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

COMMERCIAL CASE NO. 51 OF 2004

ALAN ERNESTINE .....1ST PLAINTIFF
ROLAND VICENT .....2ND PLAINTIFF
ROBERT SIMPSON .....3RD PLAINTIFF
MARY - ALISE ERNESTINE..... 4TH PLAINTIFF

VERSUS

JOHNSON LUKAZA.....1ST DEFENDANT
KERNEL LIMITED .....2ND DEFENDANT

JUDGEMENT

KALEGEYA, J.

The Plaintiffs, represented by Mr. Lutema, Advocate, pray for judgement against the Defendants, severally and jointly as follows:-

"a. An order for restitution of US $ 93,290.00 being monies given to Defendants due to his (sic) misrepresentation and/or fraud.

b. An order for payment of US $ 30.000.00 being specific damages incurred by the plaintiffs while pursuing recovery of the sum under (a)

c. General damages as assessed by the Court.

d. An order for payment of interest on (a) & (b) above at the Commercial rate of 30% per annum from the date of respective receipt of the money to the date of Judgement of this suit.

e. *An order for payment of interest on the decretal sum at the court rate from the date of judgement till full payment.*

f. *Costs of this case be provided for.*

g. *Any other order or reliefs as the Honorable Court deem fit and equitable to grant"*

The Defendants were represented by Mr. Kakamba, Advocate.

The Plaintiffs called three witness [1st Plaintiff-Allen as PW1; 3rd Plaintiff-Robert Simpson as PW2 and James Bwana as PW3] and tendered 12 documentary Exhibits (Exh: P1-12) while DW1 (the 2nd Defendant) was the sole witness for the Defendants.

The following facts stand undisputed.

The Plaintiffs are businessmen and foreigners. While the 3rd Plaintiff is based in South Africa, the rest are in Seychelles.

The 1st and 4th plaintiffs are husband and wife respectively.

The 1st Defendant is Tanzanian national.

The 2nd Defendant is a limited liability company registered under the laws of Tanzania and of which the 1st Defendant, who was the promoter, is the majority shareholder.

Upon knowing each other, the plaintiffs and the 1st Defendant executed Exh. P1 by which 18% shares of the 2nd Defendant were transferred to Plaintiffs. The said Exh. P1 states:

"SHARE PURCHASE AGREEMENT

THIS AGREEMENT *is made 4th day of June, 2001*

BETWEEN

JOHNSON LUKAZA *of P.O. Box 1495, Dar es Salaam of one part (hereinafter referred to as the "VENDOR")*

AND

ROLAND VICENT *of P.O. Box 1161, Victoria, Seychelles,* ***ALLAN ERNESTINE*** *of P.O. Box 790, Victoria, Seychelles* ***MARY-ALISE ERNESTINE*** *of P.O. Box 790, Victoria, Seychelles and* ***ROBERT SIMPSON*** *of P.O. Box 38, Winklespruit 4126 Natal, South Africa of the other part (hereinafter referred to as the"PURCHASERS")*

WHEREAS *the VENDOR is the Chairman and Director of* ***KERNEL LIMITED*** *holding Ninety percent (90%) of the total shares.*

AND WHEREAS *the VENDOR is desirous of selling some of his shares and the PURCHASERS are desirous of buying the same from the VENDOR free from all encumbrances and liabilities on terms and conditions herein after appearing.*

NOW THIS AGREEMENT WITNESSETH

1. *Subject only to the conditions contained in this Agreement the VENDOR shall sell and the PURCHASERS shall purchase 18% of the shares each free from all encumbrances.*
2. *That the purchase price for said shares shall be paid to the VENDOR in a period of four years from the date of signing this Agreement.*

3. *That upon execution of this Agreement the PURCHASERS shall be appointed as Director of the Company with immediate effect.*
4. *That the VENDOR covenants to accord the PURCHASERS share certificates upon completion of payment of the purchase price.*
5. *That the VENDOR covenants with the PURCHASERS that the interest which he professes to the purchaser subsists and that he has proved to transfer the same and that in the event this Agreement shall be nullified for reasons the VENDOR did not have title or right over the shares, the parties shall revert to their original position, and Monies advanced or paid by the purchaser shall be returned to the PURCHASERS by the VENDOR.*

6. *That in the event that the shares sold to the PURCHASERS are not paid for by the purchaser in the manner provided for in this Agreement their directorship shall be revoked and the shares shall (sic) forfeited.*

IN WITNESS WHEREOF *the parties hereto have duly executed these presents on the days and in the manner hereinafter appearing."*

This agreement was duly executed by all the Plaintiffs and the 1st Defendant on 4/6/2001.

No monetary value or part thereof, (of the said shares) however was ever paid as such. The parties were to embark upon business

relationships and the foreigners needed local partners of which the Defendants filled up the gap. The first deal showed up in gold and diamond selling/buying venture. 200 kgms of gold and 2kgms of diamond were to be sold to plaintiffs with the Defendants being, among others, guarantors. The guarantee was reflected in yet another executed agreement, Exh. P2. The said agreement provided

"AGREEMENT
3-6-2003

This agreement is a loan agreement with guarantees.
This agreement will include the following parties.

1/ *Jonhson Lukaza as the recepient Kernel Ltd of the loan and the supplier of the guarantee with the client.*
2/ *R. Vicent as the financer.*
3/ *Allan Ernestine as the financer.*
4/ *Johson Lukaza as the representing agent between the parties*

This agreement must be treated as a loan agreement for the following:

1/ *The recipient to the loan is to supply a guarantee for the amount of 200 kilos in gold, which is to be 99.82% pure and delivered to the bank of the financer with all legal, relevant documentations allowing for the financer to hold the said guarantee in his name and his property until such time period given for re-payment of this loan.*

2/ *This loan from the financer will be interest free.*

3/ *The period of this loan is to be given as follows: From the date the recipricant appropriates the funds a given period of fourteen days to sort out documentation for the sale of the recipricants products. In the event that these documents are not forthcoming, the financer will have full rights to retain and sell the guarantee supplied in full. In the event that the documents and the sale of the recipricants products is carried out successfully, the recipricant will settle the loan amount and the guarantee will be returned, should there be any mishaps or any form of hold up that would jeopardixe the sale of the products from the products will be given a further twenty days.*

4/ *It must be clearly seen that the financer is purely assisting in an interest free loan for the period given and for no other reason other than this.*

5/ *Upon full and final inspection of the guarantee and the documentation and the deposit into the deposit box to the satisfaction of the financer, an amount of U$ seventy-seven thousand will be paid in equivalent in Tanzania shillings to the recipricant agent. The following to take place within the security of the bank.*

6/ *In the event that the financer is not satisfied with either the guarantee or the documents, this amount will not be paid".*

This also was duly executed by the trio above enumerated on the date appearing atop thereof (3/6/2003).

Subsequently, the Plaintiffs paid US $77,490.60 by a telegraphic transfer (Exh.9) from Australia and News Zealand Banking Group Limited Branch at Perth through the 2nd Defendant's account No.010260012100 lying with Standard Chartered Bank (T) Limited and the same was drawn by the 1st Defendant. This sum was said to be for the administrative part of the purchase process of the said minerals including paying government taxes and duties; purchase of: Exh.P6, a SADC ownership certificate showing that 200 kgms of gold were to be exported by the 2nd Defendant (as exporter and consignee), Exh. P7, a certificate of origin in respect of 2 kgms of Diamond (otherwise known as Kimberley certificate of origin verifying that these are "no conflict diamonds") showing that the exporter was the 2nd Defendant while the consignee was Malca-Amit Antwerp, Belgium. The sum also was to cater for freight charges.

The above was followed by yet another payment of US$ 10,800 which was said to be for facilitation of changing ownership-from sellers to buyers. This amount was part of the cash drawn by PW1 vide Exh. P5 - a bank transaction receipt. The said sum was received

by 1st Defendant although the acknowledgement receipt/note (Exh. P4) was signed by one Erick Kibee. Among the documents supplied also is Exh. P8, a single Bill of entry by Tanzania Revenue Authority which shows that the 2nd Defendant as an Exporter using Cath Freight Forwarders was to export ***"ONE STEEL BX STC VALSIONES"*** whose base value was Tshs 3,664,500,000/= to ***MALCA - AMIT ANTWERP, BELGIUM*** and that Duty/Tax due in the sum of shs 10,993,500/= being 0.3% thereof was paid.

And yet still, a further US $ 5000 was paid by Plaintiffs to facilitate what was said to be other transfer documents for the minerals in question, bringing the total sum paid by Plaintiff to US $ 93,290.60

Notwithstanding the above payments no gold or diamond was procured.

As for the disputed part, PW1 deposed that the 1st Defendant was the one who introduced them to one Eric who was said to be the agent of the owner of the Minerals; that they trusted him (1st Defendant) hence letting him to be the organizer and link – man of all the transactions; that he is the one who, among others, collected

US $ 5000 from James Bwana (Pw3); who organized the viewing of the boxes carrying gold at the Kenya Commercial Bank where he (Pw1) took photographs thereof (Exh. P3) and who (1st Defendant) turned out to be a frauder with others in a project which, unknown to them (Plaintiffs) was a scam right from the start and that therefore he is liable to meet the claims lodged.

Pw2 deposed that his plaintiff colleagues had invited him to engage in gold and diamond business; had come to Tanzania and was introduced to 1st Defendant who in turn introduced Eric as the agent of the owner of Diamonds and gold and another person Sam Kapaso. He stated that he was led by these people in company of security guards and Allen to a wharehouse where he examined the gold in boxes and using his gold tester kit and experience, treading on random sampling he made, was satisfied that indeed it was gold; that however after payments had been made, the 1st Defendant, Eric and Kapaso disappeared after the latter had called them on telephone and informing them that they were being hunted by security officers which threat made them to run away from the country.

Pw3 who stated that he had been instructed by Plaintiffs to make a follow up of the gold and diamond business deposed to have witnessed boxes of gold at a place where he was led by 1st Defendant and Eric; to have received US $ 5000 from the 1st Plaintiff and to have paid the equivalent in Tanzania shillings to 1st Defendant in three installments (as per three handing over notes) of shs 3,150,000/= on 20/11/2003 (Exh. P10); shs 1,700,000/= on 24/11/2003 (Exh. P11) and shs 400,000/= on 1/12/2003 (Exh. P12).

On his part, the 1st Defendant deposed that he was just a facilitator of the minerals deal between Plaintiffs and Eric who was the agent of the owner Kapaso; that the monies received were channeled to Eric. He denied having received the US $ 5000 equivalent in Tshs. Contrary to what the Plaintiffs allege, the 1st Defendant deposed that it was the 2nd Plaintiff who introduced Sam Kapaso to him; that Eric was introduced by Kapaso; that Eric is the owner of the Cathy Forwarders; that Exh. P2 got extinguished once the documentations were secured; that after perfection of the latter he went to Dubai in his Business of importing fire fighting equipment only to find that he was required in court as a criminal suspect upon his return and eventually charged in criminal case No. 270/2003 at

Kisutu Resident Magistrates Court. He however did not disclose the gist of the charge against him.

In the final submissions, for the Defendants it was contended that the Plaintiffs had no capacity to contract hence void (referring to s. 11(2) of the Law of Contract cap 345 R.E. 2002 as they had no necessary trading licences let alone a Master Dealers licence for either Gold or Diamond and being foreigners; that Exh. P1 had no price tag attached to it hence void and made reference to Nitin Coffee Estates V. V.E.W. Ltd (1988) T.L.R. 203 at 212; that lack of certainty as to the source of the minerals to be bought/sold makes the transactions illegal making reference to s. 24 of Cap 345 (supra); that the circumstances portray a very minimal participation in the transaction by 1st Defendant; that Exh. P2 is full of ambiguities but that even if it is not, 1st Defendant should be taken to have prayed and completed his part of the guarantee - bargain as per clause 6 thereof; that Pw3's testimony was ***"extremely porous and badly needed pieces of logic, reason, truth and situations of fact to be believed"*** as it contained lies, strange coincidences and unreasonable behaviors. Finally, it was urged that even if the other

claims were to be upheld, a claim for special damages cannot stand as it was not proved.

For the Plaintiffs it was first submitted that issues should be reframed in terms of 0.XIV Rule 5 of the Civil Procedure Code, 1966 to include diamonds which were inadvertently omitted; that in paragraph 4 of the written statement of Defence, the 1st Defendant admitted to have had knowledge of the existence of the *"Parcels of Gold and Diamond"* and that this taken together with the guarantee provided under Exh. P2 and over – all participation shows his actual knowledge in the matter; that there was no legal requirement that required Plaintiffs to have any licence; that the purchase could even be made by letters of credit, making reference to a book entitled ***Sale of Goods, 9th edition at pages 389 and 390 by P.S. Atiyah and Johns Adams;*** that a licence has nothing to do with legality or illegality of the contract; that there is no illegality about the sale of Gold and Diamond as neither the consideration or object was unlawful under s. 23 (2) of the Law of Contract Cap 433 adding that in any case exceptions under same section [s.23 (2) (a) –(c)] would cover them as they genuinely paid requisite taxes /duty, acted to secure necessary documentation although they turned out to be

false due to 1st Defendant and colleagues' fraud and misrepresentations of which they were ignorant.

The Plaintiffs further submitted that as the Defendants intentionally misrepresented material facts which they knew and believed were untrue and succeeded in inducing the innocent plaintiffs to part with their money, in terms of s. 19 of cap 433, the contract is voidable at the instance of the innocent plaintiffs and that Defendants cannot be allowed to hide behind their fraud and *"con-artism".*

Regarding the US $ 5000, it was submitted that denying his own handwriting and so is branding Pw3 a lier is proof of his experience as a con-artist; that the sums stated was duly received and that special damages included costs for air tickets from and to South Africa; Seychelles and accommodation for 10 days at Holiday Inn.

Issues framed are:

1. Whether there was an understanding between the parties for the Defendants to supply 200 kgms of gold to the Plaintiffs?
2. Whether the Defendants received a sum of US $ 93,290.60 to facilitate the supply of gold to the Plaintiffs?

3. If the answer to issue 1 and 2 are in the affirmative, whether the Defendants failed to supply the said gold?
4. Whether the Plaintiffs suffered specific damages in the sum of US $ 30,000?
5. To what reliefs are parties entitled?

I will start with the Plaintiffs' submissions that the issues should be reframed to include diamonds. I am persuaded that indeed the word ***"Diamonds"*** should have been included in issues 1-3. This is so because pleadings – para 6,9,10 and 12 of the plaint and paragraph 4 of the written statement of defence make reference thereto. Further to this, denial of the contents of the said paragraphs in the written statement of defence intrinsically is reference thereto.

Order XIV, Rule 5 of the Civil Procedure Code empowers this court to rephrase issues. Thus, I hereby amend issues 1-3 by adding the words ***"and diamonds"*** immediately after the word ***"gold"*** wherever it occurs.

Now for the merits.

I will tackle issue one to three at the sametime and together. I should unreservedly say that I am persuaded that indeed there was

an understanding between the parties that the 1st Defendant would oversee the supply of gold and diamonds to the Plaintiffs although I should add that the former, from the start, knew that it was a scam; that US $ 93,290.60 was duly received but that no gold and diamonds were received/supplied.

Although the 1st Defendant tries to wriggle out of the transaction, the evidence's grip cannot let him free. I appreciate that there is no evidence which shows that the owner of the said gold and diamonds was either of any of the Defendants or Eric who was fronted as an Agent. And, though Sam Kapasu is named here and there as the owner and although his acts portray him to be part of the transaction, there is no tangible evidence that he was. The owner and from whom the minerals were to come remains obscure. That factor alone however does not exonerate Defendants, because the all round circumstances show that the whole transaction was a scam from the word go and that, the 1st Defendant was at its centre: as a key personality. Pw1 and 2 testified that he was the one who introduced them to Eric and Sam. The first tranche paid (US $ 77,490.60) passed through his company's account. He admitted drawing the same. He also received the 2nd tranche of US $ 10,800.

The above apart, his involvement in the transaction is also brought out by part of his own testimony, thus:

> *"We decided to start business of buying and selling gold and related transactions. As a Tanzania with a limited liability Company that was my level of involvement..... The effect of Exh. P2 was that I was a local partner, simpson as a gold tester, Mr. and Mrs Allan as financiers and Roland as a Co-ordinator. We entered the business. We met Sam Kapasu, a diamond and gold seller"*

As for Exhibits 10-12 (in respect of US $5000), without claiming to be an expert on handwriting, a comparison of the signatures thereon clearly leaves no one in doubt that they resemble his signatures on other documents whose authorship he acknowledges i.e Exh. P1 and 2. Although Pw3, on certain aspects left me with suspicions and to which I shall revert later, on this, I found him credible. He detailed how he had contacts with 1st Defendant on the US $ 5000; how whatever he did he made contacts first with 1st Plaintiff and how throughout it was 1st Defendant who insisted that without that sum being paid in whole the minerals would not be moved. The 1st Defendant claims that he left for Dubai on his fire fighting equipment mission but logic and common sense would dictate that being part of

the transaction and from which he stood to gain as displayed, he could not suddenly lose interest and move on other errands without first making sure that the minerals were procured and dispatched as intended. The only logical conclusion is that having completed the scheme of getting the US $ 93260.60, as did others including Eric and Sam, he decided to disappear into this air!

I do appreciate that both Exh. P1 and P2 contain some wanting elements. For example, one fails to comprehend how shares (as per Exh. P1) in 2nd Defendant could be transferred without any consideration being paid save undertakings of future anticipation and even then without being defined, or how 1st Defendant could be a guarantor and recipient of the loan and yet be part of the business transaction involving the very goods that were to be supplied. The above coupled with what is even more surprising: payment of taxes/duty and administrative process expenses, with no price tag being placed on the alleged minerals; lack of details as to how the owner was to be paid and how the profits of the property valued (as per Exh. P 8) at Tshs 3.6 billion were to be shared, leave a lot of un answered questions. It is not surprising therefore that the 1st Defendant comes up with arguments of the transaction being void

and related in the final submissions. Those doubts however do not change the obvious that the purported minerals buying/selling episode was a scam perpetrated by the 1st Defendant liasing with others including Eric and Sam.

I should hastily comment on the allegations of illegality launched by Defendant. These have no basis as no trading licence was required and, in any case, the transaction was being conducted under the 2nd Defendant, a locally registered company. In the same vein there is nothing illegal about transacting in gold and diamond. It should also be noted that the Plaintiffs were made to believe that the transaction was lawfully being conducted hence their innocent parting with US $ 93.290.60 (which is not little money by all standards) to pay taxes/duties and for others official documents as paraded by 1st Defendant and colleagues.

I should at this point also observe, as reserved earlier on, regarding Pw3's testimony. I have already stated that I harbour some reservations on certain aspects of his testimony. Part of his testimony is as follows:

> *"I remember way back in July 2003 I received a call from Roland who was in Seychelles and said that they wanted to engage me on a number of issues one*

of them being what he called "robbery" of their more than US $ 77,000 and or recovery of 200 kgms of gold and 2 kgms of Diamond from one Johnson Lukaza. One of the Plaintiffs, Simpson was arriving in the country. When he arrived I took him to the police station where I witnessed him writing a statement regarding theft of their more than us $ 77,000".

A few days later, after Simpson had left,....I received a call from Johnson Lukaza whom I had not met and he asked me whether we could meet. I accepted and we met soon thereafter.....He told me that he had been able to trace the 200 kgms of gold ..... That he has found a buyer in Austria and that he was planning to leave the country for Austria to meet the buyer whom he said he had not met.

I asked Johnson that instead of trading with a person he did not know why shouldn't he go back to his friends, meaning the 4 Plaintiffs and finish the transaction they had started a few weeks before.

He was reluctant at first but I managed to persuade him. He however said he would need some amount of money that would be used to obtain papers for the government fees before the exportation. He required US $ 5000. I communicated with my clients ..... and after long conversation (which involved 1st Defendant as well) ..... Allan was optimistic that may be this time around the transaction would go through.

Allan sent me US $ 5000".

The witness then goes on to explain how on insistence of 1st Defendant and with Allan's permission he disbursed the whole amount (as per Exh. P10-12) with a promise by 1st Defendant that he would move the gold to a bonded wharehouse; how subsequently he received a telephone call from unknown person informing him that one of their people had been arrested; how he checked the police stations as to whether it was Johnson without success and how the cell phone used was not reachable; how subsequently he was contacted by Johnson who seemed not to be well from the way he was talking and who said that he had been arrested by ***"guys at Msimbazi"*** police station and beaten though released and went to hospital where he was calling from without disclosing it; how he promised to perform his undertaking which he didn't and that he (Pw3) then reported to the police and clients.

This PW3, however, a lawyer by profession, and who had full instructions of his clients admitted to have had "*doubts regarding the whole transaction right from the moment I came involved in the transaction*"; to have accepted invitation to view boxes containing the minerals in a vehicle parked at a suspicious place and in the presence of

Johnson and *"4 terrifying people"* and explains why he still had guts to deal with the suspicious Johnson thus,

> *"we agreed to give out US $ 5000 more to Johnson so that we get more evidence of his involvement in the matter".*

And yet he said that he did not report to the police because of the terrifying people and fears for his life!

Pw3's testimony seems to leave a lot behind the scenes. For example, if he doubted the transaction right from the moment he was instructed, as a professional lawyer, why didn't he advise his client accordingly but instead went on to do what he did including advising the said client(s) to part with a further US$ 5000! If he was instructed after the client(s) had already concluded that 1st Defendant had already *"robbed"* them of over US $ 77,000 how could he casually (as his quoted testimony displays) let go that very person after he had surfaced with a story of having traced the gold and diamonds for which plaintiffs were crying wolf! When he was invited to witness the minerals was it not the opportune moment to involve the police? It will be noted that, if his story is believed, till he saw the alleged minerals he did not know exactly where the same would be

nor of the existence of the alleged 4 terrifying persons, hence fears for his life could not have set in by then.

The above brain pounding questions however do not shake the other part of the testimony supported by Exh. P10-12, that 1st Defendant also received the US $ 5000. Nor does it water down the other evidence already discussed and conclusions made that the 1st Defendant was deeply involved and at the centre of the whole transaction which he smartly schemed and perfected, hood-winking the Plaintiffs into believing that they were engaged in a very sound and valuable business. The scam naturally could not breed any minerals save milking Plaintiffs of their monies. This disposes issues 1-3.

Issue four should not waste much of our time. As rightly pointed out by the Defendant's counsel in his final submissions, specific damages must specifically be proved. A mere statement that ***"I travelled between so and so points or I spent this here and there"*** is as good a nothing (***Masolele General Agencies v AICT (1994) TLR 192; HC-Yusuf Mzee Ngororo v Mohamed***

Salum Rashid, Civil Appeal No. 31 of 2002; CAT-Zuberi Augustino vs Anicent Mugobe (1992) TLR 137).

Lastly, we turn to reliefs. I have already held that the whole transaction was a scam. It was wholly imbued in fraud as defined under s.17 of the Law of Contract Cap 345 R.E. 2002 which provides as follows:-

> *"(1) "Fraud" means any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract-*
>
> *(a) The suggestion, as to a fact, of that which is not true by one who does not believe it to be true;*
>
> *(b) The active concealment of a fact by one having knowledge or belief of the fact;*
>
> *(c) A promise made without any intention of performing it;*
>
> *(d) Any other act fitted to deceive; or*
>
> *(e) Any such act or omission as the law specially declares to be fraudulent."*

A contract induced by fraud is voidable (s.19). I am satisfied that the way the 1st Defendant and his colleagues conducted themselves could not enable the Plaintiffs with due diligence to discover that the transaction was a scam. As the circumstances clearly show that the

1st Defendant and colleagues cannot in anyway procure and supply the minerals agreed upon, the plaintiffs are entitled to refund of the sum of US $ 93,290.60 they parted with as per prayer (a) of the prayers' paragraph. They are also entitled to interest at reasonable rate which I assess and fix at 21% per annum a per prayer (d). Awarded also is interest at 7% rate per annum from the date of judgement till payment in full.

Judgement is hereby entered in favour of the plaintiffs in terms detailed above. They are also awarded costs.

L.B.KALEGEYA
JUDGE

Words: 4,882