SHANDONG TAISHAN SUNLIGHT
INVESTMENTS LIMITED
versus
YUNNAN LINKUN INVESTMENTS
GROUP COMPANY LIMITED
and
OLDSTONE INVESTMENTS (PRIVATE) LIMITED
and
CHINA-AFRICA SUNLIGHT ENERGY
(PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 17, 18, 21 & 23 December 2015

Urgent Chamber Application

Mr *B. Ngwenya*, for the applicant
Mr *T. Magwaliba* with Mrs *E. Chimombe*, for the respondents

FOROMA J: This application was filed as an urgent chamber application and although I had misgivings about its urgency I decided to set it down because it concerned a project of national interest. I therefore felt that I could not do justice to such an important matter by declining to hear it on my preliminary view that it did not deserve to be heard on an urgent basis. For this reason I directed that it be set down so that the parties could ventilate on the issue of urgency.

After the parties addressed me on the issue of urgency I directed without ruling on urgency that the parties deal with the merits in case in my ruling on urgency I considered that the matter was urgent and therefore go into the merits.

The factual background of the matter is fairly straightforward. The applicant and the second respondent entered into a joint venture agreement in November 201 for the formation of the third respondent with each party holding 50% shareholding in the third respondent. The third respondent was locally incorporated and went into business of prospecting, exploration and exploitation of mineral deposits as well as processing and selling of coal.

In or around 22 July 2015 the applicant and second respondent agreed to disengage with a view to terminating the joint venture agreement. It was a condition of disengagement

and termination that the second respondent would identify a new partner who would replace the applicant and pay compensation to the applicant for the applicant's shares. The second respondent identified the first respondent who entered into an agreement with the applicant for the sale of the applicant's 50% shareholding in the third respondent. The agreement between the applicant and the first respondent was subject to the condition that the purchase price would be paid before the 50% shareholding could be transferred to the first respondent. Once the 50% shareholding was fully paid for the applicant would ensure that its nominees on the Board of the third respondent resigned obviously for the first respondent to replace them with its own directors.

The applicant in support of the application attached various documents which it believed made clear its case. These are annexures to the founding affidavit.

Annexure B is a joint venture agreement between the second respondent and the applicant.

At the commencement of the hearing Mr *Magwaliba* who appeared on behalf of all the three respondents raised a point *in limine* namely that the matter was not urgent. In his submissions he raised the point that the urgency to be satisfied in a case such as the present is what can be classified as commercial urgency as there was no fear of physical harm which could befall the applicant. He further submitted that commercial urgency is the fear that the applicant could suffer so serious economic loss as would threaten the very existence of the applicant. Submitting that the applicant is a company incorporated in China whose interests in Zimbabwe are as a shareholder respondents counsel urged that as a shareholder the applicant does not manage the Joint Venture Company (third respondent) and

1. that the complaint that the first respondent had misrepresented itself as a shareholder had not caused any loss to the applicant.
2. the allegation that the first respondent has sourced equipment in China on behalf of the third respondent had not caused any loss to the applicant.

The allegation that the second respondent had appointed a Chief Executive Officer to the third respondent without following corporate governance rules i.e without a board resolution had not caused any harm to the applicant as it was the prerogative of the second respondent between 2010 and 2016 to appoint such Chief Executive Officer for the third respondent. Citing the authority of *Silver Trucks and Anor* v *Director of Customs and Excise* 1999 (1) ZLR 490 counsel for respondents submitted that no irreparable harm threatening the

very existence of the applicant had been demonstrated as a consequence of the respondents' conduct complained of.

The respondents' counsel observed that the certificate of urgency was not helpful on the issue of urgency as its para 6 was a bold allegation that the first respondent and the second respondent were undermining the third respondent as a going concern thus causing irreparable harm and prejudice to the applicant. Counsel also took issue with the claim by the applicant that it only became aware of the respondents actions on 9 December 2015 as no cogent explanation had been given as to why the visit by the Chinese President at the beginning of December 2015 had escaped the applicant's attention and knowledge. Finally the respondent's counsel submitted that the events complained off had already taken place and there was no suggestion that they were to be repeated in future as an interdict as a remedy is used to protect injury or conduct anticipated. Counsel thus submitted that no proper case for the application to be dealt with on an urgent basis had been made out.

Mr *Ngwenya* on behalf of the applicant submitted that the matter was indeed urgent as the first respondent had been conducting itself in several respects in breach of the sale of Shares Agreement in that:

(a) 1st respondent had not yet acquired the 50% shareholding in CASECO (3rd respondent) and it could not lawfully call itself a shareholder of 3rd respondent and that the disengagement of the applicant from the Joint Venture with the second respondent had not been finalised. He emphasised that the applicant was still the 50% shareholder of CASECO and the agreements with both the first respondent and the second respondent do not allow the respondents to act as if the applicant had completely disengaged.

The applicant's counsel presented argument showing breaches by the first and second respondents of the agreements but failed to show what loss the applicant would suffer as a consequences of such breach and how such loss could be considered as irreparable.

It is important to note that what is holding up the completion of disengagement is the need for the applicant to fulfil the Exchange Control conditions for the authority to disinvest to be granted unreservedly. The applicant's argument in regard to potential loss is premised on the risk that the disengagement may fail in which case (at least its argued) it would remain attached to CASECO as a shareholder. The applicant's counsel could not adequately explain why the applicant only got to know about the publication of the transactions related in the Herald forming the basis of its complaint on 9 December 2015 when the media was awash

with the news of the Chinese President's visit from the 1st of December 2015. In fact he explained that the news complained of had been carried in newspaper articles of the 4th and 5th December 2015 contradicting a statement on oath that the applicant only got to know of the Herald interviews on 9 December 2015.

One of the documents produced by the applicant to show that the first respondent had been conducting itself in an unacceptable and injurious manner is letter dated 11 November 2015 addressed to CASECO Board Chair and copied to Board of Directors on p 90 of the application. In that letter the following English version of the letter's contents says:

> "However recently we have received some troubling information that may hamper the continued advancement of the project (Gwayi Coal –electricity Integration Power Project)
>
> Specifically that the potential investor Yunnan Linkun Investments Group Co. Ltd (Yunnan Linkun) is engaging several Chinese enterprises and ……. Enquiries about equipment price as a legal shareholder and also declaring that Shandong Sunlight Investments Co. (applicant) has already transferred its shareholding rights to it. In addition Yunnan Linkun have purported to have signed a framework Agreement on the EPC of Gwayi Project with CASECO with relevant subsidiaries of Power China Ltd …… In order to seize the opportunity of the visit of China's top leaders to Zimbabwe and to effectively promote the Project with the EPC Contractors we request that as Chairman with the concurrence of the Board of directors issue an immediate directive for the company to conduct its current activities according to the law and forthwith cease all activities in contravention to Board resolutions todate"

In referring to the letter from which above has been quoted in its founding affidavit the applicant had the following to say in para 14.5 on p 14 of the affidavit:

> "The applicant has even raised its concerns and requested for a meeting to stop the actions of the first respondent which calls have not been heeded to. See here Annexure H being a letter requesting for a meeting of 3rd respondent"

What emerges from the letter Annexure H is that as early as about 11 November 2015 the applicant already had a cause of complaint but did nothing about it. The need to act arose then but the applicant sat on its laurels – see *Kuvarega* v *Registrar General and Anor* 1988 (1) ZLR 188 HC. Despite not acting when the need to act arose the applicant neither explained its inaction and when I asked whether waiting until a month i.e from about 11 November 2015 to 14 December 2015 is the immediate action the applicant contemplated as quoted above Mr Ngwenya indicated yes but I do not agree.

The applicant's counsel urged me to accept that the business risk attendant on the statements contained in the Herald publications of the 9th of December 2015 constitutes irreparable harm. The irreparable harm urged upon arises from the applicant's membership and status as 50% shareholder of CASECO. A proper understanding of the documents filed

by the applicant i.e Special Resolution of the 3rd of July 2015 (pp 55-56) Joint Venture Termination Agreement (p 59) viz para 2 on p 61 and Supplementary Agreement to Joint Venture Termination it will be clear that there is no risk to the applicant not being paid the investment compensation thus there cannot be any possibility of any irreparable harm likely to arise from the respondents conduct.

As indicated herein above the only hold up to payment of investment compensation to the applicant is its dilatoriness in fulfilling the Exchange Control Authority's conditions for disinvestment and for which the applicant cannot possibly blame any of the respondents.

At the hearing I directed that the parties address me on the merits in case anything turned on them (merits) which could persuade me to reassess the matter of urgency. The only other relevant matter was the balance of convenience which I do not propose to go into in any detail save to say that this appeared to be a minefield for the applicant.

The general rule as far as applications for matters to be heard as a matter of urgency, is that this court must be satisfied that if the matter is not heard urgently … substantial injustice would result to the applicant per Adam J in *Pichving* v *Zimbabwe Newspapers* 1991 (1) ZLR 71 (H) 93 E. I am not satisfied in all the circumstances of this case that substantial injustice would result to the applicant if the matter is not heard as a matter of urgency.

Although the applicant claims that there is no alternative remedy other than to seek an interdict from this court in my view this is not so. The urgency that applicant relies upon is what is also referred to as commercial urgency. As submitted by the respondents counsel the complaint raised by the applicant is that if there is a risk to its business interests then this can be adequately remedied by a claim for damages among other remedies. A proper reading of Annexure B will reveal that the joint venture agreement can be terminated by reasons of a fundamental breach or default by the other party which has not been cured or rendered within 90 days see clause 20 of Annexure B. It is clear therefore that if the conduct complained of is a fundamental breach the injured party can demand that it be remedied within the period of 90 days failing which it will be entitled to terminate the agreement. Cancelation is therefore another remedy available to the applicant.

I accordingly conclude that the matter is not urgent and it is refused with costs.

Chinawa Law Chambers, applicant's legal practitioners