

CONSTANCE ZVAMAIDA MANDEWO
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 19 July 2012 and 30 April 2014

Opposed Matter

R. Matsika, for the applicant
B. Peresu, for the respondent

MAKONI J: The property at the centre of the dispute is Stand No 396A Dzivarasekwa Township (the property). A Mr Mazuru, who is now late, entered into an agreement of lease with the respondent with an option to purchase the property. He later sold his rights, title and interest in the property to a Mr Mukadiro. In April 2008, Mukadiro sold his rights title and interest in the property to the applicant. He had not yet taken title to the property. The applicant paid the purchase price in full to Mukadiro. The applicant and Mukadiro were advised to pay certain amounts to the respondent before cession could be effected. They both paid the demanded amounts to the respondent. On 6 May 2008, they both attended the respondent's offices at Rememberance Drive and they signed the Memorandum of Agreement of Assignment.

The respondent, through its Director of Housing, signed the Memorandum of Agreement of Assignment. On 2 July 2008, the Director wrote to the applicant confirming the assignment in her favour and attaching the signed Memorandum of Agreement of Assignment and directing the applicant to take the said document to the housing office in Budiro for purposes of change of ownership into her name. On 14 November 2008, the applicant received a letter from the Director advising her that the cession was cancelled and that the transaction was deemed to be null and void. The basis for the cancellation was that the agreement of lease between the respondent and the late Mr Maziva had been cancelled. The applicant then approached this court seeking to have the Memorandum of Agreement of Assignment declared valid and binding upon the respondent, that the decision by the respondent to cancel the cession be declared of no force or effect and that the applicant shall

remain vested with all rights which flow from the cession until such time as the cession is cancelled in terms of the law.

The applicant brings the application in terms of s 4 of the Administrative of Justice Act [*Cap 10:28*] (The Act). The applicant's basis is that the respondent was *functus officio* when it wrote the letter of withdrawal. When an authority decides that to withdraw its decision, the decision cannot thereby affect or abolish the rights which its previous act has already created. She further avers that she was not afforded the right to be heard. She further avers that a person who signs a contract thereby signifies his assent to the contents and if these later turn out not to be to his liking, he has no one to blame.

The respondent challenges the application on the basis that the cession is tainted with illegalities on the basis that at the time of the death of Maziva, he had not passed any rights to Mukadiro. Mukadiro therefore did not have rights to pass to the applicant. Secondly, the cession papers before the court are between Maziva and the applicant and yet there was no obligatory transfer between the applicant and Maziva. It further avers that the court should exercise its discretion to declare the cession a nullity as it is bad in law.

The respondent also further avers that the respondent was justified and had reasonable cause to not abide by the provision of s 3(2) of the Act.

Functus Officio

When an administrative official has made a decision which bears directly on an individual's interests, it is said the decision maker has discharged his office or is *functus officio*. See L Baxte, *Administrative Law* (1984) p 372. At p 375. The author states that if a public authority has made a decision which it afterwards discovered to be based upon an error of fact or law it will be nevertheless still be *functus officio* whether the error was within or beyond its discretionary powers. See also *Chirambasukwa v Ministry of Justice* 1998 (2) ZLR 567 (5) at 569 E-G where he stated:

“The issue to be determined is the stage which the decision maker becomes *functus officio*. In my view, he or she becomes *functus officio* when his or her decision has been officially communicated to the person affected. In my view, until the decision has been officially communicated to the person affected, the decision maker can vary, revoke or suspend it. However, when it is officially communicated to the person affected, the point of no return is reached.”

In *casu*, the decision by the respondent to cede the property to the applicant having been communicated to her by the respondent's Director of Housing in the letter dated 2 July 2008, a point of no return was reached. The time to vary, revoke or suspend the decision had

lapsed. The applicant had acquired rights. The respondent could not therefore unilaterally cancel the cession.

Right to be heard

It is common cause that the respondent is an administrative body and that its actions in respect of this matter were administrative acts.

The applicant seeks redress in terms of s 3(1) of the Act. The section provides

- “(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, reasonable 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 period, within a reasonable period after being requested to supply reasons by the person concerned.”

It is the applicant’s contention that she was never afforded an opportunity to make representations. The applicant had a legitimate expectation to be heard before a decision adversely affecting her vested rights was made. She relied on the authorities of *Kanonhuwa v Cotton Company of Zimbabwe* 1998 (1) ZLR 68(H) and *Taylor v Ministry of Education & Anor* 1996 (2) ZLR 772 (S). In Taylor’s case it has stated that the *audi* principle applies both where a person’s existing rights are adversely affected and where he has legitimate expectation that he will be heard before a decision is taken that affects some substantive benefit, advantage of privilege that he expects to acquire or retain and which it would be unfair to deprive him without first consulting with him.

The respondent’s contention is that it was justified and had reasonable cause of not abiding by s 3(2) of the Act. Section 3(3) provides exceptions where an administrative authority did not have to comply with the provisions of s 3(1) of the Act. Section 3 (3) (b) provides the grounds under which an administrative authority can depart from the provisions of s 3(1). Three reasons were advanced by the respondent to justify its departure from the provisions of s 3(2). The first one was that the transaction, that is the cession, was a legal nullity as the applicant and Mukandiro had no authority to represent the estate of Mazuva.

Secondly, Mukandiro did not have any rights at the time of the cession. No Agreement of Sale was provided. Thirdly, there is no proof that the merx was paid by the applicant to the respondent. The respondent's offer was therefore induced by a fraudulent misrepresentation. It is a nullity and the court cannot perpetuate a fraudulent transaction.

Section 3(3) (b) provides:

“An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if

(a)

(b) The departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters including:-

- (i) the objects of the applicable enactment or rule of common law;
- (ii) the likely effect of its action;
- (iii) the urgency of the matter or the urgency of acting there on;
- (iv) the need to promote efficient administration and good governance
- (v) the need to promote the public interest

The position adopted by the respondent appears to show that it is not disputing that it did not comply with the provision of s 3(1). It is its position that the departure was reasonable and justifiable in the circumstances as outlined above.

As was correctly pointed out by Mrs Matsika, in her reply, the issue that there was no Agreement of Sale between the late Maziva and Mukadiro was being raised for the first time in the submissions. There is no such averment in the respondent's opposing papers. The position is that the respondent's letter wherein they advised the applicant to take ownership refers to a three pronged cession. The reference to the letter reads:

“Stand No 396/1 Dzvivarasekwa Township Estate late D. Maziva to C.T. Mukadiro to C.Z. Mandewo.”

It is clear from the above that the respondent was aware of the sequence of the cession. From the papers, the respondent has not been able to establish that there was any misrepresentation of facts from the applicant. The applicant was accompanied by Mukandiro. This confirmed by Mukadiro is the supporting affidavit that he deposed to.

As regards the issue of payment, Mukadiro also confirmed that he paid the purchase price to the respondent. The applicant was also made to make some payment in order for the cession to be effected which she did. She misplaced the receipt. My view is that even if the

applicant had not paid the purchase price, it does not constitute circumstances warranting a departure from the provisions of s 3(1) of the Act.

Once a court makes a finding that an administrative authority failed to comply with the provision of s 3(1) of the Act it will grant relief in terms of s 4 of the Act. Section 4(2) provides *inter alia* for the confirmation or setting aside of the decision concerned. My view is that the decision be set aside in view of the fact that by the time the decision was made, the respondent was *functus officio* and that the respondent, as an administrative authority, was supposed to comply with the provisions of s 3(1) of the Act.

In view of the above, I will make the following order :

1. The Memorandum of Agreement of Assignment which was issued by the respondent in favour of the applicant on the 7th July 2008 be and is hereby declared to be valid and binding on the Respondent.
2. The decision by the respondent to cancel the cession of Stand 396A Dzivarasekwa Township to the applicant be and is hereby declared to be of no force or effect.
3. The applicant shall remain vested with all the rights which flow from the cession until such a time as the cession is cancelled in terms of the law.
4. The respondent shall pay costs of suit.

Wintertons, applicant's legal practitioners
Honey & Blanckenberg, respondent's legal practitioners