

CLIVE CHARERA
versus
CHITUNGWIZA MUNICIPALITY
and
JOHN CHIMEDZA
and
FLORENCE CHIMEDZA

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 26 January & 21 March 2024

Opposed Application

Ms P R Zvenyika, for the applicant
Ms S Ndewere, for the 1st respondent
Ms C Vushe-Bwititi, for the 2nd and 3rd respondents

MHURI J: This is an application in terms of s 4(1) of Administrative Justice Act [*Chapter 10:28*] which seeks to set aside the decision of the first respondent to repossess applicant's stand and sell it to second and third respondents. The brief facts giving rise to this application are that in March 2007 applicant accepted an offer from first respondent for the purchase of stand number 7403 Manyame Park. A lease agreement was executed between these two parties. In 2022 after visiting first respondent's office applicant learnt that the lease agreement had been cancelled and his stand repossessed from him in 2019. Applicant raised a query with first respondent about this and was verbally advised that there was an error in that regard which will be resolved. In March 2023 applicant received a letter advising him of the repossession of the stand and subsequent allocation to second and third respondents.

Applicant prays for an order in the following terms:

1. The decision of the first respondent to repossess stand number 7403 Manyame Park, St Mary's Chitungwiza from the applicant and allocate it to second and third respondents be and is hereby set aside as being unlawful, unreasonable and unfair.

2. The lease agreement with option to purchase the repossessed stand number 7403 Manyame Park, St Mary's Chitungwiza issued by first respondent to second and third respondents be and is hereby declared null and void and is hereby cancelled.

3. The first respondent be and is hereby ordered to reallocate stand number 7403 Manyame Park, St Mary's Chitungwiza to the applicant for with.

4. The first respondent shall pay costs on a legal practitioner and client scale.

Issues for determination

1. Whether or not first respondent followed the correct procedure for repossession of applicant's stand and subsequent allocation of the same to second and third respondents?

2. Whether first respondent acted lawfully, reasonably and fairly in repossessing applicant's stand and allocating it to second and third respondents?

3. Whether or not applicant is entitled to reallocation of the stand?

4. What is an appropriate order as to costs?

It is not contested that there is Chitungwiza Municipality Housing Policy which in clause 14 provides:

"Council reserves the right to repossess undeveloped stands after expiry of 5 years from allocation. This shall be done in terms of the agreement of lease. Repossession procedure shall include advertising in the national press for not less than 21 days."

Section 152 (2) (a) of the Urban Councils Act [Chapter 29:15] provides that:

(2) "Before selling, exchanging, leasing, donating or otherwise disposing of or permitting the use of any land owned by it, the Council shall, by notice published in two issues of newspaper and posted at the office of the council, give notice-

(a) of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale, exchange, lease, donation, disposition or grant of permission of use."

First respondent is an administrative authority as defined in s 2 of the Administrative Justice Act [Chapter 10:28]. It is bound by the requirements of s 3 (1) (a) and (c) as read with s 3 (2). Section 3 of this Act states:

"(1) An administrative authority which has responsibility or power to take any administrative action which may affect the rights, interest or legitimate expectations of any person shall-

(a) act lawfully, reasonably and in a fair manner and

(b)

(c) where it has taken action, supply written reasons therefor within the relevant period specified by law, or if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.”

A definition of what constitutes a fair administrative action is provided for in subsection 2 as follows:

“(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection 1-

- (a) adequate notice of nature and purpose of proposed action; and
- (b) a reasonable opportunity to make adequate representation
- (c) ...”

Section 68 of the Constitution of Zimbabwe provides;

“(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

(2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct, has the right to be given promptly and in writing the reasons for the conduct.”

In casu, applicant and first respondent entered into a lease agreement on 24 June 2013. Clause 15 of the lease agreement required applicant to erect buildings, failure of which the lessor would be at liberty to declare the agreement terminated, possess the stand and eject the lessee therefrom.

Did first respondent follow the correct procedure in repossessing applicant’s stand and subsequently allocating the same to second and third respondents?

The answer is found in the Housing Policy and the Urban Councils Act.

Clause 14 of the Chitungwiza Housing Policy lays down the procedure for repossessing a stand/stands by first respondent.

First respondent reserves the right to repossess undeveloped stands after expiry of 5 years from allocation. This shall be done in terms of the Lease agreement. Repossession procedure includes advertising in the national press for not less than 21 days.

Section 152 (2) (a) of the Urban Councils Act [Chapter 29:15] provides that:

“Before selling, exchanging, leasing, donating or otherwise disposing of or permitting the use of any land owned by it, the Council shall, by notice published in two issues of newspaper and posted at the office of the council, give notice of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale, exchange, lease, donation, disposition or grant of permission of use.”

In order to repossess the stand first respondent had a duty of advertising same in the national press for at least 21 days. It is not in dispute that first respondent never made this advertisement. There is no evidence adduced to prove that. Furthermore, in order to effect the repossession first respondent was required by s 152 (2) (a) of the Urban Councils Act to effect a notice at the office of the council. There is no evidence to show that first respondent posted a notice at the council's office. It follows therefore that first respondent did not follow the correct procedure in repossessing the stand from applicant. The purported repossession and subsequent sell are therefore a nullity as they flow from a flawed process. The adage one cannot put something on nothing and expect it to stand is apt.

In the case of *Mcfoy v United Africa Co Ltd* 1961 (3) ELR1169 at 1172 Lord Denning noted that;

“If an act is void, then, it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of court for it to be set aside. It is automatically null and void without much ado, although it is sometimes more convenient to have the court declare it to be so.”

First respondent led evidence to show that a letter giving applicant 14 days' notice of termination of the lease agreement was served on the applicant's postal address. From the evidence led, applicant provided 1134 Gune Street St Mary's Chitungwiza as his *domicillium citandi* which first respondent sent the letter to. However, there is no acknowledgement of receipt of this letter; which begs the question...was applicant duly served? Again, this same address was used by first respondent to advise him of the termination of the lease agreement but there is no acknowledgement of receipt by the recipient.

Did first respondent act lawfully, reasonably and fairly in repossessing applicant's stand and allocating it to second and third respondents?

In an application made in terms of the Administrative Justice Act seeking the setting aside of a decision of an administrative authority applicant must allege and prove that the authority acted unlawfully, unreasonably and in an unfair manner.

Section 3 of the Administrative Justice Act provides:

“3 Duty of administrative authority:

1. An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—
(a) act lawfully, reasonably and in a fair manner; and

(b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and

(c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.

(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—

(a) adequate notice of the nature and purpose of the proposed action; and

(b) a reasonable opportunity to make adequate representations; and

(c) adequate notice of any right of review or appeal where applicable.....”(underlining for emphasis).

Section 4 (1) of the Administrative Justice Act, empowers a court to set aside a decision that breaches its provisions. This was echoed in the *In Zimbabwe School Examinations Council v Victor Mukomeka* (on behalf of a minor Charmaine Mukomeka) and another SC10/2020 at p 17 PATEL JA (as he then was) noted that,

“The general principle is that the courts will not interfere with the actions or decisions of an administrative authority unless they are shown to be unlawful, grossly unreasonable or procedurally irregular or unfair.”

This principle was also recognised by MCNALLY JA in *Affretair (Pvt) Ltd & Anor v M.K. Airline (Pvt)Ltd* 1996 (2) ZLR 15 (S) at 21:

“The duty of the courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly and legally possible, that it carries out its functions fairly and transparently. If we are satisfied that it has done that, we cannot interfere just because we do not approve of its conclusion.”

The administrative action which is the subject of this application by the applicant is the repossession of stand number 1134 St Mary’s Chitungwiza and its subsequent sell to the second and third respondents. It was not in dispute, as between the parties, that the Council is an administrative authority as defined by the Administrative Justice Act. Indeed, that this is the correct position cannot be debated as the first respondent carries out administrative functions that affect other persons as defined in s 2 (1) (d) of the Administrative Justice Act. (See also *Logan v Morris N.O & Ors* 1990 (2) ZLR 65 (S.) Therefore, did the first respondent conduct itself in a lawful, fair and reasonable manner when it exercised its power to repossess applicant’s stand and sell it to second and third respondents. The lawfulness, reasonableness and fairness of first respondent’s conduct can also be assessed through a reading of Clause 14 of the Chitungwiza Housing Policy and s 152 (2) (a) of the Urban Councils Act [*Chapter29:15*] which both oblige first respondent to advertise the purported

repossession for at least 21 days. As found earlier, first respondent never made the advertisement hence I find that its conduct was unreasonable and unfair. In view of this, this point is found in favour of the applicant.

Is applicant entitled to reallocation of the stand? Having found that first respondent's conduct in repossessing the stand from applicant and selling it to second and third respondents was procedurally unfair, unreasonable and illegal, it follows that, to remedy this conduct applicant should be reallocated the stand in question. If first respondent is still inclined to repossess the stand it must follow due process. Second and third respondents contend that there are innocent purchasers who have made improvements to the property. They argue that their lease agreement with first respondent is still extant and pray for the dismissal of this application. As I pointed out earlier that, first respondent acted unlawfully, unreasonably and unfairly in repossessing applicant's stand it follows that the subsequent allocation of the same to second and third respondent is unlawful. Second and third respondents' remedy lies with first respondent.

In the result, I will grant the application and order as follows: -

- 1.The decision of the first respondent to repossess stand number 7403 St Mary's Chitungwiza from applicant and sell it to second and third respondents be and is hereby set aside as being unlawful, unreasonable and unfair.
- 2.The lease agreement with option to buy stand number 7403 St Mary's Chitungwiza issued by first respondent to second and third respondents be and is hereby declared null and void and is hereby cancelled.
- 3.The first respondent reallocates stand number 7403 St Mary's Chitungwiza to the applicant forthwith.
- 4.The first respondent shall pay costs of suit on a legal practitioner and client scale.

Muchirewesi & Zvenyika, applicant's legal practitioners
Matsikidze Attorney at Law, first respondent's legal practitioners
Zvavanoda Law Chambers, second and third respondent's legal practitioners