

OLIVIA TAFADZWA CHINOUYA

Versus

AROSUME PROPERTY DEVELOPMENT (PVT) LTD

And

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

**IN THE HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE 20 SEPT. & 10 NOV. 2022.**

Mr. K. Siyeba , for the Applicant.
Mr. S. M Bwanya, for the 1st Respondent.
Ms. Magunde, for the 2nd Respondent.

NDLOVU J: This is an Application for a Declaratory Order in terms of S 14 of the High Court Act, Chapter 7:06 in which the Applicant is seeking the following relief:

“IT BE AND IS HEREBY ORDERED THAT:

1. *The Application be and is hereby granted.*
2. *The Applicant be and is hereby held to have paid the full purchase price for Stand Number 288 Carrick Creagh Township of Carrick Creagh of section 4 of Borrowdale Estate registered under the deed number 3434/2012 in full and final settlement of the purchase price.*
3. *The 1st Respondent be and is hereby held to have no right to claim development costs from the Applicant in terms of the tripartite agreement between the 1st & 2nd Respondents together with Sally Mugabe Housing cooperative.*
4. *The 1st Respondent be and is hereby held to have the right to only offset any outstanding development fees through the 50 stands granted to it through the tripartite agreement between itself & the 2nd respondent together with Sally Mugabe Housing cooperative.*
5. *The Applicant be and is hereby held to not have any obligation to pay development fees to the 1st Respondent.*
 - 5.1 *The Applicant be and is hereby held to have the right to elect to settle outstanding development fees claimed by the 1st Respondent under case number HC*

8146/15 at the rate of one is to one with the Zimbabwean dollar in full and final settlement of the claim.

6. *The 1st Respondent to pay costs of suit on a legal practitioner and client scale.”*

BACKGROUND FACTS

The parties have been in court before over this matter. *HC 8146/15 and HC 6752/18* refer. *HC8146/15* the matter went as far as the Pre-Trial Conference stage way back in November 2017 and *HC 6752/18* was an application by the 1st Respondent for registration of caveat on the property in question. The facts of this matter are a common cause.

In 2008, the Applicant entered into a Lease to Purchase agreement with the then Minister of Local Government, Public Works and National Housing then styled Ministry of Local Government, Rural and Urban Development in which she was to lease to purchase a property commonly known as Stand number 288 Carrick Creagh – Borrowdale, Harare. She was later given the offer to purchase the land in question outright, she did and paid US\$31 310.00 as the purchase price. Sometime later she was approached by the 1st Respondent, the appointed Developer of the Carrick Creagh Estate who informed her that she was supposed to contribute towards the development costs of the property. She complied by paying US\$1 000.00 per month for several months until she decided to stop paying. In 2012, she got Title Deeds for the property in her name.

In August 2015, the 1st Respondent issued her with a summons claiming US178 806.88 in respect of outstanding development cost under case number *HC 8146/15*. The claim was based on the terms of a Tripartite Agreement entered into by and between the 1st & 2nd Respondents and a co-operative known as Sally Mugabe Housing Co-Operative in 2007.

On 5 April 2022, the 2nd Respondent wrote to the Applicant and advised her of his intention to cancel the Title Deed she is holding in respect of the property in question. The basis for the 2nd Respondent’s intention was stated in the letter as follows;

“... Government has concluded that when the stand was registered in your name on 25 July 2012, this was done, firstly, in error, and secondly, it was not done in accordance with the law.”

The 2nd Respondent went on to explain as follows –

- (a) At the material time the value of the stand was US\$31 911.00 but the applicant paid US\$31 310.00 and got transferred without fully paying for it.*
- (b) The Power of Attorney to pass transfer was signed fraudulently by a public officer in that it was done in pursuit of an unlawful instruction.*
- (c) That the Applicant had neglected or refused to pay US\$1 255 150.00 being her pro-rated share of the cost of development to 1st Respondent.*
- (d) She was not a member of the Sally Mugabe Housing Co-operative nor was she one of their recommended nominees to benefit from the project.*

The Applicant was given 14 days within which to make representation to the 2nd Respondent. Her lawyers wrote to the 2nd Respondent protesting his intention to cancel the Title Deed. On 14 June 2022, the Applicant, 1st & 2nd Respondents held a round table meeting whereat the 2nd Respondent's officials only insisted that she had underpaid the purchase price by US\$610.00 (in fact the correct figure was US\$601.00) and demanded the same to be paid by her and she complied and paid on 17 June 2022. However, the controversy between her and the 1st Respondent remained unresolved at that meeting. It was agreed that they would resolve that issue between themselves and revert to the 2nd Respondent and update him.

On 24 June 2022, the Applicant and the 1st Respondent held a meeting whereat the 1st Respondent insisted that the Applicant pay US\$1 255 150.00 The Applicant did not budge and said that was not due and payable by her, and that she had paid previously in error. That no contract existed between her and the 1st Respondent for development costs. She reminded the 1st Respondent's people that it had sued her for US\$178 806.88 in 2015 and said if she were to pay, she would be willing to pay that US\$178 806.88 at a rate of 1:1 with the Zimbabwean dollar. The parties stuck to their guns and there was an impasse. The Applicant then filed this application.

POINT IN LIMINE.

The Applicant took a point *in limine* that the 1st Respondent filed its Notice of Opposition out of time. I dismissed the point taken, at the hearing, and proceeded to hear the matter on its merits. The reasons for the dismissal are that the 1st Respondent filed its opposition on time but failed the compliance check in that the document was in the landscape position instead of the portrait position. While still struggling with that compliance issue, the 1st Respondent emailed the Applicant a copy of its opposition and advised of the challenges it was

facing in filing the opposition. By the time the 1st Respondent successfully filed, it was out of time. I believe the 1st Respondent did what a reasonable litigant would do. The Integrated Electronic Case Management System (IECMS) is in its infancy and such challenges as experienced by the 1st Respondent are not uncommon in the circumstances. What matters most is what the litigant does when meeting a challenge of such a nature.

THE APPLICANT'S CASE.

The Applicant says she approached this Court through this application so that the Court determines her obligations, if any, to the 1st Respondent, and to make sure that this matter is laid to rest once and for all. According to the Applicant;

1. She never contracted with the 1st Respondent.
2. She is not a party to Tripartite Agreement and therefore cannot be bound to it.
3. The 2nd Respondent with whom she contracted did not disclose to her the terms of the Tripartite Agreement.
4. She is a beneficiary on the 20% of the Stands reserved for the 2nd Respondent's Ministry and therefore is exempt from paying development fees, in terms of the Tripartite Agreement.
5. She is not a member of the Sally Mugabe Housing Co-Operative.
6. When she paid development fees previously, it was an error borne out of her not being properly informed leading her to capitulate under the 1st Respondent's erroneous demands.
7. The 1st Respondent must resort to the 50 Stands allocated to it as security against defaulters.

1st RESPONDENT'S CASE

The 1st Respondent has told the Court that the land in question is a subject of a Public-Private Partnership Tripartite Agreement entered into in June 2007. The Tripartite Agreement regulates the acquisition of Rights and Interests by the beneficiaries in that land. It sets out the rights and obligations of the parties to it, including those of the beneficiaries and the processes and procedures relating to the acquisition of those Rights and Interests. The dispute between the parties in this matter is that the Applicant circumvented the Tripartite Agreement provisions

because of her romantic relationship with a former senior Government official who corruptly ordered his subordinates at the time to issue the Applicant with a Lease to Purchase Agreement when the Applicant was not qualified to benefit from the scheme. The Applicant has failed to pay her pro-rated share of the development fees which she knows that she is obliged to pay. Her payment previously in 2012 bears testimony of her appreciation of the obligation on her to pay. Her receipt of title in 2012 was a result of a corrupt order issued to Ministry officials by their then boss because she was never entitled to get a Title Deed as she had not complied with the conditions precedent to that process.

The development fees have a tendency to escalate over time based on the nature of development or servicing that would have been done on the land, hence one would find that what he was levied in, say 2015 and was not paid, would be lower than what he is levied today simply because of the extra development that would have been done between 2015 and present day.

In this scheme, the development fees are paid by all the beneficiaries except those that benefited through the 20% Stands that are Government commonage, and the Government commonage is a matter of Government policy reserved for public officials or entities. The Applicant is not a public official and never was. In practice, a list of the Government commonage beneficiaries is compiled by the Ministry supervised by the 2nd Respondent and transmitted to the Developer (in this case the 1st Respondent). The Applicant's name was never on that list. At the time of filing this application, she had been told at a meeting held at The Ministry of Local Government and Public Works and National Housing of the fact that she was not a beneficiary through the 20% Government commonage and that she is not exempted from paying the development fees. She has not paid them in full and must fully pay the same.

2ND RESPONDENT'S CASE

The 2nd Respondent's case is that the Applicant was supposed to pay US\$31 911.00 as the purchase price (being the value of the land then) together with the development fees *before* the transfer of the property to her name. However, she only paid US\$31 310.00 and thereby left a balance. He was informed by the 1st Respondent that the Applicant had failed to pay the full development fees. He does not know how the Applicant managed to get a Title Deed in respect of the property in question before paying all the monies due. Upon realizing these anomalies regarding payments, the 2nd he gave the Applicant notice of his intention to cancel

the Title Deed in question in terms of section 18 of the Deeds Registries Act, ChapterHe further stated that the beneficiaries were advised that they were required to pay for the development of Stands to the 1st Respondent hence the Applicant had paid US\$1 000.00 monthly for several months. The Applicant was not part of the beneficiaries who were exempted from paying Development Fees, and she was advised of her obligations and should not feign ignorance of her obligations now and try to run away from them.

THE TRIPARTITE AGREEMENT

Central to the resolution of the dispute between the parties is the relevant provisions of the Tripartite Agreement. I have found the following Clauses pertinent.

“2.0 ***The Role of the Ministry.***

2.2 *The Ministry shall facilitate title survey and issuing of Title Deeds.*

2.3 *The Ministry shall provide 50 stands as security in case the beneficiaries default on payments to the Developer.*

3.0 ***The Role of the Developer.***

The Developer shall undertake to:

3.5 *Submit the list of paid-up beneficiaries to the Ministry for processing of the lease agreement.*

4.0 ***Beneficiary Obligations.***

4.2 *No beneficiary shall sign lease agreement until he/she pays the Developer for the cost of development....*

5.0 ***Condition of the Agreement.***

5.1 *The land shall remain under the ownership of the Ministry until such time it can be transferred to the beneficiaries.*

5.2 *The Developer shall recover development costs from the beneficiaries of the scheme.*

5.4 *Beneficiaries who do not meet the Developer's requirements shall not be allowed to sign lease agreements which will lead to issuing of title.*

5.5 *20% of the land shall be reserved for Government use.”*

RESOLUTION

It is pertinent to highlight the following aspects of this case.

- (a) The Applicant is not seeking to interdict anyone from doing anything.
- (b) Neither is the Applicant seeking a review of any conduct or decision by anyone.
- (c) The Applicant is not seeking a declaration of the validity or otherwise of the lease to purchase agreement, neither is she seeking a declaration of the validity or otherwise of the Tripartite Agreement.
- (d) The Applicant does not deny that as of now she has been told by the 2nd Respondent that she is not a beneficiary on the 20% Government commonage Stands, and that like the rest of the other beneficiaries she must pay towards the development costs.
- (e) She does not deny that she is not and has never been a public official at the relevant time.
- (f) The Applicant approbates and reprobates her obligation to pay toward the development costs.

The Applicant in her arguments has immensely dealt with the demand by the 2nd Respondent for the payment of US\$610.00 shortfall and how that impacts the contract of the lease to purchase entered into by and between her and the 2nd Respondent's predecessor about 14 years ago. The 2nd Respondent has not put in issue in these proceedings that the Applicant paid the total amount she actually paid, and neither has the Applicant alleged that he is threatening to do that. The 1st Respondent has in its arguments strongly argued the point that the 2nd Respondent is entitled to cancel the Title Deed that the Applicant is holding over the property because she allegedly got it without satisfying the procedures outlined in the Tripartite Agreement. The 2nd Respondent argued in a manner that indicated that it had not been brought to his attention that the Applicant has since paid the shortfall he alluded to in the notice of his intention to have the Title Deed canceled.

What is clear is that in terms of the Tripartite Agreement, the 1st Respondent is entitled to charge and recover from the beneficiaries the development costs except from those beneficiaries on the 20% Government commonage reserved stands for public officials and

entities. This Court has been told that regarding benefitting from the 20% of the stands reserved for the Ministry as Government commonage, it is the practice that the various Government Departments bid for land when such land is available under the 2nd Respondent's Ministry. A list of successful bids is compiled and forwarded to the developer. Those beneficiaries on that list are excluded in practice from paying development costs. It is common cause that the Applicant is not a public official and neither is she a member of the Sally Mugabe Housing Co-Operative. She was told that she was not qualified to be a beneficiary on the 20% Government commonage Stands by none other than the 2nd Respondent's Ministry officials. Her name never appeared on the list of successful bids by Government Departments.

It is clear therefore that the Applicant is not exempted from paying development fees to the 1st Respondent. The Applicant cannot seek to benefit from an agreement she clearly says does not bind her. To argue that because she has no contract with the 1st Respondent, is without merit on the facts of this matter. In any case, she paid for some time and chose to stop paying for reasons far from convincing. She is obliged to pay. She cannot be allowed to twist and turn.

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According to the Tripartite Agreement fully paying development costs to the developer is part of the key steps to obtaining a Title Deed in the scheme. The 1st Respondent has explained how development costs escalate over a period of time in direct relationship to the nature of the development that would have taken place up to the time of billing. I do not find that explanation to be unreasonable.

It is trite that a Declaratory Order is designed to clarify what before was uncertain or doubtful. It constitutes a declaration of rights between the parties to a dispute and clarifies the law, on a given set of facts. It is granted at the discretion of the Court exercised in relation to the particular circumstances of the case. Its purpose is not to declare a matter of fact like is being sought by the Applicant in this matter. I have already concluded that the Applicant is obliged to pay development costs charged by the 1st Respondent who has a right to claim them. It is not for this Court to prejudge a matter that is not before it. ***HC 8146/15*** is not before me.

In my view, the Applicant has not shown or established any existing, future, or contingent right entitling her to the relief she is seeking. This application stands to fail and it fails. It is therefore ordered as follows:

IT IS HEREBY ORDERED THAT:

The application be and is hereby dismissed with costs.

Bherebende Law Chambers, Applicant's Legal Practitioners.

Mutuso, Taruvinga & Mhiribidi, 1st Respondent's Legal Practitioners.

Civil Division of the Attorney General's Office, 2nd Respondent's Legal Practitioners.