CHIRATIDZO LORRAINE JEYACHEYA
(In her capacity as the Executrix Dative of the
Estate Late EUNICE JEYACHEYA)

Versus

CITY OF KWEKWE

And

MINISTER OF LOCAL GOVERNMENT,
PUBLIC WORKS & NATIONAL HOUSING N.O.

And

REGISTRAR OF DEEDS N.O.

And

THE DEPUTY SHERIFF OF THE HIGH COURT
OF ZIMBABWE N.O.

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 6 AND 16 JUNE 2022

Opposed Application

Advocate S. Siziba for the applicant
A. Mutatu for the 1st respondent
T. *E. Kamema,* for the 2nd – 4th respondents

KABASA J: This application was filed on 1st September 2020 by Eunice Jeyacheya. Eunice subsequently died on 1st August 2021 as per the death certificate filed of record. Chiratidzo Lorraine Jeyacheya was then appointed Executrix Dative as per Letters of Administration also filed of record and in that capacity sought to be substituted as the applicant and was so substituted in terms of Rule 32 (9) of SI 202/2021.

The applicant seeks the following relief:

"1. The 1st respondent be and is hereby ordered to comply with the 2nd respondent's directive issued under Local Authorities Circular Minute No. 1 of 2015.
2. The 1st respondent be and is hereby ordered to take all the necessary steps to pass transfer of the property being house number 15 Westminster Avenue, Fitchlea, Kwekwe into the applicant's name failing which within thirty (30)

days of service of the order upon them 4th respondent be and is hereby authorized, directed and empowered to take all the necessary steps, sign all transfer documents on behalf of the 1st respondent.

3. 3rd respondent be and is hereby ordered to do all that is necessary to ensure that the said property is transferred into the name of the applicant.
4. The 1st respondent be and is hereby ordered to pay applicant's costs of suit."

This relief is being sought premised on the following background:

Eunice Jeyacheya was employed by the 1st respondent in January 1981 and allocated the house in question where she lived with her family. She retired from the 1st respondent employ in 2016 and continued residing at the premises. In 2018 she became aware of a circular issued by the 2nd respondent, which circular forms the basis of her claim. I propose to reproduce the contents hereunder:

"Local Authorities Circular Minute No. 1 of 2015

All Town Clerks/Secretaries
All Provincial Administrators

Subject: Title Deeds for House 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 the 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.

It has been noted that as of recent, some local authorities have shown reluctant *(sic)* to implement the long standing policy. Therefore, in terms of section 313 of the Urban Councils Act (Chapter 29:15), the Honourable 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. Council may consider converting other housing schemes into house 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."

The applicant considered herself a genuine and deserving tenant who therefore was supposed to benefit from this ministerial directive, giving rise to this application.

The 1st respondent opposed the application whilst the 2nd – 4th respondents did not file any papers and chose to abide by the decision of the court.

In opposing the application the 1st respondent took a point *in limine*, the import of it being that the relief sought is incompetent as the applicant is seeking transfer of a property she did not purchase. The terms of the agreement bestowing such right on the applicant are not clear and so the applicant has no legal basis to seek transfer of a house which belongs to the 1st respondent, so argued the 1st respondent.

At the hearing of the application I asked the parties to address me on both the preliminary point and on the merits so that whatever decision I made regarding the point *in limine,* it would not result in the parties coming back to argue on the merits.

Advocate Siziba's contention was that the point *in limine* was not properly taken because the applicant predicated her cause of action on the ministerial directive and not on a contract between her and the 1st respondent. In any event the point *in limine* delves into the very issue this court is called upon to adjudicate and so effectively invites the court to go into the merits.

Advocate Siziba's argument is sound. The applicant's cause of action is predicated on the ministerial directive and so the court cannot possibly delve into issues of whether there was a contract of sale, the terms thereof and the purchase price. The issue of whether she should get title to the property is what the matter is all about and it is therefore not an issue to be taken as a point *in limine*. The point *in limine* invites the court to go into the merits.

The point *in limine* was therefore not properly taken and is accordingly dismissed.

As regards the merits, *Advocate Siziba's* argument was that the applicant was a tenant in a Council property and had been such for over 20 years as at the time the ministerial directive was issued. That directive did not differentiate between those whose tenancy was by virtue of being ordinary citizens residing in Council houses or such tenancy arising out of employment and so an employment benefit.

The applicant did not own property elsewhere and following the ministerial directive, the 1st respondent did not make any representations to the Minister in terms of section 313 (2) of the Urban Councils Act, Chapter 29:15. The directive having been couched in peremptory terms, Council had to comply as s313 (3) of the same Act elevated the directive to a binding legislative requirement which the 1st respondent had to comply with.

Advocate Siziba urged the court to depart from an earlier decision of this court in *Maguma* v *City of Kwekwe and 2 Ors* HB-11-22 where the court held that there was no privity of contract between the applicant in that case and the Minister as the directive was by the Minister to Councils and the applicant was not a party to that. This court in the *Maguma* case also held that since Council had not been afforded an opportunity to make representations regarding the directive, such directive was therefore not binding on it. In urging the court to hold a different view, counsel submitted that section 313 (2) of the Act accorded the 1st respondent an opportunity to respond and the 1st respondent must look to s313 (2) and take up that invitation to respond if so inclined. Such response is therefore as provided by statute and not a matter of evidence.

The court in the *Maguma* case *(supra)* cited the decision in *Community Water Alliance Trust & Another* v *City of Harare & Anor* HH-194/20 where MAFUSIRE J had this to say;

> "Plainly s313 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 s313 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, the 1st respondent acknowledged seeing the circular number 1 of 2015 and equally acknowledged complying with it. *Mr Mutatu* for the 1st respondent, in my view, correctly abandoned the argument to the effect that there was no evidence adduced on whether the 1st respondent was given an opportunity to make submissions.

Section 313 of the Act provides that:

> "(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)."

I agree with MAFUSIRE J's observation that the provisions of s313 must be read as a whole and not disjunctively.

What this means therefore is that once the ministerial circular/directive was issued and communicated in writing to council, council would look to s313(2) if it was inclined to make any representations to the Minister as envisaged by s313 (2). Equally, the reference to the further period, should council fail to adhere to the 30 day period, entails overtures by council to the Minister again in light of s313(2) and the Minister would then allow a further period as sought by council.

I am therefore in agreement with *Advocate Siziba* that the opportunity to make any representations following the issuance of the directive which s313 (3) rendered binding on council is anchored in s313 (2) and it is to that provision that the 1st respondent looks not an invite by the Minister outside this statutory provision.

The issue however does not end there. *Mr Mutatu* argued that 1st respondent had the discretion to determine who was a genuine and deserving tenant. Paragraph 3 of the ministerial directive is not qualified. The 1st respondent considered the circular *in toto*, it allowed local authorities at their discretion, to retain a certain percentage to be maintained and managed as institutional or rental houses, depending on the housing units available on stock.

There was nothing to controvert the 1st respondent's assertion, as articulated in the opposing affidavit deposed to by the Acting Town Clerk that the 1st respondent complied with the directive and exercised the discretion bestowed on it in the ministerial directive in disqualifying the applicant as a genuine and deserving tenant. The reasoning being that applicant's tenancy was by virtue of an employment benefit, which benefit was to be extended to the applicant's successor upon her retirement. Council was therefore not able to dispose of all its houses and that was in line with the directive which gave council the discretion to retain a certain percentage to be maintained and managed as institutional or rental houses depending on the housing units available on stock.

There is nothing on record to show that the 1st respondent did not comply with the directive or that it only retained a percentage for the purposes alluded to in the ministerial directive. *Advocate Siziba* referred this court to the doctrine in *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52 (S) a case which involved a decision made by the Minister and which the respondent had refused to comply with. It is important to look at the facts of this case. The appellant company had applied to the Board for a licence to buy 'A' class tobacco at the auction. The Board declined to issue the licence on the basis that this would result in too many buyers for the efficient and orderly marketing of tobacco. The appellant appealed to the Minister in terms of the Tobacco Marketing and Levy Act (Chapter 18:20) and the Minister remitted the matter to the Board for it to reconsider. The Board maintained its earlier decision whereupon the Minister directed, in terms of the Act, that the appellant be issued with a licence.

The Board declined to implement the Minister's directive forcing the appellant to seek a mandamus from the High Court. It sought an order compelling the Board to issue the licence in terms of the directive from the minister. The High Court dismissed the application on, *inter alia*, the fact that the Board was better placed to decide on who to issue a licence and the Minister had usurped the Board's powers.

On appeal GUBBAY CJ had this to say:

> "The alternative basis upon which the learned judge dismissed the application may be disposed of shortly. It was not open to him to purport to review the decision of the Minister in directing the Board to issue the buyer's licence. The Board had not sought to bring that decision on review and so the Minister was not before the court. Moreover, the criticism that the Minister had substituted his discretion for that of the Board was unjustified."

Turning to the facts *in casu*, I am not persuaded by *Advocate Siziba's* argument that the ministerial directive only gave the history in paragraph 1 and such should not be read with the directive in paragraph 3 thereof. The Minister's directive was in pursuance of the policy position which saw Government taking the position that tenants in Council houses must be allowed to own them. Councils had been allowed to retain a percentage of the houses depending on what they had at their disposal. The 1st respondent's argument is not that the directive sought to usurp its powers. Equally this court is not reviewing the ministerial directive. It is a directive that is binding and to be complied with. However, the applicant *in*

casu did not specifically engage the Minister with a view to ensure the 1st respondent's decision to retain a percentage of the houses did not leave her out as a beneficiary. In other words the decision to include the house the applicant was occupying as one of those retained by Council was not appealed against to the Minister seeking the removal of that house from the pool of the retained houses. Sight must not be lost of the Acting Town Clerk's assertion that Council complied with the directive at the time such was given and the first paragraph in the 2015 directive by the Minister must not be looked at in isolation or as a mere background divorced to the directive as argued by *Advocate Siziba*

The 1st respondent was given the leeway to exercise a discretion which was not challenged and the directive by the Minister can therefore not be interpreted to mean the applicant is to benefit notwithstanding the discretion 1st respondent exercised in holding that she was not a genuine and deserving tenant and that the house in question was part of those houses retained for the purposes referred to in the Minister's directive.

The circular in question was directed to all local authorities and not the 1st respondent in particular. The directive to give title to genuine and deserving tenants did not particularly refer to the applicant.

It therefore cannot be said the directive is peremptory and the 1st respondent must comply in so far as the applicant's case is concerned. The contents of Circular number 1 of 2015 cannot be read disjunctively as argued by *Advocate Siziba*. The directive was not for the specific purpose of addressing the applicant's issue. It also did not specifically exclude council employees who happened to have been in council houses for over 20 years from having such houses forming part of the ones to be retained as institutional houses. The 1st respondent's discretion was therefore not fettered with regards to the houses that were to be in that percentage council was allowed to retain.

The reference to the requirements for a mandamus must be looked at in light of the particular circumstances of this case. The applicant can only talk of a clear or definite right, an injury actually committed and absence of a similar protection if she could show that the 1st respondent had no discretion as to who to regard as a genuine and deserving tenant and equally that it had no discretion to retain a percentage of the houses for institutional and rental purposes.

In the *Maguma* case (*supra)* DUBE-BANDA J had this to say:

> "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 of 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."

These remarks are apposite and apply with equal force *in casu*. The position would have been different had it been shown that the Minister's directive specifically defined who a genuine and deserving tenant is, besides the years of tenancy, and equally which of the houses were to be retained by council with a specific criteria which criteria the applicant could argue covered her situation.

There was reference to other council employees who benefited as a result of the directive but the 1st respondent contended that there has been no suggestion or evidence that these tenants' circumstances mirror the applicant's. One of the mentioned individuals, the former Town Clerk, was said to have bought the house as part of his retirement package and not as a result of the ministerial directive.

This court is therefore unable to hold that the applicant was discriminated against or that the 1st respondent failed to act lawfully, reasonably or fairly. There is no basis to hold that the 1st respondent showed disfavor to the applicant or that its decision is so unreasonable as to warrant interference by this court.

This court cannot impose a contract on the 1st respondent by ordering it to offer the house in question to the applicant and to agree on a purchase price for it. Contracts are entered into by consenting parties and courts come in when there is need to enforce such contracts or to interpret the terms thereof.

With that said, has the applicant made a case for the relief she seeks? I would say the answer is in the negative.

The 1st respondent asked for punitive costs. I find no justification to censure the applicant. A case for punitive costs has consequently not been made.

In the result, I make the following order:

1. The application be and is hereby dismissed.
2. The applicant shall pay costs at the ordinary scale.

Advocate Siziba Chambers, c/o Phundu & Company, applicant's legal practitioners
Mutatu & Partners c/o Mutatu, Masamvu & Da Silver-Gustavo Law Chambers, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd – 4th respondents' legal practitioners