IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 380 OF 2021

MANTRA TANZANIA LIMITED .....APPELLANT

VERSUS

COMMISSIONER GENERAL,
TANZANIA REVENUE AUTHORITY (TRA) ..... RESPONDENT
(Appeal from the decision of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Mjemmas, Chairperson, Mkasiwa, Member and Zuberi, Member, J)

dated the 27th day of April, 2021
in
Tax Appeal No. 2 of 2021

.....

JUDGMENT OF THE COURT

25th October, 2022 & 19th April, 2023

LILA, JA:

The appellant is before the Court disputing the liability to pay withholding tax imposed by the respondent under Withholding Tax Certificate No. WHT/GST/02/12/14 of 4th December, 2014 for the years 2010-2012 (the Certificate). The Certificate required the appellant to pay TZS 157,194,288.00 as principal tax liability due and TZS 100,000.00 being interest thereon making a total of TZS 257,195,034.00. The efforts to

challenge it before both the Tax Appeals Board (the TRAB) and the Tax Revenue Appeals Tribunal (the TRAT) bore no success.

The principal business of the appellant included exploration of minerals in Tanzania and in the year 2008 it was licensed to conduct uranium exploration in areas of southern Selous Game Reserve. On the other hand, Tanganyika Wildlife Safaris (TWSL) was licensed to carry out hunting activities in Hunting Blocks LU7, LU8 and MB1 whereas Game Frontiers Limited (GF) was licensed to carry out hunting activities in the Mbaran'gandu Wildlife Management Area.

The parties are not at issue that the respondent conducted a tax audit on the appellant for the years 2010 to 2012 which revealed that the appellant had effected payments to TWSL and GF (henceforth the hunting companies) of USD 150,000 annually for which the respondent was of the view that the appellant had an obligation under the law to deduct tax at the appropriate non-residential withholding tax rate in accordance with the requirement of section 83(1)(b) of the Income Tax Act (the ITA) but failed to do so. Similarly, the appellant does not dispute making such payments. Pursuant to

that, the respondent issued the aforesaid Certificate which the appellant disputed its validity.

The dispute culminated into the appellant instituting an appeal to the TRAB contending that the payments made were not in the nature of rent but rather a compensation for business disruptions which emanated from access agreements entered between the appellant and the hunting companies termed as Strategic Alliance Agreements (the SAAs). The appellant claimed that the agreements were aimed at ensuring a smooth co-existence on the land during the performance of their respective activities which overlapped in the Hunting Blocks LU7, LU8 and MB1 for TWSL and in the Mbaran'gandu Wildlife Management Area for the GF. In reply, the respondent maintained that by virtue of the SAAs, the compensation paid to the hunting companies by the appellant constituted rental payments hence were subject to withholding tax under the provisions of section 82 of the ITA.

So as to set the roadmap in the determination of the dispute, the TRAB framed the following issues: -

1. Whether payments made by the appellant to the hunting companies amount to rent.

2. Whether the respondent has included in its tax demand the amount of USD. 6,430 of withholding tax already paid by the appellant.
3. Whether the appellant is liable to pay any withholding tax based on the above
4. To what reliefs are the parties entitled.

Hearing of the appeal before the TRAB proceeded by way of written submissions and the appellant tendered four documentary exhibits; the Tax computation prepared by the respondent (exhibit A1), SAAs (exhibit A2), advance payment document (exhibit A3) and Withholding Tax Certificate (exhibit A4). The respondent did not tender any document as exhibit.

Relying on clause 9(b) of the SAAs, the definitions of the words rent and lease as provided in the ITA and section 88(1)(a) of the Land Act Cap. 113 R.E. 2002, sections 95(1)(b)(c) and 96(30 of the Mining Act, 1998, Dr. Abel Mwiburi, learned advocate, who represented the appellant, strongly submitted before the TRAB that the payments made to the hunting companies by the appellant do not translate to rent but a compensation for loss of business on the part of the hunting companies on which the liability to withhold tax does not arise. In response, Ms. Achimpota, appearing for

the respondent, stoutly submitted that looking at the meaning of the term SAAs and bearing in mind the distinct activities each of the parties to the SAAs had in the area, the agreements do not suggest that parties to the SAAs were going to share the resources. Instead, she contended, the SAAs were cleverly drafted to avoid tax. She, further, contended that compensation is founded on the extent of injury or loss as would be assessed at a particular time and cannot therefore be a fixed amount as was the case between the parties to the SAAs. She had no qualm with the definitions of the words rent and lease and the imports of the provisions of the sections cited by Dr. Mwiburi but she insisted that the SAAs do not qualify as payments in the form of compensation but were arrangements to facilitate tax avoidance. Referring to clause 6 of the SAAs, Ms. Achimpota, pressed that each of the parties to the SAAs enjoyed exclusive possession of the area and it was apparent that the hunting companies leased their piece of land to be used by the appellant for access to its exploration site thus qualifying to be a lease.

The TRAB, after a full trial, answered the first three issues in the affirmative and dismissed the appeal by the appellant. In essence, and particularly in respect of the first issue which is very relevant in this appeal,

the TRAB decided in favour of the respondent that the appellant was liable to pay the withholding tax in terms of section 82(1)(a) of the ITA on the rental income and interest thereon.

The appellant felt aggrieved by the TRAB decision and sought to challenge it by lodging a four-point statement of appeal to the Tax Revenue Appeals Tribunal (the TRAT). The first two grounds touched on whether the payments made by the appellant to the hunting companies were compensation or rental charges and faulted the TRAT for treating it as rental charges and hence subject to payment of withholding tax. The remaining two grounds related to, respectively, about whether there was proof that USD 6,430 was already paid and whether interest was payable in respect of the alleged withholding tax liability.

The TRAT was called upon to reconsider and determine the appeal basing on similar arguments which were placed before the TRAB. It allowed the appeal in respect of USD 6,430 which it held was already paid. As for the first two grounds, for similar reasons given by the TRAB, it concurred with the finding of the TRAB that the payments effected to the hunting companies

by the appellant constituted rent for which withholding tax was payable. It held that:

> *"As correctly held by the board, if the payments were intended to be compensation and not for lease as alleged by the appellant in the true meaning thereof, they would not occur on specific amounts as indicated in the agreement in each year, rather in staggering amounts based on actual or estimated assessment of the damages caused as ordinarily risks as damages cannot be expected to be at constant levels each year."*

In respect of payment of interest on the withholding tax liability, the TRAT held it to be consequential.

Still, the appellant was not satisfied, hence the instant appeal against the TRAT decision. There are two grounds of appeal which read as follows:

> *"1. The Tax Revenue Appeals Tribunal grossly erred in law by holding that the payment made by the appellant to hunting companies constituted rent for which withholding tax is payable.*
>
> *2. The Tax Revenue Tribunal grossly erred in law by holding that the appellant is liable to pay interest."*

At the hearing of the appeal, the parties reinforced their representations. The appellant had the services of Dr. Alex Mwiburi who also appeared before the TRAB and TRAT and was assisted by Ms. Anitha Kimario. For the respondent, Ms. Consolata Andrew, learned Principal State Attorney appeared and was assisted by Mr. Hospis Maswanyia and Mr. Harold Gugami, both learned Senior State Attorneys.

We propose to begin by stating that the scope of the Court's mandate in appeals emanating from the TRAT is limited by law. The Court is precluded from dealing with issues of facts and to do so is a violation of the provisions of section 25(2) of the Tax Revenue Appeals Act (the TRAA). We therefore endorse the legal proposition as advanced by the respondent in the reply written submission. We are compelled to state so on account of the submissions lodged in Court by both sides and the respective arguments before us in which, a substantial part of them tend to move the Court to reconsider the evidence on record so as to determine the appeal. This, however, does not in any way mean that we do not appreciate the lucid and detailed submissions filed by the parties. The opposite is the truth. We do not intend to, again, recite the parties' submissions in details but we shall refer to them in the course of this judgment where such need would arise.

The epicenter of the dispute or crucial issue to be answered in ground one (1) of this appeal is whether the money paid by the appellant to the hunting companies constitutes rent which is subject to payment of withholding tax or constituted compensation hence not subject to payment of withholding tax. The parties' stand points have not changed all along as stated above. Bearing the above in mind, it becomes clear that resolution of the above stated issue is mostly dependent upon the legal impressions of the SAAs terms and conditions. Of great significance and relevance here, as argued by the parties and considered by the TRAB and TRAT, are the definition of what is meant by a Strategic Alliance Agreement and clauses E and 6 of the SAAs. We shall also consider what is rent and compensation and the distinction thereof. Like both the TRAB and TRAT, for easy reference, we reproduce the contents of the afore listed documents as hereunder:

Definition of the SAAs is provided to be: -

> ***"The Strategic Alliance Agreement ("Agreement") is an arrangement between two companies who have agreed to share resources in a specific project.*** *A strategic alliance can be forged for sharing products, distribution channels, manufacturing capability, project*

funding, capital equipment, knowledge, expertise or intellectual property." (Emphasis added)

Clause E of the SAAs provides: -

> *"The Hunting Company and the Mining Company have agreed to cooperate so that each company is able to undertake its respective functions, hunting and exploration and mining, respectively, to achieve its objectives in the property."*

And, Clause 6 stipulates that: -

> *"The Mining Company shall have full and unrestricted access onto and within the property to conduct mineral exploration and mining activities including but not limited to ground work, drilling, airbone surveys, mining and mineral processing and the Hunting Company shall ensure that its activities do not disrupt or in any way impeded the Mining Company's activities on the property, provided that the Mining Company shall give reasonable notice to the Hunting Company of its intended activities."*

We now consider the grounds of appeal beginning with ground one (1) of appeal. As demonstrated above, at the hearing of this matter before the TRAB, TRAT and before us, it was common ground that the appellant's principal business included exploration of minerals in Tanzania and in the year 2008 was licensed to conduct uranium exploration in areas of southern

Selous Game Reserve. Tanganyika Wildlife Safaris (TWSL) was licensed to carry out hunting activities in Hunting Blocks LU7, LU8 and MB1 whereas Game Frontiers Limited (GF) was licensed to carry out hunting activities in the Mbaran'gandu Wildlife Management Area. It was further not disputed that the activities of the appellant and the hunting companies overlapped as was explained by the appellant. Likewise, the appellant did not dispute entering into agreements with the hunting companies, the SAAs. It is the contents of the SAAs and the nature of payments made by the appellant to the hunting companies which are now at issue whether they paid in an arrangement which amounted to a lease and therefore the payment amounted to rent from which a liability arose to the appellant to withhold tax.

We have given due consideration to both oral and written submissions of both sides. In view of the undisputed facts above, we think, so as to have a smooth landing in resolving the issues before us, we should start with expounding the essential features of a lease. Lease agreements are regulated by specific legal provisions. Section 2 of the Land Act, Cap. 113 provides for the definition of various terminologies relevant in leases. In terms of it, lease includes a sub-lease whether registered or unregistered of

a right of occupancy and includes a short-term lease and an agreement to lease. It also defines a lessor or grantor to be a person by whom lease is granted and a lessee/grantee or tenant as a person whom lease is granted. A licensee is defined as the person granting or giving the licence. Equally important is the definition of licence which is defined thus:

> *"licence" means a permission given by the Government or an occupier of land under a right of occupancy or a lessee which allows the person to whom the licence is given to occupy or use or do some act in relation to the land comprised in the right of occupancy or the lease which would otherwise be a trespass but does not include an easement."*

In the light of the above definitions, by being granted licence to conduct the aforesaid activities, the appellant and the hunting companies became licensees. They were simply granted permission to conduct their respective activities on the land comprised in their respective areas as defined in their respective licenses. They were not leased that land. For lease to exist, these essential features must be apparent in the permission given. **One**, the lessee or tenant must have exclusive possession for a fixed period or term certain in consideration of rent. Tenga R.W. & Mramba S.I. in their

book **Conveyancing and Disposition of Land in Tanzania, Law and Procedure**, Second Edition, pages 149 and 150 elaborate that:

> *"**The tenant must have the right to exclude all other persons from the premises demised**. A right to occupy certain premises for a fixed period cannot be tenancy if the person granting the right remains in general control of the property. In addition, if no defined premises are in question, there cannot be a lease..."* (Emphasis added)

Elaborating on the essence of the above element, Lord Templeman in **Street v Mountford** [1985] AC 809, quoted in the book **Property Law: Cases and Materials**, Sixth Edition by Roger J. Smith (henceforth Roger's Book), page 471 stated that: -

> *"...The traditional view that the grant of exclusive possession for a term at a rent creates a tenancy is consistent with the elevation of a tenancy into an estate in land. The tenant possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair."*

Two, the duration of the lease must be clear in that it should be defined or specific. The rent, commencement and period of the lease (length) must be certain. An agreement for an uncertain term cannot be a tenancy. Insisting on this requirement, Lord Neuberger in **Mexfield Housing Co-operative Ltd v Berrisford** [2012] 1 AC 955 cited in the Roger's Book, page 466 had this to say: -

> *"It seems to have been established for a long time that an agreement for uncertain term cannot be a tenancy in the sense of being a term of years. In **Say v Smith** (1563) Plowd 269, 272, Anthony Brown J. said that 'every contract sufficient to make a lease for years ought to have certainty in three limitations, viz in the commencement of the term, in the continuance of it, and in the end of it... and words in the lease, which don't make this appear, are but babble'."*

In circumstances where the duration of the lease is uncertain, the agreement or transaction is not a lease. Lord Denning MR: in **Harvey v Pratt** [1965] WLR 1026 Cited in Roger's Book at page 463, when dealing with an argument that the agreement should be presumed to commence within time where the agreement has no commencement date, provided this guidance:

"The first point is this: the document does not specify any date from which the lease is to commence. It has been settled law for all time that, in order to have a valid agreement for lease, it is essential that it should appear, either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence...

I think the answer to that argument, however persuasive, is that the law is settled on the point... It is settled beyond question that, in order for there to be a valid agreement for lease, the essentials are not only for the parties to be determined, the property to be determined, the length of the term and the rent, but also the date of its commencement. This document does not contain it. it is not sufficient to say you can supply it by an implied term as to reasonable time".

With regard to obtaining consequences in the event term of the lease is uncertain, Davies L J, on the same page, made it clear that, in the case of an agreement for a lease, if the length of the term and the commencement of the term are not defined, then the subject of the agreement or contract is uncertain too.

Three, lease must be created in the proper way. Formalities or procedures for creating a lease should be complied with for it to be valid. These may include registration and others.

It seems clear to us, from the reading of the above authorities that, existence of a lease is dependent upon the three essentials being conjunctively satisfied. Simply stated, for a lease to exist, the agreement must explicitly show that the land was granted for a specific duration (must have a commencement date, continuation and the date it will end), specific rent should be pronounced and the tenant must have exclusive possession of the land during the tenancy period. Writing on leases and licences and providing the distinction between lease and licence, Kate Green & Joe Cursley in the book titled; **Land Law**, Fifth Edition at page 53 have the following to say: -

> *"Normally, if a person occupying another's land does not have exclusive possession (the right to keep the owner out), she is not a tenant under a lease but only a logger, or a licensee. The word "licensee" describes anyone who has a permission to be on the land, such as readers in a library; ...A licence can be created by contract, with a regular payment of what looks like rent, and then it may closely resemble a lease. However,*

leases are interests in land while licences are merely personal rights: they cannot usually be transferred and will probably not bind a buyer of the land."

After laying down the legal foundation we now revert to the issues calling for our resolutions in this appeal. Dr. Mwiburi predicated his contention on the argument that the SAAs were intended to facilitate a smooth co-existence between the appellant and the hunting companies and the payments made to the later were compensation for interruptions caused by the appellant's mining activities to the hunting activities. This argument has been gallantly disputed by the respondent. Based on the foregoing stated essential features of a lease, the question to be answered is whether the SAAs bear such characteristics for them to qualify to be leases and consequently the payments made to amount to rent which would be subject to withholding tax.

We have carefully examined the SAAs, in particular the above quoted clauses. While doing so, we were alive of one of the basic rules of construction and interpretation of transactions on tax liabilities. It states that: -

"Substance not form is the basis of interpretation of transactions. The courts will look at the real substance not the form of the transactions; for example, it does not make any difference whether, a tax-payer labels a payment or consideration for services rendered a salary, gift, commission, pension, gratulty, emolument or benefit."

(See the book: ***INCOME TAX IN TANZANIA*** *by Paul Joseph, First Published in 1990, page 5)*

This principle accords with the concern by the respondent that looking at the substance, the arrangement was intended to facilitate avoidance of tax. According to the principle, nomenclature is of no essence but the transaction or arrangement. In the present case, the respondent claimed payment of withholding Tax in terms of section 83(1)(b) of the ITA arising from payments made by the appellant to the hunting companies pressing that the payments made annually amounted to rent. That section stipulates that: -

"83.-(1) Subject to subsection (2), a resident person who-

(a) (not applicable)

(b) pays a service fee or an insurance premium with a source in United Republic to a non-resident person shall

withhold income tax from the payment at the rate provided for in paragraph 49(c) of the First Schedule."

Both the TRAT and TRAT were of the concurrent finding that the payments were rent, that is to say, they interpreted the transaction as lease and the payments made to be rental charges.

A reading of the clauses, in very clear terms, shows that the appellant and the hunting companies agreed to share the resources in the property and to conduct the respective activities in the property. The property under reference was the same. The only conditions were that the mining activities should not interrupt the hunting activities and the appellant's right of access to the mining areas was restrictive, that is upon giving notice to the hunting companies. Neither the appellant nor the hunting companies surrendered possession of the property to the other. That, definitely meant they had to co-exist, as was rightly argued by Dr. Mwiburi.

Our further examination of the SAAs shows that the agreements were intended to allow the appellant to have access to the hunting activities in areas where the mining and the hunting overlap as indicated above. At the very least, the agreements did satisfy the condition that the agreement must be specific as it stated clearly the specific areas of concerns.

It is, however, plain from the clauses of the SAAs that, the agreements did not satisfy the condition that the lease should have a clear and certain beginning and a certain end. The SAAs show that both agreements were dated 17/8/2008 but executed on 26/8/2008 and they contained common conditions on commencement and termination which stipulated thus: -

> *"Clause 18. Any changes, modifications, revisions or amendments to this Agreement which are mutually agreed upon by the Parties shall be incorporated by written instrument and effective when executed and signed by all the Parties to this Agreement.*
>
> *Clause. 19. This Agreement shall be terminated upon the expiry of the term of Prospecting Licence or Mining Licences or by mutual agreement between the parties.*
>
> *Clause 20. The Agreement shall become effective upon the* ***day and year first above written as witnessed by the Parties and shall remain in full force and effect until it is terminated*** *pursuant to clause 18."* (Emphasis added)

We do not accept the proposition by the respondent that the transaction satisfied the condition for creating a lease. The above quoted Clause 20 is self-contradictory. It reveals that the date of commencement is the date when the agreements were prepared (17/8/2008) and at the

same time it shows that the agreements were to become effective when witnessed by the parties, that is the date when they were executed (26/8/2008). Even the end date is also not stipulated as it is dependent upon the occurrence of an event that may lead to its termination as stipulated under clause 18 and 20.

The transaction, therefore, could not amount to lease for want of two of crucial features that the appellant (the lessee) did not have exclusive right over the leased property and the duration of the lease was not certain (specific). Much as we agree with the respondent that we should look at the substance of the transaction and not form, we are also enjoined to give effect to the intention of the parties when they entered into the agreement as reflected in agreements (the SAAs). The circumstances should be seriously examined. That accords with the caution given to the courts by Arden L. J. in **National Car Parks Ltd v Trinity Development Co (Banbury) Ltd** [2002] 2 P&CR 253 quoted in Roger's Book (supra) at page 475 that:

> *"...The court must, of course, look at the substance but, as I see it, it does not follow from that that what the parties have said is totally irrelevant and to be disregarded. For my part, I*

would agree with the judge that some attention must be given to the terms which the parties have agreed. On the other hand it must be approached with healthy skepticism, particularly, for instance, if the parties' bargaining positions are asymmetrical.

So the court must look to the substance and not form. But it may help, in determining what the substance was, to consider whether the parties expressed themselves in a particular way. Of course I bear in mind in ***Street v Mountford*** *that the apparent effect of an agreement which, it was common ground, conferred exclusive possession on the occupier, was to create a tenancy on that ground. It would in my judgment be a strong thing for the law to disregard totally the parties' choice of wording and to do so would be inconsistent with the general principle of freedom of contract and the principle that documents should be interpreted as a whole. On the other hand, I agree with Mr. Furber's submission that it does not give rise to any presumption. At most it is relevant as a pointer."*

The circumstances in this case negative the intention to create a tenancy. That said, the payments made cannot amount to rent that would have created a liability on the appellant to withhold tax under section

83(1)(b) of the ITA above or in terms of section 82(1)(a) of the ITA which provides that: -

"82-(1) Subject to subsection (2), where a resident person-

(a) Pays a dividend, interest, natural resource payment, ***rent*** *or royalty; and*

(b) .....(not applicable)

The person shall withhold income tax from the payment at the rate provided for in paragraph 4(b) of the First schedule." (Emphasis added)

In the light of the above, we agree with the proposition by Dr. Mwiburi that, the SAAs were not leases and the payments made by the appellant did not amount to rent. The clauses in the SAAs do not suggest that the appellant had exclusive possession of the overlapping areas to the extent of being able to keep out strangers and the Hunting Companies. They contain very certain and express terms that the parties were to co-exist in the overlapping areas and therefore the money paid was not rent as Dr. Mwiburi rightly argued. The liability to withhold tax did not therefore arise. This finding renders consideration of ground two (2) of appeal superflous because

the substantive claim having failed, payment of interest cannot arise. We allow that ground too.

For the reasons given above, we allow the appeal, quash the decisions by both the TRAB and TRAT and set aside the consequential orders made. In the circumstances of the case, each party shall bear its own costs both here and before the tribunals below.

DATED at **DAR ES SALAAM** this 6th day of April, 2023.

S. A. LILA
JUSTICE OF APPEAL

L. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment is delivered this 19th day of April, 2023 in the presence of the Mr. Rashidi George, learned counsel for the Appellant and Mr. Amandus Ndayeza Principal State Attorney for the respondent is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL