F. MUTATA
and
P. MANDIZVIDZA
and
NYASHA MASAWI
and
MVURA KM MHINDU
and
THOKO CHIKAMHI
and
G. MUCHADEYI
and
C. CHIRAIRO
and
D. CHAKADENGA
and
M. DINIDZA
and
S. KACHINGWE
and
S. NTABENI
and
T. USHE
and
T. MURINDA
versus
THE MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND URBAN DEVELOPMENT

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND NDEWERE JJ
HARARE, 29 March 2016 and 23 March 2017

Civil appeal

B. Chikowero, for appellants
H. Magadure, for respondent

CHITAKUNYE J: This is an appeal against the judgment of the magistrate sitting at Harare in which he granted an order for the eviction of the appellants from certain premises owned by the government.

The appellants are retrenched or retired civil servants who occupied houses situate in the Messengers' Camp in Highfields, Harare.

The respondent is the Minister responsible for the Ministry that leased houses in question to the appellants.

During the early years of the appellants' occupation of the houses, the respondent caused them to sign lease agreements. As time progressed the appellants continued occupying the houses without signed lease agreements. They were now statutory tenants.

As the appellants were no longer civil servants, the respondent later wrote letters demanding that the appellants vacate the houses they were occupying. The appellants resisted the eviction and did not comply with notices of eviction that were subsequently issued out by the respondent.

In 2006, the respondent issued summons for the eviction of each of the appellants and whoever was claiming occupation of the houses through them.

The appellants' plea was to the effect that they had been promised that the houses would be sold to them and that they were thus willing to purchase the houses. In the alternative, the defendants contended that they had been promised alternative suitable accommodation in the event of being evicted from their current houses. They thus demanded to either be sold the houses or to be provided with alternative suitable accommodation.

The appellants' defence in the court *a quo* was basically that they had a legitimate expectation that the houses will be sold to them as sitting tenants or suitable alternative accommodation will be provided by the government in terms of what they said was government policy.

The respondent disputed that hence the matter was referred to trial. At the time of trial in 2007 the appellants had lived in the houses for periods ranging from 10 to 19 years.

The issues for determination were basically on the respondent's right to evict the appellants and whether the appellants had any legitimate expectation that the houses will be sold to them or alternatively that they should be provided with other suitable accommodation. The trial magistrate ruled that the defence of legitimate expectation could not avail the appellants as such a defence only applied to procedural rights such as the right to be heard and not on substantive rights such as that the respondent be ordered to sell the houses to the appellants or to provide them with suitable alternative accommodation.

The magistrate's decision was premised on the fact that the appellants had been insisting that respondent should sell the houses to them or provide them with alternative accommodation to buy failure of which they would not vacate the houses.

In as far as the trial magistrate understood the appellants to be resisting eviction on substantive rights and not procedural rights, he cannot be faulted. Besides the pleadings that have already been referred to, the appellants' witness, Nyasha Masawi, confirmed as much. Under cross examination the witness confirmed that upon receiving letters to vacate they went and saw the Minister seeking to be provided alternative accommodation. Upon the Minister's verbal promise to organise alternative accommodation for them, they left. He concluded by saying that: "we expect to be given stands to move to."

In his closing submissions, in the court a quo, appellants' counsel reiterated the appellants' stance that the legitimate expectation the appellants were expecting was for these houses or alternative accommodation to be sold to the appellants. He thus asked court to order the disposal of the houses to the appellants. In written submissions made at the court a quo's request, counsel repeated the same when he said that: "the delay in evicting the defendants after the expiry of the leases and the promises of disposal cemented defendants' legitimate expectation of disposal of the houses to them as sitting tenants."

Counsel further argued that: "it is the duty of the Ministry of local government, public works and national housing to house the citizens of Zimbabwe rather than evict them like what they want to do in this case. if they are not prepared to dispose of these houses to the defendants it is only just and equitable to have plaintiff hear the side of defendants story in a hearing and map the way forward rather than evict them. They should then afford the defendants the procedural right of legitimate expectation that is available in our law." p26

It was clear that the rights the appellants were craving for pertained to substantive and not to procedural rights. They wanted to be sold the houses. The trial magistrate having found that the defence of legitimate expectation is available only in instances of procedural rights concluded that since the appellants were seeking substantive rights, their defence was untenable.

The appellants' grounds of appeal were couched as follows:

1. The learned magistrate in the court a quo erred by holding that courts cannot interfere in policy matters holding that they are solely for the government, failing to take into account the basic and rational for administrative law is to exert legal control over the way in which administrative authorities exercise their functions in order to ensure that

these authorities do not exceed or abuse their powers. The law promotes effective use of administrative power at the same time providing protection against misuse of power.

2. The learned magistrate in the court *a quo* erred by holding that long stay in government house does not impute ownership failing to take into account the circumstances that led to the long stay. Due consideration was not given to the undisputed fact that the long stay was caused by the respondent's assurances. The appellants have been staying in the houses for a period ranging between 10- 20 years, was a result of Ministerial and political promises that they were in the process of disposing the houses to the appellants.
3. The learned magistrate in the court *a quo* erred by overlooking the extent to which respondents had gone in promising appellants that they were going to buy the houses they were occupying. Respondents had up to present day registered the appellants' names with City of Harare for the payment of rates, water and electricity bills. According to appellants such actions legitimatized their expectations that the houses were going to be sold to them.
4. The learned magistrate in the court *a quo* erred clearly misdirected himself, thus his analysis of the matter can successfully be challenged.

Before determining whether the magistrate in the court *a quo* erred or not, it is pertinent to appreciate the doctrine of legitimate expectation.

In *Metsola* v *Chairman, Public Service Commission & Another* 1989(3) ZLR 147(SC) at 155F-H, GUBBAY JA (as he then was) had this to say on legitimate expectation:

> "Mr. Gillespie laid much emphasis on the legitimate expectation test introduced by Lord DENNING MR in *Schmidt & Anor* v *Secretary of State for Home Affairs* [1969] 1 ALL ER 904(CA)at 909C and upheld by the Privy Council in *Attorney General of Hong Kong* v *N g Yen Shiu* [1983] 2 ALL ER 346(PC) at 350 a-j. Yet this catch-phrase is no more than a manifestation of the duty to act fairly. It is clearly connected with the "right to be heard". It does not constitute an additional ground for the application of the *audi alteram partem* principle. In essence it means no more than that the decision-maker must act fairly and apply the principles of natural justice before reaching any decision that will adversely affect *the legitimate expectations of the aggrieved party."*

In *Matake & 17 others* v *Ministry of Local Government and National Housing & 2 others* 2007(2) ZLR 96, the basic requirements of this defence were summarised as including the following:

1. The expectation underlying the expectation must be clear, unambiguous and devoid of relevant qualification.

2. The expectation must be reasonable.
3. The representation must have been induced by the decision-maker.
4. The representation must be one which it was competent and lawful for the decision maker to make, without which reliance cannot be legitimate.

The doctrine of legitimate expectation is really a call for fairness and for the right to be heard before a decision adverse to the expectation of an affected party is made.

In applying the above exposition to the case at hand it is apparent that in raising legitimate expectation the appellants were not seeking a procedural right to be heard but that the houses be sold to them as per their expectation. The pleadings and evidence in court confirm as much. It is in that light that the trial magistrate alluded to the fact that legitimate expectation is for procedural and not substantive rights.

In his heads of arguments counsel for the appellants made the following concessions:

1. That the appellants cannot argue that respondent be ordered by this court to sell the houses to them, and seek to defend their eviction on that basis.

2. That the respondent never sold the houses in question to the appellants.

3. That the respondent did not offer the houses to the appellants for sale with the result that all the appellants had to do was to accept such offer for contracts of sale to be concluded.

The above concessions show a change in stance by the appellants. It is this change that counsel now introduced as the basis for the appeal. In paragraph 8 of the heads of argument counsel stated that:

> "The argument is not that respondent must either have sold the houses to appellants, or provided them with alternative accommodation before instituting eviction proceedings. Instead , the contention is this: that having raised their legitimate expectations to purchase the houses and alternatively, to provide them with alternative accommodation in the form of Stands to purchase, respondent is bound by the principle of legitimate expectation to hear the appellants before instituting eviction proceedings against them."

This argument is not in tandem with what transpired in the court *a quo*. In the court a quo the appellants defence was not on the procedural right to be heard before summons were issued, but to have the respondent ordered to sell the houses or to provide them alternative accommodation.

As already alluded to above the defence of legitimate expectations applies to procedural right, such as the right to be heard before an adverse decision is made against a

party. It is not available in a situation such as this where the appellants were in fact contending that court should order respondent to sell the houses to them.

Counsel having appreciated the limits of the defence of legitimate expectation correctly made the above concessions.

In respect of the right to be heard, it was clear that the policy that the appellants were relying on was a general policy that the government had adopted.

The net effect of the concession is that the question to be ascertained is whether there was a change in the alleged government policy, if so were the appellants entitled to be heard before being asked to vacate the houses.

As already alluded to the policy to sell to sitting tenants was a general policy. That general policy was addressed to the respondent's provincial administrators. Part of the letter dated 18 December 2000 addressed to the provincial administrators on the subject read as follows:

> "RE: DISPOSAL OF POOL AND RESERVED HOUSES STILL ON RENTAL
> This Ministry is, in terms of the Millenium Economic Recovery Programme required to among other things:
> a) Review rentals for houses to market levels; and
> b) Dispose of some of the pool and reserved houses.
> You are required to consult with the other heads of Government Ministries in your respective provinces to determine the number of pool and reserved houses to be disposed of without disrupting government operations. The age of the houses should be used as one of the criteria of selecting the houses to be disposed of.
> You are also required to give preference to houses in Messengers' Camps situated in urban centres as these were left out in the 1994 disposal."

The above was a request for assessment of houses to be disposed of. It was not an offer to sell all the houses to sitting tenants.

Even after the appellants had expressed desire to buy the houses, they were not personally offered the houses for sale. The general policy was changed before the appellants had been offered the houses. When the general policy was changed the appellants were made aware of this by letters addressed to them and advising them to vacate. It is these letters that prompted them to seek audience with the Minister of Local Government. The appellants confirmed holding such a meeting in which it was made clear to them that the houses would not be sold to them as government policy had changed. It was then that they asked for alternative accommodation and the Minister made a verbal promise to organise alternative accommodation. Clearly as at that stage they had been given a hearing and had accepted that the policy had changed and they were no longer going to be offered the houses for sale.

What they remained with at the most was the verbal promise by the Minister to organize alternative accommodation for them. The general Policy had not provided for alternative accommodation.

The issue of the change of general policy by government is something that court cannot easily interfere with. It is in this light that the courts have said that questions of economic and social policy are matters within the domain of the executive discretion and the courts should exercise great restrain in delving into the details of policy instruments of directing the precise manner of their implementation unless court is convinced that the assessment in question is manifestly without merit. (See *Minister of lands and Others* v *Commercial Farmers Union* 2001 (2) ZLR 457at 475).

The same could be said regarding changes to general policies by government.

What court will require is that those affected by changes in general policy be afforded a hearing before such is implemented. *In casu*, the appellants upon receiving letters indicating a change of the general policy approached the responsible Minister and other officers within the Ministry. They were afforded a hearing. The suggestion that they should have been heard before the general policy was changed would not be realistic. This having been a general policy, to expect the Ministry to have invited each and every person to be affected to input before the change would be unrealistic. What was crucial in my view is that the change was communicated and those affected were given audience.

In casu, the court *a quo* alluded to the change in policy that had occurred such that whilst at one time the appellants were made to expect that the houses will be sold to them, such a policy was changed before the houses had been offered to the appellants.

The appellants' right in the circumstances was to be afforded a hearing before they were evicted. They were indeed heard. It was only after the meetings with the Ministers and other Ministry officials in the period 2002 to 2005 that summons for their eviction were issued out in 2006.

In the circumstances of this case I am of the view that the decision by the court a quo cannot be faulted given the appellants' defence before that court. Even on the procedural right to be heard it cannot be said the appellant were not heard before summons for eviction were issued. The appeal cannot thus succeed.

Accordingly it is hereby ordered that the appeal be and is hereby dismissed with costs.

NDEWERE J. I concur ……

Gutu & Chikowero, appellants' legal practitioners
Civil Division of the Attorney General's office, respondent's legal practitioners