

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

TOM NYAMA
(doing business as
TEKO AGRICULTURAL PROJECT)

-

APPELLANT

AND

SALINI CONSTRUTTORI SPA
(SALCOST)

-

RESPONDENT

CORAM:

Hon. Ms. Justice S. Koroma J.S.C.
Hon. Mr. Justice P.O. Hamilton J.S.C.
Hon. Mr. Justice A. N. B. Stronge J.A.

SOLICITORS:

A. S. Sesay Esq for Appellant
N. D. Tejan-Cole Esq for Respondent

JUDGMENT DELIVERED ON THE 15th July 2011.
KOROMA J.S.C.

KOROMA J.S.C. – This is an Appeal against the Judgment of the Honourable Mr. Justice J. E. Massaly J. deceased delivered by the Honourable Mrs. C. L. Taylor on the 9th of June 2006.

BACKGROUND

The facts of the case according to the evidence is that in May of 1992 Salini Construttori SPA (SALCOST) a foreign company doing business in Sierra Leone the Respondent/Defendant (hereinafter called the Respondent) entered into an agreement with Tom Nyama (doing business as Teko Agricultural Project) the Plaintiff/Appellant (hereinafter called the Appellant) to undertake the clearing of the catchment area of the dam and reservoir at Bumbuna which is being constructed by the Respondent. The parties signed the agreement in May 1992 and the contract period was from 1st May 1992 to 30th April 1994. The terms and conditions of the contract were detailed

in the **Letter of Intent** signed by both parties. It was indicated the letter of intent would serve as the contract until a formal contract was drawn up.

On the **21st August 1993** the Respondent drafted a letter headed "**Bumbuna falls Hydro Electric Project – Object: - Reservoir clearing project – claims, settlement and works suspension**". The gist of the letter was for a temporary suspension of the contract and it was also indicated that the Respondent could not fix a date for resumption of the works. Each party's obligations in the contract were set out in detail. Both parties signed the agreement.

On the **23rd June 1995** the Respondent again wrote to the Appellant suggesting that the contract be terminated because since the suspension in 1993 no date could be envisaged for resuming the works and with the added difficulties of the war it was pointless to continue with an indefinite suspension of the works.

The Appellant was opposed to the termination of the contract and proposed continuation of the indefinite suspension of the contract. Subsequently, by letter dated **21st August 1995** the Respondent terminated the contract. The contract had lasted 15 (fifteen) months. The Appellant issued a Writ dated **24th April 1996** against the Respondent for Damages for breach of contract and consequential loss upon such breach of contract and for costs.

The High Court action came before the Honourable J. E. Massaly J. now (Deceased) and he, after reviewing the evidence gave Judgment in favour of the Respondent. It is against that Judgment that the Appellant has appealed to this Court on three (3) grounds.

The Grounds of Appeal are as follows:

1. That the Learned Trial Judge's conclusion that documents Tendered in Exhibits 'J' 'L' and 'M' were not a unilateral conduct on the part of the Defendant, and therefore dismissed the matter is erroneous - in that the suspension was not an issue, but the termination of the contract.

2. That the Learned Trial Judge erred in that he did not address the question of termination of the contract which is the thrust of the Appellant's case.
3. That the Judgment is against the weight of the evidence.

Before considering the grounds of Appeal I will briefly deal with the issue of the contract between the parties. The transaction between the parties started with a letter from the Respondent by its Site Manager on a day in May 1992 addressed to the Appellant. This was headed "**Letter of Intent**", 'b' of the preamble of the Letter of Intent stated "***This Letter of Intent is being issued as a temporary substitute pending signing of a formal contract to enable work on the Reservoir area clearance to commence immediately***".

The letter contained all the terms and conditions of the parties pertaining to the clearance of the dam/reservoir area. Most importantly the duration of the project was spelt out to commence on the 1st of May 1992 and end on the 30th April 1994 – in effect a period of two years. Both parties signed the **Letter of Intent** and for all intents and purposes the parties regarded this as the contract document of the project. As far as the records go no "formal contract" was thereafter signed. Neither party has disputed the validity of the document signed.

Ground 1 (One)

The Appellant's contention is that the suspension of the contract was the unilateral act of the Respondent. The suspension of the contract was dealt with in Exhibit 'H' in letter drafted by the Respondent dated 21st August 1993 which both parties subsequently signed.

For clarity's sake, I will reproduce two short portions of that document headed "**Object: Reservoir clearing project – claims settlement and works suspension**".

"Concerning the above project, we inform (sic) that you, that due to various reasons we are forced to suspend the works.

We assume that the activities will be resumed at a later stage, but we are not able to fix a date at the present moment. Therefore we wish to make the following proposal for a temporary suspension of the works and of the subject agreement".

The letter went on to detail the obligations of both the parties, and it ended with the following two paragraphs:

"The Contractor will sign a copy of this letter for acceptance of all the above clauses and receipt of outstanding balance due him.

The Sub-Contractor Teko Agricultural Project declare also that by signing the subject letter has nothing else to claim from SALCOST Sierra Leone for the whole contractual period and during the suspension of the works, in connection with the agreement signed May 1992".

It is clear from the two quoted segments of Exhibit 'H' that the suspension of the contract was proposed by the Respondent, but Exhibit 'H' clearly showed that it was however a negotiated agreement reached by both parties and this was further confirmed by Exhibit 'M' in which the Appellant dealing with other issues thereafter stated *"I further stressed that I was comfortable with an indefinite suspension for as long as SALCOST considered it unsafe for us to resume the clearing operations"*.

In the light of this I find the Learned Trial Judge was correct in his conclusions that the suspension of the works and contract was not a unilateral act of the Respondent. I find no merit in ground one (1) of the Appeal.

Ground 2 (Two)

This is a ground worthy of more consideration. The Learned Trial Judge found that both the suspension and termination of the contract were not a unilateral conduct of the Respondent. I beg to differ. The issue of the termination of the contract is of a different nature from the suspension of the contract which was endorsed by the Appellant.

The Respondent addressed a letter Exhibit 'J' to the Appellant on the 23rd June 1995 which stated: *"As the works are suspended since 1993 and no date can be envisaged for resuming the project, thus also considering the added difficulties created by the war situation in the country we formally suggest to mutually convene a termination to our agreement. You will agree that it is now pointless to continue with an indefinite suspension of the works"*.

I can understand why the Learned Trial Judge concluded that the termination was not unilateral. This I believe is due to the fact that Exhibit 'J' was couched as a proposal from the Respondent. However I disagree with his conclusion. It was almost 23 months after the suspension of the contract by both parties. However, it appears for reasons advanced by the Respondent including the war in Sierra Leone that it was a firm position they had reached, as the letter went on to state:

"On the other hand should the project ever be resumed in the future, we shall be pleased to consider a new and up-to-date proposition from your side".
Emphasis mine.

The Appellant in reply by Exhibit 'K' dated 29th June 1995 stated:

"On the issue of convening a termination to our contract on the grounds of the current state of the security in the country, we consider your proposal not in our interest and therefore cannot accept such an arrangement. An extension to the indefinite suspension currently in force will probably be viewed as appropriate in the light of the prevailing circumstances".

Here lies the difference between the parties on this issue.

I find Exhibit 'L' dated 3rd July 1995 much more illuminating in trying to second guess the Learned Trial Judge's reason for reaching his conclusion that the termination was not unilateral. The Respondent stated in Exhibit 'L'

"....we have agreed in view of the continued suspension of the works and the problems posed by security situation in the country to terminate our contract and the reciprocal obligations by mutual consent amicably and without further demands on each other". This purported agreement was vehemently denied by the Appellant in Exhibit 'M'. I therefore conclude that this was a unilateral termination of the contract by the Respondent albeit for alleged good reasons.

The Respondent in his amended Defence and Counter Claim, pleaded in **paragraph 9** of the amended Defence that the head contract with the Government of Sierra Leone had been suspended. This led to the suspension of the contract between the parties as evidenced by a written agreement signed by both parties dated **21st August 1993**.

What we have is a situation in which the Respondent on evidence adduced had to suspend the works at the dam and reservoir with no idea when activities would be resumed. On the other hand the Appellant with full knowledge of the security situation caused by the war was prepared to maintain the suspension of the contract for however long that security situation lasted.

Many contracts expressly provide for performance to be excused if rendered impossible to be concluded by unavoidable cause such as force majeure or act of God. However in this particular contract there was no such clause and indeed the Respondent did not raise that as a defence.

It is my view that what is more relevant in a case of this nature which is silent as to the position of the parties in the event continued performance of the parties' obligations becoming literally impossible is the "Doctrine of subsequent impossibility or frustration"

Applying the facts of the case to this doctrine, there is evidence from the Respondent that the head contract had been suspended due to the security situation. This was not rebutted by the Appellant. This evidence was further strengthened by the fact that expatriate employees of the head contractor, the Respondent had left the country. Even the Site Manager was not in the country to give evidence at the trial.

I hold that termination of the contract by the Respondent in this respect did not need the agreement of the Appellant. As far back as **August 21st, 1993** when the Appellant signed the agreement for the suspension of the contract he had acknowledged the impossibility of continuing with the performance of the contract. A valid contract can be brought to an end generally from the moment of impossibility (see paragraph 442 of Halbury's laws of England, 4th Edition under the rubric "**Impossibility And Frustration in general**"). In a case of this nature the contract is discharged, releasing both parties from further performance.

The impossibility of continuing the contract was mentioned in Exhibit 'L' dated **3rd July 1995** addressed to the Appellant by the Respondent where the manager clearly stated:

“..... regretting the general situation forcing on both parties the impossibility of continuing the ‘works’.....”. I can safely conclude one of the consequences of this is that the event of war did not only affect the sub-contract but also the head contract. It is part of the evidence that all activities stopped and the site cleared after **21st August 1993**.

It is commonly held that the legal result of impossibility to perform such a contract lay where they fall. So that money already paid is irrecoverable and money due under the contract for work already done is enforceable. So that a party who had performed only part of an entire contract could recover nothing. In this case under the agreement dated **21st August 1993**, Exhibit ‘H’ the obligations of both parties were set out and the Respondent paid the amount that was agreed to be outstanding and the Appellant did declare that by signing the letter he had nothing to claim from the Respondent for the whole contractual period and during the period of suspension.

This issue of impossibility of performance of a contract can be further buttressed by the judgment of Lord Denning MR in the *“Harbutts Plastacine Ltd V Wayne Tank and Pump Co Ltd [1970] 1 All ER 225* in which he stated at page 233

“It is clear therefore that if the innocent party with full knowledge refuses to accept the termination of the contract the effect is that the status quo ante is preserved and remains in force for both sides. Therefore each party has no right to sue for damages for past or future breaches”.

I note that the counter claim by the Respondent was dismissed due to the failure of an important witness to come to Sierra Leone to testify on issues raised.

I will now deal with the last points in this Appeal together. Apart from the impossibility of performing the contract, the duration of the contract was two years and there was nothing in the subsequent agreement which extended the duration of the contract. By **August 1995** when the contract was terminated by the Respondent, the contract spelt out in Exhibit ‘H’ should have long come to an end, on the **30th April 1994** to be precise.

I do agree with the Appellant that the Learned Trial Judge did not deal with the termination exclusive of the suspension of the contract.

However for reasons I have addressed this ground of Appeal has no merit and it therefore fails.

Having dealt with the legal position of the Doctrine of impossibility or frustration of performance of contracts which I believe is applicable to the essence of the appeal, I will deal with issues under paragraph 4 of the Appeal very briefly and only as an intellectual exercise. Paragraph 13 (1-16) of the particulars of claim headed "**particulars of loss**" itemised a long list of claims. However the legal position is that special damages must be pleaded with detailed particulars but more importantly strictly proved by evidence at the trial, this was so held in *Macauley V Coker 1968 – 69 ALR SL 399*. This in my view was not done by the Appellant. Furthermore, I hold that all those alleged losses occur either or emanate from activities before 21st August 1993 when both parties signed Exhibit 'H' and the Appellant declared that by signing the agreement and upon receipt of payment made by the Respondent he could have no further claim against the Respondent for the whole of the contractual period and during the suspension of the works. The claim for special damages therefore fails.

In conclusion, I hold that there is no merit in any of the grounds of Appeal and the Appeal is hereby dismissed. I therefore order that costs of this Appeal shall be paid by the Appellant to the Respondent. Such costs are to be taxed.



Hon. Ms. Justice S. Koroma J.S.C.



Hon. Mr. Justice P. O. Hamilton J.S.C.