) ZLR 483(S) and *Minister of Information* v *PTC Managerial Employees Workers' Committee* 1999(1) ZLR 128 (S) at 136A-C.

The above requirements were considered in greater detail in *National Director of Public Prosecutions* v *Phillips* 2002(4) SA 60 (W), which was cited, with approval, by the Supreme Court of Appeal in *South African Veterinary Council* v *Szymanski* 2003(4) SA 42 (SCA).

HEHER J in *National Director of Public Prosecutions* v *Phillips, supra*, said:

> "The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:
>
> (i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (*op cit [Judicial Review of Administrative Action* 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate

expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so failing which they act at their peril.

(ii) The expectation must be reasonable: *Administrator, Transvaal* v *Traub [supra]* [cited with approval by the Constitutional Court in *President of the Republic of South Africa & Ors* v *South African Rugby Football Union & Ors* 2000(1) SA I (cc)]; De Smith, Woolf and Jowell (*supra* 417 para 8-037).

(iii) The representation must have been induced by the decision-maker: De Smith Woolf and Jowell (op cit at 422 para 8-050); *Attorney General of Hong Kong* v *Ng Yuen Shui* [1983] 2 ALL ER 346 (PC) at 350h-j.

(iv) The representation must be one which it was competent and lawful for the decision-maker to make without which reliance cannot be legitimate: *Hauptfleisch* v *Caledon Divisional Council* 1963(4) SA 53 (C) at 59E-G"

Adopting and applying this exposition, it is plain that the applicants' case was defective from the outset. They may subjectively have had expectations. But these expectations fail to meet the criteria (i) and (ii) making unnecessary to consider any further requisite. There was no representation to the applicants that the houses will be sold to them – let alone a clear, unambiguous and unqualified representation. Nor were the applicants' expectation to that effect reasonable. It is worth emphasising that the reasonableness of the expectation operates as pre-condition to its legitimacy – see Lord Diplock's speech in *Council of Civil Service Unions & Ors* v *Minister for the Civil Service, supra* at 949h-j and *South African Veterinary Council* v *Szymanski, supra.* The first question is factual – whether in all the circumstances the expectation sought to be relied on is reasonable. That entails applying an objective test to the circumstances from which the applicant claims the expectation arose. Only if that test is fulfilled does the further question – whether in public law the expectation is legitimate – arise. As alluded to above, the representation underlying the expectation, *in casu,* is not a clear and unambiguous statement which is devoid of relevant qualification that the 1st respondent will sell the houses to the applicants. If anything, it expressly states that their request will be considered. That entails either a favourable or an unfavourable outcome of the consideration. No legitimate expectation could therefore have been created that the 1st respondent will sell the houses to the applicants. Further, the expectation by the applicants is not reasonable. They assumed a positive outcome of their request. They acted at their peril. Their letter and those written by the Principal of Gweru Teachers College were requests. A person who requests cannot claim that he expects a positive answer to his request. The letter relied upon is no more than an acknowledgement of the requests and an undertaking that these requests will be considered by the 1st respondent. Indeed these requests or pleas for charity were considered and the outcome was unfavourable

and this was communicated to them in writing.

Accordingly, the provisional order granted by this court on 30 April 2004 be and is hereby discharged with costs.

Mhuruyengwe & Associates, c/o Calderwood, Bryce Hendrie & Partners, applicants' legal practitioners
Coghlan & Welsh respondents' legal practitioners