**Tuke v Dhow Mercantile (EA) Ltd**

**Division:** High Court of Tanzania at Dar-es-Salaam

**Date of Judgment:** 17 February 2004

**Case Number:** 147/02

**Before:** Kimaro J

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Contract – Loan agreement – Whether plaintiff entitled to recover – Appointment of receiver/manager in event of default.*

**JUDGMENT**

**KIMARO J:** The plaintiff became acquained with Mr Gulamali Bohari Shah and Yohana Nyakibari who are the directors of the defendant, in the process of business ventures. The defendant had a contract with the Parastatal Sector Reform Commission which allowed it to hire Lupembe Tea Factory for six months. It had no capital for running the factory. Through one Mr Kahindi who was working with National Chemicals Industries in Tanga, the plaintiff was introduced to the directors of the defendant aforementioned. The plaintiff accepted a request by the defendant’s directors to finance the defendant’s company. In that process he became a shareholder as well as a director in the defendant company.

Their arrangement of functions for running the factory placed the plaintiff in Mombasa for marketing the tea Mr Gulam was placed at Dar-es-Salaam and Mr Yohana Nyakibari was stationed at Mufindi to supervise production and other processes.

The pleadings and the evidence tendered during the trial show that the plaintiff granted the defendant a loan of TShs 90 million for the purpose mentioned earlier. The parties are now in dispute on how much of the loan which the plaintiff granted to the defendant has not been repaid.

Whereas the plaintiff avers that TShs 38 309 830 is the outstanding balance which the defendant has failed to repay, the defendant denies that there is any outstanding balance. According to the defendant, the plaintiff has been repaid over and above what he had given to the defendant as a loan.

The issues framed for the determination of the Court are:

(i) Whether the loan amount under the debenture has been fully liquidated.

( ii) To which relief(s) the parties are entitled to.

The plaintiff’s testimony was that various moneys were loaned to the defendant until the amount reached

TShs 90 million. An amount of TShs 60 million of the loan was secured by debenture. The remaining amount of TShs 30 million was loaned on a gentleman’s agreement. The money was loaned in instalments. It was for buying tea from the farmers, replacing a damaged generator and doing other activities. The condition for repayment was that it had to take place whenever the money was available.

The activities took place during the period 1999-2001.

According to the plaintiff, the parties reached a point when it was no longer necessary for him to continue being stationed in Mombasa because a reliable market had been established. On 4 December 2000 all directors did reconciliation of accounts and it was found that the plaintiff had given the defendant the amount of TShs 90 million. He said he had been repaid TShs 36.5 million. The balance outstanding was TShs 54 190 000. Subsequent to the reconciliation, the plaintiff was paid TShs 13 million leaving a balance of TShs 38 039 830 which he is now claiming from the defendant.

The plaintiff tendered in court the following documents which were admitted in court as Exhibits; the debenture Exhibit P1, the registration form from the debenture Exhibit P2, reconciliation of accounts

Exhibit P3 and the letter for demand Exhibit P4.

The other directors of the defendant (Yohana Hillarius Nyakibari (DW1) and Gulam Ali Shah Bohari (DW2)) admitted most of the testimony of the plaintiff.

They admitted their acquaintance was through Mr Kilindi, the plaintiff was their financier, an amount of TShs 90 million was advanced to the defendant by the plaintiff, TShs 60 million was secured by a debenture, the schedule for their duties in running the business together as well as reconciliation of the accounts.

What the two witnesses did not agree with the plaintiff was the balance outstanding. The witnesses said that the plaintiff marketed tea worth USD 97 000 which he never accounted for. The two witnesses said that the plaintiff accounted for only one export and he did not even show the real amount which was realised from the sale. They said the amount of USD 97 000 was more than the loan which the plaintiff had given to the defendant.

Although both witnesses admitted that there was a reconciliation of accounts, DW2 testified that the reconciliation was done to determine what was receivable and what was paid for. They could not record what was determined because all documents pertaining to the exportation of tea were in the factory. The whole exercise was done in the spirit of putting the business in a good position. DW2 admitted that at reconciliation, the plaintiff had been paid TShs 36.5 million. He concluded his testimony by saying that the plaintiff has been wholly paid. The witness said that the plaintiff cannot opt to recover the unprotected money first. He said if the argument is accepted by the Court, the defendant is not indebted to the plaintiff. Substantially, this is the evidence which was led during the trial.

In his final submissions Mr *Ukongwa*, learned advocate for the defendant submitted that it was the protected loan that was the defendant’s priority to pay. He made reference to paragraphs 2.1 and 2.2 of the debenture deed and 6.02 of the loan agreement arguing that these are the documents which gave the defendant authority to have priority on the repayment of the protected loan. His conclusion is that if the value of the tea which was supplied to the plaintiff is considered, added to the amount already repaid to the plaintiff, the plaintiff has been over paid.

Mr *Ngudungi*, the learned advocate appearing for the plaintiff submitted that the evidence on record shows that the defendant has not fully repaid the loan and that TShs 30 million was repaid by the defendant through the gentleman way.

Admittedly, there is no problem at all resolving the issue between the parties because it is an issue of fact.

Although Mr *Ukongwa* tried to convince this Court that the defendant opted to have priority in repayment of the protected loan, through the debenture deed and the loan agreement, there is nothing on record to support him. The loan agreement he referred to was not tendered in court as an Exhibit. The paragraphs in the debenture do not give the defendant such authority. There is therefore no basis for Mr *Ukongwa*’s argument particularly when bearing in mind the existence of Exhibit P3 which Mr *Ukongwa* never mentioned. He remained totally silent on this document, presumably because he knows the effects of the said document.

Exhibit P3 totally defeats the defendant’s evidence that the plaintiff has been fully paid. Exhibit P3 is reconciliation of accounts of funds which the plaintiff gave to the defendant. The reconciliation took place on 4 December 2000.

DW2 (Gulam Ali Shah Bohari) admitted being a signatory to the Exhibit for the defendant.

Exhibit P3 shows that the total funds which the plaintiff gave to the defendant was TShs 90 690 500.

The total funds which had been repaid to the plaintiff at the time of reconciliation was TShs 36,5 million.

The balance which stood outstanding on that date was TShs 54 190 500.

Subsequent to the reconciliation of accounts, PW1 said he was paid in tea worth USD 18 000 and that was on 24 January 2001. The USD 18 000 was equivalent to TShs 13 million. Although DW2 attempted to show that when the reconciliation was done, the proceeds of the tea which was sold by the plaintiff was not taken into consideration, this is an agreement which cannot be accepted by this Court. Both DW1 and DW2 admitted that the plaintiff gave a loan of TShs 90 million to the defendant. Exhibit P3 shows what was paid subsequent to 4 December 2000. DW2 admitted that the plaintiff financed everything and even the amount of TShs 30 million which the parties said was advanced on a gentleman’s agreement, was not a gift but a loan. No other transactions of sale of tea by the plaintiff took place in between 4 December 2000 and 24 January 2001. DW2 having made reconciliation on 4 December 2000 with the plaintiff to ascertain what the plaintiff had advanced to the defendant and what had been repaid to him cannot pretend that they did not have all the documents which were necessary for purposes of reconciliation. The parties are bound by their signatures on Exhibit P3.

The evidence considered in totality shows that the plaintiff has not been fully paid. There is an outstanding amount of TShs 38 309 830 which has not been repaid.

This Court makes a finding that the plaintiff has proved his case on a balance of probabilities. He is granted judgment for the TShs 38 309 830 being the principal outstanding, plus interest to be calculated at commercial rate from the date of the receipt of the last instalment to the date of judgment. Thereafter interest to be calculated at the Court rate of 7% till full satisfaction.

In the event the defendant defaults payment, the plaintiff, is allowed to appoint a receiver/manager to manage the affairs of the defendant until such time he is fully paid. The plaintiff is also granted costs.

For the plaintiff:

*Mr Ngudungi*

For the defendant:

*Mr Ukongwa*