

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 141 OF 2021

MAHUZA NYAKIRANG'ANIPLAINTIFF

VERSUS

SEC INVEST HOLDINGS LIMITED1ST DEFENDANT

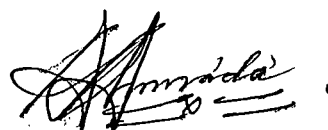
FEROZ KASSAM.....2ND DEFENDANT

CATA MINING COMPANY LIMITED.....3RD DEFENDANT

JUDGMENT

A.A. MBAGWA, J.

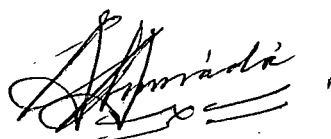
What triggered the institution of this suit is a dispute over purchase of shares agreement allegedly entered into between the plaintiff and the 1st defendant. At the time of transaction, the plaintiff was one of the shareholders and directors in CATA Mining Limited, the 3rd defendant who offered to sell the shares in dispute whilst the 2nd defendant, Feroz Kassam was a shareholder and managing director of the 1st defendant's company who executed the purchase of shares agreement (exhibit P1) on behalf of the 1st defendant. The plaintiff's complaint is that the 1st defendant illegally



transferred his shares into its ownership without completing payment of the agreed consideration. Thus, after several fruitless follow ups and reminders to the 1st defendant to pay the balance, the plaintiff resolved to institute the present suit.

In his plaint, the plaintiff prays for judgment and decree against the defendants in the following orders;

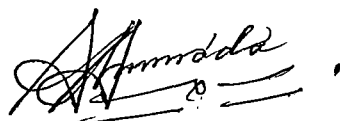
- a) A declaration order by this Honourable Court that the purported transfer of 132 shares to the 1st defendant was ineffective for lack of consideration.
- b) An order for return of 132 shares to the plaintiff and rectification of register of members of 3rd defendant to the effect that the plaintiff is a shareholder to the extent of his transferred back shares from the 1st defendant and a notice of such rectification to the Registrar of Companies at the Business Registration and Licensing Agency (BRELA).
- c) An order against the 1st and 2nd defendants for payment of general damages as shall be assessed by the court.
- d) Costs of this suit, and



e) Any other order(s) and relief(s) the Honourable Court may deem just and fit to grant in the circumstances of this matter.

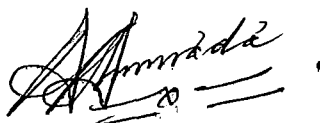
As hinted above, the borne of dispute in this case is the sale and subsequent transfer of shares arising from the sale agreement titled "Offer Letter Agreement" dated 18th November, 2016 (exhibit P1) between the plaintiff and 1st defendant. According to the plaint, the plaintiff was one of shareholders and directors of the 3rd defendant, CATA Mining Company Limited. In the agreement, the plaintiff offered to sell his 240 shares to the 1st defendant at the consideration of United States Dollars Two Million (US\$ 2,000,000) being US\$ 8, 333 per a share. The agreement was signed by the plaintiff and Feroz Kassam (DW1), on behalf of the 1st defendant whilst it was witnessed by Stefan Nagy, one of the shareholders and directors of the 3rd defendant company. More so, the plaintiff contended that, in addition to the agreed consideration, the 1st defendant through its director Feroz Kassam (2nd defendant) agreed to facilitate the 3rd defendant to secure funding of about USD 15 million.

It was the plaintiff's averment that out of US\$ 2,000,000 which was agreed as a consideration, the 1st defendant paid him only United States Dollars Nine Hundred (US\$ 900,000) thereby leaving the outstanding payment of

A handwritten signature in black ink, appearing to be 'Amridda', with a horizontal line underneath it.

USD 1.1 million. The plaintiff states that the said payment of US\$ 900,000 was made via bank transfer from the 2nd defendant's account to the plaintiff's account No. 0011048047 maintained at Exim Bank, Tower Branch. The plaintiff continued that despite several reminders to the 1st defendant to pay the outstanding balance of US\$ 1.1 million, the 1st defendant failed to make good of it. The plaintiff further lamented that the 1st defendant, at the instance of its director one Feroz Kassam, the 2nd defendant caused transfer of all 240 shares from the plaintiff to the 1st defendant despite incomplete payment of consideration. It was further claimed in the plaint that the unpaid sum of US\$ 1.1 million is worth 132 shares but the 1st defendant neglected to transfer back the said shares notwithstanding frequent demands from the plaintiff. The plaintiff averred that following the 1st defendant's failure to pay the full consideration, the plaintiff suffered loss and damages as follows;

1. That the plaintiff was denied right of ownership of shares in the 3rd defendant following improper transfer of the shares without first making payment for the same.
2. That the plaintiff has lost all the opportunities and profits that he would otherwise have earned from the date of his shares were



improperly transferred to the 1st defendant without full payment for the same.

3. That the plaintiff has lost the use of the unpaid purchase price (USD 1, 100,000,000) of the said shares for over five-year period.
4. That the plaintiff has lost an opportunity to utilize the outstanding USD 1.1. million for other profitable ventures which he could have ventured into but for failure by the 1st and 2nd defendants to pay the said outstanding consideration.

Upon service, all the three defendants filed their respective written statements of defence separately. In essence, the 1st and 2nd defendants' defences were substantially similar and were made by one and same person namely, Feroz Kassam (DW1), the director of the 1st defendant's company. The 1st and 2nd defendants, in their written statements of defence, admit entering into purchase of shares agreement dated 18th November, 2016. However, they contend that the plaintiff was paid his selling price by the 2nd defendant and that all procedures for transferring of shares were duly complied with. Furthermore, they alleged that under clause 2 of the agreement (exhibit P1), the plaintiff had the right to repurchase the shares (call option) if he thought that there was breach of



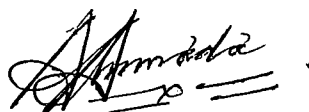
contract but he did not exercise his right. They also disputed the particulars of loss claimed by the plaintiff and finally prayed the court to dismiss the suit with costs.

The 3rd defendant, on its part, confirmed that the plaintiff and 1st defendant entered into purchase of shares agreement. Nonetheless, it candidly averred that it was not a party to the agreement hence the plaintiff wrongly sued it. Finally, the 3rd defendant prayed for dismissal of the suit with costs.

Upon completion of the pleadings, this court (before Maruma J.) with the consensus of the parties, framed three issues for determination;

1. Whether there was a contract of sale of shares at a consideration of US\$ 2 million between the plaintiff and the 1st defendant.
2. If the answer in issue No. 1 is in affirmative, how and through whom the agreed consideration was paid to the plaintiff.
3. What reliefs are parties entitled to?

When the matter was called on for hearing, the plaintiff was represented by Mr. Makaki Masatu, learned counsel, on the one side. On the other side, the 1st and 2nd defendants had the services of Messrs. Barlow Lyimo and



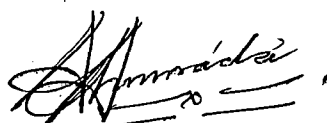
Jovinson Kagirwa, learned counsel whilst the 3rd defendant was ably represented by Miss Elizabeth Majuva, learned counsel.

In discharging his burden of proof, the plaintiff paraded one witness namely, Mahuza Nyakirang'ani (PW1) together with three documentary exhibits to wit, Offer Letter Agreement dated 18th November, 2016 (exhibit P1), Bank Statement for account No. 0011048047 in the name of Mahuza Nyakirang'ani (exhibit P2) and Annual Return of the 3rd Defendant Company made on 14th July, 2017 (exhibit P3).

In his witness statement, PW1 narrated that in 2011, he and two others formed the 3rd defendant company namely, CATA Mining Limited whose main activities were mining of general gemstone and precious metals. He stated that the company's operations were mainly carried on by Mr. Stefen Nagy, a co-shareholder and co-director to the plaintiff. According to PW1, Stefen Nagy brought Mr. Feroz Kassam, the 2nd defendant who expressed his interest to buy the plaintiff's shares in CATA Mining Limited. As such, on 18th November, 2016 the plaintiff and 2nd defendant, on behalf of the 1st defendant signed a purchase contract titled 'Offer Letter Agreement' for purchase of the plaintiff's 240 shares at the consideration of USD 2,000,000. He clarified that each share was valued at USD 8,333. He



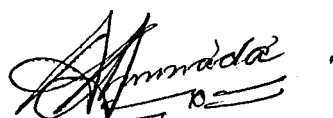
recounted that upon signing the agreement, the 2nd and 3rd defendants left with the original copy of the agreement deed while leaving the plaintiff with only a photocopy. PW1 tendered a photocopy of the contract deed and the same was admitted in evidence and marked exhibit P1. PW1 continued that following the conclusion of contract, on 29th December, 2016, the 2nd defendant Feroz Kassam transferred into the plaintiff's account No. 0011048047 maintained at Exim Bank, Tower Branch a sum of USD 900,000. PW1 tendered an account bank statement (exhibit P2) to buttress his assertion. He contended that despite incomplete payment of the purchase price, the 1st defendant with the help of 3rd defendant proceeded to transfer all 240 shares from the plaintiff to the 1st defendant, Sec Invest Holdings Limited. He expounded that the transfer of shares was effected in 2017. During cross examination, PW1 testified that he did not exercise his right to buy back the shares as provided in the agreement because the purchase transaction was not completed as the 1st defendant did not pay the consideration in full. He also admitted that the 3rd defendant was not a party to the agreement nor did it prevent the plaintiff from taking necessary actions. In fine, the plaintiff prayed the court to



order a return of 132 shares which are commensurate to the unpaid balance to wit, USD 1.1. million along with other consequential orders.

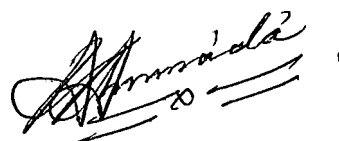
In rebuttal, the defendants brought two witnesses in total. Whereas the 1st and 2nd defendant produced one witness namely, Feroz Amir Kassam (DW1), Mr. Shadrack Lameck Msekalele (DW2) testified on behalf of the 3rd defendant. It is noteworthy that the defendants did not tender any exhibits save the two documents namely, share transfer form and tax clearance certificate (exhibitD1) which were admitted at the request of the 1st and 2nd defendant's counsel one Barlow Lyimo during cross examination of DW2.

The thrust of the 1st and 2nd defendants' defence was that the plaintiff was paid his consideration of USD 2,000,000 in full and no amount remained outstanding. DW1 explained that the plaintiff was paid USD 900,000 via his bank account maintained at Exim Bank while the remaining USD 1.1 million was converted into a bank guarantee of the loan that was advanced to the 3rd defendant company. Feroz Kassam (DW1) contended that the 3rd defendant was granted loan to which the 2nd defendant stood as a guarantor but the 3rd defendant failed to service the loan which stood at USD 2, 253, 696 as of 28th September, 2019. He contended that the plaintiff requested the 1st defendant to use the remaining balance of USD

A handwritten signature in black ink, appearing to read "Amranda", with a horizontal line underneath it.

1.1. million for guarantee of loan. DW1 recounted that on 28th September, 2018 he deposited USD 400,000 into the 3rd defendants' loan account No. 0010048274 in a bid to repay the loan. DW1 stressed that all the 240 shares were sold in whole and not *pro rata*. In addition, DW1 contended that nowhere the agreement stated that the value of each share was USD 8, 333. He concluded that the plaintiff had no valid claims hence he prayed for dismissal of the suit with costs. However, during cross examination, DW1 conceded that USD 1.1 million was not paid. He also admitted that he once sued the 3rd defendant for its failure to repay the loan which he claimed that he had started repayment.

Shadrack Lameck Msekalele (DW2) on behalf of the 3rd defendant was so brief. He admitted knowledge of the existence of the purchase agreement (exhibit P1). He, however, parted ways with the 1st and 2nd defendants on the assertion that the unpaid balance of USD 1.1 million was agreed to be used as guarantee for the loan that was advanced to the 3rd defendant. During cross examination, he affirmed that the share transfer certificate was signed on 14th December, 2016.

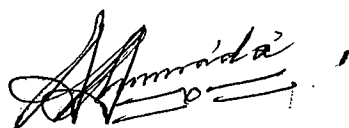
A handwritten signature in black ink, appearing to read 'Shadrack Lameck Msekalele', with a date '20' written below it. The signature is written over a horizontal line.

Upon closure of the evidence for both parties, counsel were allowed to file final written submissions. I commend both counsel for their insightful submissions they timely filed in court.

Having summarized the evidence and upon navigating through the written submissions, the task ahead of me is to determine the issues framed.

The 1st issue is whether there was a contract of sale of shares at a consideration of US\$ 2 million between the plaintiff and the 1st defendant. Parties are at one that on 18th November, 2016, the plaintiff and 1st defendant entered into agreement (exhibit P1) in which the plaintiff offered to sell his 240 shares at the consideration of USD 2, 000,000. The plaintiff tendered the said purchase agreement titled 'Offer Letter Agreement' which was admitted as exhibit P1. Clause 1 (a) of exhibit P1 is very clear that 240 shares were sold at USD 2 million. This fact was also conceded by the defendant's witness Feroz Kassam (DW1) during cross examination. As such, I hereby answer the 1st issue in the affirmative.

The 2nd issue is if the answer in issue No. 1 is in affirmative, how and through whom the agreed consideration was paid to the plaintiff. The plaintiff strongly asserted that out of USD 2 million which was agreed in the contract, he was only paid USD 900,000 thereby leaving a sum of USD



1.1 million unpaid. PW1 tendered a bank statement for account No. 0011048047 in the name of Mahuza Nyakirang'ani (exhibit P2) to substantiate his contention. Exhibit P2 confirms the plaintiff's version as it indicates that on 29th December, 2016 a sum of USD 900,000 was transferred into the plaintiff's account from the 2nd defendant one Feroz Kassam. The plaintiff claimed that the remaining balance of USD 1.1 million remains unpaid to date. On the adversary, the 1st and 2nd defendants through DW1 admitted to have paid the plaintiff a sum of USD 900,000 only through a bank transfer. However, they strongly contended that the remaining balance of USD 1.1 million was paid through bank guarantee of loan which was advanced to the 3rd defendant. DW1 contended that it was agreed in the contract that the remaining balance of USD 1.1 million would be converted into a loan guarantee. DW1 recounted, under paragraph 12 (d) of his witness statement, that the 3rd defendant was granted loan which it failed to service as such, the 2nd defendant had to repay the it. He elaborated that, in the efforts to liquidate the loan, he had paid a total sum of USD 500,000 in two instalments namely, USD 400,000 and USD 100,000. DW2, Shadrack Lameck Msekalele was in support of the plaintiff with regard to the unpaid USD 1.1 million. He denied existence of the




contract term to the effect that the remaining purchase price of USD 1.1 was to be converted into loan guarantee.

I have dispassionately scanned the provisions of the contract in dispute (exhibit P1). From clause 1 through 5 there is no any provision whatsoever to the effect that the sum of USD 1.1 million was to be converted into loan guarantee nor did DW1 attempt to refer the court to such a clause. What is provided under clauses 3 and 4 is that upon execution of the purchase agreement (exhibit P1), the 1st defendant would facilitate a loan to the 3rd defendant.

The counsel for the 1st and 2nd defendants one Mr. Barlow Lyimo through cross examination of DW2 prayed and was allowed to tender in evidence the share transfer form and tax clearance certificate (exhibit D1). I have had a glance on it but I found nothing useful in it proving the payment of disputed sum of USD 1.1 million.

While stressing on the absence of a provision to covert the consideration into bank guarantee, learned counsel for the plaintiff referred this court to the case of **Joseph F. Mbwiliza vs Kabwa Mohamed Lyeselo Msukuma**, Civil Appeal No. 227 of 2019, CAT at Tabora where the court held that once parties to a contract reduce their agreement into writing,

A handwritten signature in black ink, appearing to be 'A. Amrinda', with a horizontal line underneath.

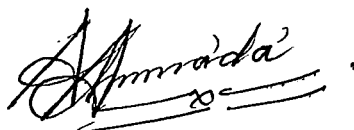
the written agreement prevails in terms of section 101 of the Tanzania Evidence Act.

I agree with the plaintiff's counsel that even if the plaintiff, later on, agreed orally the remaining balance of consideration to be converted into bank guarantee, still such oral agreement could not prevail over written agreement.

It is a common principle under the law of contract that parties are only bound by the terms contained in the contract deed. While deliberating on akin issue, the Court of Appeal in the case of **Univeler Tanzania Limited vs Benedict Mkasa Trading as Bema Enterprises**, Civil Appeal No. 41 of 2009, CAT at Dar Es Salaam had this to say;

'No party would therefore be permitted to go outside that agreement for remedy. For the purpose of the instant appeal before us, it means that the rights of the appellant and the respondent herein are strictly limited to what is provided for in the agreement (exhibit P7) between these disputing parties and nothing more!'

On the above observations and guided by the foregoing decision, I firmly hold that there was no agreement to convert the sum of USD 1.1 million, which is part of the consideration into loan guarantee as contended by the 1st and 2nd defendants. As such, I agree with the plaintiff that he was only



paid a sum of USD 900,000 out of USD 2,000,000 which was agreed upon in the agreement hence the remaining balance of USD 1.1 million is still unpaid to date. The claims that the sum of USD 1.1 million was paid via bank guarantee are unsubstantiated, in my considered findings.

Thus, in winding up the 2nd issue, it is my findings that the 1st defendant paid the plaintiff only a sum of USD 900,000 through its director one Feroz Kassam, the 2nd defendant by transferring the said amount from the Kassam's account into the plaintiff's account No. 0011048047 maintained at Exim Bank, Tower Branch. As such, the 1st defendant is still indebted to the plaintiff in the sum of USD 1.1 million.

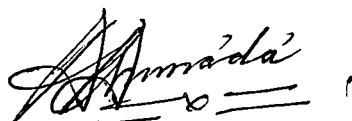
As to what reliefs are parties entitled to, the plaintiff has beseeched the court to grant him a declaration order that the purported transfer of 132 shares to the 1st defendant was ineffective for lack of consideration, an order for return of 132 shares to the plaintiff and rectification of register of members of 3rd defendant to the effect that the plaintiff is a shareholder to the extent of his transferred back shares from the 1st defendant, and a notice of such rectification to the Registrar of Companies at the Business Registration and Licensing Agency (BRELA). More so, he prayed for an order against the 1st and 2nd defendants for payment of general damages



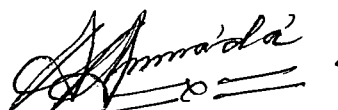
as shall be assessed by the court, costs of this suit, and any other order(s) and relief(s) which the Court may deem just and fit to grant in the circumstances of this matter. Submitting in support of the prayer for general damages, the plaintiff's counsel said that the plaintiff is entitled to general damages as the same may be granted upon being asked by mere statement or prayer of claim. To bolster his argument, he cited the case of **Cooper Motor Corporation LTD vs Moshi/Arusha Occupational Health Services** [1990] TLR 96.

Learned counsel for the 3rd defendant pressed for dismissal of the suit with costs stating that the 3rd defendant was not privy to the contract from which this suit emanated.

I have critically assessed the evidence produced and observed that there is nowhere the plaintiff alleged the illegality of the purchase agreement (exhibit P1). The only grievance of the plaintiff is non-payment of the remaining purchase price to wit, USD 1.1 million and consequential transfer of the shares. On the adversary, the 1st and 2nd defendants claim that the consideration was fully paid by transferring of USD 900,000 into the plaintiff's account and through repayment of loan which was advanced to the 3rd defendant. The 1st and 2nd defendants thus prayed for dismissal of

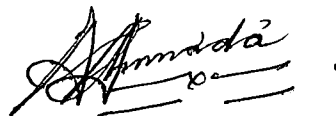


the suit with costs. Equally, the 3rd defendant prayed for the dismissal of the suit with costs. Indeed, there is no evidence to annul the agreement. Both parties admitted to have freely entered into the agreement in dispute. The only anomaly I have noted is the failure by the 1st defendant to pay the consideration in full that is to say the remaining USD 1.1 million. In my considered view, this is a failure to perform contractual obligation by one party. In the case of **Simba Motors Limited vs John Achelis & Sohne GMBH and Another**, Civil Appeal No. 72 of 2020, CAT at Dar es Salaam, it was held that every failure to perform contractual obligation amounts to a breach of contract and a party who suffers from such a breach is entitled to compensation. Following the foregoing deliberations, it is common cause that the 1st defendant which is managed by the 2nd defendant failed to complete payment of consideration as such, it breached the contract. I have considered the plaintiff's prayers for a declaration order that the purported transfer of 132 shares to the 1st defendant was ineffective for lack of consideration, an order for return of 132 shares to the plaintiff and rectification of register of members of 3rd defendant to the effect that the plaintiff is a shareholder to the extent of his transferred back shares from the 1st defendant, and a notice of such rectification to the Registrar of



Companies at the Business Registration and Licensing Agency (BRELA) but I found them unsuitable in the circumstances of the case at hand. This is because there is no evidence to annul the contract in order to return the parties to their original positions. Nonetheless, the plaintiff has, among other reliefs, prayed the Court to grant any other relief which it may deem fit and just. Thus, instead of declaring the transfer of shares ineffective and subsequently ordering their return to the plaintiff, I find it fit and just, by virtue of the prayer under paragraph (e) in the plaint, to order the 1st defendant to pay the plaintiff the remaining balance of USD 1.1 million.

In addition, the plaintiff claimed general damages on the grounds that; he was denied the right of ownership of shares in the 3rd defendant following improper transfer of the shares without first making payment for the same, that he has lost all the opportunities and profits that he would otherwise have earned from the date when his shares were improperly transferred to the 1st defendant without full payment for the same, that he has lost the use of the unpaid purchase price of (USD 1, 100,000,000) of the said shares for over five-year period and that he has lost an opportunity to utilize the outstanding USD 1.1 million for other profitable ventures which he could have ventured into but for failure by the 1st and 2nd defendants to

A handwritten signature in black ink, appearing to read 'Aminda', with a horizontal line underneath it.

pay the said outstanding consideration. No evidence was brought by the defendants to refute these claims. It is my considered findings that, based on the plaintiff's pleadings and upon consideration of the circumstances in this case, the plaintiff is entitled to general damages in the sum of Tanzania shillings One Hundred Million (Tshs 100,000,000/=) and costs of the suit.

With regard to argument by 3rd defendant that it was not privy to the contract in dispute, I agree with her but on similar vein I join hands with the plaintiff's counsel that the 3rd defendant was a necessary party in the circumstances of the case. This is because the shares in despite belong to its shareholder as such, the plaintiff was right to join her in this suit.

That said and done, I hold that the plaintiff has, on balance of probabilities, proved its case. In consequence thereof, I enter judgment and decree in favour of the plaintiff with the following consequential orders;

1. The 1st defendant, Sec Invest Holding Limited is hereby ordered to pay the plaintiff Mahuza Nyakiring'ani a sum of USD 1.1 million say United States Dollars One Million One Hundred Thousand being the

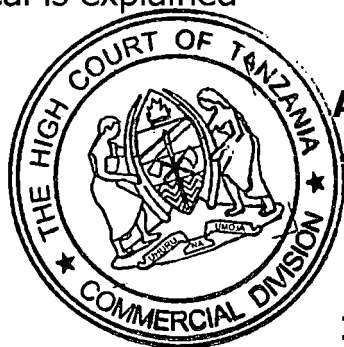


outstanding amount of consideration in the purchase of the plaintiff's 240 shares.

2. The 1st defendant, Sec Invest Holding Limited and 2nd defendant, Feroz Kassam are hereby ordered jointly and severally to pay the plaintiff a sum of Tanzania Shillings One Hundred Million (100,000,000/=) being general damages.
3. The 1st defendant, Sec Invest Holding Limited is hereby ordered to pay interest on the decretal sum under (1) above at the court rate of 7% from the date of this judgment to the date of full payment.
4. The 1st defendant, Sec Invest Holding Limited is hereby ordered pay costs of the suit.

It is so ordered.

Right of appeal is explained



A.A. Mbagwa
A.A. Mbagwa

JUDGE

10/05/2023