TOLASPY INVESTMENT (PVT) LTD
versus
McSHANE INVESTMENT (PVT) LTD
and
CEPHAS CLARENCE SAKALA

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 28 November 2012

Opposed Application

J Mandevere, for applicant
A A Debwe, for respondent

HUNGWE J: After hearing the parties to this dispute, I dismissed the application and indicated that the reasons for the dismissal will follow. These are they.

The applicant seeks an order declaring him a 50% shareholder in first respondent. He also seeks an order that first respondent sets up and constitutes the Board of Directors of a new company within 30 days, an order barring second respondent from conducting business on behalf of the first respondent without the written consent of the applicant together with costs. It is common cause that the relationship between the parties is governed by an agreement the parties voluntarily entered into. Applicant and first respondent are legal personae. These two entities act through the medium of their respective alter ego, their respective directors. It is not in dispute that applicant and first respondent intended to form a new company as a result of a purchase of shares in first respondent by applicant. (Founding Affidavit, clause 3 to 6). Specifically, clause 6 sets out how the new entity would be created; namely either by way of changing the first part is the addition or by purchasing a new shelf company which would hold the Chipise Coalfields. However this can only occur if certain conditions were first fulfilled.

It was contended on behalf of the applicant that clause 4 was varied by the subsequent agreement, Annexure "B", to relieve the applicant of the obligation to pay for its shareholding in terms of clause 4 of Annexure "A". According to the agreement, first and second respondents were required to transfer 50% shareholding in first respondent to applicant. Despite demand to transfer such shareholding, the respondents had refused or neglected to do so.

The respondents dispute such an interpretation of the relationship between the parties. It is argued, on behalf of the respondents, that the agreement was lawfully cancelled after Applicant failed to rectify its breach regarding its obligations set out in clause 4. Notice of cancellation was given in terms of clause 18.1.1 of Annexure "A". Upon failure to rectify the breach, the agreement was lawfully cancelled by the respondents. According to the respondents Annexure "B" was entered into for the purposes of regulating how the anticipated future investment would be appropriated. As such it did not relieve the applicant of its obligations in terms of the original agreement, Annexure "A". As I understood it, the respondents' argument is that the applicant failed to fulfil its obligations as set out in clause 3 of the original agreement. In terms of that clause, applicant would pay US$50 000, 00 against signature of the agreement in order to secure its right to the change in the shareholding structure in 1st respondent. Once this was paid, first respondent was obliged to cause a transfer of 50% of its shareholding into applicant's name. This first respondent did. There is evidence to that effect. Immediately after the changes to first respondent shareholding was effected, applicant was to pay a further US$50 000, 00. These two payments were made on behalf of applicant. What is in contention is when US$400 000, 00 became due and payable by the applicant to the first respondent. The respondents rely on clause 4 in holding that it became due within six months of signature of the agreement. On the other hand, applicant contends that it would only fall due when the prospective investors had paid their share of the investment.

The relief sought in this application amounts to an order for specific performance. Our law is clear that the plaintiff is always entitled to specific performance and, assuming that he makes out a case, his claim will be granted subject only to the court's discretion. (See *Farmers Co-op Society (Reg)* v *Berry* 1912 AD 343 @ 350 **(**per INNES J); *Tamarillo (Pty) Ltd* v *BN Aitken (Pty) Ltd* 1982 (1) SA 389 @ 440G-H). Explaining the discretion which INNES J

referred to in Berry's case, DE VILLIERS AJA said in *Haynes* v *Kingwilliamstown Municipality* 1951 (2) SA 371 (A) @ 378G;

> "The discretion which the court enjoys, although it must be exercised judicially, is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances."

The reference to rigid rules was explained by HEFER JA in *Bensen* v *SA Mutual Life Assurance Society* 1986 (1) SA 776 (AD) @782F-783C as meaning, in effect, that there are no rules except that the court's discretion is to be exercised judicially upon a careful consideration of all the relevant facts. Specific performance is a remedy which is available for a breach or threatened breach of contract. As with an interdict, specific performance is a method of enforcement of a contract. Therefore before a party is entitled to an order for specific performance, that party must allege and prove the terms of the contract; it must show that it has complied with its antecedent or reciprocal obligations and allege the non-performance by the respondent of his obligations.

In *casu*, the applicant has not proved that it has fulfilled its antecedent obligations as set out in the original agreement annexure "A". That agreement required applicant to pay US$400 000,00 being consideration for 50% of shareholding in an new entity to be formed when other expected investments materialised. The expected investment has not materialised. The payment has not been made for the 50% shareholding. Respondent contends that as the applicant had failed to rectify its breach upon due notification, it had duly cancelled the contract. As such the contract was lawfully cancelled. The preponderance of probabilities favour an interpretation which would require the payment for value of the 50% of the shareholding by the applicant. The parties contemplated that in order for applicant to enjoy the rights of a shareholder it would have to pay for such rights. In the absence of that payment then it would not have any right to that shareholding. The papers show this beyond a reasonable doubt. Any other interpretation would lead to an absurdity whereby a party is entitled to shareholding without payment of value for that shareholding.

In light of this finding, I am satisfied that the contract was lawfully cancelled by second respondent when no value was received within the stipulated time. In the event that I am wrong in so holding, I still come to the same conclusion on a different basis.

The very nature of the relationship contemplated by the parties in terms of annexure "A" required mutual trust. Applicant and the respondents would ultimately form a new company either through share restructuring of first respondent or buying a new shelf company in which both applicant and first respondent hold equal shares which would be the vehicle for the exploitation of Chipise Coalfields. Once such disagreements as have become apparent here arise, the fabric upon which the contract is based would be destroyed. The personal nature of the relationship which the contract intended to build can no longer be built. The court cannot enforce this type of relationship. An order for specific performance would not only be an inappropriate remedy but also an unworkable one. There is a further basis of dismissing this application. Applicant and first respondent are separate legal entities. No basis in fact and in law has been laid for the prayer in para(s) 2 and 3 of the order prayed for. It is clear that a full consummation of the contract envisaged the creation of a new legal entity to which the parties would have equal representation on the Board of Directors of that new entity. That stage had not been reached when this application was made. Therefore there is no basis for an order in the terms sought by the applicant.

The order for costs on a higher scale is not justified in all the circumstances of this case. I have pointed out the deficiencies in the applicant's case which entitled the respondents to resist the claim in its present form. In light of the above, I am of the view that the applicant has not made a case for the order sought.

The application is dismissed with costs.

It was for these reasons that I dismissed the application on the turn.

Sawyer & Mkushi, applicant's legal practitioners
AA Debwe & Partners, respondents' legal practitioners