IN THE HIGH COURT OF TANZANIA

[Commercial Division]

AT DAR ES SALAAM

Commercial Case No. 81 of 2006

DIGITEL HOLDINGS LIMITED.....Plaintiff

Vs

TANZANIA AMERICAN INTERNATIONAL

DEVELOPMENT CORPORATION LIMITED.....Defendant

Advocates: Mr Mhango, Advocate; Mhango & Company for the Plaintiff

Mr. Nyika, Advocate; IMMA Advocates for the Defendant.

Date of last order: 30th July, 2009

Date of Judgment: 18th September, 2009

JUDGMENT

Werema, J.

The Plaintiff was at all times a holder of two prospecting licences No. 1087/98 at an area known as Geita North and had another licence No.1086/98 covering an area referred to as Bwanga North in Biharamulo. It is a common ground that the plaintiff assigned the prospecting rights under these instruments to the defendant who was interested in the prospecting of minerals at the areas herein with an option of sharing with the plaintiff's prospecting rights under the

licences. He approached the plaintiff and an agreement between them was made. In these proceedings the Agreement and the two licences were tendered in evidence collectively as **Exh P1**.

The Plaintiff assigned to the defendant all rights under the Prospecting licences as was stipulated under Article 2 of the Agreement. The consideration for this assignment was provided for in Article 3 of the Agreement. I think for the sake of brevity it is better to state it. It provides that:

> *"In consideration for the Licensee's undertakings herein the Company shall pay the Licensee United States Dollars Twenty thousand (US $ 20,000) on the date of signing of this Agreement and a further sum of United states dollars Twelve Thousand (US$ 12,000) on every anniversary of this Agreement until commencement of exploration or abandonment of this agreement due to negative feasibility results. Should the Company proceed to construction of mines the Company shall pay the Licensee a onetime payment of United States dollars Two Hundred Thousands (US$200,000)."*[My own underlining].

The term **"Licensee"** refers to the Plaintiff's Company and the term **"the Company"** refers to the Defendant's company which was also referred in its acronym "TANZAM 2000"

It is the case for the Plaintiff that the defendant defaulted on its contractual obligations under Article 3. He filed this suit

claiming a sum of United States dollars Ninety Two Thousands (US$ 92,000). Interest at court rate and commercial rate of 31% on the principal claim are also a subject of the demand. The court is asked to grant cost of litigation to the plaintiff as is the case for the grant of any other relief that it may deem fit to grant.

The following issues were agreed to by the parties before hearing:

1) Whether or not the Defendant owes the Plaintiff any amounts payable annually arising out of the Prospecting and Mining Option Agreement;
2) If the first issue is in the affirmative, the amount due and owing to the Plaintiff;
3) To what reliefs are the Parties entitled to.

The Plaintiff summoned Brig General (rtd) Hassan Ngwilizi to testify and did testify for the Plaintiff and was recorded as PW1. He was a Director of the Plaintiff's company. His testimony regarding the quantum of the plaintiff's claim is that he was only paid a sum of US$20,000 and a further sum of US$ 12,000 for the first year. The Prospecting Licenses were surrendered to him in 2005 and 2007 respectively. According to him he only claims a sum of US$ 72,000. My understanding is that US$ 20,000 was paid upon signing of the Agreement and the accumulation to the quantum of the claim arises due to non payment of anniversary payments as stipulated in the

contract. This is drawn from the pleadings including the final concluding remarks.

I was addressed by both advocates on this issue to the effect that the sum which is admitted to have been paid be reduced from the principal claim accordingly. I agree entirely.

As I have stated, this suit is based entirely on the interpretation of Article 3 of the Agreement which governed the commercial relationship between the Plaintiff as a licensee and the defendant's Company. The scope of that Article is relevant in determining the issues drawn for determination. There were two payments which were to be made. The first one was a front payment upon the agreement being signed. There is no dispute, and it is in fact, a common ground that US$ 20,000 was paid as such. The second type of payment of US$ 12,000 was to be paid **"on every anniversary of this agreement until commencement of exploration or abandonment of this agreement due to negative feasibility results".** The second payments were only payable if the defendant has not commenced exploration but were not due if the defendant had commenced exploration. That is the plain interpretation of that clause. My interpretation is that the first anniversary fell on the 8th November, 2000.

The issue of interest is whether or not any of the occurrences stopping anniversary payments occurred. In particular, whether the defendant commenced exploration or abandoned the agreement due to negative feasibility results.

PW1 line of evidence is that he was not informed by the defendant whether they had commenced exploration or had abandoned the site and accordingly Mr Mhango; Learned Advocate for the Plaintiff argues that as long as the defendant retained the licences its obligations to pay the anniversary payments subsisted. Indeed, it could not be possible for the Plaintiff to know whether exploration had commenced or not. The Agreement did not provide for a mechanism for flow of such information. But is it commercially prudent for a person to acquire an assignment of prospecting rights and merely sit on them? Let me turn to the facts.

The position taken by the plaintiff is contradicted by the evidence of Joseph Kahama who testified as DW1. It was the latter's testimony that the Plaintiff was informed about the defendant's commencement of exploration. A letter dated 8th July 2002 was tendered in evidence as **Exh D1** informing the Plaintiff that the defendant had commenced exploration in the 1999/2000 and that due to Article 3 of the Agreement payment of US$ 12,000 anniversary dues would cease. This letter was admitted in evidence without contention and the veracity of the witness during cross examination was not shaken. The Plaintiff did not respond to the letter, then. He did not dispute the reception of the letter.

I am satisfied that commencement of exploration begun as alleged by the defendant in the 1999/2000 period and that this period falls, without any hesitation, within the first

anniversary of the Agreement. Having decided that commencement of exploration had begun, it follows that there would be no further anniversary payments to the Plaintiff after payments made to him on the first anniversary. I will therefore answer the first issue as stated, in the negative.

Having answered the first issue in the negative, the answer to the second issue is obvious. The defendant is absorbed by the requirement of Article 3 and is not indebted to the plaintiff under obligations stated in the Article.

The last issue is on reliefs. The Plaintiff has failed to prove his claim. His suit is frivolous, at its best. It is dismissed in its entirety with costs to the defendant. The costs shall be taxed accordingly. It is so ordered.

F.M. Werema,

JUDGE

This Judgment is pronounced in Chambers this 18th day of September 2009 in the presence of the Parties and the Court Clerk.

F.M.Werema,

JUDGE

1,237 words