CIV.APP 31/2010

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:-

CHRISTIAN OGOO
DATATEL NETWORK GS M
(S.L) LTD - APPELLANTS/APPLICANTS

AND

HUAWEI TECHNOLOGIES LTD - 1ST RESPONDENT
CELLCOM TELECOMMUNICATION (S.L)
LTD - 2ND RESPONDENT

CORAM

HON. MRS. JUSTICE A. SHOWERS, JA
HON. MS. JUSTICE V. M. SOLOMON, JA
HON. MR. JUSTICE A. S. FOFANAH, J

Advocates

E. E. C. Shears Moses Esq. for the Appellants
C. Macauley Esq. for the Respondents

JUDGEMENT DELIVERED THE 3rd DAY OF February 2012
SHOWERS. J.A.:

This is an appeal against the Ruling of the Hon. Mr. Justice N.C. Browne-Marke, JA dated the 10th day of November, 2009.

The brief facts of the case are that the Appellants who are in the business of telecommunications in Sierra Leone entered into a contract dated 15th April 2005 with a company operating in China and dealing in the business of telecommunications equipment. The party with whom the Appellants contracted according to the contract is Huawei Technologies Co. Ltd.

The goods supplied were GSM/CDMA/Microwave equipments to the value of about US$6, 101,540.00 and the equipments were shipped to the Appellants who installed them. The Appellants allege that because they found the industry very competitive for that reason they obtained further credit facilities from Huawei Technologies Co. Ltd.

The Appellants at this point offered equity holdings to the general public and the 2nd Respondent showed interest to buy majority shareholdings which was communicated to Huawei Technologies Co. Ltd who approved the transaction. This led to an agreement between the Appellants and the 2nd Respondent dated 13th July 2007.

The Appellants further allege that the Respondents did not press for payment but issued a writ of summons dated 8th September 2009 for the recovery of the sum of US$ 4,881,232 or the equivalent in Leones due and owing by the Appellants to the Respondents, liquidated damages at the fixed and or agreed rate of 0.05%; in the alternative recovery from the Respondents of all telecommunications equipments supplied and installed by the Appellants pursuant to the Agreement dated 15th April 2005 for the benefit of the 2nd Respondent; damages for breach of contract; interest on the said sums and costs.

The Appellants entered appearance to the said writ of summons and a defence dated 13th October 2009 was also filed on their behalf. In the said defence the Appellants admitted owing the 1st Respondent the sum of US$ 4, 881,232 and based on those admissions,

the 1st Respondent applied for judgment to be entered in its favour for the said sum, which application was granted on 10th January 2011.

In an earlier Notice of Motion dated 21st October 2009, the Appellants had applied for the writ of summons dated 8th September 2009 to be struck out for want of jurisdiction. The application was refused by Mr. Justice N. C. Browne-Marke who also refused leave to appeal to the Court of Appeal against his Ruling.

The Appellants later applied to the Court of Appeal for enlargement of time within which to appeal which was granted and they also obtained leave to appeal and thereupon filed their Notice of Appeal dated 19th July 2010.

After filing the said Notice of Appeal, the Appellants alleged that as a result of the several applications coming before the court, they were put on inquiry and they embarked on some investigations the result of which caused them to apply for leave to adduce fresh evidence and amend their grounds of appeal. The applications were granted and they duly filed an amended Notice of Appeal dated 21st February 2011 and an affidavit sworn to by the 1st Appellant, **CHRISTIAN OGOO** adducing fresh evidence.

THE GROUNDS OF APPEAL

GROUND I

The Appellants allege that the 1st Respondent is not a legal person and therefore lacks the capacity to bring an action before any court in this country. This is fresh evidence disclosed in the affidavit filed on behalf of the Appellants.

Counsel for the Appellants argued that there is evidence obtained from the Registrar General of Sierra Leone and exhibited to their said affidavit that the 1st Respondent is not a company registered in Sierra Leone. He contended that the said 1st Respondent cannot therefore bring an action in the courts in this country. He further contended that it would have capacity to sue only if -

(1) It is a Company incorporated and registered in Sierra Leone with the Registrar of Companies.

(2) It is a foreign Company that has been registered to do business in this country.

Counsel relied on s. 485 of the Companies Act, No. 5 of 2009 for his submission. He referred the court to the Certificate of Registration of the said 1st Respondent in the Peoples Republic of China where the Company is registered as **SHENZHEN HUAWEI TECHNOLIGIES CO. LTD** Exh "CO4B" to the said affidavit. He also referred to the list of countries in which the contracting party has offices – Exh "CO5" and stated that Sierra Leone is not listed amongst them, nor does it have a branch office or subsidiary in Sierra Leone.

He maintained that from the above evidence it is clear that the 1st Respondent is not a branch office of the contracting party. He went on to submit that even if the 1st Respondent had been a branch of the contracting party, it will still not have had the capacity to bring an action in our courts because it is not a legal person under the laws of this country and therefore lacks the capacity to bring an action.

In response to the above submission counsel for the Respondents submitted that assuming that the 1st Respondent is not incorporated and or registered in Sierra Leone that does not in anyway deprive them of their right to maintain an action against the Appellants in Sierra Leone if the fact and circumstances of the case as well as the law permits them to do so. He maintained that s. 485 of the Companies Act, 2009 relied upon by the Appellants does not prohibit a company incorporated out of Sierra Leone and not registered to do business in Sierra Leone from bringing and or maintaining an action by virtue of that fact. He stressed that the said Act makes no pronouncement on the issue of the right or the non-right of a company incorporated out of Sierra Leone and not registered to do business here to sue and be sued as the Appellants have canvassed.

The issue to be determined is whether the 1st Respondent Company not being a company incorporated and registered in Sierra Leone with the Registrar of Companies and being a foreign company not registered to do business in Sierra Leone has the capacity to sue or be sued in Sierra Leone.

Counsel for the Respondents has relied on the case of **Newby vs. Von Open and the Colts Patent Fire Arms Manufacturing Co.** (1872) L. R. 7 Q. B. 293 and the case of **Lazand Brothers & Company vs. Midland Bank Ltd** (1932) A. C. 289 where it was held that a foreign company can sue as Plaintiffs.

Counsel for the ~~Plaintiffs~~ Appellants has stressed that the 1st Respondent Company is not a legal person under the laws of Sierra Leone and therefore lacks the capacity to bring an action. In the case **Coquhoun vs. Hedden** (1890) 6 TLR 153 Pollock, B at page 154 states as follows: "Company denotes -- - a legal entity, the validity of which depends on the law of the country in which it is established." The question therefore is whether our law recognizes the 1st Respondent as a legal person capable of bringing an action in this country.

Counsel for the Respondent has stressed that regardless of the fact that the 1st Respondent Company is not incorporated and or registered in Sierra Leone there is nothing prohibiting it from bringing an action against the Appellant and furthermore the Companies Act relied upon by the Appellant makes no pronouncement on the issue of the right or otherwise of a company not incorporated in Sierra Leone and not registered to do business here to sue or be sued. Counsel has relied on authorities already referred to above in support of his contentions.

Counsel for the Appellant maintained that the situation in Sierra Leone is different and should not be compared with what prevails in Europe where the European Union has made it possible for a party to bring action in member countries at will.

He contends that here a company must be registered in the country and not having been registered and incorporated here is not a legal person under our laws and therefore lacks the capacity to bring an action.

In determining whether the said 1st Defendant can be considered a legal person with capacity to bring an action in Sierra Leone it is necessary to look at the provisions of our laws. The Companies Act, No 5 of 2009 makes provisions relating to the activities of Companies. Counsel for the Appellant has already referred the court to the provisions of s. 485 which regulates the requirements in respect of Companies incorporated outside Sierra Leone. There is clear evidence that the 1st Respondent Company has not complied with any of the requirements stipulated in the said Act in respect of a foreign Company intending to do business in Sierra Leone. Section 492 of the said Companies Act provides for the penalties where a foreign company fails to comply with these provisions. In particular subsection 2 of s. 492 of the said Act provides as follows:

> "If a company defaults in delivering to the Commission any document required under s. 485 to be delivered for registration, its right under or arising out of any contract made in

Sierra Leone during the time of the default shall not be enforceable by action or other legal proceedings."

The above provisions are quite clear and it is apparent that the 1st Respondent Company is caught by them. The 1st Respondent Company having defaulted in delivering to the Commission the required documents provided for in s. 485 of the Companies Act 2005 cannot enforce its rights under the contract by action In other words it has lost its capacity to sue or take any other legal action proceedings to enforce its rights under the said contract.

GROUND 2

The Appellants allege that the 1st Respondent is a complete stranger to the contract between Datatel Communications and Huawei Technologies Company Ltd and so has no locus standi to bring the action. They contend that the writ of summons issued against the Appellants is in the name of Huawei Technologies Ltd which is a different entity from Huawei Technologies Co. Ltd, the party with whom the Appellants contracted.

Counsel for the Appellants submitted that it is settled law that a stranger to a contract cannot sue on it and that the 1st Respondent therefore lacks the locus standi to bring the action against the Appellants.

In response to this submission, counsel for the 1st Respondent denied that the said 1st Respondent Company is a stranger to the contract.

He submitted that the 1st Appellant in his statement of defence and in his affidavit sworn to on 10th December 2009 in opposing the application for judgment on admissions filed on behalf of the 1st Respondent, the debt was admitted owed to Huawei Technologies Ltd. He therefore argued that the said admission in effect showed that there was no real doubt in the mind of the 1st Appellant as to the 1st Respondent's right to bring this action. He further submitted that the omission of the word "Co" in the description of 1st Respondent is of no moment and does not vacate their indebtedness to the said 1st Respondent. He relied on the case of **Mobil Oil Sierra Leone Ltd vs. Texaco Africa Ltd and United Africa** Co., 1964-66 ALRSL 133 and also the case of **Basma vs. New India Assur – Co.,** 1964-66 ALRSL 198. In both cases it was held that the name of the company used by the Plaintiff is a misdescription or a misnomer which could be amended and the error ~~was~~ is not sufficient to vitiate the writ of summons. Both cases predate the Companies Act 2009.

It is my view that the issue in this appeal goes beyond that of whether the omission of the word "Co" in the name of the 1st Respondent is a misdescription or a misnomer. That issue is of little significance when compared with the question of whether the said 1st Respondent has the capacity to bring the action at all in this jurisdiction. It is quite apparent that the Appellants have established that the 1st Respondent by whatever name it is called has failed to satisfy the legal requirements to institute an action in Sierra Leone relating to the said contract.

misdescription or a misnomer. That issue is of little significance

GROUND 3 TO 8

I agree with counsel for the 1st Respondent that these grounds can be dealt with together.

The Appellants disagreed with the learned Judge's view that issuing of the writ without first submitting to arbitration in accordance with the terms of the agreement is an irregularity. They further disagreed with him when he said that an application to set aside the writ of summons must be made before the time limited for a defence and before taking any fresh step.

The issue under contention is therefore whether the issuing of the writ of summons in Sierra Leone is an irregularity or is a question of jurisdiction. Counsel for the Appellants has stressed that Article 18 of the contract provides for the law applicable under the contract and specifies it to be the United Nations Convention on Contracts for the International Sale of Goods (CISG). It further provides that in a case where the issues fall outside the scope of the CISG the substantive law of the Peoples Republic of China shall apply. He therefore contended that the only court competent to issue a writ of summon will then be the court in the Republic of China and not the court in Sierra Leone. He further argued that the issue is one of jurisdiction and that the High Court in Sierra Leone had no jurisdiction to issue the writ of summons.

specifies it to be the United Nations Convention on Contracts for

The learned Judge in his Ruling held that the want of jurisdiction complained of by the Appellant is in reality the irregularity in the ~~Appellants~~ Respondents issuing the writ of summons without first submitting ~~its~~ their claim to Arbitration as provided for in the contract.

In my judgment the terms of the contract are quite clear and Article 18 stipulates the law applicable under the contract which is ~~the~~ Chinese law. Any departure from those provisions in my view brings into question the issue of the jurisdiction of the court. That issue is of paramount importance and has to be determined before any issue of irregularity can be dealt with.

The 1st Respondent has relied on the provisions of Order 12 Rule 16 of the High Court Rules 2007 which set the time limit for a party wishing to dispute the jurisdiction of the court. It states that such application shall be made within the time limited for service of a defence. He submitted that the Appellants have not brought the application promptly enough. The learned Judge himself stated that the Appellants by filing their Defence took a fresh step after becoming aware of the irregularity.

It is my view that the issue of the court's jurisdiction is quite fundamental and is not an irregularity as opined by the learned Judge which can be raised within a time frame. The complaint raised here by the Appellant goes to the capacity of the court to hear the matter at all.

I therefore agree with counsel for the Appellant that the application being one calling to question the jurisdiction of the court, makes the circumstances of the case such that it cannot be said that the application is made out of time.

On the issue of the choice of law applicable, as stated earlier the agreement clearly states that Chinese law applies. Counsel for the 1st Respondent has relied on the case **A.P. Moller vs. Hadson Taylor**, an unreported Court of Appeal decision. I believe it is necessary to look at the circumstances of this case where the issue of the court's jurisdiction to hear the matter at all is in issue. Even if the court considers the dictum of Thompson-Davis, JA relied upon by counsel for 1st Respondent persuasive it cannot be applied in this case where the court finds that the contract cannot be enforced by the 1st Respondent in this country for reasons stated above.

With regards the issue of Arbitration counsel for the Appellants submitted that the Arbitration Act applies to those matters which the Laws of Sierra Leone govern and the courts of this country have jurisdiction to hear, but he argued that it is not of general application to all arbitration agreements and that if a court has no jurisdiction to entertain an action, an application to enforce an arbitration clause cannot be made to it. He maintained that the court cannot encourage such an application because the agreement is governed by a different law, in this case the Law of the People's Republic of China.

He relied on the case of **Re Leland DAF Ltd Talbot & Anor vs. Ederest Ltd** {1994} BCC 166, and submitted that the parties having by themselves agreed on the applicable law, both parties are estopped from departing from it.

Counsel for the 1st Respondent submitted that on the contrary parties to an agreement cannot by the said agreement or any other agreement oust the jurisdiction of the courts of Sierra Leone. He relied on the case of **Kamara vs. Kabia**, 1967-68 ALRSL 60.

I agree with counsel for the Appellant that the Arbitration Act covers all arbitration agreements and their performance in Sierra Leone. It cannot be applied where the agreement is governed by a different law as in this case where the applicable law is Chinese Law.

For all the above reasons, the appeal is allowed. Costs in the High Court and in the Court of Appeal to the Appellant to be taxed.

Hon. Mrs. Justice A. Showers, J.A.

I agree ----------

Hon. Justice V. M. Solomon, J. A.

I agree ----------

Hon. Justice S. A. Fofanah, J.