IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 18 OF 2007

JEREMY WOODS.....1ST PLAINTIFF
CAMERON WOODS.....2ND PLAINTIFF
VERSUS
ROBERT CHOUDRY.....1ST DEFENDANT
CULLINAN CUT & POLISH LTD.....2ND DEFENDANT

JUDGMENT

Date of Hearing – 15/11/2007

Date of Judgment – 16/11/2007

MASSATI, J

The Plaintiffs' claim against the Defendants is for the refund of USD .200,000 which the 1st Defendant received from them on certain terms, which were breached by them. It is alleged that in September 2005, the 2nd Plaintiff transferred USD 200,000 to the 1st Defendants' account for the purposes of developing a cutting and polishing, wholesale and retail trade in rough and cut diamonds, on condition that the money would remain the property of the Plaintiffs and later to be used for facilitating the change of shareholding structure of CULLINAN DIAMONDS LIMITED, then wholly owned by the 1st Defendant. Instead, the 1st Defendant used the money to form the Second Defendant Company, build a factory and buy

equipment for it. On demand the 1st Defendant promised to repay the money but has not done so, hence the present action.

On the other hand, the Defendants claim that the USD.200,000 received from the Plaintiffs was intended for the participation of the Plaintiffs in the trade of rough diamonds, and for formation and registration of a new Company in which they would be allotted some shares through their trustees. They admit that it was agreed that the funds would remain the property of the Plaintiffs but would be available for trade in diamonds. The Defendants, however, also claim that the cost of construction of the factory was higher than the USD.200,000 in question and that in the spirit of their understanding, a new Company was formed, with 37.5% initial shares meant for the Plaintiffs allotted to Mr. Hyera, Advocate, pending transfer thereof to a trustee of the Plaintiffs' choice. The Defendants, however, vehemently deny the existence of an arrangement for the repayment of the money. For those reasons the Defendants prayed for the dismissal of the suit with costs.

The suit was ably handled by Mrs. Kashonda, learned Counsel for the Plaintiffs, and Mr. T.A. Hyera learned Counsel for the Defendants.

At the trial, the Plaintiffs' evidence was presented by **CAMERON WOODS** as PW1. He said that, sometime in 2005, he

met the 1st Defendant. He became interested in the business conducted by him. They agreed that he and his father, the first Plaintiff would invest in the business.

He contacted the 1st Plaintiff who transferred USD.200,000 to the 1st Defendant's account. When they found that the 1st Defendant was not living up to his promises, they demanded back the money, but on reporting the matter to the police for assistance, the 1st Defendant instituted a civil suit at Kisutu RM's Court for a declaration that the agreement that he signed at the police was void. He admitted a copy of the plaint as Exh.P4. He also tendered Exh.P1, P2, and P3 to show what the 1st Defendant did, in part performance of their arrangement for the incorporation of a new Company, but for which they were not allotted any shares. Even the alleged transfer of shares Exh.P3, were just empty shells. Although PW1 admitted in cross examination that he once worked for the Company, whatever he was paid was part of his remuneration for his services and not part of the investment funds. He admitted to have received USD.12500, which he said he used to offset part of his upkeep, and not part of USD 55,000 which the 1st Defendant had promised to pay at the police station. So his demands were not anything less than full refund of USD.200,000, plus interests and costs or to be put in possession of the factory.

But the Defendants' case, which was put forward by the 1st Defendant **ROBERT CHOUDRY (DW1**) was that he met Mr. Cameron Woods in Nairobi. He became interested in his business and sought to join in. There was a memorandum of understanding which reduced in writing, the terms of their agreement subject to its being perfected into a formal agreement. According to DW1, his understanding was that a new Company was to be formed in which the Plaintiffs would own 37.5% of the shares, and a new factory would be built. He said that the new factory cost USD.500,000, and that he was to own 62.5% of the shares in CULLINAN CUT & POLISH LTD and the Woods' shares would initially be held by Mr. Hyera, pending nomination of their own trustee. This was to meet the legal requirement in the business of gemstones. As far as he could recollect the Plaintiffs finally nominated MS. IMMMA, Advocates as their trustee to whom the shares were finally transferred.

He said that he witnessed the said share transfer and that all along the Plaintiffs were duly informed. He did not however follow up to see if the transfer were duly registered or tax thereon paid. However, he was later shocked to receive a message from the Plaintiffs, demanding back the money. As he began to cogitate on the basis of the demands, he was summoned to the police where he was forced into an agreement to repay the money or else face criminal charges for theft of USD.200,000. He said, following the said threats he was forced to pay USD.12,500, but later decided to

file a suit at Kisutu to seek a declaration that the agreement was void. Both in his evidence in chief and cross examination, DW1 admitted that he received USD.200,000 from the Plaintiffs and used part of it to buy the factory equipment. He also admitted that the 2nd Defendant did not issue any share certificates which could be transferred to the Plaintiffs. He informed the Court that, PW1 briefly worked at the factory as a director and was paid USD.2300 per month as salary and some fringe benefits. Pressed further in cross examination, DW1 admitted that the Plaintiff's money was also used to build the factory, but as part of their 37.5% shares in the new Company. Apart from USD.12500 DW1 admitted he never paid anything else that he had undertaken to pay, even the USD.50,000 he had expressly promised to, because he had began to run short of capital, due to the seizure of his passport by the police.

At the close of the defence, I asked the learned Counsel if they had anything to submit on their cases. Mr. Hyera, learned Counsel, said he had nothing to say. But Mrs. Kashonda learned Counsel for the Plaintiffs, briefly submitted that since the 1st Defendant had admitted receiving USD.200,000 from the Plaintiffs, utilized it to build the factory and equipment, and thereafter cheating out the Plaintiffs on the promised shareholding in the 2nd Defendant Company, and upon failure to refund the said sum in demand, the Plaintiffs are entitled to judgment as prayed with costs.

All the evidence and the submission of the Plaintiffs' Counsel, was actually directed at answering the following issues:-

(i) Whether the Defendants owe USD.200,000 to the Plaintiffs? If so on what account?

(ii) What were the terms of the Agreement between the parties under which the money was advanced?

(iii) Whether any of the terms of the Agreement was breached by any of the parties?

(iv) To what reliefs are the parties entitled?

I will now attempt to answer those issues.

On the first issue, I think there is no dispute that the Plaintiffs advanced to the 1st Defendant, the amount of USD.200,000. This is verified not only by the admission of the 1st First Defendant in his testimony, but also by Exh.P3 and P4. According to Exh.P3 to USD.200,000 was sent to the 1st Defendant's bank, BARCLAYS BANK (T) by wire on 15/9/2005 through SEI INVESTMENT, and credited into the 1st Defendant's account on 19/9/2005. On the question what the money was meant for we can only gather from the evidence of PW1, DW1 and Exh.P4. On the totality of that evidence,

I find that the money was sent as part of the Plaintiffs' investment in the business of cutting, polishing, and trading of rough and cut diamonds. I also find that it was to cover the value of 37.5% shares in CULLINAN CUT & POLISH LTD.

On the second issue, the terms of the agreement under which the money was transferred? While the testimonies of PW1 and DW1 were not at one as to all the terms of the agreement, I think one thing is clearly established. From the evidence, there is little doubt that a new Company was to be formed in which the Plaintiffs would own 37.5% shares. I have no doubt therefore that this was part of the established purpose of the USD.200,000.

On whether any of the terms of the agreement was breached by the Parties?

In my view, once it is established that the Defendants had received the USD.200,000 from the Plaintiffs, the Plaintiffs had discharged their part of the deal. It was therefore the duty of the 1st Defendant to use the money for the purposes for which it was sent, including establishing the new Company, and ensuring that the share structure represents the interests of the Plaintiffs. From the evidence on record, I find that the 1st Defendant did indeed establish a new Company, CULLINAN CUT & POLISH LTD. This is demonstrated by Exh.P1 and P2. According to Exh.P1, the 1st Defendant owned 625

out of 1000 shares. The other shares (i.e. 375) were owned by THADEI A. HYERA. According to DW1 the 325 shares were temporarily owned by Mr. Hyera in trust for the Plaintiffs pending the Plaintiffs' election of their own trustees. DW1 took pains to inform the Court that, at all the time, the Plaintiffs were informed of these developments. What beats me, however, is that, there is no evidence that Mr. Hyera was appointed as trustee for the Plaintiffs by the Plaintiffs. If the 1st Defendant was in touch with the Plaintiffs as he claims, I do not see why, the Plaintiffs, on being properly appraised of the legal position, did not ratify the appointment of Mr. Hyera as their trustee? All these questions point to the fact that there was no consensus ad idem between the parties on this arrangement.

Be that as it may, the 1st Defendant further testified that the shares held by Mr. Hyera, were finally transferred to the Plaintiffs' appointed trustees, Ms IMMMA Advocates. In my view, since the law of evidence demands that, he who alleges should prove, it was incumbent upon the 1st Defendant to prove this fact. I also take judicial notice that, in law, transfer of shares is a documented transfer of share certificates. So the Company that seeks to transfer shares must first issue share certificates. It is only the share certificates which can be transferred. In the present case, there is no evidence from the Defendants, that the 2nd Defendant had ever issued any share certificates at all, let alone in favour of Mr. Hyera, in

the first place. In the absence of such evidence, I can only conclude that it cannot be true, as DW1 claimed in Court, that he witnessed the transfer of shares from Mr. Hyera to IMMMA because there was nothing to transfer. Therefore by failing to issue share certificates and transferring them to the Plaintiffs, I think the Defendants acted in breach of the implied terms of the agreement. This is my finding on the 3rd issue.

The last issue is as to what reliefs are the parties entitled? Although, there is in my view, no written agreement, I am satisfied that the Plaintiffs, have on a balance of probability proved that they had sent to the 1st Defendant, some USD.200,000 for the purposes of investing in the business of trading cutting and polishing diamonds, and in the course, form a Company for the joint venture. Although the 1st Defendant did receive the money and set up the Company (the Second Defendant), contrary to the implied agreement, he did not see to it that the Plaintiffs were allotted the shares they contracted for. This means that the Plaintiffs suffered damages for that breach of contract. On the other hand, there is evidence that PW1 did receive USD.12,500 from the 1st Defendant. He has not produced any evidence to show the manner in which he used the money to offset his upkeep as he claimed. I find that fact not proved.

For all the above reasons, I enter judgment for the Plaintiffs and decree as follows:-

(i) The Defendant is to refund the USD.200,000 to the Plaintiff, less USD.12,500 which the Plaintiff acknowledged to have received. That means the decree is for USD.187,500 only.

(ii) The said USD.187,500 is to attract interest at commercial rate of 21% per annum from 15/9/2006 to the date of judgment.

(iii) The decretal sum shall attract interest of 7% per annum from the date of judgment to that of payment in full.

(iv) The Plaintiffs shall also have the costs of this suit.

It is so ordered.

S.A. MASSATI

JUDGE

16/11/2007

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