

TANZANIA / JUDGMENT

GASLAMP HOLDINGS CORP VS PERCY BEDA MWIDADI COMM CASE NO

COURT
TANZLIIDECIDED
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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT DAR ES SALAAM
COMMERCIAL CASE No. 119 OF 2015 BETWEEN GASLAMP HOLDINGS CORP.....
PLAINTIFF VERSUS

1. PERCY BEDA MWIDADI..... 1stDEFENDANT
2. VICTOR JOSEPH PETER,.....2nd DEFENDANT
3. MAKSIM CHALDYMОВ.....3rdDEFENDANT
4. YURY VALENTINOVICH CHERNOMOCHENKO..... 4th DEFENDANT
5. RUPHINUS i ANTONY MLORERE..... 5th DEFENDANT
6. GOLD TREE TANZANIA LIMITED.....6th DEFENDANT

JUDGMENT.

MRUMA, J.. The plaintiff is a Limited liability company registered under the laws of the British Virgin Islands carrying on business in Tanzania and is seeking to recovery from the defendants US\$ 5,100,000 being loan amounts advanced to the 6th Defendant togethCrWith interest and other charges thereon. The plaintiff also seeks for a declaration order that shares held by the 1st and 5th Defendants in the 5th Defendant Company were held in trust of the Plaintiff and that the issuance of shares to the 1st, 3rd and 4th Defendants was done wrongfully and in breach of the trust arrangements between the Plaintiff and the 1st and 5th Defendants with intent to defraud the Plaintiff hence should be nullified. The Plaintiff further seeks for a declaration that the appointment of the 2nd 3rd and 4th Defendants as directors of the 5th Defendant's company was done wrongfully and with intent to defraud the Plaintiff. Furthermore the Plaintiff is seeking for permanent injunction restraining the 1st ,2nd, 3rd, 4th and 5W Defendants from dealing with the assets of the 5th Defendant company including but not limited to the Mining Licence Numbers ML425/2011 and ML458/2012. The Plaintiff i s also claiming for general damages and any other reliefs as the court may deem fit and just. It is the Plaintiff's case that the Defendant no.s is a limited liability private company registered in Tanzania in 2010. The first shareholders of that company were the 1st and 5th Defendants each having subscribed to 50 shares which were held

in trust for the Plaintiff. The 1st and 5th Defendants executed a declaration of trust and deed of indemnity declaring that all the shares held by each one of them were so held in trust of the Plaintiff absolutely. It is further the Plaintiff's case that pursuant to the trust arrangements between the Plaintiff and the 1st and 5th Defendants, on 8th June 2011 the 1st and 5th Defendants being the shareholders of the 6th Defendant's company passed a resolution approving inter alia the transfer of 47 ordinary shares which were held by the 1st Defendant and all the 50 ordinary shares which were held by the 5th Defendant to the Plaintiff. The Plaintiff states that all material times following the incorporation of the 6th Defendant the 1st and 5th Defendants were holding those shares in trust for the Plaintiff and to this end the 1st and 5th Defendant executed and undated share transfer instrument in favour of the Plaintiff. The plaintiff contends that without any colour of right or justification and in breach of the trust arrangements entered between the Plaintiff and the 1st and 5th Defendants convened a general meeting on 19th February, 2014 and passed a resolution to inter alia appoint the 4th Defendant as a director of the 6th Defendants company. It is further contention of the Plaintiff that on 11th November, 2014 again without any colour of right and with intention to defraud the Plaintiff the 1st and 4th Defendants purported to convene an extra-ordinary general meeting whereby they wrongfully and maliciously passed resolutions to inter alia:

- (i) Appoint the 2nd 3rd and 4th Defendants as directors of the 6th Defendant company (ii) Approve the transfer of all 50 ordinary shares from the 5th Defendant to the 1st Defendant; (iii) Appoint the 3rd Defendant as a Company Secretary of the 5th Defendant's company; (iv) Authorize allotment of an aggregate of 49,900 shares to the 1st, 3rd, and 4th Defendants in the following proportions: 1st was issued with 47,500 shares and the 4th Defendant was issued with 1000 shares. On 14th November, 2014 the 1st, 2nd 3rd and 4th Defendants caused documents giving effect to the changes of shareholding and directorship structures stated above to be filed with the Registrar of companies at BRELA. The Plaintiff conducted an official search with the Registrar of Companies which revealed that all the post incorporation documents submitted by the 6th Defendant were not registered at BRELA due to anomalies including incomplete annual returns, change of shareholding structure without complying with the requisite procedure and change of directors without complying with the requisite procedure. The plaintiff contends that in pursuit to being the beneficiary of the shares held in trust by the 1st and 5th Defendants in the 6th Defendant's company, the Plaintiff together with other lenders issued loans to the 6th Defendant's company to the tune of USD 5,100,000.00 together with interest and other charges for purposes of continuation, operation and expansion of the 6th Defendant's company prospecting and mining activities in Chunya Mbeya Region. The loan amount remains unpaid and it is alleged that the Defendants are wasting the 6th Defendant's company properties which are situated at the mining site in Kungutas Village, Chunya District properties which are charged in favour of the Plaintiff by way of debenture dated 12th August 2015. The 1st and 6th Defendants in their joint written statement of defence acknowledged that the allotment of the shares occurred as alleged save for the fact that the Plaintiff is not a share holder of the 6th Defendant's company. They contended that the allotment of shares to the 2nd 3rd 4th and 5th Defendants

in the 6th Defendant's company were rightly and correctly procured. The second and fifth Defendants filed separate written statements of defence largely acknowledging the Plaintiff's claims and prayers. The second Defendant stated that he was not disputing the Plaintiff's claims as they are against the 6th Defendant and not him. On his part, the fifth Defendant despite the fact that he admitted every allegation of the plaintiff nevertheless he prayed for the dismissal of the Plaintiff's case. Defendants No.3 and No. 4 in their separate (but somewhat similar) written statements of defence, on top of preliminary objections denied in toto any liability and knowledge of the claim by the plaintiff, putting the plaintiff to strict proof thereof. However, during the course of the trial the 1st, 2nd and 5th Defendants changed their minds and one can rightly say that they betrayed the rest of the Defendants as they admitted the Plaintiff's claims and they filed a deed of settlement with the Plaintiff. In the deed of settlement (i.e. a Deed of Compromise of suit), the 1st, 2nd and 5th Defendants agreed as follows:

- (i) That the Defendants (i.e. 1st ,2nd and 5th) agree and accept that there was a valid agreement between the Plaintiff on the one hand and the 1st and 5th Defendants on the other hand for the latter to hold shares in the 6th Defendant's company in trust and on behalf of the Plaintiff; That the said agreement required Defendant to transfer 47 shares out of 50 shares he held in the 6th Defendants company to the Plaintiff and further required the 5th Defendant to transfer all 50 shares held by him in the 6th Defendants company; (iii) That on 31st December 2013, the 1st Defendant and the 5th Defendant signed transfer of share forms whereby the 1st Defendant transferred 47 shares to the Plaintiff and the 5th Defendant transferred 50 shares to the plaintiff in line with the agreement between the Plaintiff, the 1st and 5th Defendants and further that the executed Transfer of Share Forms were lodged with the Registrar of Companies for registration on 13th November 2015; (iv) That the Defendants shall take all necessary steps to ensure the Transfer of Shares to the Plaintiff;
- (v) That if necessary the parties agree to execute such other documents as may be necessary to complete the Transfer of Shares as will be required by the Registrar of Companies in order to put into effect the Transfer of Shares; (vi) The 1st Defendant forfeits the 1,400 shares that were allotted to him; (vii) That the transfer of 50 shares that were purported to have been transferred by the 5th Defendant to the 1st Defendant is invalid; (viii) That the Defendants acknowledge that the 6th Defendant is indebted to the Plaintiff to the tune of USD 5,100,000.00. Following a Deed of Compromise of Suit being filed, a consent judgment was entered for the Plaintiff and against the 1st and 5th Defendants pursuant to the terms of deed. The suit against 3rd, 4th and 6th Defendants proceeded for full trial. The remaining story of the case can be gathered from the issues of facts framed by the court and agreed by the parties at final pre-trial and scheduling conference, and the testimony of witnesses. At this stage it is necessary to determine the first issue which is whether or not the Plaintiff is holding any share in the 6th defendants company. PW1 was Igor Nielerievich Gundobin (PWI) who at the material time was a Strategic Investor in the Plaintiff's company. He testified that sometimes in 2009, the founders and business partners of the Plaintiff made a decision to invest in gold business in Tanzania. The idea to invest and the area to invest were

suggested to them by Percy Beda Mwidadi (the first Defendant) and Maksim Chaldymov (the third Defendant). At the material time the first Defendant was residing in Tanzania while the 3rd Defendant was residing in Russia. PWI arranged for business visa and invitation for the 1st Defendant to visit Russia and participate in the discussions. During the discussions it was discovered that the mine site earmarked was held under a Primary Mining Licence and that the Plaintiff being a foreign company was not eligible to acquire it. According to PWI it was agreed that the Plaintiff should incorporate a local limited liability company whose shares would be owned by the 1st and 5th Defendants who are Tanzanian on the understanding that the Plaintiff and its business partners would come ii) and invest in that company at the appropriate time. It was further agreed that the 1st and 5th Defendants would apply for a Mining Licence and immediately thereafter transfer their 47 and 50 shares respectively to the 6th Defendant and the Plaintiff in that order. Accordingly the 6th Defendant was incorporated on 6th April 2010 with 1st and 5th Defendant each holding 50 shares in trust arrangement for the benefit of the Plaintiff. PW1 tendered in evidence the Memorandum and Articles of Association of the 6th Defendants company (Exhibit P1), undated forms of transfer of shares executed by the 1st and 5th Defendants under the trust arrangements in favour of the Plaintiff (Exhibit P 3). It was further testimony of PW1 that on 8th June 2011 pursuant to the agreed trust arrangements, the 1st and 5th Defendants passed a special resolution transferring to the Plaintiff their 47 and 50 shares held in 6th Defendant's company. They signed and executed undated Forms of Transfer of Shares (Exhibit P5), to effect the transfer of shares to the Plaintiff. It was further testimony of PW1 that at all material time the operations of the 6th Defendant's company were being funded by the Plaintiff through loans advanced by the Plaintiff and its business partners. That the funds were used to acquire various mining equipments, paying costs of civil constructions at the working sites, costs of local and expert labour forces and overall management costs. Another witness who testified for the Plaintiff is Andrey Vasilievich Dvornichenko (PW2), who worked with the 6th Defendant's company as a supervisor of geological exploration works in site. He said that during the material period the 3rd Defendant Maksim Chaldymov was the Project Manager and the 4th Defendant Yuri Valentinovich Chernomorchenko was the Technical Director in the 6th Defendant's company. He said that during their operation period the funding for the mining project of the 6th Defendant in Kunguta's site was provided by the Plaintiff and its parent company called Pietersite Corp. The funding was in the form of one convertible loan by which the convertible loan was to be converted into 97% stake in the 6th Defendant's company and succeeding commercial loans providing for standard interest rate. According to PW2 the funding was used for exploration works including drilling for water and sampling, purchasing of equipments and provision of electricity and water facilities to nearby villages. According to this witness the equipment purchased included but not limited a ball mill imported from China, electrical generators, a bulldozer and a forklift. Other materials included materials for laying electricity and water supply etc. He said that the 3rd Defendant was the person responsible for handling the funds invested by the Plaintiff. He said that to his knowledge the 2nd, 3rd, 4th and 5th Defendants didn't make any contribution to the financing of the 6th Defendant affairs. The

evidence of PW1 and PW2 regarding the Plaintiff having shares in the 6th Defendant's company was sufficiently corroborated by that of Rufinus Antony Mlorere (PW3) and Percy Beda Mwidadi (PW4) who were the 1st and 5th Defendants respectively but who testified for the Plaintiff and against the Defendants in this case. The totality of their evidence is to the effect that the Plaintiff has shares in the 6th Defendant's company and that most of the 6th Defendant's operations were financed through the loans advanced by 4M Plaintiff. For instance Antony Beda Mwidadi (PW4) testified that in his capacity as the Director of the 6th Defendant he personally executed loan agreements under which the Plaintiff advanced monies for the 6th Defendant's operations. His evidence was supported by that of Rufinus Antony Mlorere (PW3) another subscriber and Director of the 6th Defendant's company who testified that in total USD 5,100,000.00 was advanced to the 5th Defendant's company by the Plaintiff. As stated in the course of this judgment, the 1st, 2nd and 5th Defendants having deflected and joined hands with the plaintiff supported the Plaintiff's claim. The 3rd, 4th and 6th Defendants continued to fight on. They filed their respective witness statements but for reasons stated in various rulings delivered in the course of the trial they didn't appear for cross-examination. Rule 56 (1) of the High Court (Commercial Division) Procedure Rules 2012 provides that:- "Where the witness fails to appear for cross examination, the court shall strike out his statement from the record, unless the court is satisfied that there are exceptional reasons for the witness's failure to appear" In the case at hand there was no reason let alone exceptional one for the witnesses' failure to appear for cross-examination. What actually transpired were deliberate efforts of the remaining Defendants to have the proceedings stalled. Thus in line with the wording of sub-rule (1) of Rule 56 quoted above the court has no option but to strike out as it hereby do their respective witness The effect of striking out witness statement of a party is that the party whose witness statement has been struck out does not have any evidence to offer to counter the other party's evidence. In other words and with reference to this case, the Plaintiff's evidence remains unchallenged. Now in view of the above analysis of the evidence and the law, there is no dispute that the Plaintiff's company was formed and incorporated by PW3 and PW4 after some discussions and agreements with PW1. The Memorandum and Articles of Association of the Plaintiff's company which was tendered as Exhibit P1 shows that the subscribers and share holders of the company were Beda Percy Mwidida (PW3) and Ruphinus Antony Mlolere (PW4) each holding 50 shares in 100 subscribed total shares. There is also undated Transfer of Share or Stock Documents (Exhibit P2) which was signed in the year 2013 in which Percy Beda Mwidadi (PW3) and Ruphinus Antony Mlolere (PW4) were transferring their shares to the Plaintiff's company. Further to that there is a Declaration of Trust and Power of Attorney (Exhibit P3) showing that PW3 and PW4 were holding 50 shares each in the 6th Defendant's company in trust and Deeds of Indemnity signed by them in favour of the Plaintiff's company (Exhibit P4). Thus, in view of the evidence of PW1, PW2, PW3 and PW4 the totality of which is to the effect that the Plaintiff is holding shares in the 6th Defendant's company I answer the 1st issue in the affirmative. That is to say the Plaintiff is holding 97 (i.e. 47 shares transferred from PW3 Percy Beda Mwidadi and 50 Shares transferred from Ruphinus Antony Mlolere) shares in the 6th Defendant's company. Issue No.2 is whether allotment of

shares to the 1st 3rd and 4th Defendant in the 6th Defendant's company was wrongfully procured. As correctly submitted by the counsel for the Plaintiff it was the requirement under the Memorandum and Articles of Association of the 6th Defendant's company that all unissued shares were at the disposal of the Directors who may allot, grant or option over or otherwise dispose of them to such persons at such times and on such terms as they think proper. The 1st, 3rd, and 4th Defendants didn't show in their pleadings and have established in their evidence that there was a resolution of the Board of Directors of the 6th Defendant's company which allotted shares to the 1st, 3rd and 4th Defendants. Section 111 of the Evidence Act [Cap 6 R.E. 2002] puts a burden of proof in a suit on that person who would fail if no evidence at all were given on either side and under section 110 (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In this case the Defendants have asserted that they were allotted shares in the 6th Defendant's company. The burden of proof was on them to prove that they were actually allotted shares. This proof is wanting. Moreover, there is evidence from the 1st and 5th Defendants to the effect that no such Board Resolution was ever passed. Accordingly this court answers the second issue in the affirmative. That is to say the purported allotment of shares of the 6th Defendant's company to the 1st, 3rd and 4th Defendants was wrongfully procured. J The findings in respect of the second issue can be visited in the third issue which asks whether the 1st Defendant owns 50 shares in the 6th Defendant's company. As stated in the course of this judgment, the 1st Defendant Percy Beda Mwidadi has deflected and has testified in favour of the Plaintiff. It is his testimony that at the end of 2013 he transferred his 50 shares to the Plaintiff. He tendered in evidence a transfer of Shares or Stock agreement (Exhibit P1) exhibiting transfer of his shares to the Plaintiff, thus having conceded that he transferred his 50 shares to the Plaintiff, the issue of holding 50 shares in the 6th Defendant's company dies a natural death. As regards the 4th issue which asks "whether or not the 1st and 5th Defendants approved the transfer of their 47 and - 50 shares respectively to the Plaintiff?". As stated hereinbefore, the 1st and 5th Defendants have compromised with Plaintiff and gave evidence in the Plaintiff's favour. They testified positively to the transfer of their shares to the Plaintiff and they tendered in evidence (Exhibit P2) to substantiate their assertions that they had actually transferred their respective shares to the Plaintiff. The rest of Defendants didn't lead any evidence to counter the 1st and 5th Defendants assertions on the transfer of their shares. Thus by virtue of the said transfer (Exhibit P2), the 1st and 5th Defendants approved the transfer of their shares to the Plaintiff and the Plaintiff became the majority share holder in the 6th Defendant's company immediately after 31st December, 2013 holding 97 allotted shares. This answers the 4th issue in the affirmative, that is to say the 1st and 5th Defendants transferred their shares to the Plaintiff. The 5th issue is whether or not there was any trust arrangement between the Plaintiff on the one hand and the 1st and 5th Defendants on the other hand. The plaintiff and both the 1st and 5th Defendants have testified to the effect that there was such an arrangement. It is the evidence of Percy Beda Mwidadi (PW3) that sometimes in 2009, he travelled to Moscow on invitation from the Plaintiff and that while in Moscow it was agreed to establish a private limited liability company (the 6th Defendant) whose share would

initially be owned in trust by himself and the 5th Defendant Ruphinus Antony Mlolere. According to Percy Beda Mwidadi the understanding was that the Plaintiff and her business partners would invest in the 6th Defendant's company and that later on the shares held in trust would be transferred to them. Similar evidence was given by Ruphinus Antony Mlolere, 5th Defendant who after a compromise of suit between him and the Plaintiff he testified as PW4. Thus on the evidence available, the 5th issue is answered in the affirmative. That is to say there was a trust arrangement between the Plaintiff on the one hand and the 1st and 5th Defendants on the other hand in which it was agreed that the 1st and 5th Defendants would hold shares in the 6th Defendant's company in trust of the Plaintiff. The 6th issue which asks if the answer to the 5th issue is in the affirmative, whether the 1st and 5th Defendants have breached the trust arrangement has to be answered in the affirmative. As the evidence on record would depict there were several attempts to make changes in the ownership and management Defendant's company prior to the institution and trial of this suit. These attempts were being made by the 1st and 5th Defendants in total disregards of the trust arrangements which existed between them on the one hand and the Plaintiff on the other hand. Both the 1st and 5th Defendants after they compromised the suit with the Plaintiff and during the trial conceded that they were involved in the attempts to change the ownership and management of the 6th Defendant. This was a clear breach of the trust arrangement. The 7th issue is whether or not the 6th Defendant is indebted to the Plaintiff. To prove this issue there is the testimonies of PW1, PW2, PW3 and PW4. According to PW1, all the transactions of the 6th Defendant's company were funded by loans from the Plaintiff. The funding was used by the 6th Defendant to acquire mining equipments, to pay for civil construction works on site, labour force etc. Similar evidence was adduced by Dvornichenko Andrey Vasilievich (PW2), who worked as a Manager of Geological Explorations of the 6th Defendant's company during the material time. Plaintiff tendered in evidence several Loan Agreements (Exhibit PS) which shows that on various dates from 15th April 2010 up to July 2015 various loans were advanced to the 6th Defendant's company by the Plaintiff. In all these loan agreements Mr. Percy Beda Mwidadi (PW3) and Mr. Ruphinus Antony Mlolere (PW4) signed as Directors of the 6th Defendant's company. The 1st and 5th Defendants conceded that there were such loan agreements and that they at their capacities as directors of the 6th Defendant's company signed the said loan agreements on behalf of the 5th Defendant. According to PW3 and PW4 to their recollection the said loans had not been repaid and the 6th Defendant is liable to pay to the Plaintiff USD 5,100,000.00 as claimed in the plaint. As stated hereinbefore, the Defendants didn't challenge the Plaintiff's evidence therefore it stands unchallenged. Thus, the 7th issue is answered in the affirmative that is to say on the evidence adduced the 6th Defendant is indebted to the Plaintiff. Turning to reliefs which constitutes the last issue, I have no doubt that on the totality of the evidence adduced, the Plaintiff is entitled to the some of the reliefs claimed in the plaint and I enter judgment for the plaintiff as against defendants and declare as follows:-

1. That the shares held by the first and fifth Defendants in the 6th Defendant's company were held in trust of the Plaintiff

2. That the purported issuance of shares in the 6th Defendant's company to the 1st, 3rd and 4th Defendants were wrongfully issued and the wrongfully issuance of shares were in breach of trust arrangements between the Plaintiff and the 1st and 5^{*} Defendants with intent to defraud the Plaintiff;
3. That the appointments of the 2⁼, 3rd, and 401 Defendants as Directors of the 6th Defendant's company was done wrongfully and with intent to defraud the Plaintiff and hence it is null and void;
4. That the 1st, 2nd, 3[^], 4^{*} and 5th Defendants are hereby permanently refrained from dealing with the assets of the 6th Defendant's company including her Mining Licenses No. ML 426/2011 and ML 468/2012;
5. That the 6th Defendant shall pay to Plaintiff USD 5,100,000.00 being the amount of monies advanced her by the Plaintiff; F / -----
6. The 6th Defendant shall pay to the Plaintiff interest on the decretal sum at the rate of 3% per annum from the date of filing the suit to the date of judgment and further interest at the court's rate of 1 % per annum from the date of judgment to the date of full payment of the decretal sum.
7. The Plaintiff shall have her costs of the suit. The Plaintiff's claim for general damages is rejected. General damages amount to financial compensation that is issued by a court to compensate for injuries suffered, for which no real financial value can be calculated. Examples of general damages can include financial compensation for pain and suffering, or for shortened life expectancy. In rare breach of contract cases, where the aggrieved party can prove that the breach was an intentional attempt to mislead or defraud, the court may order the breaching party to pay an additional monetary sum as general damages. In the case at hand despite the fact that there is undisputed evidence that the 1st, 3rd, 4th and 5[^] Defendants with intent to defraud the Plaintiff attempted to change the Management and Directors of the 6th Defendant's company but in view of a compromise of suit entered between the 1^{*} and 5th Defendants who were the Directors of the 6th Defendant on the one hand and the Plaintiff on the other hand and the Deed of Settlement filed in court, I find no justification to go

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