CIV.APP.20/2000

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN:

ATTORNEY-GENERAL AND MINISTER
OF JUSTICE - APPELLANTS

MINISTRY OF DEFENCE
MINISTRY OF FINANCE

AND

CHATELET INVESTMENT LIMITED - RESPONDENT

Coram: Hon.Mr.Justice E.C. Thompson-Davis - JSC
Hon.Mr.Justice M.E. Tolla Thompson - JA.
Hon.Mrs.Justice Patricia Macaulay - JA.

S.E.Berewa Esq.,Attorney General
and Minister of Justice for Appellants.

G. Banda Thomas Esq., for Respondent

JUDGMENT DELIVERED ON THE 10th DAY OF December 2001

THOMPSON-DAVIS JSC:- Sometime in 1989 the appellant entered into an agreement with the Government of Sierra Leone whereby the respondent were to supply a list of military hardware including helicopter gun ship engines and spares; the usual "End Users Certificate" in favour of the Respondents was approved and signed by H.E. the President of the Republic of Sierra Leone.

It is common ground between the parties and accepted by the Court that a certain number of goods was supplied and a large amount in U.S.Dollars was paid. It is also common ground between them that not all the goods ordered under the agreement have arrived in this country. The Respondents are saying that the sum of $377,490 is still to be paid by the Appellants. Now with regard to a claim in foreign currency I would say that it is not right for our Courts to give judgment for an amount in foreign currency; a debt expressed in foreign currency must be converted in leones with reference to the rate of exchange prevailing on the day when the debt was payable.

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In these circumstances the plaintiff/respondents by writ dated December 16, 1999 commenced the present action; the respondents claiming the debt and the defendant/appellants alleging that they had paid them in full and that the plaintiffs/respondents had acknowledged in writing receipt of the said payment, and alleged in a counter-claim that the goods supplied were not in accordance with the contract and not at the time agreed on. The Learned judge found the plaintiff/respondents' evidence satisfactory and reliable and proved and gave judgment for them.

Being dissatisfied with the decision the appellants have come here for a redress.

Before going further one must try to be precise about the extent of the obligation to which the parties had been subjected.

The contract was made on the 28th of September 1988 - See Exh.D, on October 29, 1990 notification of the decision of the Sierra Leone Government to import into its country some military equipment and related materials was sent to the Security Council Committee U.N. New York, on November 2, 1988, this body wrote back to the Permanent Mission of Sierra Leone to the U.N. to say that it had taken note of such notification.

The contract was for the sale of specific and ascertained goods, there was nothing in it terms as to the time the property in them was to transfer to the buyers. However from the conduct of the parties and the circumstances of the case time was an important factor in its implementation even though it was not of the essence of the contract.

In the absence of any definite intention on the part of the parties as to the time at which the property in the goods was to pass to the buyers one must have recourse to the sale of Goods Act, Cap.225 Laws of Sierra Leone - SS. 19 & 20 and Rule 1 to these Rules.

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S.19 (1) reads:

"Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract wanted to be transferred".

(2) "For the purpose of ascertaining the intention of the parties regard shall be had to the term of the contract the conduct of the parties and the circumstances of the case".

S.20 reads:

"Unless a different intention appears the following are rules for ascertaining the intention of the parties at to the time at which the property in the goods is to pass to the buyer".

RULE 1 reads:

"Where terms is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time and payment or the time of delivering, or both be postponed".

The goods passed to appellants on 28th September 1998 when the contract was made, it follows then that on September 28 1998, the Government of Sierra Leone was in complete possession of all the goods landed at the fixed point of entry into Sierra Leone, Lungi International Airport and the property in them transferred to the Government.

The question now arises whether this particular Rule which I have read applied, that is whether the property had passed. There is no suggestion by any of the parties that any time had been fixed for the purposes. Failing that, and it is a question of law and fact, the time for the property to pass to the buyer is when the contract is made.

I do not think it is desirable to quote at length the grounds of appeal by the Appellants but I intend to deal with them under various headings.

A Exhibits A & B including the Report of a Board of Enquiry

It was submitted by learned counsel for the appellants who had said everything possible on behalf of his client that those two documents were wrongfully admitted by the trial judge on the ground of contravening the hearsay rule. He said their admission was a flagrant extension of the hearsay rule. If this submission is sound the other complaints and challentes to the validity of the judgment do not need to be considered. Logically it merits the position of being considered first.

The contention for the wrongness and invalidity of this submission is largely counted by learned counsel for the respondents by the argument that both documents were made by parties to the action and that they were informal admissions by the parties.

The truth of the matter is that the whole case ~~was~~ hinged upon these two documents (Exhs A & B) both were documents made by the 3rd and 2nd respondents respectively parties to the action, A & B were primary evidence against them, evidence which are receivable to prove the contents of the documents even without notice to produce: Vide Slatterie v. Pooly, Exchange 1840.

I shall now reproduce these two documents as tendered before the learned judge.

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EXHIBIT "A"

Minister of Finance, Development
and Economic Planning
Ministry of Finance
Freetown
Sierra Leone.

Tel: 225612

13th August, 1999.

GOVERNMENT OF SIERRA LEONE

Mr. Serge Muller
Chatelet Inv.
Villa 9
Cape Sierra Hotel
P.O. Box 962
FREETOWN.

Dear Mr. Muller,

I acknowledge receipt of your letter dated 10th August 1999 by which you requested payment of the amount of US$377,490 due you. The contents of your letter have been duly noted.

I have discussed with His Excellency the President your information that a Board of Enquiry has published its report and that such report cleared you of committing wrong doing. Consequently, you saw no further justifiable reason why you should not be paid. When I exchange views with the President, he informed me that indeed he is aware of the conclusion of the report mentioned in your letter. However, he remarked that that report had been sent to the Attorney General and Minister of Justice, whom he had requested to present a more comprehensive report on the matter. He added that until such report is available no further action would be necessary.

I deeply regret the circumstances in which we find ourselves, but as you know, not having been involved in any way with the entire transaction relating to the military purchase, I innocently made the commitment, when you requested it, that you will be paid. Indeed, as I have previously informed you, I gave instructions for the payment to be made but it was subsequently stopped by executive order at the Central Bank. I will urge you to exercise some patience until the matter is resolved.

Yours sincerely,

JAMES O.C. JONAH
MINISTER OF FINANCE,
DEVELOPMENT AND ECONOMIC PLANNING.

Before proceeding to deal with these documents, I would quote from Phipson 11th Ed. Paragraph 768 at p. 767.

It reads:

> "Documents which are or have been in the possession of a party will as we have seen generally be admissible against him as original (circumstantial) evidence to show his knowledge to their contents, his connection with or complicity in, the transactions to which they relate or his state of mind with reference thereto."

I do not hesitate to apply these words to this case. Exhibit A was written by the 3rd Appellant in this matter Dr.James O.C. Jonah who at the relevant time was Minister of Finance, and Exhibit B written by one Sellu for the Director General of the Minister of Defence the 2nd appellant.

I shall now refer to a passage in Exhibit B written by the 3rd Appellant. It reads:

"I have discussed with H.E. The President your information that a Board of Enquiry has published its report and that such report cleared you of committing wrong doint. However, reported that the report had been sent to the Attorney-General and Minister of Justice who he had requested to present a more comprehensive report on the matter ..... " When asked by the Court about this more comprehensive report on the matter, the Attorney-General and Minister of Justice replied that the report was produced but it is convered by prevelege between him and the President."

It is quite clear trom the contents of Exhibit A that 3rd Appellant in his informal statement had committed the Government of Sierra Leone to pay the respondent company the full sum of $377.490 owed them by his Government and that he had given instructions to the effect, but that payment was stopped by executive order.

(b)

Hon.Deputy Minister of Defence.

REPORT OF BOARD OF INQUIRY THAT INVESTIGATED THE SUPPLY OF WRONG SPARES FOR MI - 24V HELICOPTER GUNSHIP SLAF 001

I hereby inform you that following the grounding of the MI - 24V Helicopter Gunship SLAF 001, Chatelet Investment LTD represented by its local agent Mr.Zeev Morgenstern, was awarded the contract to supply all the spares needed to reactivate the Helicopter. But the wrong spares were supplied. In this vain, a Board of Inquiry was constituted by the Chief of Defence Staff Brigadier General M.M. Khobe, to determine among other things, the cause of the supply of the wrong spares.

2. In its findings, the Board observed that though the Contractor supplied the correct engines as specified in the order, yet the TB3--117BM engines imported were meant for the MI-8 (MI-17) transport helicopter and not for the MI-24 as against the Airwing technicians recommendation. It was also observed that the aircraft had been flying on two different types of wrong engines (TB3 - 117) BM on the right and TB - 117B on the left). Moreover, the non-proficency of the Airwing technicians on the M1 - 24 Helicopter was responsible for the recommendation of wrong engines.

3. Consequent upon paragraph 2 above, the Board recommended that:

(a) the aircraft, the servicable engine now in the aircraft and the 2 (two) reconditioned engines imported by the Contractor be traded - off for another helicopter.

(b) that the Contractor be paid the balance of his money $377,449 since he satisfied his own part of the contract and be made to deliver the remaining ammunication and shotguns.

(c) and for future Government committment of this nature, only qualified agents or employees that are users should be assigned preshipment inspection tasks.

4. I further wish to submit that the Chief of Defence Staff has accepted the Report and Recommendations for implementation by the Ministry of Defence as outlined in paragraph 3 above.

5. Please find attached the complete report of the Board.

6. Respectfully submitted Sir.

(Sgd) A.K. Sellu
for: DIRECTOR GENERAL.

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In its informal statement as shown in Exhibit B the 2nd Defendant had contended that a Board of Enquiry set up by his Ministry to investigate the supply of spares when the contract had recommended that the respondent be paid the balance of his money and be made to deliver the remaining ammunication and shortguns. This report was not produced at the trial even though it was plainly mentioned in the exhibit. It was the duty of the Appellants to make it available to the respondents and to the court; they had knowledge of its contents and they had connection with it. Then Appellants have complained that a report of a Board of Enquiry which was allegedly attached to Exhibit B was not in evidence. The Penultimate paragraph in the said exhibit states "Please find attached the complete report of the board". This document was never attached to Exhibit B instead it must have remained in the hands of 2nd appellants. I may say that the trial Judge was satisfied with what was provided by Exhibit B without more.

I fail to see how learned counsel for the Appellants can complain about the non-production of this document when it was still in the hands of the parties on their side.

It is plain on the surface of Exhibit B that a good deal of what was recorded in the Report was in fact spelt out in it.

B. Equitable doctrine of recession

Let me now turn to the grounds of appeal which complained about the learned judge, treating the appellant's case as "one seeking the equitable doctrine of recession for evidence of the contract and as a basis of the decision."

This court will interfere in a judge's decision if the judge has acted on a "wrong view of the law or on a finding of fact not justified by the evidence."

To quote Lord Evershed M.R. in the case of Re. C (infants)

"This court as very loth to interfere with what the judge may decide and will only do so in exceptional

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cases, if the court feels on mature reflection that what the judge decided was not readily justified".

There is nothing in the case for the Respondents to suggest that they were relying on the equitable grounds of recission to prove their case. I must however say that the approach of the learned judge to the issue of the appellants recinding the contract was neither here nor there, it did not decide the appeal nor was it a factor in it. The learned judge's expressions were merely anologus to the equitable doctrine. It was not a good enough factor however to tip the balance.

Evidence of ~~D~~. Appellants witness

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C. Misquotation of the evidence

The appellants' complaint on this ground is that "Learned judge erred in law in failing to consider adequately or at all the evidence of the appellants witness DW1 - Neil Ellis and for his refusal or omission to do so".

The appellants have also complained that the trial judge misquoted the evidence on ~~material~~ material issues thereby arriving at the wrong decision.

I shall take these two issues together as counsel's contention on behalf of the appellants was that the trial judge in his judgment categorised appellants witness as a partisan witness, ~~as~~ + PW1 Zeev Morganstern was not by implication.

First of all I must say that I understand the learned judge to be expressing his view on the facts as he reviewed the evidence, he was perfectly right to do so. No where in his judgment did he say that PW1 was inpartial and ~~Natural~~ Neutral witness.

Again I fail to see how the evidence led on any material issues in the case was misquoted by the learned judge what learned counsel should have done was to state the passage or passages complained about and then state the nature and area of the misquotation.

D. The Log Book - M1 & M2

" " " - N1 & N2

I come now to the question of the log books - M1 & M2 also N1 & N2, these books were admitted into evidence despite objections raised by the Defendants/Appellants. The entries in these books were assertions on information about and history of the aircraft by unidentified men who made them. The evidence was hearsay and inadmissible.

In my research of this matter I have not been able to find any matter in which an aircraft log books were placed within the class of public documents forming an exception to the hearsay rule. They appear to be inadmissible as evidence of the truth of their contents.

The books ought not to have been admitted into evidence.

Both sides have frankly admitted relying on these log books in their submissions but now that their shortcomings have been exposed and their evidential value rejected, one can now only rely on any close inspection of the engines to determine whether or not they were servicable or unservicable. There was no such close examination of them.

In any event there seems to be no rejection of the engines or any of the other items by the Government even though DW1. did speak of an attempt at rejection by the Airwing of the Military.

It has been contended in this appeal that it should be viewed from a realistic circumstance, an ordinary man in the street in this capital or in Bo in Kenema Town or Makeni would say that Sierra Leone was at war and that the Respondents were obliged to come to her help under any circumstances. In my judgment, the Respondents did come to this country's aid when it was desparately needed; but the aftermath of these two companys vivying for the contract with the Government could have influenced the behaviour of persons connected with the issue when only one company was allowed the contract.

Let me refer to part of the cross-examination of DW.1 by Mr.Banda Thomas

"Q. You were not [illegible]

For my part, I fail to see how the learned judge refused or omitted or misquoted the evidence of DW1. I also fail to see how the appellants were able to know or decipher what relevant issues in the matter were not considered by the learned judge. Page 9 Next.

D. The Log Books - M1 & M2

" " " - N1 & N2

I come now to the question of the ~~record~~ log books - M1 & M2 also N1 & N2, these books were admitted into evidence despite objections raised by the Defendants/Appellants. The evidence from them was hearsay and inadmissible.

In my research of this matter I have not been able to find any matter in which an aircraft's log books were placed within the class of public documents forming an exception to the hearsay rule. They appear to be inadmissible as evidence of the truth of their contents.

The books ought not to have been admitted into evidence.

Both sides have frankly admitted relying on ~~the log~~ books in their submissions but now that their shortcomings have been exposed and their evidential value rejected, one can now only rely on any close inspection of the engines to determine whether or not they were servicable or unservicable.

In any event there seems to be no rejection of the engines or any of the other items by the Government, ~~though~~ even though DW1, did speak of an attempt at rejection by the Airwing of the Military.

In their Defence 2nd and 3rd Defendants admitted contracting with the plaintiffs as alleged in their Statement of Claim but averred in their paragraphs 3 and 4: as follows:

(3) "The 2nd and 3rd Defendants had paid in full the agreed contract price for the said hardware according to their promise and guarantee alleged in paragraph 3 of the Statement of Claim and the plaintiff had acknowledged in writing receipt of the said payment."

A. I was not pleased.

Q. The reason for giving the sort of evidence you gave when led by the Attorney-General was that you did by your displeasure?

A. No.

It may well be that the Learned Trial Judge was referring to this well taken point when he "Catogerised Appellants witness as a partisan witness"

In their defence the Appellants have averred that in paragraph 3, they have paid the plaintiff in full for the agreed contract and in paragraph 4, they have alleged that the said amount of ₱377,4000 claimed by the Respondents have been occasioned by the failure of the Respondents to perform the said contract in accordance with its terms and that they do not owe the Respondents that amount or any amount at all.

In addition it was submitted by the Learned Attorney General that "It is not just that the Appellants are not owing any monies under the contract or the money claimed but the Appellants are entitled to judgment under the counter-claim in the sum of ₱552,868" By bringing the two negatives together in "It is not just that the Appellants are not owing any money under the contract" the Learned Attorney was admitting that the Appellants were owing the amount under the contract, but that the Appellants were entitled to judgment under their counter-claim.

In complete contract 3rd and 2nd Defendants/Appellants in Exhibit 'A' & 'B' were saying in paragraph 3(b) of Exhibit 'B' that the contractor be paid the balance of ₱377,449 since he satisfied his own part of the contract, and he made to deliver the remaining ammunication and shot guns and in Exhibit 'A' that amongst other statement, "Indeed as I have previously informed you, I gave instructions for the payment to be made but it was subsequently stopped by executive order at the Central Bank.

There is a profound cotradiction between the defence put forward

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seem to know what they rely on and have counterclaimed, as follows:

PARTICULARS OF BREACH

8(a) Failure to supply the said hardware in accordance with the contract.

(b) Failure to supply the said hardware at the time agreed in the said contract.

In the premises, the 2nd and 3rd Defendants suffered loss and damage.

PARTICULARS OF DAMAGE

9(a) Damage resulting from the failure to be in proper readiness for a pending hostile military activity in the absence of the said hardware.

(b) Cost of procuring alternative goods for defence purposes.

Looking at the evidence adduced in court with regards to the counter-claim, there is no proof of the alleged breach or damages, and it will take a very brave judge to attempt to assess any damages for "the failure to be in proper readiness for a pending hostile military activity".

Then there are Exhibits 'A' and 'B' emaniting from the 3rd and 2nd Defendants respectively, both documents admitting the debt and saying that payment would be forthcoming.

On a plain reading of all this together with exhibit 'D' "The End Users Certificate" in favour of Cathelet Investment Ltd. signed by H.E. The President and Minister of Defence, one must having regard to S.S.19 & 20 the Sale of Good Act. 229 Laws of Sierra Leone, and Particularly to Rule 1 of this Rules the Government of Sierra Leone came into possession of the goods listed out and confirmed in Exhibit 'D' the "End Users Certificate" signed by H.E. The President.

It now seems enimently reasonable to consider three questions in concluding the matter.

(1) Did the Appellant pay the said sum of USD377,490 as claimed by the Respondent or any part of it?

(2) Do the Appellants owe the Respondent nothing at all ?

(3) Did the 2nd and 3rd Appellants admit owing Respondents the said amount?.

For all these reasons I feel driven to the conclusion that I shall say 'no' to the first question; 'no' to the second question and 'yes' to the third question.

I therefore hold that the appeal fails and should be dismissed and it is accordingly dismissed. The counterclaim is also dismissed.

Respondents must deliver the goods wherehouse in Bulgeria to the Government of Sierra Leone on or before the expiration of a period of three months of the satisfication of the Judgment debt by the said Government. Respondent are entitled to the costs here and below. Such costs to be taxed.