ABSOLOM MUCHANDIONA
versus
AROSUME PROPERTY DEVELOPMENT (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 8 June 2021 & 13 September 2021

Opposed application

Mr *G R J Sithole,* for applicant
Mr *M Kuwana (barred)*

TSANGA J: On the 8 of June 2021 I dismissed the application for a declaratur herein with no order as costs. This was on the basis that the declaratur could not be granted under the contradicting factual circumstances averred by applicant and respondent regarding the applicant's obligations to the respondent.

The declaratur sought was to the following effect:

1. That the payment of ZW$103 500.00 which was made by the Applicant to the Respondent on 16 of July was in full and final settlement of the development fees which were due and payable by the applicant in respect of stand 74 Carrick Creach Township Borrowdale Harare.
2. Within ten days of this Order the Respondent shall issue the Applicant with a clearance letter confirming that the Applicant settled all the development fees which were due and payable by him in respect of Stand 74 Carrick Creagh Township, Borrowdale, Harare.
3. The Respondent shall bear the costs of this application on the legal practitioner and client scale.

Applicant has requested written reasons for the dismissal and these are they.

Background facts

The applicant bought the stand from City of Harare in 2008. After purchasing the stand, the applicant was required to pay development fees to the respondent for the development of infrastructure which was being done in various stages. Applicant claimed that he had settled all

development fees due, as final, when in May 2014 he paid the amount US$21791.91 for four invoices that had been sent to him.

The correspondence shows that applicant tried to get the developer to regard his payments as full and final but instead, in June 2015, applicant had received a letter of demand for US$ 69 032.08 being for further developments. Applicant disputed any amount as owing at the time on account of his own view that he had settled all development fees in May 2014.

By 2017 the amount owed for further developments stood US $103 491.51 with applicant still refusing to pay or accept the bill. However, the bill had been finally paid in July 2020 and it was on the basis of this payment that the applicant sought the order as captured above.

The respondent though barred at the hearing for failure to file heads of argument had, however, filed a notice of opposition to the application through its erstwhile legal practitioners. I therefore considered the matter on the merits. Primarily, the respondent denied that the infrastructural developments were complete and averred that if that had been the case, the applicant would have received a certificate stating as much. The respondent also averred through its representative that the applicant was trying to force the hand of the developer by self-declaring that the infrastructural developments were completed and finalized when they were in fact on going. For the reason that the infrastructural developments were ongoing, the respondent had therefore averred that the applicant's order, which sought to have the court declare his payment as final, was incompetent. The applicant was said to be as yet to receive his bill of how much he owes for the developments that have continued to be effected by the developer.

In view of the applicant's refusal to pay at the time when requested, only acknowledging the debt due and payable in 2020 by paying at a rate of 1.1 in Zimbabwean dollars, following the *Zambezi Gas Zimbabwe (Private) Limited* v *(1) N.R. Barber (Private) Limited & Anor* SC 3/2020 decision, the respondent had sent the money paid back to the applicant.

In response to the respondent's opposing affidavit, the applicant denied that there were any dispute of facts or that developments were on-going. He stated that private residents had in fact had to put together money in 2020 to pay a private contractor to have electricity connected. He also referred to a letter written by respondent's erstwhile lawyers in December 2018, to the effect that he could begin the process of engaging the Ministry of Local Government for registration of title. Furthermore, the City of Harare was said to have issued him with a building permit and

approved his building plans. In essence, his response was that there was no way they could have done this if there were still outstanding development works. He therefore insisted his relief was competent.

Fuelling applicant's order as sought was that S.I. 33 of 2019 and the Finance Act No 2 of 2019, converted the amount he owed from US dollars to ZW$103 500.00 and that with his payment of this amount he owed no further obligations to the respondent. At the heart of respondent's opposition was that infrastructural developments are ongoing and have been ongoing beyond what was invoiced to him in 2017 and therefore his obligations could not and cannot be declared to be final.

Section 14 of the High Court Act [*Chapter 7:06*] provides that the High Court may in its discretion, at the instance of any interested party, inquire into and determine any existing, future or contingent right or **obligation**, notwithstanding that such person cannot claim any relief consequential upon such determination.

This section therefore confers on the court the power to make a declaratory order on rights and obligations whether existing or future, in an appropriate case. However, that discretion has to be exercised judicially. The applicant must satisfy the court that he is a person interested in an existing, future, or contingent right or obligation. If satisfied on that point, the court then decides a further question of whether the case is a proper one for the exercise of its discretion conferred on it. In this instance, the applicant was certainly an interested person by virtue of having bought the stand in question. What he sought was a declaration as to his obligations regarding the full and final payment of development fees.

From the court's reading and hearing of this matter, it was clear that there were material dispute of facts regarding whether the infrastructural developments were final or still on going. These facts could clearly not be resolved on paper and it was evident that in so far as the applicant sought a final determination of his obligations with regards to development fees for infrastructure then he had clearly chosen the wrong procedure in using the application procedure in quest of a declaratur on largely factual obligations. The applicant was merely asking that his version of the situation on the ground be taken as reality.

In an application for a declaratur the court is not resolving factual disputes but clarifies rights and legal obligations where the facts are not an issue. This court could not have declared the

development fees paid in full when the other party was in fact saying it is still developing the area. Neither party placed firm evidence before the court to show completeness of works as alleged by applicant or ongoing works as alleged by the respondent.

With regards to the 2017 debt, granted S1 33 as indeed interpreted in the *Zambezi Gas* case *supra* converted obligations owing in US$ to Zimbabwean dollars debt. But even if the respondent was incorrect in returning the amount paid, the order sought was for this court to declare the payment made by the applicant as having been in full and final settlement of the development fees and yet there was a dispute between the parties as to whether the development of infrastructure is fully complete. The court was also being asked to order the respondent to issue a clearance letter that all development fees that were due and payable have been paid. Surely it was clear as daylight that in the face of factual disputes as to the completeness of the developments that no such order on his legal obligations would be issued by the court. The applicant should have foreseen this.

It was for these reasons that the application was dismissed without an order as to costs.

Danziger and Partners, applicant's Legal Practitioners
Musekiwa & Associates, respondent's Legal Practitioners