

1. TYNWALD DEVELOPMENT ASSOCIATION-LOT 14
versus
LIFE MINISTRY ZIMBABWE
and
THE MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND URBAN
DEVELOPMENT

2. LIFE MINISTRY ZIMBABWE
versus
TYNWALD DEVELOPMENT ASSOCIATION- LOT 14
and
THE MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND URBAN
DEVELOPMENT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 25 January 2017

Opposed Application

T. Manjengwa, for the applicant
T. Mpofu, for the 1st respondent
J. Mumbengegwi, for the 2nd respondent

CHITAKUNYE J: The above two applications were dealt with together at the request of the parties as the issues involved arise from the same agreement and the parties are the same save for the fact that the applicant in the first matter is the first respondent in the second matter and the applicant in the second matter is the first respondent in the first matter.

The second respondent is the same in both applications.

In the first application the applicant seeks an order that:-

It is hereby declared that:-

1. The first respondent breached the parties' agreement by failing to complete the works regarding servicing of Tynwald- Lot 14 by 30 November 2010 as envisaged in the programme of works agreed upon by the parties.

2. The first respondent is not entitled to demand payment from the applicant and/or its members before completing the works regarding servicing of Tynwald Lot 14.
3. The respondents have by disposing of the 217 security stands breached the parties' agreement.
4. The respondents are obliged to acknowledge in writing each of the applicant's members' continuing interest in the respective stands allocated to them before demanding payment from them.
5. That if the first respondent has recovered an amount in excess of the cost of servicing of Tynwald Lot 14 from the sale of the 217 security stands it will be unjustly enriched in recovering further sums from applicant and/or its members individually.
6. The respondents shall pay the costs of these proceedings at a legal practitioner and client scale.

In the second application, the first respondent, who is the applicant, in that case, sought an order that:-

1. The first respondent's members are obliged to pay the infrastructure construction costs during the currency of the construction and must meet the reasonable charges raised by the applicant.
2. The first respondent's members shall pay the sum of US\$276 989-00.
3. Costs of suit shall be borne by the first respondent.

The second application is essentially a counter application and so the parties shall be referred to as in the main application for easy of reference.

Brief facts

Sometime in 1996, the government of Zimbabwe through the second respondent introduced a housing scheme titled "Start paying for your house scheme". Under this scheme persons were invited to make monthly contributions to the scheme. Some beneficiaries formed an association under the style Tynwald Development Association-Lot 14. Membership of this association comprised those people who had been allocated stands in Tynwald Lot 14 under the scheme. The monthly subscriptions were meant to fund the construction of residential accommodation for the members on various stands that they would have been allocated by the second respondent.

When the second respondent faced difficulties in fulfilling its obligations in the construction of roads and other infrastructure as provided by the scheme a new agreement was crafted which now included the first respondent as the developer.

In terms of this new agreement the obligations of each party to the tripartite agreement were spelt out, this is the agreement of 19 June 2008.

The two applications are premised on this agreement that the three parties, namely, Tynwald Development Association-Lot 14, Life Ministry Zimbabwe and the Minister of Local Government, Public Works and Urban Development entered into on 19 June 2008.

The applicant in HC 10642/14 alleged that in terms of the agreement the first respondent undertook, among other things, to raise finance from its financiers, prepare tender documents, bills of quantities and infrastructure designs and provide onsite infrastructure that is, roads and storm water drainage, water supply, and sewage reticulation to standards approved by the local authority and electricity 'reticulation' and ensure that the project is completed within the contract period or as per the project's program of works. In terms of clause 5.2 of the contract the first respondent would recover part of its development costs from the beneficiaries of the scheme and any difference thereof from the 217 stands set aside by the second respondent as security.

The applicant alleged that the first respondent failed to complete the project within the period stipulated in the program of works. The first respondent also failed to get sufficient finance from its financiers and sought an advance from the applicant to enable them to complete the balance of the outstanding work. The applicant advanced the first respondent a sum of US\$87,086-00. In spite of this assistance the first respondent failed to complete the project during the year 2011 when it was supposed to be completed.

The applicant further stated that the first respondent, with the tacit consent of the second respondent, then prematurely disposed of the 217 stands that had been provided as security by the second respondent. According to the applicant these stands were supposed to be disposed after the full cost of the project had been determined, a subsidy to the applicant was determined and, thereafter, if the applicant defaulted in payment then such amounts due were to be recovered from the 217 stands.

The applicant argued that the agreement of the 19 June 2008 was a novation of the original agreement between the applicant and the second respondent and so some of the terms of the earlier agreement must be read into this contract.

The first respondent, on the other hand, contended that it was not part to the original agreement between the applicant and the second respondent. As it was not privy to that agreement the terms of that agreement should not affect it. Instead, the only binding agreement between the parties is that of the 19 June 2008. According to that agreement the financing of the project included collecting payments from the applicant's members.

The first respondent was obliged to subsidise the development cost. The subsidy was to be at the first respondent's discretion and the security stands that were offered by the second respondent were to cushion the first respondent against any loss that may be visited upon the first respondent in the course of the project. These stands were not meant to indemnify the applicant from paying their dues. The first respondent further contended that there was never any agreement that the applicant would pay at the completion of the project.

The first respondent in essence was contending that the applicant was in breach of the agreement by not making payments as stipulated in the agreement and, instead, arguing that payment will only be due at the completion of the project.

On the disposal of some of the security stands, the first respondent contended that these were disposed to cushion the first respondent from the loss visited by the applicant who had been defaulting on its payment since the inception of the agreement. The sale of some of the stands enabled the first respondent to effect developments to the current state.

The second respondent's attitude on the issue of the Stands was that the security stands were given to the developer as a subsidy of the development fees and not any form of security. The developer would sell the stands to recover the subsidy part and the remainder would be paid by the beneficiaries of the stands.

The second respondent thus viewed the timing of the sale of the stands as not material but the complete development and servicing of the area in terms of the partnership agreement.

The major issues in respect of case No. HC10642/14 were as follows:-

1. Whether the first respondent breached the agreement; and
2. Whether the applicant is obligated to pay the first respondent.

In respect of the second application, case No. HC 4954/15, the main issues were as follows:-

1. Whether Tynwald association as the first respondent is liable to pay the development costs during the currency of the development process; and

2. What these costs are.

In their submissions, the parties agreed that the major dispute is on the interpretation of the clauses of the agreement of 19 June 2008.

From the submissions made the following are common cause:-

- The agreement involving the three parties was entered into on 19 June 2008.
- The second respondent surrendered 217 Stands to the 1st respondent;
- The first respondent has done some work in terms of the agreement as confirmed by the Partial certificate of compliance issued by the City of Harare
- The applicant has not been making payments to the first respondent serve for a sum of USD87 969-00
- The first respondent has sold some of the stands offered as security.
- Parties were not agreed on the selling price for the stands.
- Parties are not agreed as to whether the applicant was supposed to make any payments during the currency of the agreement or at the completion of the project.

Interpretation of contracts/agreements.

In interpreting provisions of contracts it is essential to ascertain the intention of the parties as contained in the agreement. The interpretation to be accorded to the provisions must be such as will lead to the realisation of the common intention of the parties. An interpretation that leads to a failure of the intended objective of the contract should not be lightly reached.

In *Madoda v Tanganda Tea Company Ltd* 1999(1) ZLR374(S) @ p377B-D SANDURA JA had this to say:-

“As JOUBERT JA said in *Coopers & Lybrand & others v Bryant* 1995(3) SA 761(A) at 767D-F:

‘The matter is essentially one of interpretation. I proceed to ascertain the common intention of the parties from the language used in the instrument. Various canons of Constitution are available to ascertain their common intention at the time of concluding the cession. According to the ‘golden rule’ of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnance or inconsistency with the rest of the instrument.’

The same view was subsequently expressed by my brother McNALLY in *Chegut Municipality v Manyora* 1996(1) ZLR 262(S) at 264D-E where he said that:-

“There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord WENSLEYDALE said in *Grey v Pearson* (1857) 10 ER 1216 at 1234, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.”

In *Metro International (Pvt) Ltd v Old Mutual Property Investment Corporation (Pvt)Ltd and Another* SC 83/2006, the Supreme Court quoting from *Coopers & Lybrand v Bryant* 1995 (3)SA 761(A) JOUBERT JA at 767E-768E said that:-

“The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself The correct approach to the application of the ‘golden rule’ of interpretation after having ascertained the literal meaning of the word or phrase in question is broadly speaking, to have regard:

1. To the context in which the word or phrase is used with its inter-relation to the contract as a whole, including the nature and purpose of the contract.....
2. To the background circumstances which explain the genesis and purpose of the contract, i.e, to matters probably present to the minds of the parties when they contracted.
3. To apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence, of their own intentions.”

In resolving the issues in these applications the approach stated above will be of utmost importance. A reading of the various provisions of the agreement gives the impression that the overall objective was to ensure that Tynwald Lot 14 is serviced and infrastructure developments are implemented to a standard allowed by the local authority. This would then enable the applicant’s members to construct residences for their accommodation. To this extent clause 1.2 describes the scope of the work to be done as:

“The scope of the works involves infrastructural development of the land, facilitating title surveys, preparation of tender documents, construction of requisite infrastructure, that is, roads and storm water drainage, water supply and sewerage reticulation to standards approved by the local Authority, and electricity reticulation. Co-ordination and supervision of the works.”

In order to achieve the above objective each party to the tripartite agreement was assigned specific responsibilities or/obligations to fulfil. It is my view that had each party done their bit the objective would have been realised without the need for these court

applications. Unfortunately, an element of intransigence or suspicion of each other seems to have crept in and adversely affected the attainment of the objective.

The parties soon disagreed as to whether the applicant was required to pay during the tenancy of the agreement or after the completion of the project.

As a result the applicant and/or its members have virtually not made payments as was expected by the first respondent.

The first issue that arises is whether the first respondent can be held to be in breach of the contract by not completing the works.

The applicant alleged that the first respondent breached the contract by failing to complete the designated programme of works within the stipulated period, by 30 November 2010 and so should be held liable.

The first respondent, on the other hand, contended that the programme referred to was not signed and in any case the delay in completing the project has been occasioned by applicant's failure to pay in terms of the agreement. In the circumstances the applicant should not seek to benefit from the consequences of its breach.

The parties could not agree as to whether the applicant was required to pay for the cost during the currency of the agreement or after the completion of the project.

The pertinent clauses of the agreement on this aspect provided that:-

Clause 2.3 - obligations of the second respondent:

“The Ministry/ Local Authority shall provide 217 Stands as security in case the beneficiaries default in payments to the Developer.

Clauses on the role of the developer state that:

Clause 3.1- To raise finance for the project through their financiers;

3.6 The developer shall undertake to submit the list of paid up beneficiaries to the Ministry/Local Authority for processing of lease agreements.”

On the role of beneficiaries the agreement provides that:

4.1. Beneficiaries shall pay the cost of constructing the requisite infrastructure at a subsidized rate to be determined by the developer;

4.2. No beneficiary shall obtain title to land until he/she pays the developer in full for the cost of the development.

4.3. The cost of land shall be met by the beneficiaries of the project by way of lease rentals or purchase payments to the responsible State Land Authority.

Other conditions of the agreement for which the parties were expected to comply with included that:

- 5.2. The developer shall recover development costs from the beneficiaries of the scheme and any loss shall be recovered from the stands set aside as security by the Ministry/ Local Authority.
- 5.4. Beneficiaries who do not meet the Developer's requirements shall not be permitted to develop the stand and the offer shall be withdrawn.
- 5.6. Upon signing of the Partnership agreement, the Developer shall be required to provide a tentative Programme of works, which shall be agreed upon by the parties and shall be an Addendum to this agreement.

It is clear that the beneficiaries have the duty to pay the cost of constructing the infrastructure at a subsidised rate. The developer determines the rate of the subsidy. In *casu*, the amount claimed by the first respondent is at a subsidised rate and the first respondent explained that rate. I also did not hear applicant to deny this. Clearly the applicant should pay the subsidised costs.

The use of the word subsidise is critical. The oxford dictionary defines "subsidy" as support (an organisation or activity) financially" it is to 'pay part of the cost of producing (something) to keep the selling price low.' the developer ,in this case, has reduced the cost to be paid by the applicant's members as required in terms of the agreement.

Once the subsidized cost has been set and beneficiaries know how much to pay, their obligation is to make the payment.

Clause 3.6 makes it clear that upon such payments being made the developer shall submit a list of paid up beneficiaries to the Ministry for the processing of lease agreements. The consequence of failure to pay by a beneficiary is that his/her name will not be on the list to be submitted by the developer to the Ministry for the processing of his/ her lease agreement.

The other consequence as captured in clause 4.2 is that no beneficiary shall obtain title to the stand until he/she has paid the costs of development in full.

Clause 5.4, as alluded to above, is to the effect that a beneficiary who does not meet the developer's requirements will not be allowed to develop the stand allocated to them and such stand shall be withdrawn.

The consequences of failure to pay are very clear. This in my view confirms the seriousness with which parties required the beneficiaries to pay the subsidised costs.

It may also be said that to enable the developer to submit a list of paid up beneficiaries, the beneficiaries must have been making payments during the tenancy of the agreement. It could not have been intended that payment will only be done after the completion of the works as by that time the agreement will have come to an end. I did not hear the applicant or counsel for the applicant to argue that the obligations of the parties were to extend beyond the duration of the construction and development of the infrastructure. Had the parties intended that the beneficiaries would only pay after the completion of the project such would have been clearly stated and the procedure for the recovery of the cost after the contract period clearly stated. Such aspects as interests charges would have been provided for as this would be akin to a credit arrangement.

In the circumstances a proper interpretation of the contract is that the beneficiaries would have been making payments during the currency of the agreement and by the time of the completion of the works they would be up to date with their payments hence their names are then submitted for processing of lease agreements and eventually for title.

In terms of clause 5.6 upon the signing of the Partnership agreement, the Developer was required to provide a tentative Programme of works, which shall be agreed upon by the parties and shall be an Addendum to this agreement. Such a tentative programme of works was done but was not signed. Its period expired before the works were completed.

Upon a careful analysis of the papers filed of record and hearing submissions, I am persuaded to agree that the interpretation proffered by the applicants that its obligation to pay would only arise after the completion of the project is not correct.

I am of the view that in as far as the objective of the agreement was clear, and that each party to the tripartite agreement was given its role to play, each party was expected to play that role during the currency of the agreement. It was in this light that upon signing the agreement the second respondent provided the stands as security envisaged under clause 2.3 of the agreement. The first respondent set upon doing its task. The applicant on the other hand decided not to pay and to instead wait for other parties to complete their roles.

In interpreting agreements the context is important to ascertain the intention of the parties. In *casu* the nature of the agreement according to the applicant was to enable the applicant's members who are not well resourced to have shelter on a payment scheme that

suited their pocket. It was with that in mind that the initial payments were being made to the second respondent. When that failed, a tripartite agreement now involving the respondent was entered into whereby the first respondent was to develop the area at a subsidized cost to the beneficiaries.

It is indeed true that the first respondent was to also raise money from its financiers but that did not absolve the beneficiaries from paying the subsidised costs. The purpose of such finance was to enable the first respondent to subsidize the cost of the development and to ensure that development was not entirely dependent on the funds to be paid by applicant's members as these would not be enough due to the subsidy.

The offer of stands as security did not indemnify the beneficiaries. The stands were meant to cushion the first respondent as it was to subsidise the cost of development and it was taking the risk of the beneficiaries defaulting in their payments even at the subsidised rate. I did not hear it argued that the first respondent was expected to develop the area at a loss and so it still needed to recoup the part of the subsidised costs from the stands.

In terms of clause 3.1 the developer was to raise funds from its financiers. I am inclined to accept the argument that the purpose of such finance was to enable it to subsidise the beneficiaries who are the applicant's members. It was also to ensure that the developer did not depend on the applicant's funds only. This finance was not to cover all the costs otherwise there would have been no need to subsidise the applicant or to require the applicant to pay towards the costs of development as envisaged in clause 4.1.

Had the parties intended that the beneficiaries would only pay for the costs after the completion of the project such would have been expressly stated.

It may also be noted that in terms of clause 3.6 the developer was mandated to submit a list of paid up beneficiaries to the second respondent for processing of lease agreements. This confirms the role given to the developer of keeping a record of payments by beneficiaries. This could only be during the currency of the agreement. In fact clause 4.1 makes it clear that:-

“No beneficiary shall obtain title to the land until he/she pays the developer in full for the cost of development.”

If the beneficiaries were not expected to pay during the currency of the agreement, the first respondent would not have been required to submit a list of paid up beneficiaries.

Further, proof of the need to pay during the currency of the agreement may also be noted from the applicant's letter dated 24/10/2014, at p 96 of the record (HC 4954/15). In that letter the applicant was requesting the second respondent to give its members new lease agreements. In terms of clause 3.6 such lease agreements could only be processed after the developer had submitted a list of paid up beneficiaries to the Ministry/Local authority.

If the applicant's members were not required to pay during the currency of the agreement how was the first respondent to submit the list? Clearly the parties intended that beneficiaries make payments during the currency of the agreement as this was the only way the first respondent would be able to submit a list of beneficiaries deserving the processing of their lease agreements.

In another letter dated 9 July 2013, at p 94 of the record, the first respondent, as the applicant in HC 4954/15, was asking for money and proposing that the applicant seconds three people to be part of committee handling the completion of the project. In a way, this was in an effort to persuade the applicant to comply with its obligations and assuring it of proper use of the money for the development of the area.

The first respondent contended that it is the failure by the applicant to pay that caused the project not to be completed on time. In the circumstances can the first respondent be said to be in breach of the contract for the benefit of the applicant. This may not be just.

In *Blumo Trading (pvt) Ltd v Nelmah Milling co. (Pvt) Ltd & Another* 2011(1) ZLR 196(H) at 201F-H PATEL J (as he then was) opined that:-

“It is a fundamental premise of every contract that both parties will duly carry out their respective obligations. See *Green v Lutz* 1966 RLR 633; *ESE Financial Services (Pty) Ltd v Cramer* 1975 (2) SA 805(c) at 808-809. As is explained by Christie, *Business Law in Zimbabwe* at pp106 & 119:

“There is a presumption that in every bilateral or synallagmatic contract, i.e. one in which each party undertakes obligations towards the other, the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations. ...

Conversely, a party who has caused the other to commit a breach cannot found a claim on the breach. ..”

In *casu*, the applicant had obligations to pay during the currency of the contract and has not done so and so it cannot be seen to be seeking relief on the basis that the first respondent has not completed the project in time when it has not complied with its own obligations in terms of the agreement.

Accordingly the applicant's claim cannot succeed on this aspect.

The applicant opposed the application for specific performance. As is evident from the papers filed of record the facts and circumstances are the same as the first application. In fact even the arguments proffered are the same in as far as they hinge on the interpretation of the clauses of the contract. The question to be specifically answered is whether the first respondent has made out a case for specific performance.

The finding that the applicant's members were obligated to pay during the currency of the agreement and that they have not been paying stands. The consequence is that they have to pay.

The first respondent (applicant in HC 4954/15) alleged that in as far as it is agreed that the applicant's (first respondent in HC4954/15) members have to pay the cost of the construction of the infrastructure it follows that the applicant must be ordered to pay. The first respondent has, in compliance with its obligations, prepared a bill of quantities which shows that the outstanding amount that the applicant's members must pay is USD276 989-00 (two hundred and seventy six thousand nine hundred and eighty nine United States dollars only).

The applicant, on the other hand, contended that the first respondent has no right to receive such an amount as it has not proved such costs. The first respondent must prove the actual costs incurred by the production of such evidence as vouchers and receipts showing payments made to service providers. The applicant emphasized that the first respondent cannot rely on a bill of quantities as this is just an estimate.

The applicant further contended that the obligation of the applicant and/or its members would only arise upon the completion of the project and when all the costs have been agreed on or proved adequately.

I have already made a finding that the applicant's members were obligated to make payments during the currency of the agreement and not after its completion or even the completion of the works. The question that arises is the issue of the adequacy of the bill of quantities as a basis for the first respondent's quantum of claim.

The applicant contended that a bill of quantity is a tender document which provides estimates regarding the costs of performing the various tasks. There is still need to get a final position regarding any such costs or the actual costs incurred.

The first respondent's response was to the effect that the agreement as it stood did not state that the first respondent will be reimbursed upon the completion of the project. Had that

been the case the agreement would have clearly stated so. In this scenario the applicant cannot expect that the work will be done for free or entirely from the first respondent's means without the applicant's contribution. In any case, before the first respondent's entry into the contract, the applicant's members were already in the process of making payments in instalments towards the project in terms of the first agreement between applicant and the second respondent. The applicant's obligation to pay towards the development of infrastructure was not changed by the coming on board of the first respondent. If anything, the first respondent essentially took over the responsibilities that the second respondent was to do of developing the area as the applicant's members paid their installments.

The applicant's contention is without merit. I am inclined to accept that the applicant is liable to pay the sum demanded. If it is a matter of suspicion that the money will be misused, the first respondent requested the applicant to appoint persons of its choice to sit on a committee to oversee the use of the money in the project.

It may also be noted that the sum being demanded is not the total costs but is a subsidised sum. The first respondent has done its part by estimating the costs and asking the applicant to pay only part of the estimated costs.

The applicant also raised the issue of the premature sell of the security stands. It alleged that the stands realised a sum well above the sum required for the project and so the first respondent will be unjustly enriched if the applicant or its members were to make the payment being demanded.

The applicant was, however, not able to prove the price at which the stands were sold, let alone how much was realised from such sales. It was a case of sheer speculation as the first respondent disputed the alleged selling price and the number of stands said to have been sold.

In any case, the issue of the security stands was really as between the first respondent and the second respondent with the applicant's members benefiting by being afforded a subsidy and in the case of defaulting in making some payments. Thus some of the costs were to be met from the stands. The second respondent, as the owner of the stands and as the provider of the security stands had no problem with the sale of the stands as they were meant to cushion the first respondent in the process of carrying out the project. Thus, if any excess amount was to be realised, it would be up to the second respondent to claim it or not. The applicant's obligation was to fulfil its own contractual obligation by paying the subsidised

cost. Now that the subsidized costs have been ascertained the applicant or its members must pay.

A careful analysis of the two applications before me shows that the applicant has not been forthcoming in meeting its obligations. Such conduct has only served to delay the completion of the project to the prejudice of its members and the respondents.

The impression created was that the applicant was apprehensive about the use of its member's money but this fear would easily have been allayed by the first respondent's offer to have some of the applicant's members in a committee overseeing the project. Such an offer was clearly a show of sincerity on the part of the first respondent in an effort to ensure that the project was brought to fruition.

In an application for specific performance court has discretion to order or not to order specific performance. From the submissions made, the applicant did not allege any specific difficulties that would arise from a grant of the relief of specific performance. The applicant did not allude to any particular hardship it may encounter. I am thus persuaded that the circumstances of this case are such that an order for specific performance would be appropriate. This will enable the completion of the project which everyone acknowledged had been partially completed. It is only logical that the project be completed and parties realise their initial objective.

My conclusions as regards the applicant's claims are as follows:

1. On the request for a declaratory that the first respondent breached the terms of the agreement:

As alluded to above the applicant cannot seek to benefit from its own breach. Whilst the other parties have made some headway in fulfilling their obligations the applicant has failed to make payments as envisaged under the contract. The applicant can thus not seek to benefit from the consequences of its default.

2. On the aspect that the first respondent is not entitled to demand payment from the applicant and /or its members before completing the works regarding servicing of the Tynwald Lot 14.

My finding is that the first respondent was perfectly entitled to demand that the applicant's members make payments as subsidized by the first respondent during the currency of the contract and not after completion of the works. The contract required the first respondent to keep the second respondent informed of the list of the

applicant's members who were up to date with their payments for purposes of the processing of their leases. This would not be possible if beneficiaries were not to pay during the currency of the contract.

3. On the disposal of the stands:

The owner of the stands, the second respondent, indicated that there was nothing amiss about the stage of the disposal of the stands. Indeed as long as the stands were towards the intended objective to meet the shortfall and make up for the subsidized part and loss due to the applicant's default there was nothing wrong with the disposal. The agreement did not forbid the disposal of the stands as long as the proceeds went towards the intended purpose of the stands. In *casu*, the applicant's members have not been paying their part and so some of the stands were disposed to ensure the development of the area.

4. That the respondents are obliged to acknowledge in writing each of the applicant's members continuing interest in the respective stands allocated to them before demanding payment from them.

The applicant could not point to any clause in the contract that provided for such acknowledgment. The clauses of the contract, in fact, gave the impression that it was only those who made payments whose names the first respondent was expected to forward to the second respondent for processing of lease agreements. Further, clauses 4.2 and 5.4 stipulate the need for beneficiaries to meet the developer's requirements and the consequences of failure to do so.

If, therefore, as appears to be the case, the applicant's members were already allocated stands before the current agreement came into force, such members would only maintain their interests by complying with the terms of the agreement. In terms of clause 3.6 the first respondent was only required to submit the names of those beneficiaries who were paid up for processing of lease agreements. Any attempt to entrench the rights of the applicant's members, before such members were paid up, would not be in the spirit of the contract as they would not be in compliant with the contract. Such a claim should only be made by a beneficiary who has performed his/her obligations.

5. That if the first respondent has recovered an amount in excess of the cost of servicing Tynwald Lot 14 from the sale of the 217 security stands it will be unjustly enriched in recovering further sums from applicant and/ or its members individually.

This was a speculative claim as the applicant was not even certain on how many of the stands had been sold and at how much each stand had been sold for. In any case the stands were not provided as indemnity for the applicant's members from performing their obligation. The stands did not absolve the applicant's members from performing their own side of the contract. It may also be stated that it is the second respondent who provided the stands in return for the first respondent subsidizing the applicant's members in terms of charges and costs for the project. It is the second respondent who should cry foul if the stands are not used for the intended objective or have turned out to be a lot more than the parties had anticipated. The applicant should thus not use the issue of the stands to avoid its contractual obligations.

As regards the counter application my view is that the first respondent has shown that the applicant's members, as beneficiaries, are obliged to pay for the infrastructure construction costs during the currency of the construction and must meet the reasonable charges raised by the developer. The developer having quantified and subsidized the costs the applicant must pay.

The applicant's members must therefore pay the sum demanded.

Costs

I am of the view that the applicant should bear the costs of this application and counter application.

Accordingly it is hereby ordered that:-

1. The applicant's application in HC 10642/14 be and is hereby dismissed with costs.
2. The first respondent's counter application (case No. HC 4954/15) be and is hereby granted as follows:-
 - a) The applicant's members are obliged to pay the infrastructure construction costs during the currency of the construction and must meet the reasonable charges raised by the 1st respondent.
 - b) The applicant's members shall pay the sum of USD\$ 276 989-00 to the first respondent.

- c) The costs of suit shall be borne by the applicant.

Wintertons, applicant's legal practitioners

Coglan, Welsh & Guest, first respondent's legal practitioners

Civil Division of the Attorney General's Office, second respondent's legal practitioners