

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

THE WEST AFRICAN REGIONAL DIRECTOR &
LEONARD CHESHIRE INTERNATIONAL -

1ST APPELLANTS

AND

LEONARD CHESHIRE INTERNATIONAL -

2ND APPELLANT

AND

ABDUL RAHMAN JALLOH -

RESPONDENT

CORAM:

Hon. Mrs. S. Bash-Taqi, JSC (Presiding)

Hon. Ms. S. Koroma, JSC

Hon. Mr. E.E. Roberts, JA

Barristers

J. B. Jenkins-Johnston, Esq. for the Appellant

Y. H. Williams, Esq. for the Respondent

RULING DELIVERED ON THE 18TH DAY OF JUNE 2009

S. BASH-TAQI, JSC:- This is an appeal by the Appellants against the Judgment of Edwards J. delivered on the 28th day of February 2007. The said judgment appears at pages 64 -65 of the Records of the proceedings:

Brief History of the Case

The action commenced by Writ of Summons dated 21st February 2006 in which the Respondent (then Plaintiff), owner of a Tipper Lorry Reg. No AA1 384 brought an action against the Appellant (then Defendant) in the High Court for negligence arising out of a Road Traffic Accident on 19th December 2003. The said accident involved the Respondent's Tipper Lorry AA1 384 and the Appellant's Toyota Hiace Mini Bus Reg. No ABD 617. In the said action the Respondent claimed Le 60,000,000.00 cost of his Tipper Lorry; Le14,060,00 the value of the goods lost as a result of the accident; Le 2,960,000.00 per month loss of use of the said vehicle from 19th December 2003, the date of the accident, until payment and interest.

The Appellant entered an appearance to the Writ of Summons by their Solicitors on 9th March 2006 and on 15th May 2006 filed a Statement of Defence. The Respondent delivered his Reply on 27th May 2006 and thereafter the action was entered for trial on 27th May 2006 before the High Court Holden at Freetown.

On 15th September 2006, the Respondent took out a Summons for Directions which was heard on the 26th September 2006 by Taylor J. She gave several directions in accordance with Order XXB.

The directions are:

1. "That a list of witnesses to be called at trial be exchanged between the parties;
2. That written statements of the oral testimony which the parties intend to adduce on any issues of fact be exchanged between the said parties;
3. That the parties do discover and exchange all relevant documents to be used at the said trial;
4. That the said list of witnesses, the written statements of witnesses and exchange of all relevant documents to be used at the trial be done within 21 days from the date of this order;
5. That liberty is hereby given by this Honourable Court for further directions to be given, in action herein, if and when necessary;
6. That Tuesday the 24th of October 2006 is hereby fixed as the date for the hearing of the action herein;
7. That the costs of this application be costs in the cause."

On 24th October 2006, the date fixed for the trial of the action in the said order, the action did not commence as both parties had not complied with the directions of the Judge. The case was therefore adjourned to 24th November 2006.

On the adjourned date (24th October 2006) when the matter came up before Taylor J, the parties had again not complied with Directions. Counsel deputizing Mr. Yada Williams for the Respondent applied for an extension of time within which to comply with the order, and Taylor J, extended the time to 14th December 2006. Counsel for the Appellant was not present at this hearing.

On 13th December 2006, Counsel for the Respondent complied with the Judge's Directions and filed and served on the Appellant's Solicitors the Court bundle containing the Respondent's documents to be used at the trial as ordered.

When the matter came up for hearing on adjourned date, of 14th December 2006, both Counsel were present. Counsel for the Appellant not having complied with the Order on the Summons for Directions, applied for an extension of the time for him to comply with the directions; the application was granted and the time for compliance was again extended to 9th January 2007.

The matter next came up in Court on 5th January 2007, instead of 9th January 2007, and this time before Showers J. in the presence of Mr. Jenkins-Johnston Esq. Mr. Yada Williams for the Respondent did not attend. Mr. Jenkins-Johnston then requested a further adjournment to Tuesday 6th February 2007. The application was granted and notice was ordered to be served on Mr. Yada Williams notifying him of the adjourned date. On 6th February 2007, the matter was not mentioned and there is no record of what transpired.

On 13th February 2007, the case was reassigned to Edwards, J, and when it was called up on that day Counsel for the Appellants had again failed to comply with the Court Order. In the result, Edwards J. made the following order:

"Court notes that the defendant has failed refused and or neglected to comply with the orders of Justice Taylor dated 26th September 2006, 24th November 2006 and 14th December 2006. In the circumstances the court orders that unless the defendant complies with the order of court dated 26th September 2006 within 7 seven days after service of this order the defence filed will be struck out and judgment entered for the plaintiff."

The matter was then adjourned to Wednesday 28th February 2007. The order of Edwards, J, was drawn up, filed and served on the Appellant's Counsel on 16th February 2007.

On the 28th February 2007, when the matter next came up for hearing before Edwards J, in the presence of both Counsel, it was clear that Counsel for the Appellant had again failed to comply with the Judge's 'unless order'. Edwards J. thereupon struck out the Appellant's defence, entered Judgment for the Respondents against the Appellants and made the following orders:

"Court notes that there is an affidavit of service of the court order of 13th February 2007 on the file....."

Court:

The Defendants failed to comply with the Court order dated 13th day of February 2007 it is this day ordered as follows:

- (1) That the Defence dated 15th day of May 2006 filed herein be struck out and judgment be entered for the plaintiff as follows:
 - (a) Le 60,000,000.00 as the cost of the plaintiff's tipper lorry with registration number AA1 384.
 - (b) Le 14,060,000.00 the value of goods lost in the accident.
 - (c) Le 2,960,000.00 per month for loss of use of the said vehicle from the 19th December 2003 until payment.
 - (d) Interest be assessed.
 - (e) Cost to be taxed if not agreed by the parties.

On 6th March 2007 Counsel for the Appellant filed a Notice of Motion applying for the following Orders: (1) that the Judgment of 28th February 2007 be set aside, (2) that the Appellants' defence be restored; (3) that the Appellant be granted an enlargement of time within 7 days to comply with the Order of Taylor, J; and (4) that execution of the Judgment of 28th February 2007 be stayed. The Motion was supported by the Affidavits of James Blyden Jenkins-Johnston sworn on 6th March 2007 and that of J.B. Jenkins-Johnston sworn on 8th March 2007, giving reasons for the delay in complying with Taylor J's Court Order of 26th September 2006.

The Motion came up before Edwards, J, on 29th March 2007 who refused the application, including the application for stay of execution, in a detailed Ruling delivered on 3rd April 2007.

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The next day, that is, on 4th April 2007, pursuant to the said Judgment, the Respondent took out garnishee proceedings to recover the judgment debt. The motion came up before Edwards, J, on 9th April 2007, who granted a Decree Nisi, returnable on 25th April 2007.

On 17th April 2007, the Appellants Solicitors filed a Notice of Appeal to the Court of Appeal against Edward J, 's said Order and Judgment of 28th February 2007, and on 23rd April 2007 applied by Notice of Motion for a Stay of Execution of the judgment pending the hearing and determination of the Appeal filed in the Court of Appeal. The motion was fixed for 25th April 2007; an interim stay of execution was granted pending the hearing thereof on that date. On 25th April 2007, Edwards, J, heard the Motion and refused to set aside his Judgment of 28th February 2007 and the Stay of Execution of the said judgment.

On 3rd May 2007 the Garnishee Order Nisi was made absolute, and the Respondent recovered part of the Judgment debt of Le192,000,000.00 from the Appellant's bankers.

It is against this background that the appeal came before us. The grounds of appeal filed on 17th April 2007 are as follows:

- (i) That the Learned Trial Judge exceeded his Jurisdiction and was wrong to have entered Judgment against the Defendants herein for failure to comply with the Order made on the Summons for Directions by Taylor J. on 26th September 2006 as Order XXB dealing with Summons for Directions in the High Court Amendment Rules C.I. No. 3 of 2006 MAKES NO SUCH PROVISION for Judgment to be entered in such circumstances.
- (ii) That the Judgment was against the weight of the evidence
- (iii) The relief sought from the Court of Appeal are:
 - a) that the Order and Judgment of 28th February 2007 entered by Hon Justice D. B. Edwards J against the Defendants herein be set aside.
 - 2) That the Defence of the Defendants dated 15th May 2006 which was struck out by the Learned Trial Judge be restored.
 - 3) That the Defendants be given such time as the Court shall direct to comply with the Order on the Summons for Directions;
 - 4) That the action be remitted to the High Court for Trial;
 - 5) That the costs of the Appeal be paid by the Plaintiff/Respondent.

On the 6th December 2007, when the appeal came up for hearing, Counsel for the Appellants, Mr. J. B. Jenkins-Johnson, applied for leave to amend his first ground of appeal in the manner underlined in the Notice of intention to amend dated 29th May 2007. Leave was granted accordingly and the amended appeal reads as follows:

- (iv) That the Learned Trial Judge exceeded his Jurisdiction and was wrong to have entered Judgment against the Defendants herein for failure to comply with the Order made on the Summons for Directions by Taylor J. on 26th September 2006 as Order XXB dealing with Summons for Directions in the High Court Amendment Rules C.I. No. 3 of

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2006 MAKES NO SUCH PROVISION for Judgment to be entered in such circumstances, and in any event the said Order made on the Summons for Directions by Taylor J on 26 September 2006 was itself invalid and void having been made on a Summons for Directions filed contrary to the mandatory provisions of Order XXB Rule 1(i) of the Constitutional Instrument No. 3 of 2006.

Counsel for the Appellant argued the second limb of his appeal underlined above. He submitted that contrary to the provisions of Order XXB, the Summons for Directions was not taken out within the time specified by the Rules; that the matter having been entered for trial on 27th May 2007, the Summons for Directions ought to have been taken out within one month thereafter. In this case the Respondent's Summons for Directions was dated 15th September 2006, that is four months after the close of pleadings and it was heard on 26th September 2006 when Taylor J. gave her directions regulating the future conduct of the matter. He submitted that Counsel for the Respondent did not apply for leave to extend the time within which to apply for the Directions; that in the circumstances, the Summons for Directions and the Order of Taylor J, following there-from are both invalid and void. He stressed that the Summons for Directions having thus been irregularly filed without leave, Taylor J. did not have jurisdiction to hear it or to have made the Order of 26th September 2006. In the result all other orders following the Order of 26th September 2006 would be irregular, including the Judgment of Edwards, J.

In support of his submission Counsel relied on the decision in the case of **F. I. Orange vs. O. T. Jibowu** 13 WACA at page 41.

Arguing the first limb of his Appeal, Counsel submitted that there is no provision under Order 20B of Constitutional Instrument Act No.3 of 2006 for Judgment to be entered where there has been a non-compliance with its provisions. He pointed out that Order 20B is intended to provide directions for the future conduct of the action. He urged the Court to set aside both Taylor J 's Order of 26th September 2006 and Edwards, J's Judgment of 28th February 2007 obtained thereby.

Mr. Y. H. Williams of Counsel for the Respondent in his reply conceded that pleadings closed on 27th May 2006; that the summons for directions was taken out after the period specified in Order XXB Rule (1) of the Act. He also conceded that applying for the Summons for Directions out of time without the leave to extend the time, was irregular. He however stated that the irregularity is not fatal that it cannot be waived; that the case of **F. I. Orange**, supra, is distinguishable in that that case concerned an appeal which was filed out of time, as opposed to this case which is at the trial stage. He further submitted that under Order 50, mere non-compliance did not render the proceedings in any action void; he also relies on **SLOF v Pyne Bailey Civ. App. page 21**. He urged the Court of disregard the irregularity as the Appellants themselves had delayed in taking this objection, and was taken only after the Appellants' Solicitors have taken a fresh step in the proceedings.

As to whether the Trial Judge had jurisdiction to enter judgment for non-compliance of Order XXB, Mr. Williams submitted that the Summons for Directions included an Order for discovery; therefore the Court's power to strike out pleadings for failure to discover documents under Order 20A, should be extended to Order 20B. He submitted that under the 1999 Annual Practice English Rules, single application can be made for both Discovery and Directions (see page 451). Therefore if the Court has power to strike out pleadings under 20A for non-compliance, it must also have similar powers to strike out pleadings for non-compliance of Order 20B.

He pointed out that before the 'unless order' was made by Edwards, J, the Appellants had applied for 4 extensions and still failed on each occasion to comply with the Court's order; that in those

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circumstances, the Order of 28th February 2007 was reasonable and in accordance with the provisions of Orders 20A and 20B. He argued that the Appellants' reasons for failure to comply with the Court's Directions of 26th September 2006 were not substantial and relied on the case of *Allen v Sir Alfred MacAlpine & Sons Ltd.* {1968} 2QB 229. He conceded that the Court has power to set aside the Judgment, but argued that setting aside in the instant case would serve no useful purpose. He relied further the decision on *Alpine Bulk Shipping Co. vs. Saudi Eagle* 1986 2 Lloyds Report 221, and noted that the Appellant's delay in complying with the Court's Order amounted to a denial of justice (see Judgment of Lord Denning at page 245 in *Allen vs. Sir Alfred MacAlpine*, supra).

I have narrated and considered the history of the action and the submissions of Counsel. At this stage it will be pertinent to examine the provisions of Order XXB and XXA respectively of Constitutional Instrument No 3 of 2006.

ORDER XXB - Constitutional Instrument No. 3 of 2006 is entitled SUMMONS FOR DIRECTIONS provides as follows:

- "1. (i) *With view to providing, in every action to which this rule applies, an occasion for the consideration by the Court of the preparations for the trial of the action, so that-*
- (a) *all matter which shall or can be dealt with on interlocutory applications and have not already been dealt with may, so far as possible, be dealt with; AND*
- (b) *such directions may be given as to the future course of the Action as appear best adapted to secure the just, expeditious and economical disposal thereof, the plaintiff shall, within one month after the pleadings in the action are deemed to be closed, take out a summons (in these rules referred to as a summons for directions) returnable in not less than seven days."*

Rules 1(4), (5) (7) & (8) of Order XXB state as follows:

- (4). *If the plaintiff does not take out a summons for directions in accordance with sub-rules (1) to (3), the defendant or any defendant may do so or apply for an order to dismiss the action.*
- "(5). *On an application by a defendant to dismiss the action under sub-rule (4), the court may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions.*
- (8) *A plaintiff whose action has been dismissed under sub-rule (5) may apply not later than one month after the date of the order by notice on motion that the order be set aside and the action be restored; and the court may, for good and sufficient cause order that the action be restored upon such terms as it may think fit.*
- (9)
5. (4) *If the court on the hearing of the summons for directions requires a party to the action or his legal practitioner to give any information or produce any document and that information or document is not given or produced, then, subject to sub-rule (5), the court may -*
- (a).....

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(b) if it appears to it to be just so to do, order the whole of any part of the pleadings of the party concerned to be struck out, or, if the party is plaintiff or the claimant under a counterclaim, order the action or counterclaim to be dismissed on such terms as may be just.

The wording of the Order XXB (1) (i) is quite clear and appears to be mandatory, as to the time within which a party to proceedings should take out a Summons for Directions; that is, one month after the close of pleading, the plaintiff or on his/her default, the defendant shall apply to the Judge for directions to be issued as to the future conduct of the action (emphasis added).

In this case, Counsel for the Respondent has conceded that the Summons for Directions was not taken out until almost 4 months after the close of pleadings. In these circumstance it is reasonable to argue that the Order of Taylor J, of 26th September 2006 was itself irregular having been granted pursuant to a Summons for Directions taken out of time. Taylor J, did not notice the irregularity at the time of making her Order; not only that, neither Counsel appeared to have noticed the irregularity and Edwards, J. did not avert his mind to the time factor under the Rule when he made his 'unless order'.

What then is the consequence of Taylor J, s Order of 26th September 2006? Is the irregularity so fundamental as to render the proceedings void?

Counsel for the Respondent has rightly conceded that the Summons for Directions of 14th September 2006 before Taylor, J, exceeded the one month period provided for by Order XXB Rule 1 (1) and that the Order of Taylor J, of 26th September 2006 obtained thereby was itself irregular and we agree with him. He has however submitted that the irregularity can be cured under Order 50 (1).

Order L of the High Court Rules provides: -

- "1. *Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court shall think fit.*"

The above rule gives the Court power not to put undue weight on irregularities, and Counsel for the Respondent has asked us to invoke the said rule to save this situation, but Counsel himself has relied on the non-compliance of the rules, when he applied for the Appellants' Defence to be struck out and judgment entered in the Respondent's favour. We cannot in the circumstances ignore the irregularity.

In our view, the Respondent having failed to comply with the mandatory statutory provisions of Order XXB, the Order derived there-under was wrongly obtained and thus the proceedings before the Judge were clearly void. It should have been quite clear when the case came before Edwards J, that the summons giving rise to the Order of Taylor J was out of time. In our view, there were serious defects in the proceedings, and although it has been submitted that Counsel for the Appellant did not notice the defects or take an objection until after Edwards J. proceeded to make his 'unless order' and subsequently entered judgment on behalf of the Respondent, that does not make the proceedings regular. In our view the irregularity in this case is sufficient to renders the summons for directions void, and Taylor J should not have entertained it without granting an extension of time for compliance.

Counsel's arguments in reply to the submission that Order XXB made no provision for sanctions against a Defendant for non-compliance with Directions, is that Court's powers to strike out pleadings for failure to discover documents under Order XXA should be extended to XXB. His reasons being, that an application for discovery under XXA also includes an application for directions.

We will now consider the provisions of: Order 20A.

ORDER XXA – of C.I. NO 3/06: is entitled “DISCOVERY AND INSPECTION OF DOCUMENTS”: it provides as follows:

- “1. (1) *After the close of pleadings in an action begun by writ, there shall, subject to and in accordance with this Order, be discovery by the parties to the action of the documents which are or have been in possession, custody or power relating to matters in question in the action.*
- (2) *Nothing in this Order shall be taken as preventing the parties to an action agreeing to dispense with or limit the discovery of documents which they would otherwise be required to make to each other.*
2. (1) *Subject to sub-rule (2) and rule 4, the parties to an action between whom pleadings are closed shall make discovery by exchanging lists of documents and, accordingly, each party shall, within fourteen days after pleadings in the action are deemed to be closed as between him and the other party, make and serve on that other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action.*

Unlike Order XXB, Order XXA does not require a party to an action to apply to the Court for an Order for Discovery. A close examination of that Order shows, namely, that Rule 1(i) provides for mutual discovery; Rule 1 (2), for discovery by exchanging lists of documents after pleadings have closed and without an order or parties can agree to partial or limited discovery.

Similarly unlike Order XXB, Rule 18 of Order XXA provides a penalty for failure to comply with the requirements for discovery. It states as follows:

- “18. (1) *If any party who is required by rules 1 to 15, or any order made under any of those rules to make discovery of documents or to produce any document for the purpose of inspection or any other purpose or to supply copies thereof fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of failure to comply with any such provision, to sub-rule (2) of rule 3 and sub-rule (1) of rule 11, the court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.*

As can be seen from the above Orders, whereas Order XXA makes provision for failure to comply with requirement for discovery, there is no such provision for failure to comply with an order for Directions given under Order XXB 1(1). The only sanction under Order XXB is against a plaintiff who fails to take out a Summons for Directions in accordance with sub-rules (1) to (3); (See Rule 1(4); there is no provision for a defendant who fails to comply with Directions under that Order. Therefore when the Learned Judge, Edwards J. in his Judgment of 28th February 2007 struck out the

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Appellant/Defendant's defence of 15th March 2006 and entered judgment on behalf of the Respondent, in our opinion, he exceeded his jurisdiction. Order 20B gives no such power to the Trial Judge.

In my view in the circumstances of this case, there were no directions; that being the case, the Appellant could not be said to have been in breach of the Order of 26th February 2007. Thus when Edwards, J. made his 'unless order' of 13th February 2007, there was no order for the Appellant/Defendant to comply with.

The situation is different in a situation where the Court is dealing with Discovery under Order XXA. Rule 18 (1) supra clearly states that in the event of failure to comply with the requirements for discovery, the Court may make such orders as it thinks just, including, in particular an order that the action be dismissed or an order that the defence be struck out and judgment entered against the party in default. But even under this Order, the power to strike out and enter judgment against a defaulter, is discretionary only, and such discretionary powers must be exercised along established principles.

In the Annual Practice 1999, dealing with an application to dismiss an action or strike out the defence which Counsel referred to, it is provided as follows:

“.....
“If an Order is made dismissing the action unless the discovery is given by a stated time, then at the end of that time, if the discovery is not given, the action stands dismissed. It is not so dead, however, that it cannot be revived by an extension of time for compliance with the order.....But the jurisdiction to extend time after the expiry of an 'unless order' will be exercised cautiously and, where appropriate only on stringent terms.....”

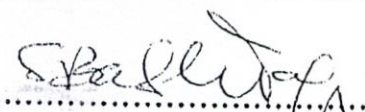
Applying the above principle of law to the present case, it is our view that in this case also, despite the failure to comply with the “unless” Order, the action is not so dead that it cannot be revived by an extension of time for compliance, and we so hold.

The conduct of both parties in this case, by their respective failure to comply with the rules of procedure at one time or another is also a matter we have taken into consideration in deciding whether the Learned Judge exercised the discretion rightly. Both parties were guilty of a breach of the rules and one party cannot be heard to say that the other party alone should be penalized for doing so.

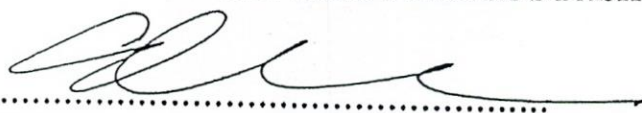
In the premises, we will allow the appeal and make the following orders:

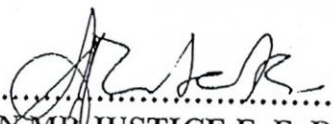
1. The Judgment of the Court below dated 13th February 2007 and all subsequent proceedings is hereby set aside.
2. The Respondent is hereby granted an extension of time to file his Summons for Directions and shall file same within 7 days from the date of this Order.
3. The amount already taken in execution of the said Judgment, including the one third thereof paid to the Respondent be paid into the interest bearing Account at Standard Chartered currently in the joint names of both Solicitors Bank pending the hearing and determination of the action.

4. The Solicitor for the Respondent is to give an undertaking to pay back the costs awarded in the action if the Appellant succeeds in the action.



 HON MRS JUSTICE S BASH-TAQI JSC

I AGREE.....

 HON MS JUSTICE S KOROMA, JSC

I AGREE.....

 HON MR JUSTICE E. E. ROBERTS, JA