

CIV APP 13/2013

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

SIERRA LEONE ROAD TRANSPORT AUTHORITY

- APPELLANT

AND

ALIE ABESS

- RESPONDENT

COUNSEL:

E E C SHEARS-MOSES ESQ for the Appellant

C F MARGAI ESQ for the Respondent

CORAM:

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

THE HONOURABLE MS JUSTICE V SOLOMON, JUSTICE OF APPEAL

THE HONOURABLE MRS JUSTICE N MATTURI-JONES, JUSTICE OF APPEAL

JUDGMENT DELIVERED THE 25<sup>TH</sup> DAY OF JUNE, 2013.

THE APPLICATION

1. This is an Application by way of Notice of Motion dated 28 May, 2013 filed on behalf of the Appellant herein. The Appellant seeks an Order of Stay of Execution of the respective Judgments of the High Court, The Hon. Mrs Justice Musu Kamara, Presiding, dated 1<sup>st</sup> February, and 26<sup>th</sup> March, 2013, respectively. The Appellant also for an Order that the Costs of this Application be Costs in the Cause, but as there is no Cause pending, but an appeal, this cannot be granted. Usually, the Applicant for an Order for a Stay, bears the Costs of the Application, irrespective of whether the Order is granted or not.
2. The Application is supported by the respective affidavits of Mr Shears-Moses, deposed and sworn to on 28<sup>th</sup> May, 2013, 7<sup>th</sup> June, and 18<sup>th</sup> June, 2013 respectively. The last affidavit became necessary, during the course of the hearing of this Application on Tuesday, 18<sup>th</sup> instant, when it was pointed out to the Court by Mr Margai, that page 2 of the Notice of Appeal filed on behalf of the Appellant, was missing from the documents exhibited to Mr Shears-Moses' 1<sup>st</sup> affidavit. The Court considered the omission of minor importance, as it was quite apparent on

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the face of the document exhibited as A to the 1<sup>st</sup> affidavit, that the Notice of Appeal was indeed filed in this Court's Registry and duly stamped with the Registry's stamp on 18<sup>th</sup> March, 2013. The Court therefore granted Leave to Mr Shears-Moses to file the further affidavit to cure the defect. The absence of the full document from the 1<sup>st</sup> affidavit, did not lead inexorably to the conclusion that there was no appeal. There was an appeal indeed.

#### APPELLANT'S AFFIDAVITS

3. The reasons for making the Application, are stated in paragraphs 5-10 of Mr Shears-Moses' 1<sup>st</sup> affidavit. They are that at the time the Learned Trial Judge made the Order of 26<sup>th</sup> March, 2013 she was already functus officio, and therefore had no authority to do so. The Appellant then applied to her for a stay of execution of ~~that~~ <sup>the</sup> Order, by way of Notice of Motion dated 21<sup>st</sup> March, 2013. On 10<sup>th</sup> May, 2013, KAMARA, J refused the Application. The Appellant therefore renewed its Application in this Court, pursuant to the provisions of Rules 28 and 64 of the Court of Appeal Rules, 1985. mke
4. In his 1<sup>st</sup> affidavit, Mr Shears-Moses argues that the award of the sum of Le295,404,000 as Special Damages to the Respondent, has no basis in Law and will amount to a misuse of public funds if it is satisfied by the Appellant, and that the Appellant would be in a difficult position to retrieve that amount of money from the Respondent should the appeal succeed. If this were to happen, the Appellant would suffer great financial loss, and it would adversely affect its operations. He deposes further, that the amount awarded by the Court below, was exorbitant. These are the special circumstances, which he believes should convince this Court that it ought to stay execution of the Judgment of the Court below. Impliedly, the Appellant is arguing that it has good and arguable grounds of appeal.

#### RESPONDENT'S AFFIDAVIT IN OPPOSITION

5. The Application is opposed by the Respondent, who has filed an affidavit in opposition deposed and sworn to by himself, on 10<sup>th</sup> June, 2013. Exhibited to that affidavit as A1-7 are copies of several documents which the Respondent deposes, provide evidence that he possesses, or, has at



his disposal, funds far in excess of the Judgment debt which he seeks to recover from the Appellant. When examined closely, these documents do not seem to be what they are intended to be. Page 1, is a copy of a proforma invoice dated 27<sup>th</sup> March, 2013, 26 days after the ~~1<sup>st</sup>~~ <sup>1<sup>st</sup></sup> Judgment.

Judgment, addressed by the Respondent to his Solicitors. It purports to state the individual prices of 6 vehicles. The total value is stated to be USD175,000 or Le772,200,000. It is not stated in the affidavit whether his Solicitors put out a tender for these vehicles. That this document was tendentious, is quite evident: It came into existence nearly ~~four~~ <sup>seven</sup> weeks after the ~~1<sup>st</sup>~~ Judgment, and 6 days after the date of the Application for a Stay of Execution, made to the Court below. Pages 2-7 of the same exhibit, are copies of Vehicle licence slips issued by the NRA to the Respondent, on 5<sup>th</sup> December, 2012 - pages 2&3; 19<sup>th</sup> December, 2012 - page 4; 28<sup>th</sup> March, 2012 - page 5; 10<sup>th</sup> August, 2012 - page 6; and 31<sup>st</sup> January, 2013 - page 7. None of these documents indicate how much was paid for each vehicle by the Respondent. What we have on page 1, are what it may be assumed are the resale value of each car. Also, there is no affidavit evidence before us, that these vehicles are still owned, or, are still in the possession of the Respondent.

6. However this may be, as we have pointed out to Mr Margai before, in particular, the case of ALEX HEROE v ABERDEEN RENDEVOUS, it is not necessarily the duty of the Respondent in an Application of this nature, to convince us that a stay of execution ought not to be granted. It is for the Applicant to convince us that we should grant it. But where the Respondent has gone the extra mile to provide us with what he believes is evidence in proof of his financial strength, we cannot disregard it. It is our duty to consider it and to determine whether the conclusion we should draw, is that the Respondent is indeed a man of substantial or, of insubstantial means.
7. The Appellant contends that if the sum of Le295m plus is paid over to the Respondent, he will not be in a position to refund it should the appeal succeed. The evidence provided by the Respondent of his financial means shows that the fears expressed by the Appellant may not be far-fetched. It is our view, that there are far better, and more effective ways of showing that an individual has, or has available to him, substantial financial funds, than a proforma invoice for vehicles imported last year,



and early this year, the true purchase price of each of which, we are unaware. Also, we do not know whether they were imported by the Respondent for the purposes of his business, or, at the instance of third parties who had provided the funds for such importation. A well-grounded and proven fear that a Respondent might not be in a position to refund a judgment debt were an appeal to succeed, is a special circumstance. The Appellant is a statutory body. Whatever may be the case, it will always be in existence for the foreseeable future.

#### THE APPLICABLE PRINCIPLES

8. The Cases have set out what constitutes special circumstances. They have also decided that each case has to be decided on its own special facts. A likelihood that the Respondent might not be in a position to refund the judgment debt paid, is one such circumstance. Another, in our considered opinion, is whether the Appellant has good and arguable grounds of appeal. For, however appealing the special circumstances may otherwise be, if the grounds of appeal do not appear to us be good and arguable, we certainly would not grant a stay of execution.

#### INTERLOCUTORY OR FINAL JUDGMENT

9. We have taken time to consider our decision for this particular reason. Mr Margai, during the course of argument, contended that the Judgment dated 1<sup>st</sup> February, 2013 was Interlocutory because the Learned Trial Judge had adjudged and Ordered that she would wish to hear from Counsel on the question of special damages, as these damages had not been proved at the end of the day. He has cited to us, case law authority in support of his argument. He argued that as that Judgment was Interlocutory, the Appellant should have first sought Leave to appeal, and after obtaining the same, file a Notice of Appeal. Whether the Judgment of 1<sup>st</sup> February, 2013 was Final or Interlocutory, is a point which we think, ought to be argued on appeal. The Learned Trial Judge clearly held that the Plaintiff had not proved special damages; in effect, she was saying the Plaintiff had failed to prove this part of his claim, which meant, that particular claim should have been dismissed. But she went on to invite Counsel to address her on this point; she did not invite further evidence. We know of no case which has been decided on the basis of Counsel's



addresses. We know that cases, and for instance, assessment of damages proceedings, are decided on the basis of the evidence led at the trial, not on the addresses of Counsel. During the course of argument, Mr Shears-Moses also remarked in passing that the Appellant was not actually represented at the hearing on 26<sup>th</sup> March, 2013; his junior, Ms Omo-Lisk had another matter in the same Court, and perchance was present when the case was mentioned. This could mean that the hearing was itself *ex parte*.

10. Further, we have looked at the drawn up Order of 26<sup>th</sup> March, 2013 prepared by the Respondent's Solicitors. It is not quite accurate in part, and in part, is quite revealing. It begins as follows: *UPON HEARING R B Kowa esq pursuant to the 3<sup>d</sup> Order of the Judgment dated the 1<sup>st</sup> February, 2013 for proof of evidence in respect of special damages.....* That is incorrect. The Learned Trial Judge did not request *proof of evidence*. The drawn up Order of 1<sup>st</sup> February, 2013 exhibited as A, to Mr Shears-Moses' 2<sup>nd</sup> affidavit states that the 3<sup>rd</sup> Order was that "*Both Counsel to address on the issue of special damages as this has not been strictly proved.*" Her request was that Counsel address her on this issue.
11. The revealing portion is the rest of the same sentence: "*...and upon Hearing the Plaintiff's evidence in the presence of Counsel for the Defendant Omo-Lisk Esq (sic - for Omo Lisk is we believe a lady lawyer).....*" The wording, selected by Respondent's Counsel, may suggest that Ms Omo-Lisk was merely present, as contended by Mr Shears-Moses, and never really participated as Counsel in the proceedings that day. If this was indeed the case, several issues will arise which would also, of necessity, affect the award of special damages made by the Court that day.

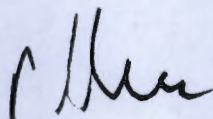
#### WHETHER THERE IS AN APPEAL OR NOT

12. Mr Margai has added further that there is no appeal against the 2<sup>nd</sup> Judgment. But on 24<sup>th</sup> May, 2013 the Appellant's Solicitors did file additional grounds of appeal, contending that the 2<sup>nd</sup> Judgment had no basis in Law, and that the award of special damages was wrong as ~~there~~ <sup>no</sup> was proof to support the same. Whether or not a separate appeal should have been filed, is a point which could be taken up at a later stage by the Respondent. For present purposes, we are satisfied that the Appellant is

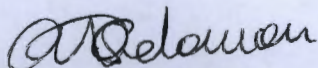


contending in this Court, that the Judgment of 26<sup>th</sup> March, 2013 was wrong in principle.

13. We are of the view that good and arguable grounds of appeal exist in this case, and that it would be foolhardy on our part to hold that they do not constitute special circumstances. We are also of the view that the fears expressed by the Appellant that if the award of special damages is settled, the Respondent will not be in a position to refund the same, are palpable, and not merely fanciful. Such a prospect constitutes special circumstances.
14. In the premises, we Grant the Appellant a Stay of Execution of the Judgments of the High Court dated 1<sup>st</sup> February, and 26<sup>th</sup> March, 2013, respectively until the hearing and determination of the appeal herein. The Costs of this Application shall be Costs in the Appeal.



THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL



THE HONOURABLE MS JUSTICE V SOLOMON, JUSTICE OF APPEAL



THE HONOURABLE MRS JUSTICE N MATTURI-JONES, JUSTICE OF APPEAL