IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 172 OF 2019

ZB HOLDINGS (T) LIMITED..... PLAINTIFF

VERSUS

GOODWILL (TANZANIA) CERAMIC

COMPANY LIMITED.....DEFENDANT

JUDGMENT

Date of last order: 06/10/2022

Date of Judgment: 18/11/2022

E.E. KAKOLAKI, J.

The Plaintiff herein ZB Holding (T) Limited instituted the instant suit against the above- named defendant praying for judgment and decree as follows:

(a) Declaration that the defendant has breached the contract between it and the plaintiff.

(b) An order requiring the defendant to pay the plaintiff Tanzania Shillings (TZS.1,458,900,000) being profit loss on account of breach of the contract by the defendant.

(c) An order requiring the defendant to pay the plaintiff TZS. 965,000,000/= being money put in business and lost for failure of the defendant to perform its part of the contract.

(d) Interest on relief (b) and (c) herein above at the rate of 29% per annum from 1/08/2019, the last date of the contract to when the money under contract will be paid in full.

(e) General damages of TZS 2,000,000,000/=

(f) Interest on the judgment debt at the rate of 7% per annum from the date of payment to the date of full satisfaction of the decree.

(g) Cost of this case.

(h) Any other relief in favour of the plaintiff as the honourable Court may deem fit and just to grant.

Upon being served with the plaint, the defendant filed a Written Statement of Defence disputing the plaintiff's claims and called upon the plaintiff into strict proof of the same while praying for dismissal of the suit in its entirety with costs. Subsequent to that, the defendant raised a counterclaim against the plaintiff. Nevertheless, the same was withdrawn on 15th June, 2022, under Order XXIII Rule 2 (b) of the Civil Procedure Code, [Cap 33 R.E 2019) (the CPC), in the course of hearing of the case.

For the purposes of better understanding of the dispute against the parties I find it imperative to state the fact of this case albeit so briefly. From the plaint it is gathered that sometimes in mid-2018, the plaintiff negotiated a business deal for supply of magnesite carbonate to the defendant under which, the plaintiff allegedly prepared and submitted to the defendant a plan to supply the defendant a minimum of 30,000 tons of the magnesite carbonate within one year at a price of Tanzania Shillings (TZS) 100,000/= per ton, thus making it a total of TZS. 3,000,000,000/= for all 30,000 tons out of which the first TZS. 1,541,100,000 would go to repay the capital invested by the plaintiff and the remaining TZS 1,458,900,000/= would be retained and enjoyed by the plaintiff as profit at a profit margin of TZS 48,630/= per ton. After a long negotiation, visitation and inspection of the site and discussion of the matter at length, on 31st July, 2018 parties entered into agreement, in which the plaintiff was required to supply and deliver to the defendant at its factory at Mkiu, Mkuranga, Coast Region, from Ndungu area within Same District, Kilimanjaro region, a minimum of 30,000 tons of magnesite carbonate, within one year running from the 1st August, 2018, at a price of TZS 100,000 only per ton, and paid TZS three Billion (3,000,000,000) only for the whole consignment of 30,000 tons of the goods

(as suggested in the business plan). Among other things, the agreement required the defendant to effect payments to the plaintiff after supply of every 300 tons of the goods and prohibited her from doing business of the inspected goods with any person other than the defendant during the existence of the said agreement. Acting under the contract and that plan, the plaintiff proceeded to the site mobilized, collected and managed to supply the defendant at his factory at Mkiu area within Mkuranga District. the first consignment of 2,000 tons, the process that took her about 30 days consecutively from early August, 2018 to early September, 2018 for which the defendant paid the her a sum of TZS 200,000,000/=.

It appears the process of collection and mobilization fo goods at Ndungu area within Same District, Kilimanjaro region to supply to the defendant under the agreement never stopped from when it started. And when the plaintiff was ready to further supply other consignments towards completion of the planned quantity, on 13/09/2018 received a phone call from the defendant stopping her from supplying the remaining consignment of the goods on the reason that defendant's storage facility of good was full. It is contended the plaintiff made all attempts through telephone calls, physical visits, telephone messages and all other available means of communication

to persuade the defendant to stop blocking the contract from being performed and effecting payments to the plaintiff without justification, but the defendant sticked to its stand to stop the plaintiff from further supply of goods. It is from such act the Plaintiff laments that, she incurred loss as she had solicited funds to perform his business arrangements which involved borrowing TZS. 375,000,000 from KCB Bank to repay with interest of up to 29% per annum and for which a non-refundable fee of 2% was payable and paid, the process which involved the defendant too. It is due to this background that the present suit is preferred where by plaintiff is claiming for the reliefs alluded to above. It is to be noted also that at the time of execution of the agreement between parties the plaintiff was trading under the company's name of ZS Safaris Limited which was later on changed and amended by the plaintiff vide court's order of 03/05/2021 to the present one of ZB Holdings (T) Limited.

At all material time, the plaintiff enjoyed the legal services of Mr. Paschal Mshanga while the defendant hired the legal services Mr. Adolf Mzeru and Athanas Wigan, all learned counsels. Before hearing could start, on 19/05/2021 the following issues were framed and adopted by the Court for determination of parties' dispute in this suit:

(1) Whether there is a breach of contract by either party

(2) If the first issue is answered in affirmative, whether there is loss suffered

(3) To what reliefs are the parties entitled to.

However, in the course of hearing with consensus of both parties and upon grant of leave of the Court, on 14/06/2022, the fourth issue was added and agreed to read as the first issue, and the rest read as the 2nd, 3rd and 4th. The said added and now 1st issue goes thus:

Whether the contract between the parties is valid or not.

To prove her case, the plaintiff called two witnesses namely, Zilly Badi Mruma Managing Director of the plaintiff and Abel Msata who will be referred as PW1 and PW2 respectively and relied on thirteen (13) exhibits.

Testifying under oath PW1 stated that, the relationship between him and the defendant started on 2017, when his friend Mr. Abbas connected him to Rashid Yang (defendant's director), whereby he visited the latter at the industry/plant who intimated to him of the minerals known as magnesite carbonate by the defendant's company. As the plaintiff's company had an area for extraction of the said minerals within Ndungu area Mr. Yang proposed to visit the said area which he did and verified the quality of the

magnesite carbonate found thereat and documents concerning ownership. It was his further testimony that, in January 2018, they met at the site where Mr. Yang took some samples for laboratory analysis before he informed him in March 2018, via phone that the minerals had passed the test, thus requiring PW1 to meet him with all documents regarding permit and ownership so as to conclude the deal. According to PW1, together with his colleague prepared a business plan which was tendered in court as exhibit PE1, with a view of knowing the amount of profit, costs as well as viability of supply of goods.

It was his evidence that on 31/07/2018, PW1 on behalf of the plaintiff and before his advocate executed an agreement with Mr. Rashid Yang (DW1) for the defendant for the supply to the defendant 30,000 tons of magnesite carbonate per year at the cost of Tsh. 100,000 per ton, in which the payment mode was to be through raising an invoice with EFD receipt before payments are effected by the defendant. According to him they also agreed that, upon signing the contract, he should not sell the minerals from that site to any other person otherwise his company would be penalized by TZS. 200,000,000.00, and further that each consignment would be weighed and analyzed in the laboratory upon receipt. PW1 said as it was their oral

agreement that, the contract would be entered into after confirmation of plaintiff's financial capacity, he informed the defendant right away of his deficit of Tsh. 375,000,0000.00 in the capital which was to be raised through loan from the bank after defendant's confirmation to the bank that they will offer the plaintiff that contract of Tsh.3,000,000,000. The said contract bearing plaintiff's former name and translated from Chinese to Kiswahili was tendered and admitted as Exhibit PE2 as the translation certificate from BAKITA was also admitted as exhibit P3.

It was PW1's testimony that, plaintiff's obligation under the contract was to mine the magnesite and transport them from Ndungu village at Same District within Kilimanjaro Region to the defendants factory at Mkiu village within Mkuranga District, Coastal region on his costs, the obligation which he performed, by transporting at first 2000 tons within a month in which the defendant paid TZS. 200 million, at the cost of Tsh. 100,000/= per ton and that was exhibited by ZB Safaris Limited bank statement admitted as Exhibit PE5. He said in order to meet the obligation had to enter in transportation agreement by hiring trucks from Underline Company Ltd in which transportation services agreement was tendered and admitted as exhibit PE12. PW1 went on the testify further that, apart from the 2000 tons

supplied to the defendant, plaintiff had a stock of 22,000 tons waiting to be supplied but while loading trucks ready for further supply of material/goods, on 13/09/2018 received the telephone call from Rashid Yang, the senior Manager and shareholder of the defendant, asking him to stop the supply of Magnesite as there was no storage space at the factory. PW1 said after receiving the said phone, notified Mr. Rashid of the progress he had made in terms of mobilization of the materials which included hiring of the motor vehicle and other plants like excavator. He testified that, the plaintiff had hired 16 trucks of 30 tons capacity for the contract period of one year, and to prove to the defendant the stages he had reached. He took some pictures from the mining site and tender the transportation services invoice worth TZS. 590,000,000, which were all admitted as Exhibit P6 collectively. He went on testifying that, following that breach of contract he pleaded Rashid Yang to vacate his decision as the delivery plan was for supply of 30,000 tons for one year but on 13/09/2018 and 27/12/2018 respectively, he charted with Mr. Rashid who sent him a video clip and messages through We-chat social media by messages and video confirming that, there was no problem about the money spent for hiring trucks, the conversation which were admitted as exhibit P8 collectively. PW1 testified further that, after that

misunderstanding, he contacted his lawyer who wrote two demand notices to the defendant without reply, the notices which were admitted as Exhibit PE9. And that at that time the said 22 tonnes of magnesite which were already moved from the mining site to Mkomazi (depot) which is almost 55 kilometers from the mining site, remained undelivered todate.

Concerning the capital for running that business PW1 testified that, after winning the tender for supply of magnesite, and as a majority shareholder of the plaintiff's company, secured loan of Tsh. 330 million from KCB Bank Uhuru Branch (Dar es Salaam), out of which Tsh.140 was an overdraft facility while Tshs. 190 million was the term loan, and that, he later on added Tsh. 35 million which makes a total of loan collected for financing the project and repaid with interest to be Tsh. 365 million. According to him after the termination of the contract he failed to re-service the loan. To prove all these transactions, he tendered the agreement between ZB safaris Ltd and Zilly Bad Mruma dated 01/08/2018 for financing the project, Bank Statement with regard to account No. 3390321284 in PW1's name and two Bank Facility letters all tendered and admitted as exhibit PE10. According to Pw1 before issuance of that loan, the bank visited the defendant to establish her seriousness of the transaction, and during visitation he took some photos

which he tendered in court and the same were admitted as exhibit PE11. Due to breach of contract, the plaintiff and PW1 were affected a lot in terms of mental and business loss, PW1 lamented. According to him, he suffered hypertension due to breach of this contract and concluded that, the company had to pass a board resolution to institute the present suit (Exhibit PE 13), hence prayed for the orders as enumerated above.

When subjected to cross examination by Mr. Mzeru for the defendant as to whether he tendered any document to exhibit that, the plaintiff had valid mining licence or permit when contracting with the defendant, PW1 admitted that, he tendered no any licence for mining magnesite nor any dealership licence. And when queried as to whether there was specific term in the contract that supply of magnesite be done simultaneously, PW1 admitted there was no such term in their contract. When referred to exhibit PE 8, as asked when was the plaintiff asked to supply the materials after suspension, PW1 said, as per their telephone conversation of 27/11/2018 Mr. Rashid Yang suspended the supply to June 2019, while admitting that, such period was within the contract period of one year. When asked further whether he had tendered any employment contract of the employees or any payroll to prove that there was employees at the site , he said he had tendered none.

When referred to exhibit PE 10, PW1 told the court that, there is nowhere in the loan facility where the defendant signed as a guarantor, and further that, there is nowhere it is stated that the bank required any commitment between plaintiff and the defendant for the release of loan. When subjected to more questions by Mr. Wigan, PW1 said that, he injected Tsh.200 million to the business but there is nowhere in the documents tendered in Court it is indicated that the claimed amount was deposited in the plaintiff company's account.

During re-examination he explained that, before signing the agreement with the defendant, the plaintiff was supposed to have business licence, certificate of incorporation of the company, mining sites and capacity to perform the contract in terms of the equipment's and financial means and lastly, that he had to pay for loyalty fees, the requirements which were all proved to the defendant. On the breach of contract he elaborated that, the supply was to start from 01/08/2018 to 31/07/2019, but he executed the contract from 01/08/2018 up to 13/09/2018 only and stopped for 9 months till June 2019 meaning one month before expiry of the contract, thus impossible to supply 30,000 tons in three months. Concerning payroll he said, at the mining site he had only labourers (vibarua). When referred to

Exhibit PE12, he said, according to that contract the transporter had to transport the materials from Mkomazi to Mkuu though there was oral agreement to transport from Ndungu village to Mkomazi.

PW2, the bank loan officer from KCB Bank came in to corroborate PW1's testimony that the plaintiff is their client and that in 2018, they processed a loan for Mr. Z. B Mruma, as he had another loan from TIB of Tsh.190, which they bought and advanced him an overdraft of 165 million plus other charges in which the amount escalated to Tsh.175 million. He said before that they visited the defendant's industry located at Mkuranga, to confirm whether the defendant has business engagement with the plaintiff as alluded above, which they established. They also satisfied themselves that, their client had the primary mining licence, BRELA registration, contract agreement for the supply of the said magnesite and other payment of necessary levies /fees. He added that, to confirm that he complied with those conditions, they issued a letter of offer to him (exhibit PE 10 collectively). He went on testifying that, all the loans issued to the Z. B Mruma were for financing the project, and were repaid smoothly in the first 6 months through PW1's account being credited by the defendant but later on stopped. It was his further testimony that, on asking their client Zilly Badi Mruma were informed

that, the defendant had stopped the supply of material as she was running out of storage space at the plant. He said that, their efforts to get the feedback from the defendant of the cessation of the contract so that they could subject their client to loan restructuring program proved futile, hence decided to issue their client with 7 and 14 days' notices to make good of his loans before he was lastly issued with 60 days' notice for disposing off the mortgaged property. He said that, the sixty days' notice has lapsed and that the collaterals can be disposed of any time. He added that, Mr. Zilly Badi Mruma had a fixed deposit of Tsh.200 million which he decided to request to withdraw before its maturity after suffering business loss.

When subjected to cross examination on the loaned money and whether there was commitment bond for payment by the defendant, PW2 admitted that, there is no evidence to the effect that the loaned money to PW1 was transferred to the company's account, and that, there is no commitment bond to show that the defendant would pay the plaintiff within 30 days of supply of magnesite, but they relied to the contract between the plaintiff and the defendant only. He also admitted that, he had not tendered any default notice issued by the bank to the defendant. When subjected to re-examination by Mr. Mshanga, PW2 said that they issued the loan to PW1 in

order to finance the company thus the money was paid to his personal account while amount of 190 million paid to TIB. This marks the end of plaintiff's case.

Defence side also had two witnesses, Mr. Yany Fang, the manager of the defendant's company, (DW1) and Ezekiel Athanasio Mtili, Senior Mining Technician from Mining Commission within the Ministry of Minerals (DW2).

In his evidence DW1 admitted to have entered into contract with the plaintiff in 2018 for the supply of magnesite materials to the tune of 30,000 tons, out of which, the plaintiff supplied only 2000 tons which was paid for. He said, in December 2018, he called PW1 and informed him that they were running out of space for storage of the material at their site thus, and asked them to stop the supply until June 2019. He said, in June 2019, he called ZB Mruma aiming at requesting for supply of material/goods without response, hence had to stop production for want of raw materials. DW1 told this court that he doesn't know why the plaintiff brought him in court as it is her who failed to supply materials to them. DW1 went on to state that they wrote to the Mining Commission at Same to inquire the validity of the Mining Licence of ZB Safaris Ltd (former plaintiff's name), and received the response that the plaintiff had no Mining licence. He finally prayed the court to dismiss the suit

since plaintiff has no mining licence hence unauthorized to trade in the said magnesite minarals.

When subjected to cross examination by Mr. Vedasto for the plaintiff, DW1 said that, plaintiff supplied the materials to them from July to September 2018. He said, as per the contract, plaintiff had to supply 30,000 tonnes but there was no term stipulating that supply should be every month. According to him, when he informed the plaintiff to stop supply, PW1 agreed and added that the 2,000 tons payment was made in instalments and the plaintiff asked the EFD receipts which included VAT. He admitted that, 1st June 2019 the remaining contract period was two months only but the company was ready to extend time to the plaintiff to supply the materials.

DW2 on the other side informed the Court that, their office received a letter from the defendant, dated 10/05/2022 exhibit (DE1) seeking to verify the plaintiff's mining licences. According to him, his office responded by writing a letter exhibit DE 2, informing the defendant that, at the time the said information was requested, plaintiff had no existing mining licence, as the response was covering the period from 2018 to date.

He clarified further that, the mining of magnesite is done by licensed person, and that, the miner must have a primary mining licence, of which during

transportation of the minerals the transporter must have also invoice indicating the receiver of the materials, government receipts indicating payment of al Government levies, District Council Levy, and where there is an agreement between the village and the miner, payment of the village levy or royalties evidence should be produced. He added that, when mining, the miner must declare the amount of minerals extracted.

During cross examination, he admitted to have signed exhibit DE2 on behalf of the in-charge and that he did not produce any document or any exhibit to prove his delegated powers by the Chief Executive Secretary to the commission to sign the said letter. He elaborated that, the requested information by the defendant was of August 2018. When asked whether a person can transfer minerals without detection, he said a person can do so though, it is difficult to transfer 70 lorries from Kilimanjaro to Dar es Salaam without being detected. That marked the end of defence case.

After each part had closed its case, the learned advocates for the parties prayed for leave to file their final submissions, the prayer which was cordially granted. Both parties adhered to the filing schedule. I had ample time to read their final submissions in support of their respective stances. I truly commend them for their hardworking and insightful inputs assisted me in

deliberating and deciding on the parties' dispute. However, I am not intending to reproduce the same, but in the course of determining this suit, I will be referring to them where need be.

Having gone through the pleadings, testimonies of the witnesses from both sides and final closing submissions eloquently crafted by the two legal minds, I wish to point from the outset that, there are some issues which are not disputed by the parties. Firstly, it is not disputed that, on 31st July, 2018 parties entered into contract in which plaintiff was contracted to supply 30,000 tons of Magnesite carbonate (minerals) to the defendant, for a period of one year starting from 1st of August, 2018, for consideration of TZS. 100,000 per ton which in total would make a sum of TZS, 3,000,000,000. Secondly, that, the minerals were to be mined from Ndungu village within Same District, Kilimanjaro region and transported to Mkiu area within Mkuranga District at the defendant's factory/plant. Thirdly that, only 2000 tons out of 30,000 tons of magnesite carbonate were supplied to the defendant and paid for. And fourthly, parties are at one in that, after receipt of 2000 tons the defendant suspended supply of materials untill June 2019 due to lack of storage space. On that note, I will now revert to determine the merit or demerit of this suit by addressing the framed issues. In so doing,

I shall be guided by the principle governing determination of civil cases that, he who alleges has the duty to prove the allegations, the principle which is encompassed in section 110(1) and (2), and 111 of the Law of Evidence Act. And that, the standard of proof is on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible that the other. See the cases of **Attorney General and Two Others Vs. Eligi Edward Massawe and Others**, Civil Appeal No.86 of 2002, **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017, **Berelia Karangirangi Vs. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017, and **Dar es salaam Water and Sewarage Authority Vs. Didas Kameka & Others,** Civil Appeal 233 of 2019 (all CAT-unreported). With that knowledge in mind therefore, this court is to decide whether the burden of proof has been sufficiently discharged.

I find it prudent to start with the issue as to whether the contract between the parties is valid or not. As per records, this issue arose after PW1 had completed adducing his evidence. Mr. Rico Mzeru for the defendant is of the view that the contract itself was illegal since the plaintiff had no mining licence as exhibited by Exhibit DE2 and in contravention of section 18(1) of the Mining Act which prohibits unauthorized trading of minerals without valid

licences or permits. On the other hand, Mr. Mshanga for the plaintiff is of the contrary view submitting that, the issue of validity of the contract was raised as an afterthought, as existence and validity of mining licence was a prerequisite condition before the parties executed their agreement, and that, the defendant through DW1 satisfied herself of their existence before signing the contract. He argued further that, even if it is believed the plaintiff had no requisite licences or permits which is not the case, the consequences thereof under section 18(4) of the Minerals Act, is to be held criminally liable, as DW2 when cross examined said there was no possibility for the plaintiff to transport 70 trucks without licence from Same, Kilimanjaro region. He added that, there was no evidence to prove that the plaintiff had no mining licence as the purported letter from the defendant requesting for information from the Mining Commission exhibit PE1 was restricted to the status of the plaintiff's licences as of August, 2018 only and not before since the agreement was entered on 31/07/2018. Basing on the principle of sanctity of the contract as adequately addressed in the case of **Simon Kichele Chacha Vs. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018 (CAT-unreported), where the Court refused to accept appellant's excuse for seeking to avoid consequences of his failure to perform a contract for want

of licence to issue loan by the other party. He therefore called this court to hold there was valid contract between parties.

Legally one of the essentials of a valid contact is existence of a lawful object or a subject matter apart from lawful consideration, capacity of parties to enter into the contract and willingness to so do (consent). In other words, validity or otherwise of the contract is a matter of Law, which is provided for under section 10 of the Law of Contract, [Cap 345, R.E 2019]. The said section provides that:

> **10**. *All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and* ***with a lawful object****, and are not hereby expressly declared to be void:*
> *Provided that, nothing herein contained shall affect any law in force, and not hereby expressly repealed or disapplied, by which any contract is required to be made in writing or in electronic form or in the presence of witnesses, or any law relating to the registration of documents*.

In this case as alluded to above it is uncontroverted facts to both parties that, parties in this matter had capacity to enter into the contract exhibit PE2, and did so with free will and for lawful consideration. What brings them apart is the issue as to whether the object for which the contract was

executed which is the supply of magnesite carbonate was lawful or not so as to render the said contract a valid one.

Before addressing the issue as to whether the contract between the parties is valid or not, I find it pertinent to address first the concern raised by Mr. Mshanga, whether the said issue was raised as an afterthought hence should not be considered by the Court. As hinted above this issue was raised and framed by the Court, by consensus of parties after PW1 had finished to testify on 14/06/2022. Since counsel for the plaintiff's Mr. Mshanga was present and did not object the prayer from Mr. Mzeru for the defendant for additional issue, then the plaintiff cannot be heard complaining that the same was an afterthought. Even if the plaintiff had resisted still the Court could have invoke its powers under Order XVI Rule 5(1) of the Civil Procedure Code, [Cap. 33 R.E 2019] and proceed to frame the additional issue upon being satisfied that it was necessary to so do for the purposes of determination of matters in controversy between parties. Order XVI Rule 5(1) of the CPC reads:

> *5.-(1) The court may at any time before passing a decree amend the issues or f**rame additional issues on such terms as it thinks fit**; and all such amendments or **additional issues as may be necessary for determining***

the matters in controversy between the parties *shall be so made or framed. (Emphasis supplied).*

Glancing at the pleadings, it is obvious to me that the defendant never raise the issue of validity of the contract when filed her Written statement of Defence on 31/10/2019 and later on when she amended Written Statement of Defence on 27/08/2020, by filing the counter claim which was also later on withdrawn. The same came in after PW1 had finished testifying and upon being cross examined as to whether he tendered any document to exhibit that the plaintiff had valid mining lincences or dealers licence to allow her engage into minerals trading. I am alive to the existing principle of the law that parties are bound by their pleadings and no party is allowed to make his case outside the pleaded pleadings unless the same are amended. See the cases of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012 (CAT-unreported) **Yara Tanzania Limited VS. Charles Aloyce Msemwa**, Commercial Case No. 5 of 2013 (HC-unreported). However, there is an exception to that rule. It is trite law that, where the issue crops up during the trial and adequately canvassed by the parties, the Court is entitled to determine it, even when the same is not expressly taken by the parties in the pleadings. This was the position of the Court of Appeal in the case of **Jovent Clavery Rushaka**

and Another Vs. Bibiana Chacha, Civil Appeal No. 236 of 2020, whether the Court had this to say:

> *"... where an issue crops up during the trial and parties adequately canvass it, by implication the parties new the issue and left it to the trial court for determination. Thus, the mere fact that the issue was not expressly taken in the pleadings would not disentitle the trial court from determining it."*

In this matter like in the above cited case, since the said issue was raised and framed by the Court and adequately canvassed by the parties, I find this Court is entitled to determine the same as I hereby proceed to do.

Now back to the issue at hand whether the contract between the parties is valid or not, the defendant through DW1 informed the Court that the same was invalid as the plaintiff had no valid mining licence to entitle her trade in magnesite carbonate minerals. His evidence is corroborated by DW1 the officer from the Minerals Commission Kilimanjaro office who testified to the effect that, the plaintiff had never possessed licence for magnesite carbonate extraction at Ndungu area within Same District, Kilimanjaro region and backed up his testimony with the letter from his office exhibit DE2 so proving. The contention by Mr. Mshanga that, the said later is covering the period of August, 2018 as requested in the defendant's letter exhibit DE1 while the

contract was executed on 31/07/2018, in my firm view does not bail out the plaintiff. I so find as the contents of exhibit DE2 are very detailed and so categorical in that there is no any record in that office showing that the plaintiff had ever possessed mining licence from that office. For easy of reference I quote part of the content of the said letter dated 14/06/2022:

> *"Napenda kukufahamisha kuwa, katika taarifa zote za leseni kwenye ofisi yangu, hapakuwa/hakuna leseni ya aina yeyote inayomilikiwa na kampuni ya ZB Safaris Limited wala ZB Holding Limited. Hivyo endapo kuna nyaraka yeyeote ya madini kwa kampuni tajwa iliyowasilishwa katika ofisi yake, haijatoka ofisi yangu.*
>
> *Ofisi ingependa kuwakumbusha kufiatilia uhalali wa leseni za madini kabla ya kuingia makubaliano ya kibiashara, kwani kwa mujibu wa sheria ya madini sura ya 123 hairuhusu kufanya biashara ya uchimbaji madini, wala biashara uya madini pasipo kuwa na leseni husika inayotambulika na Tume ya Madini. Msisite kutuandikia kwa maelezo zaid pale itapohitajika.*
>
> *Katika ujenzi wa taifa.*
>
> *Ezekiel A. Mtizi*
>
> *K.n.y: Katibu Mtendanji*

In the light of the above quoted excerpt from exhibit DE2, it is conspicuously noted that the response did not cover the period of August 2018 only as Mr. Mshanga would want this Court to believe but rather general status of the

plaintiff's with regard to ownership or dealership of or in minerals. This fact was never controverted by any documentary evidence by the plaintiff to prove that she had the valid mining licences, apart from claiming that it was a conditional precedent for the plaintiff to produce all valid document including mining licences for inspection by the defendant, before signing the contract which she did. To me that, is not enough to prove that the plaintiff possessed valid mining licences before entering into contract with the defendant, as since the issue was raised before closure of her case she had ample time to recall PW1 and or bring another witness to produce the said licences as exhibit which she failed to do. In absence of such evidence to I would hold the plaintiff possessed no valid licences at the time executing the contract with the defendant as exhibited exhibit DE2.

Now the follow up question is what are the consequences for signing the contract for supply of minerals (magnesite carbonate) without a valid mining licence?. As cited above the law under section 10 of the Law of Contract Act, requires that a valid contract must be with a lawful object. The object of the contract in this matter is supply of 30,000 tons of magnesite carbonate (minerals). The provisions of section 18(1) and (4) of the Mining Act, [Cap. 123 R.E 2019) makes it illegal by criminalizing any act of dealing with or

trading in minerals without being mineral right owner or without any dealership or broker licence. The said section reads:

> *18.-(1) Subject to subsection (2), no person other than a mineral right holder, a licensed dealer, a licensed broker or a holder of Minerals Import Permit shall have in his possession, or dispose of, any mineral or minerals, unless as an employee, agent or contractor, he has acquired and holds the mineral or minerals for or on behalf of a mineral right holder, a licensed dealer, a licensed broker or a holder of Minerals Import Permit. (4) Any person who contravenes the provisions of subsections (1) and (3) commits an offence and on conviction is liable- (a) in the case of an individual, to a fine of not less than five million shillings but not exceeding ten million shillings or to imprisonment for a term of not less than one year but not exceeding three years or to both; (a) in the case of a body corporate, to a fine of not less than twenty million shillings but not exceeding fifty million shillings.*

Since the law makes it illegal an act of trading in minerals without licence and since in this matter the contract for supply of minerals of 30,000 tons of magnesite corbonate which is an object of the contract was entered into by the plaintiff without valid mining licence hence rendering the said object illegal one for contravening the provisions of section 18(1) of the Mining Act, I am forced to hold that the contract between the parties was illegal hence

invalid. Since the object of the contract was illegal then there was no valid contract in law as the same was null and void ab initio. The first issue is therefore answered to that extent.

Now since it has been found that there was no valid contract between the parties then, the whole claims by the plaintiff against the defendants crumbles and I see no justifiable reasons to consider the rest of the issues.

In the premises the resultant consequence is to dismiss the suit in its entirety which I hereby do.

Each party to bear its own cost.

It is so ordered.

Dated at Dar es Salaam this 18th November 2022.

E. E. KAKOLAKI

JUDGE

18/11/2022.

The Judgment has been delivered at Dar es Salaam today 18th day of November, 2022 in the presence of Mr. Athanas Wigan, advocate for the defendant who is also holding brief for Mr. Paschal Mshanga, advocate for the plaintiff, and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
18/11/2022.