AEROSUME PROPERTY DEVELOPMENT
versus
TECLA CHIPO MAVINDIDZE
and
MONTSHOW INVESTMENTS (PRIVATE) LIMITED
and
SALLY MUGABE HEIGHT HOUSING CORPORATIVE
and
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS AND NATIONAL HOUSING
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 22 & 30 June 2022

Opposed Application

S V Tendere, S Mpofu, for the applicant
T Magwaliba, for the 2nd respondent

BACHI-MZAWAZI J: This is an opposed interlocutory application for a joinder wherein the applicants seek to be enjoined to court proceedings under HC 8603/18. At the hearing I gave an extempore judgement. Here is the full judgement.

The common cause facts are that the applicant and second and third respondent, have a tripartite land development agreement of residential stands at Carrick Creagh farm, Borrowdale. The applicant is the land developer, Sally Mugabe Height housing cooperative are responsible for allocating the stands to their members and beneficiaries. The third respondent is the relevant Ministry, the land owner and issuer of title. The first and second respondents are purchasers who were sold the same property and have several court disputes over the same. The second respondent is a company registered in terms of the laws of Zimbabwe.

On 20 September 2018, first respondent issued out summons commencing action in case HC 8603/18 wherein she sought cancellation of the second respondents title to stand 307 Carrick Creagh Township, section 4, Borrowdale estate. Applicant was not made a part to these and all the subsequent proceedings. They sought consent from the first respondent to be joined to the proceedings so as to defend their rights, in terms of the said Tripartite agreement. The first respondent denied them that opportunity.

It is the applicant's case that they, being the developer of the land in issue are entitled to development costs from the beneficiaries as clearly stipulated in the above-mentioned agreement.

They contend that, if they are not made part of the proceedings and the relief sought by the first respondent in the summons case is granted as is, they will be denied the development costs that are stated as a condition precedent to the issue of lease agreement and transfer of title. In that regard they claim that they have a direct and substantial interest in case, HC 8603/18, entitling them to be joined as a party to the proceedings.

The first respondent did not oppose the application. It is the second respondent who is opposing the application for the joinder of the applicant. It's reasons are that there is no law that allows for the joinder of a defendant to a summons where there is no claim levelled against them. They state further that such joinder will prejudice them as they will not have an opportunity to respond to the applicant's plea.

First respondent commenced by raising two preliminary objections. Mainly, on the ground that there are no rules or law justifying a joinder of the defendant and secondly, that the applicant cited a non- existent rule.

In response to the first *point in limine*, applicants pointed out that it was a clerical error of omission as the intonation of their application explicitly spoke to an application for joinder in terms of r 32(12) (b) of the 2021 rules of this court. On the second preliminary point, the applicant submitted that they have a direct, real and substantial interest in the matter entitling them to be made part of the suit. They elaborated that the outcome of the main or summons matter in case HC 8603/18 will affect their interests. Further, if granted as couched in the prayer the relief sought will affect their right to be paid developmental fees by the first respondent.

In my view, both objections lack merit. Discernible, is that there was a clerical, topographical error, in citing r 32(12)(b) as r 12(b) of the 2021 High court rules. Errors are common amongst humans. Such a mistake is not fatal and does not vitiate the proceedings. However, legal practitioners ought to be more alert and pay attention to the editing of their legal documents. See,*Telecel Zimbabwe (Pvt) Ltd* v *Portraz, HH 4461/15.*

On the second issue, the respondents argued that the current rules do not provide for the joinder of the defendant as it is absurd to join a part where there is no claim being made against it. However, they conceded that rule 32(12)(b) does capture that scenario. As a result, nothing turns on this point.

The issue that remains confronting the court, is whether or not the applicant has made a case for a joinder. It is the respondent's counter argument that the applicants have no allegations against them emanating from the claim in the summons in case HC 8603/18. In addition, they claim that the prayer and relief sought is not against them but the second respondents, therefore there is no need for

them to be incorporated in the suit in question in the first place. They further, argue that if the applicant is allowed to join in the said matter then the rules do not give room for the second respondents to respond to their plea.

In support of their claim the applicants state that they are part to the tripartite agreement referred to herein earlier. What is startling to them is that only two parties to the agreement where cited in the main action, to their exclusion. They argued that they are the developers who are entitled to certain stipulated payments by the first respondents in terms of the agreed contracts. They further assert that there are payment obligations precedent to the signing of the lease agreement and the transfer of the property. In their view if the relief sought by the first respondent in case HC 8603/18 is granted as it stands, it allows the by passing of the condition precedent of the payment of developers' fees as stated in the tripartite agreement binding all beneficiaries. That being so, applicant persists that they will be prejudiced if they are not allowed to be joined as a party to those proceeding so that they state their case in their plea.

Applicant further states that to avoid multiplicity of suits and promote the principle of finality to litigation it is prudent that they be made part to the main case mentioned herein. They also postulated that it will be prejudicial to them as they will be forced to go through the arduous route of instituting other parallel actions in pursuit of their claim for development fees. They punctuate their submissions by stating that, it is permissible at law to join any interested party to proceedings, as clearly stipulated in rules 32(12)(b), 32(13) and rule 32(14). To buttress their argument, they relied on the authorities of *Macey's Supermarket & Bottle Store* v *Edwards* 1961(2) SA 698(10) S*humbairerwa* v *Chiraramiro, HH 731/13 and United Watch Diamond Company* v *Disa Hotels 1972(4) SA 409(C)*

On analysis, the law pertaining to the joinder of parties, is clear and straight forward. Rule 32 of the 2021, high Court rules, in general relates to the joinder of parties to court proceedings. Rule 32(13) in particular provides that:

> "A court application by any person for an order under subrule 12 adding him or her as a defendant shall except with the leave of the court, be supported by an affidavit showing his or her interest in matters in dispute in the cause of matter."

I need not elaborate on rule 32(12) (b) as it clearly allows for a joinder at the instance of a party or if the court deems it fit so as to effectively and effectually deal with all matters in dispute in the cause of the matter. Authority abound states that, in order to qualify to be joined as a party to the proceedings the following is to be taken into account.

a. A party must have a direct and substantial interest in the issues raised in the proceedings involving the matters in dispute.
b. Its rights may be affected by the judgement of the court.

See, *Nyamweda* v *Georgias SC* 200-88

I have been persuaded by the submissions by the applicants. That they have a direct and substantial interest in the matter is evident. The tripartite agreement makes them a party to the properties in issue. Clauses in the said agreement impress on the payment of development fees by every beneficiary to enable the signing of the lease agreement. It is the developer who submits the list of paid up beneficiaries to the fourth respondent for the purposes of transfer and title. The payments are a prerequisite precedent to transfer of title.

I don't agree with the respondent's counsel's argument that the fifty stands given to the developer are the ones to satisfy development fees. Had that been the case there was no need for clear provisions insisting on payment by beneficiaries.

Clause 4.2 of the mentioned agreement states that,

'no beneficiary shall sign a lease agreement until he/she pays the developer the costs of development.'

Clause 5.2 reads,

'the developer shall recover the development costs from the beneficiaries of the scheme'

Clause 5.4 spells out that,

'the beneficiary who do not meet the developer's requirements shall not be allowed to sign lease agreements which leads to the issues of title.'

My construction of these clauses is that there is a payment that is done to the developer outside the scope of the fifty stands allocated to it. Otherwise clause 3.5 would not be requiring the developer to submit a list of paid up beneficiaries to the fourth respondent, the relevant Ministry, for the processing of the lease agreement and subsequent transfer of title. This technically means that the steps provided for in these provisions have to be fulfilled before change of title.

In juxtaposing the relief sought by the first respondent, who is the beneficiary in applicants' scheme, against the specific terms of the tripartite agreement outlined above, change of title will be affected by the court order regardless of the payment of the developer's fees or not. It then necessitates further legal suits to force the beneficiary to pay those development costs. The order would have short circuited the condition precedent, that development costs first, then the signing of the lease and the corresponding transfer of title.

I am therefore not swayed by the second respondent's contention that the applicant should not be joined as a party to the proceedings in case HC 8603/18. They stand to lose out the stipulated

payments. In that case, they will not only be prejudiced but there will be a multiple of suits, if they have to go the route suggested by the second respondent to launch a separate claim to recover those costs against first respondent. See, *Chasiya* v *Qiang & Anor* HH 128 of 2004, *Magarasadza and* 34 *others* v *Freda Rebecca Mines and another* SC 46/2017.

Ironically, the first respondent who stands to be affected to some extent with the order sought by the applicant did not contest. Rhetorically, the second respondents are the ones fighting the applicants who are literally fighting in their corner. The incorporation of applicants in the suit and their intervention offset the plaintiff's claim in the main matter. I therefore, find no prejudice on the side of the second respondent but for the applicants. See *MBCA Bank Ltd* v *RBZ & Anor HC 1147 of 2014(2015) 2W HHC 482.*

Accordingly, as prayed for by the applicant their relief is in tandem with the provisions of rule 32(14) I therefore grant the order as sought.

In the result, it is ordered that;

1. Applicant be and is hereby joined as defendant number 5 to the proceedings under HC 8603/18.
2. 1st respondent shall amend and endorse its summons under HC 8603/18 to reflect applicant as a defendant within 12 days of granting of this order.
3. After amendment and endorsement of the summons, rules as to service of summons shall apply to service of the amended summons on applicant and thereafter rules relating to entry to of appearance to defend shall apply
4. Cost will follow the cause.

Munangati and Associates, Applicant's Legal Practitioners
Chimwamurombe Legal Practice, Second Respondent's Legal Practitioners