

TANZANIA / JUDGMENT

steven mahuza vs stefen nagy another 2022 tzhccomd 348 2 november 2022

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2 November 2022

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO. 115 OF 2021 STEVEN MAHUZA.....
PLAINTIFF VERSUS STEFEN NAGY..... 1ST DEFENDANT CATA
MINING COMPANY LIMITED..... 2ND DEFENDANT Date of Last Order: 20/09/2022
Date of Judgment: 02/11/2022

JUDGMENT

MKEHA, J: The Plaintiff is a natural person and a resident of Dar es Salaam City. The Defendant is a natural person and a foreign national (Canadian). The 2nd Defendant is a limited liability company duly incorporated under the Companies Act, Chapter 212 of the Laws of Tanzania, trading and carrying on business of mining. i In terms of the plaint, the Plaintiff' s claim against the Defendants jointly and severally is for a declaratory order that the .transfer of one hundred

(100) shares from the Plaintiff to the l5* Defendant in the share capital of the 2nd Defendant is ineffectual for lack of consideration and that the Plaintiff is entitled to the said shares. The claim hereinabove arose as a result of the following: Pursuant to a Special Board Resolution of the 2nd Defendant on the 24th of October, 2012 the Plaintiff was allotted with 100 shares in the 2nd Defendant and as such became a shareholder to the extent of those shares. Following allotment of 100 shares to the Plaintiff, the shareholders of the 2nd Defendant were: the Plaintiff (100 shares), l^ Defendant (510 shares) and Mr. Mahuza Mumangi Nyakirang'ani, who is not a party to this case (390 shares). All the three shareholders were Directors of the 2nd Defendant. Then sometimes in November 2016 the l51 Defendant asked the Plaintiff to transfer his 100 shares in the 2nd Defendant to the said l51 Defendant and the transfer was to be effected at a consideration of Tanzania Shillings One Billion (TZS 1,000,000,000.00) only. In terms of the Plaint, based on mutual trust which existed between the Plaintiff and the l1st Defendant and 2 the fact that the l1st Defendant was more than a family friend to the Plaintiff at the instance of and the promise and assurance by the l51 Defendant of payment to be made in immediate future, the Plaintiff signed an instrument for transfer of shares indicating that the sum of Tanzania Shillings One Billion (TZS 1,000,000,000.00) as consideration for the purchase of 100 shares had been paid while it was not. On 10th November 2016 at the instance of the l^ Defendant and assistance from the

2nd Defendant while the agreed consideration had not been paid and without the process having been sanctioned by the 2nd Defendant's Board of Directors, a Transfer of Shares Instrument was filed with BRELA purporting to transfer the said 100 shares from the Plaintiff to the 1st Defendant. The 1st Defendant, having the Plaintiff's 100 shares transferred into his name prior to and without having paid for the same and in cooperation with the 2nd Defendant and without following the procedures, had the Plaintiff removed from the 2nd Defendant's Board of Directors. The 1st Defendant, contrary to the promise and several follow-ups including a letter dated 14th November, 2020 refused to pay a sum of Tanzania Shillings One Billion (TZS 1,000,000,000.00) being the agreed consideration for the transfer of the Plaintiff's 100 shares to him. The 3rd Defendant as well, refused, to transfer back the said shares to the Plaintiff, following failure to pay the agreed consideration. As a result of the foregoing, the Plaintiff prays for Judgment and Decree as follows:

- (a) A declaration that the purported Transfer of the Plaintiff's shares to the 1st Defendant was ineffective for lack of consideration;
- (b) An order for return of 100 shares to the Plaintiff and rectification of the 2nd Defendant's Register of Members and Notice of such rectification to the Registrar of Companies at the Business Registration and Licensing Agency (BRELA);
- (c) An order against the 1st Defendant for payment of interest at commercial rate of 18% per annum for the promised and unpaid consideration from November 2016 to the date of institution of this suit;
- (d) An order against the 1st Defendant for payment of special damages;
- (e) An order against the Defendants for payment of general damages
- (f) Costs of this suit
- (g) Any other order (s) and relief (s) the Honourable Court may deem just and fit to grant in the circumstances of this matter. 4 On the other hand, by way of a counterclaim, the 2nd Defendant claims from the Plaintiff a total sum of Tanzania Shillings One Billion an amount that was to be paid by the Plaintiff in cash in respect of the allotment of shares made to him on 24th October, 2012, plus interest at 26% of the outstanding amount, interest at the rate of 26% per annum from the date of institution of the suit to the date of judgment, general damages to be assessed by the court and costs in respect of the counterclaim. Before commencement of hearing the following issues were framed for

determination:

- (i) Whether the Defendant paid consideration for the 100 shares uansferred to him by the Plaintiff. (ii) Whether the transfer of 100 shares from the Plaintiff to the l5* Defendant was sanctioned by the 2nd Defendant's Board of Directors. 5 (iii) Whether the 2nd Defendant followed legal procedures prior to removing the Plaintiff from Directorship. (iv) Whether the 100 shares allotted to the Plaintiff were treated as 100% paid up.
- (v) If issue No. (iv) is not answered in the affirmative, whether the 2nd Defendant has legal right to claim for payment of shares through court action. (vi) To what reliefs are the parties entitled. Mr. Steven Mahuza appeared as the first witness in support of the Plaintiff' s case. Before tendering exhibits, the witness tendered his witness statement in court and the same was admitted without objection to be treated as the witness' evidence in chief. In his witness statement, he identified himself as a son of Mr. Mahuza Mumangi, one of the founders of the 2nd Defendant. According to PW1, the l51 Defendant and his father were friends to the extent of coming up with a common idea of founding the 2nd Defendant company. PW1 stated that, on 10/11/2016 he was allotted 100 shares by the 2nd Defendant and pursuant to a Special Board Resolution, he was appointed Company Secretary of the 2ndDefendant.See: 6 I Exhibit P2 that was admitted into evidence without objection. According to PW1, shares allotted to him were treated as paid up shares. This is evidenced by Form No. 55a (Exhibit P3) and Audited Accounts for the year 2016 (Exhibit P4). The two Exhibits were admitted into evidence without objection on part of the Defendants. According to PW1, the l31 Defendant had proposed acquiring his (Plaintiff's) shares for a consideration of Tanzania Shillings One Billion (TZS 1,000,000,000.00). Board approval for sale of shares and payment of consideration would be done prior to transfer of the shares to the l51 Defendant's name. Because of mutual trust and friendship, the Plaintiff signed the transfer form indicating that consideration had been paid even before the actual payment. At the time of transfer of shares, the Plaintiff, his father and the l511 Defendant were Directors of the 2nd Defendant. PW1 stated further in his witness statement that, knowing that the agreement for sale of shares had not been signed, Board of Directors had not met to sanction the transfer and knowing that consideration had not been paid, the l51 Defendant caused the Plaintiff' s shares to be transferred to him. This is evidenced by the Instrument of Transfer of Shares (Exhibit P5) as well as Annual Returns for the years 2016 and 2017 collectively 7 (Exhibit P6). The two Exhibits were admitted into evidence without objection on part of the Defendants. According to PW1, the l51 Defendant having transferred to himself the said 100 shares without paying for the same and in cooperation with the 2nd Defendant, and without following the procedures, caused the Plaintiff to be removed from the 2nd Defendant' s Board of Directors and the position of Company Secretary of the 2nd Defendant. This is evidenced by Forms Nos. 210b and 210 (Exhibit P7) that was admitted into evidence without objection on part of the Defendants. When PW1 was cross examined, he was emphatic that the shares allotted to him were paid up shares. He specifically referred to Form No. 55a to insist that his shares were paid up shares. PW1 further insisted that, there was no agreement for purchase of shares. During re-examination, PW1 told the court that, Nyakarang'ani

Construction Company Limited was the foughder of the 2nd Defendant and that, all the assets of the said construction company enabled the 2nd Defendant to get loans which enabled commencement of business. 8 Mr. Mahuza Mumangi Nyakirang'ani appeared in court as the second witness for the Plaintiff's case. His witness statement was admitted in court as the witness' evidence in chief without objection. In his witness statement, the witness identified himself as the father of the Plaintiff, one of the founders, first shareholders and director of the 2nd Defendant who was instrumental in setting up and registering the 2nd Defendant with the Business Registration and Licensing Agency. He also stated that, he used to be a close friend to the 1st Defendant that, their friendship came out of their common interest in mining that led to the creation and registration of the 2nd Defendant. PW2 stated further that, vide a Special Board Resolution made on 24th October, 2012 and filed with the BRELA on 10th November, 2016 allotment of shares was made whereof 100 shares in the share capital of the 2nd Defendant were allotted to the Plaintiff. According to PW2, in the said Special Resolution it was further resolved to and the Plaintiff was appointed Company Secretary of the 2nd Defendant thus responsible with records of the 2nd Defendant. 9 PW2 further stated that, on 02/11/2012 Board Directors of the 2nd Defendant made allotment of shares to him (PW2), the Plaintiff and the 15* Defendant. PW2 added that, the 151 Defendant as the Director of the 2nd Defendant prepared and signed Form No. 55a, Return of Allotment of Shares and had it filed with the BRELA on 14/11/2012. According to PW2, shares allotted to all of them, mentioned in the resolution were treated as fully (100%) paid up shares as shown in Form No. 55a, Return of Allotment of Shares and in the 2nd Defendant's Audited Accounts for the year 2016. PW2 stated further in his witness statement that, in the year 2017 while still a shareholder and director of the 2nd Defendant, the Plaintiff came to him seeking assistance to have the 15* Defendant pay for his shares he had transferred to himself without paying for the same or return the shares. According to PW2's witness statement, at the time the instrument of transfer of shares was signed and shares transferred to the 1^ Defendant, the Board of Directors of the 2nd Defendant had three Directors namely, Plaintiff, 1^ Defendant and himself (PW2). The witness stated in his witness statement that, no meeting of the Board of Directors sanctioned the sale and transfer of the Plaintiff' s share to the 151 Defendant nor heard the Plaintiff before removing him from directorship. 10 Upon being cross examined by Mr. Lupogo learned advocate for the Defendants, PW2 told the court that, the Plaintiff was one of the owners of mother company of the 2nd Defendant hence he directly deserved being allotted shares in the 2nd Defendant. PW2 mentioned Nyakirang'ani Construction Company Limited as the mother company. PW2 told the court that, the shares allotted to the Plaintiff were paid up in terms of the agreement between himself (PW2) and the 151 Defendant and that, PW2's assets stood in lieu of cash payments for the shares. PW2 told the court that, the 151 Defendant lived at his (PW2's) home for more than 10 years hence there was no reason for doubting him. During re-examination, PW2 told the court that, the 1st Defendant had signed for transfer of shares. PW2 insisted that, the assets which enabled the 2nd Defendant borrow money for commencement of business belong to Nyakirang'ani Construction Company Limited. To that end, the Plaintiff's case was marked closed. Mr. Shadrack Lameck Msekalele appeared

as the sole witness in support of the Defendants' case. When he appeared in court, he started by tendering his witness statement in court, to be adopted as his evidence in chief. The same was admitted without objection. The witness statement of this 11 witness indicates that, when he appeared in court as DW1, he was one of the Directors of the 2nd Defendant. According to this witness, the subscribers to the 2nd Defendant were the 151 Defendant, Jing Li and Mr. Mahuza Mumangi with 33 shares each. DW1 further stated in his statement that, on 24th October 2012 a Special Board Resolution was passed whereby the Board resolved that, 100 shares with a value of Tanzania Shillings Ten Million (TZS 10,000,000.00) be allotted to the Plaintiff in cash, for a consideration of Tanzania Shillings One Billion (TZS 1,000,000,000). The witness further stated that, after the Board Resolution was passed, the 2nd Defendant informed and filed the change of particulars under Form No. 55a informing the BRELA on the allotment of shares in cash. According to the witness statement of DW1, upon the allotment of shares and filing of respective documents the Plaintiff was required to pay the 2nd Defendant Tanzania Shillings One Billion (TZS 1,000,000,000.00) being a consideration for the allotted shares, an amount that was not paid by the Plaintiff. 12 When DW1 was cross examined by Mr. Massatu learned advocate for the Plaintiff, he maintained that the Plaintiff was obliged to pay for the shares allotted to him. The witness admitted that, the Plaintiff was not heard by the Board of Directors before being terminated as a Director and Company Secretary. The witness added that, the Plaintiff was neither issued with notice before his termination. The witness insisted that, the 151 Defendant had signed Exhibit P3 that was filed at BRELA in November, 2012. According to DW1, each share was to be treated as paid up if paid for 100%. Following failure of the 1st Defendant to enter appearance in court so as to be cross examined, his witness statement was struck out pursuant to Rule 56 (2) of the Commercial Court Rules. The said order of the court was followed by closure of the defence case and the plaintiff's case as far as the counterclaim was concerned. The first two issues can be dealt with together. It was the Plaintiff's case via the witness statement of the Plaintiff himself (PW1) and PW2 that, the first defendant, while aware that agreement for the sale of shares had not been signed, the Board of Directors of the 2nd Defendant had not met to sanction the transfer of shares and having not paid consideration for the 13 shares, caused the Plaintiff's shares to be transferred to him. These testimonies were not challenged by the Defendants in any way. Neither in cross examination of PW1 and PW2 nor in the witness statement of DW1. In other words, there was no evidence from the Defendants that the Defendant did pay consideration for the Plaintiff's 100 shares transferred to him. Neither was there evidence on how the Board of Directors of the 2nd Defendant sanctioned transfer of the Plaintiff's shares to the 151st Defendant. Therefore, the 1st and 2nd issues are answered in the negative. Regarding the 3rd issue, it was the Plaintiff's case via the witness statement of PW1 that, the 2nd Defendant removed him from the position of Director in its Board of Directors and the position of Company Secretary without according him a hearing. Upon being cross examined, DW1 admitted that, the Plaintiff was not accorded a hearing before being terminated as a Director and Company Secretary. Under section 193 (2) of the Companies Act, for removal of a director to be considered proper, a special notice of a resolution to remove a director or to

appoint a person instead of the director so removed at the meeting is required from the members of the company. On receipt of special notice of a resolution to remove a director, the company should send a copy of such notice to the 14 concerned director and the said director is entitled to be heard on the resolution at the meeting. In view of DW1, this procedure was not adhered to before the Plaintiff was terminated as a director. Therefore, the 2nd Defendant did not follow the required legal procedures for removing the Plaintiff from Directorship. The fourth issue is whether the 100 shares allotted to the Plaintiff were treated as 100% paid up. In the witness statements of PW1 and PW2, both witnesses were insistent that, the 100 shares allotted to the Plaintiff were treated as fully paid up shares. These testimonies were supported by production in court of Exhibits P3 (Form No. 55a) and Exhibit P4 (2nd Defendant's Audited Accounts for the Year 2016). The two Exhibits were admitted into evidence without any objection from the Defendants' advocate. Indeed, the two Exhibits indicate that the said shares were treated as paid up shares. PW1 and PW2 stated upon being cross examined, the way the Plaintiff was one of the owners of Nyakarang'ani Construction Company Limited, whose assets enabled the 2nd Defendant borrowing for commencement of business. There was no dispute that the 1st Defendant appended his signature to the Board Resolution (Exhibit P2) that resolved that the Plaintiff be allotted with 100 shares. This Exhibit was also admitted into evidence without any objection. That the Defendant did sign Exhibit P3 was also not in dispute. Having failed to dispute admission of Exhibits P2, P3 and P4 into evidence on part of the Defendants, the 2nd Defendant's counterclaim remained to be baseless. No wonder the Defendants brought no tangible evidence in support of the claims in the counterclaim. With that evidence on record, I proceed to hold that the 100 shares allotted to the Plaintiff were treated as 100% paid up. The holding hereinabove renders the 5th issue redundant. Because of the foregoing holdings, it is decreed in favour of the Plaintiff as hereunder:

- (a) A declaration is made that the purported transfer of the Plaintiff's shares to the 1st Defendant was ineffective for lack of consideration.
- (b) An order is hereby made for return of 100 shares to the Plaintiff and the 2nd Defendant's Register be rectified regarding its members and Notice of such rectification be furnished to the Registrar of Companies.
- (c) The 2nd Defendant's counterclaim is dismissed with costs. 16 .
- (d) The Defendants shall pay General Damages to the Plaintiff to the tune of Tanzania Shillings One Hundred Million (TZS 100,000,000.00).
- (e) The Defendants are condemned to bear costs of the Plaintiff's suit. DATED at DAR. ES SALAAM this 02nd day of November, 2022. C. P. JUDGE 02/11/2022 Court: Judgment is delivered in the presence of Mr. Makaki Massatu learned advocate for the Plaintiff and Ms. Elizabeth Majura learned advocate for the Defendants. C. P. MKEHA JUDGE 02/11/2022 I 17

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