IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 125 OF 2019

SUDHIR KUMAR LAKHANPAL...PLAINTIFF

VERSUS

RAJAN KAPOOR...1ST DEFENDANT

REGALIA TANZANIA LIMITED..2ND DEFENDANT

JUDGMENT

Date of Last Order: 27/7/2022
Date of Judgment: 19 /8/2022

MASABO, J.:-

The plaintiff is seeking to enforce an oral agreement between him and the defendants. He has alleged that sometimes in April 2016, the 1st defendant acting on his own behalf and in the capacity of the director for the 2nd defendant, orally requested him to work for the 2nd defendant. Upon discussion, they agreed to jointly manage the operations of the 2nd defendant's company on the understanding that they will jointly share the profit generated from the 2nd defendant which is a limited liability company dealing with import and supply of uniforms to defence and security institutions/forces in Mainland Tanzania and Zanzibar.

Upon the formation of the agreement, the first defendant facilitated the obtainment of a residence permit class A allowing the plaintiff to serve in the capacity of director for the 2nd defendant. Thereafter, the plaintiff started to work in the 2nd defendant managing all the imports and supply and continued so until on 14th May 2019 when his tenure was casually terminated by the 1st defendant. Throughout this time, he never received his full share of the profit generated by the 2nd defendant as the 1st defendant refused to share the realized profit in spite of several requests. Out of a sum of Tshs 654,275,627/= which ought to have been paid to him from the net profit generated by the 2nd defendant between July 2016 to 14th April 2019, he only received Tshs 125,852,500/=. He thus claims the outstanding sum of Tshs 528, 423,127/= and a commercial interest of 15% per annum from May 2019 to the date of judgment.

Prior to the hearing and after consultation with the parties, the court framed the following five issues for determination:

1. Whether the plaintiff was engaged by the first defendant to work for the 2nd defendant;
2. If yes, for how long did he work for the defendant;
3. Whether there was any cost sharing agreement between the parties;

4. Whether the plaintiff received any remuneration/profit; and
5. What reliefs are the parties entitled to.

In proof of his case, the plaintiff who was represented by Mr. Joseph Rutabingwa assisted by Ms. Idda Rugakingira, learned counsels, testified in court as PW1 and marshaled one additional witness to substantiate his claims. PW1 narrated how the 1st defendant approached him and requested him to work together, facilitated his obtainment of resident permit and made him responsible for the daily affairs of the 2nd defendant. He accounted that he was, in addition, made a signatory of the 2nd defendant's bank accounts and throughout his tenure in the company he was the one responsible for soliciting orders, placing tenders and for the general operation of the company whilst the 1st defendant was absent most of the time.

He proceeded further, much as he was working hard for the company and the company was generating profit, the plaintiff refused to give him the agreed profit share and terminated his tenure in the company. In addition to his oral testimony, he produced several documents including a copy of his residence permit (Exhibit P2); annual return of the 2nd defendant (Exhibit P3), proforma invoices (Exhibit P4 collectively); a summary of turn over

(Exhibit P5), bank statement (Exhibit P6), and a demand notice (Exhibits P7).

His second witness was Zainab Prbhai a secretary at the 2nd defendant (PW2). This was a witness to the oral agreement as she was present in office when the 1st defendant requested the plaintiff to work with him in consideration of profit sharing. She is also the one who typed the letter submitted to the Immigration Department in support of the plaintiff's application for a resident permit class A. Her other relevant testimony was that throughout his presence at the second defendant, the plaintiff was in charge of the office operations and was doing most of the company's work. He was also a signatory of the bank accounts.

On his part, the defendants led by Mr. Laurent Ntanga, learned counsel, had four witnesses. Azim Hooda, who introduced himself as director of the 2nd defendant testified as DW1. The 1st defendant testified as DW2 and Salum Maulid Salumu Bane testified as DW4. Common in the testimonies of these witnesses was that, the plaintiff was none but a frequenter to the 2nd defendant's offices and a family friend to the 1st defendant. He started

visiting the 2nd defendant office during the life time of Joginder Kapoor who was the first managing director the company and continued so after the demise of Joginder Kapoor in 2016. According to these witnesses, much as the plaintiff used to assist in some works of the 2nd defendant and although DW2 facilitated PWI's obtainment of the residence permit and paid him certain amounts of money, the two had neither a working relationship nor a profit share agreement.

DW3, Ally Nassoro Juma, an agent for the 2nd defendant operating in Zanzibar, did not have much to say about the relationship between the parties save that, he used to find the plaintiff at the 2nd defendant's office and he was made to believe that he was a mere friend.

At the conclusion of the hearing, the parties were granted leave to file final submissions. Both complied by filing the submissions on time. Unconventionally, Mr. Ntanga raised an issue of jurisdiction in the course of his written final submission. He reasoned that, the dispute between the parties is a labour matter and, by implication this court is incompetent for want of jurisdiction hence should be strucked out. Much as the objection was

improperly raised, it was found crucial to have it resolved mindful also that, it is now trite that a point on jurisdiction such as the one raised by the defendants' counsel can be belatedly raised and canvased at any stage of the suit even on appeal (See **Tanzania Revenue Authority vs Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009).

Further to this point, upon assessing the evidence on record and after a keen reflection on the pleadings, there appeared a pressing a need for amendment of the issues, or in the alternative, framing of additional issue(s) which would sufficiently address the controversy between the parties as the issues framed prior to the hearing appeared to divulge from the dispute between the parties.

Mindful of the requirement to afford the right to be heard before making any decision on the issue of jurisdiction and on whether or not to amend the issues for determination, I invited the parties to address the court on these two issues. In specific, the parties were invited to address the court on whether the contested agreement was in the nature of an employment contract and if so, whether this court has jurisdiction to entertain the dispute

between the parties and whether there was a need for amending issues/framing of fresh issues for determination.

Addressing the court, Mr. Rutabingwa submitted that that the agreement between the parties is not a labour/employment agreement but a profit-sharing agreement a fact which was pleaded in plaint, disputed in paragraphs 2 and 3 of the written statement of defence and reiterated in paragraph 2 of the plaintiff's reply to the defendants' written statement of defence. He submitted further that from the pleadings it is crystal clear that the suit is based on a contractual relationship as opposed to a labour agreement. Thus, the suit is competent before this court.

Regarding the amendment of issues, he submitted that the issues framed by the court divert from the real issues. They unjustifiably introduce an issue of remuneration which was not at issue in the pleadings. Thus, they are incapable of adequately resolving the dispute. He invited the court to amend the issues and he went ahead to propose the following four issues. He proposed the following four amended issues: *Whether the parties had an agreement for sharing of the profit of the 2nd defendant; if the first issue is*

in the affirmative, for how long did it last; whether the plaintiff received any payment from the defendants and if so, was the payment part of the profit-sharing agreement; to what reliefs are the parties entitled to.

On his part, Mr. Ntanga, without a reference to any specific part of the pleadings maintained that the contract between the parties is in the form of an employment contract as the plaintiff's claim are that he was to work as a director. As regards the amendment of issues, he left it to the court to decide.

The point on jurisdiction which I prefer to start with, requires me to navigate through section 4 of the Employment and Labour Relations Act [Cap 366 RE 2019]. Section 4 of this Act, defines the term "employee" as an individual who—

(a) has entered into a contract of employment; or
(b) **has entered into any other contract under which**—
(i) <u>the individual undertakes to work personally for the other party to the contract; and</u>
<u>(ii) the other party is not a client or customer of any profession, business, or undertaking carried on by the individual</u>; (*emphasis mine*)

In my considered view, when this provision is considered in the light of the pleadings and the submissions by the parties, it becomes clearer that much as the definition under clause (b) seems to be remotely relevant as it extends the definition of the term employee to individual contractors and other workers who would traditionally not be treated as employees, the circumstances of the present case does not fall within the definition above. As correctly submitted by Mr. Rutabingwa, paragraphs 4 and 5 of the plaint read together with paragraph 2 and 3 of the written statement of defence and paragraph 2 of the reply to the defendants' written statement of defence, it vividly shows that the asserted oral agreement is in the nature of joint venture by which the plaintiff's work in the company was regarded as a capital giving him an entitlement to share the profit of the 2nd defendant. In the premises, therefore, the dispute between them is not labour related but one on sharing of the profit generated from the 2nd defendant's operations. The question of jurisdiction does not consequently arise as the matter is an ordinary suit based on a contract to which this court has jurisdiction.

The issues for determination, to which I now turn, are basically points of disagreement drawn from the material proposition of fact or of law to which the parties are at variance (affirmed by one party and denied by the other party (Order XIV rule 1(3) of the **Civil Procedure Code**, [Cap 33 RE 2019]). When the issues framed prior/at the commencement of the hearing are found inadequate or any how fault, they may be amended at a subsequent stage of the suit pursuant to Order XIV rule 4 and the 5(1) of the Civil Procedure Code.

In the present case, having critically examined the issues framed in the light of the pleadings, I unreservedly agree with Mr. Rutabingwa that they are at fault as do not reflect the real issues. The points of variance between the parties were the existence of the profit-sharing agreement and the breach of such agreement by the defendants. To align the issues for determination with the pleadings, I hereby amended and they shall forthwith read as follows:

1. Whether the parties had an oral agreement for sharing of the profit of the 2nd defendant;
2. Whether the defendants are in breach of the agreement
3. To what reliefs are the parties entitled to.

Reverting to the merit of the suit and starting with the first issue, our law recognizes oral agreement as valid agreement if they are made out of free will and comprise the essential elements of enforceable agreements. Section 10 of the **Law of Contract Act**, Cap 435 RE 2019, categorically state that:

> 10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Provided that, nothing herein contained shall affect any law in force, and not hereby expressly repealed or disapplied, by which any contract is required to be made in writing or in electronic form or in the presence of witnesses, or any law relating to the registration of documents

Proving the terms of an oral contract such the one asserted by the plaintiff, is a pure question of facts. Most often, it is established through the oral testimonies of the parties and of the persons who were present during the formation of the agreement. Proof of oral agreements may also be inferred from the conduct of the parties prior and after the formation of the agreement. All the three types of evidence have been demonstrated in the

present case. As the testimonies of PW1 and DW2 who are the parties to the contract are at variance, the testimonies of persons who were present at the formation of the agreement will attract considerable weight. The only witness with such attributes is PW2, this witness testified to have been present when the plaintiff and the 1st defendant, who are both familiar to him, sealed the deal. Her evidence was consistent and uncontroverted during cross examination. As I was not presented with anything to impeach her credence, her testimony is found credible and accorded the weight it deserves.

Evidence pertaining to conducts of the parties also strongly suggests that the plaintiff was not a mere visitor or family friend as averred by the defendants. One of such conduct is the 1st defendant' facilitation of obtainment of the residence permit by the plaintiff. From the testimonies of PW1, PW2 and DW2 and Exhibit P4, it is credibly established that the 1st defendant facilitated the obtainment of residence permit by the plaintiff who is non-Tanzania and to undertake all managerial decisions in respect of all activities of 2nd defendant.

Having made the Immigration Department to believe that the plaintiff was engaged powers to execute all managerial works for the 2nd defendant and,

acting on that belief, to issue a residential permit in the plaintiff's favour, the defendants' assertion that the plaintiff was a mere frequent visitor and family friend is untenable as he is estopped by law from denying the above fact. In the foregoing of the above, it is my conviction that there existed an oral agreement between the plaintiff and the 1st defendant.

The status of the said agreement as against the 2nd defendant entertains concerns that need be resolved. DW1 and DW2 consistently asserted that the 2nd defendant being a corporate body is incapable of forming an oral agreement. In my considered view, this assertion is without merit. Much as it is desirable that agreements involving corporate bodies should be in writing, I am not aware of a mandatory legal requirement that agreements by companies should exclusively be in a written form. The absence of such requirement which would otherwise render the verbal agreement void under section 10 of the Law of Contract Act, implicitly means that, a verbal agreement involving a cooperate body is as valid and legally enforceable as a verbal contract by natural beings provided that it meets the tenets of a valid agreement. For illustration, there are several cases in which the verbal agreements by cooperate bodies have been recognized as valid agreements.

One of such is the case of **Engen Petroleum (T) Limited vs Tanganyika Investment Oil & Transport Limited**, Civil Appeal 103 of 2003, CAT (unreported). The parties, who were both cooperate bodies, were contending over an oral agreement. Confirming the existence of such agreement, the Court of Appeal held that:

> "we are satisfied that the transaction involving the parties to this suit was an oral sale contract of petroleum products under which the appellant supplied petroleum products to the respondent for the due price of money in US Dollars, and, or local currency. *(emphasis mine)*

It is, therefore, unfounded to argue or even to think that a cooperate body can not conclude a verbal agreement.

From the evidence and especially the testimonies of PW1, PW2 and DW2's, it is deductible, as stated earlier on that, at the 2nd defendant has three shareholders and founding directors who were Joginder Kapoor, Rajan Kapoor and Shaban Fogo. But, as time of the formation of the oral agreement, Joginder Kapoor who was the managing director of the 2nd defendant had demised and the second shareholder and director, Shaban

Fogo, had resigned from the company. It is further revealed that, no changes were made in the register of companies maintained by the Business Registration and Licensing Authority (BRELA). Thus, much as Exhibit P3 shows that the company has 3 directors in 2017, in actual sense the 1st defendant was running the company as its sole shareholder and director.

The suggestion that DW1 was as an alternate director is highly improbable and incapable of attracting weight for the following numerous reasons. First, DW1's was not a credible witness and his evidence should be treated with great caution. He was present during the testimonies of all the plaintiff's witnesses in pretense that he was the director of the 2nd defendant but it turned out that he was not. Having had the advantage of listening to the testimonies of the plaintiff's witnesses and taking notes of the evidence, he cannot be trusted as all he told the court appears to have been doctored to counter what was said by the plaintiff's witnesses. Besides, even if he was to be considered as trustworthy, his testimony would not attract much weight as it was highly contradictory to DW2. Apart from being contradictory, the testimonies of these two witnesses materially differed with other evidence on record. For instance, whereas DW2 testified that DW1 became

an alternate director for the company in 2003 and continued so until 2014 when he became full director a position he has continued to hold as of today, DW1 stated that he became full director before 2014 and was duly registered as such by BLERA. This account sharply contradicts with Exhibit P3 which shows he was not.

Second, evidence regarding DW1's position as alternate director, was itself doubtful as DW1 and DW2 did not disclose the name of the director to whom DW1 was purportedly alternating. Even more interesting, DW2 admitted to have executed a power of attorney on 10/09/2019 assigning DW1 powers of attorney over the 2nd defendant. It is beyond my common imagination why DW1 who was a full director for the 2nd defendant required a power of attorney to act for the company. With these doubts in mind and in the absence of Memorandum and Articles of Association of the 2nd defendant or any documentary evidence which would have unveiled the quagmire over DW1's status in the 2nd defendant, I am constrained to hold that the 1st defendant was the sole director for the 2nd defendant during the formation of the oral agreement and I am consequently, thereto, fortified that his capacity to act for and on behalf of the 2nd defendant was unfettered.

On the second issue, just as in written contracts, a party who concludes an agreement is bound to perform his respective duties. Section 37(1) of the Law of Contract Act provides that:

> 37.-(1) The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law.

Therefore, each of the parties in this suit was obliged to discharge his duties respective to their oral agreement. From PW1's and PW2's testimony and from Exhibit P4 and as demonstrated while answering the first issue, the plaintiff's lived up to his promise. After the obtainment of the residential permit in July 2016, he took over the management of the 2nd defendant doing all the soft and the leg works until April 2019 when his presence in the company was declared unwanted. The 1st defendant was similarly duty bound to make good of his promise by sharing the profit obtained from the 2nd defendant. As he has totally disputed the existence of the agreement, I am made to understand that save for the sum of Tshs 125,852,500/= allegedly paid to the plaintiff, he did not share the profit hence breached the agreement. The 2nd issue is answered in the affirmative.

The last issue is on reliefs. The plaintiff claims from the defendant a sum of Tshs 528,423,127/= being half of the net profit of 1,308,551,254/= generated by the 2nd defendant from July 2016 to April 2019 minus Tshs 125,852,500/=. He has also claimed for interest on these sums. The claims are in the form of special damages must be specifically pleaded and strictly proved. (See **Anicet Mugabe vs Zuberi Augustino** [1992] TLR. 139 and **Reliance Insurance Co. T. Ltd & Others vs Festo Mgomapayo**, Civil Appeal No.23 of 2019, CAT (unreported)).

In his testimony, PW1 stated that in this period the company generated an income a total income of 2,324,8898,333/= and had total expenditure of Tshs 1,016,347,078/= and balance of Tshs 1,308,551,254/= which he claims to be the net profit generated and which had to be shared between the parties. Supporting this testimony are two documents comprised of the 2nd defendant's bank statement (Exhibit P6) and a one-page word processed document titled "summary" (Exhibit P5) apparently drawn from the transactions appearing in Exhibit P6.

As the claimed profit derive from a company whose affairs, including sharing of profits (dividends), are statutorily regulated by the **Companies Act** [Cap 212 RE 2019], I have found it necessary to consult this Act. In my endeavor, I have observed that section 180(3) of the Act which regulated the disbursement of dividends states as follows:

> 180 (3) A company may pay a dividend:
> (a) out of its realised profits less its realised losses, or
> (b) out of its realised revenue profits less its revenue losses, whether realised or unrealised, provided the directors reasonably believe that immediately after the dividend has been paid the company will be able to discharge its liabilities as they fall due, and the realisable value of the company's assets will not be less than the amount of its liabilities.

From this provision, I am of the considered view that, much as the evidence rendered by the plaintiff gives some pointers on the transaction made by the 2nd defendant, it is insufficient to draw a conclusion as to the accurate net profit generated and the actual sum/profit payable to the plaintiff as it only contains entries of sums of money received and expended by the company. Other information such as the company's liabilities and working capital which are necessary in computing the accurate profit available are missing. Hence,

it is not possible for this court to tell with precision that, the sum shown in Exhibit P5, is the accurate profit generated by the 2nd defendant or that the plaintiff's net profit entitlement is commensurate to the amount claimed.

I may also add here that, in my further reading of the Act, I have observed that, profit of any company is shared in a form of dividends which go to the members of the company (directors and shareholders). This is inferred from the provision of section 106 of the Act which state that:

> 106. Except as otherwise provided by the tights attached to shares, all dividends shall be declared and paid according to the amounts paid on the shares in respect of which the dividend is paid. All dividends shall be apportioned and paid proportionately to the amounts paid on the shares during any portion or portions of the period in respect of which the dividend is paid; but if any share is issued on terms providing that it shall rank for dividend as from a particular date, that share shall rank for dividend accordingly.

From this and related provisions, it is inferred that, as there is no evidence that after the agreement, the plaintiff's membership in the company as director was formalized under section 210 or any other provision of the Act, it will be difficult for this court to order that he be paid the profit generated

by the company because, as per the Companies Act, he was not a member of the company.

That said, since the plaintiff has made no other prayer for damages subsequent to the claimed half share of the net profit of the company, I am constrained to dismiss the suit for want of proof of the profit claimed.

Considering the circumstances of the case, it is in the interest of justice that the profit be shared by each of the parties shouldering its respective costs.

DATED at DAR ES SALAAM this 19th August 2022

X

Signed by: J.L.MASABO

J.L. MASABO
JUDGE
19/08/2022