Civ App 18/2016

IN THE COURT OF APPEAL OF SIERRA LEONE

DAWNUS (SL) LIMITED - APPELLANT/APPLICANT

AND

TIMIS MINING -
RESPONDENT/RESPONDENT

CORAM;

Hon. JUSTICE REGINALD SYDNEY FYNN JA
Hon. JUSTICE ALUSINE SESAY JA
Hon. JUSTICE ALLAN BAAMI HALLOWAY JA

Counsel;

I Sorie Esq for the Applicant
M P Fofannah Esq for the Respondent

SEPARATE CONCURRING OPINION dated 2017

FYNN JA

I HAVE READ the draft of the majority opinion. And whilst I concur with the conclusion my consideration of the issues raised in this application has been along a different path and I would have had much difficulty to accede to this application for the reasons which follow:

1. The present application is by a Notice of Motion dated 30th May 2016. On the face of the motion the applicant had intended it to come up on 2nd June 2016. The application emanates from a case which is substantively before the Fast Track Commercial Court (FTCC). Any case before that court and indeed any process relating to a matter which is before that court must necessarily be treated with greater dispatch than is normal. This consideration it needs be

stated at the outset will underline and guide my opinions and conclusions in this ruling.

2. The application primarily seeks an order extending or renewing the time periods set out in the Interim Stay of Proceedings granted by this court (Fynn JA sitting alone) on 18th April 2016. The said Interim stay was to last for 30 days and no more.
3. By the date of hearing arguments in this application, the records for appeal were still unsettled and the applicant argued that they had done all that they were to do and that the delay in settling the records of the appeal had not been due to any fault on their part. How the issue of fault on the applicant's part arises regarding the expiration of the stay is not unfathomable at all even though the lifespan of the stay did not directly depend on them or their actions. The applicant was given time within which to facilitate the settling of the records for appeal and to request for a panel to hear the appeal. This was in a separate order from that which set the lifespan of the stay. I will now reproduce that order:

> *"ii. that this appeal shall be expedited and that the applicant herein shall facilitate the settling of the records and shall in no more than twenty-one (21) days of this ruling request a panel for the hearing of the same"*

4. The applicant had twenty-one (21) days within which to facilitate the settling of the records for appeal. He was unable to achieve this. The question of whether the applicant was at fault for the records not having been settled should not be confused with the order which provided for the life span of the stay. The latter is in no way dependent on the actions of the parties.
5. There's no denying that it would have been useful if the applicant's facilitation efforts had been successful and the records had been ready and a panel set for the hearing of the appeal. Such success would have rendered the current application needless. The Interim Stay however had a life span which survived the period granted for the settling of the records – the former was to last for thirty (30) days or up to the date the appeal came up for hearing.
6. The order made provision for two eventualities. The first was for the Interim stay to last for 30 (thirty days) but then this was only the outer limit. An earlier expiration date depended on the appeal coming up for hearing before the thirty

days limit. Sadly the appeal did not come up for hearing and the full period of thirty (30) days ran its course. That order in its entirety provided as follows:

> *"iii. that the orders granted herein shall be deemed vacated on the expiration of thirty (30) days hereafter or upon the appeal coming up before a full panel of this court whichever is sooner"*

7. The time limits given in the orders of 18th April 2016 are not solely meant to provide time within which the applicant can file his appeal and have same brought before a panel, they are also meant to protect the integrity of the fast track process. The timelines are there to ensure that speed which is one of the hallmarks of the fast track process is not sacrificed by administrative or logistical challenges nor counsel's avowed punctiliousness (which on a closer look is found to be far from).
8. Counsel for the applicant argues that he has done all that the orders of 18th April 2016 required of him. He submits that he has written a letter asking for a panel to hear the appeal. He also submits that he has already completed and filed the synopsis of his appellate arguments. Counsel's letter requesting a panel is Exhibit **"H"** of the supplemental affidavit in support of this application. Counsel contends that there was nothing more that he could have done to "facilitate" the settling of the record.
9. There is more to be done in settling the record. The applicant's own Exhibit "**B**" to the affidavit in support of 30th May 2016 which is a letter from the Registrar of the Court of Appeal reminds the appellant of certain payments that an appellant should attend to before the records would be deemed settled and an appeal ripe for hearing. These payments are all found in the Court of Appeal Rules of 1985, particularly Rule 13(4) and Rule 14.
10. The applicant does exhibit his compliance with part of the payments required by the rules. Exhibit "**C**" is a receipt for Le 1, 025,000 paid in respect of same but it leaves the significant matter of the "deposit to abide the costs of the appeal" unattended. In his submissions the applicant did submit that he has in fact attended to "the deposit to abide the costs of the action" but alas the court does not have before it any evidence that this is so as is the case for Exhibit "**C**". No bond has been exhibited. Why was the applicant writing to ask for a panel on 26th April 2016 (Exhibit "**H**") when he knew fully well that he had only complied with

Rules 13 and 14, which he only complied with in part on 5th May 2016 (exhibit **C**)?.

11. Besides the applicant's failure to fully comply with Exhibit "**B**" the court cannot be oblivious to the fact that the time limits which this application seeks to enlarge lapsed some six (6) months ago. When we withdrew to consider a ruling, there was no evidence before us that the applicant had fully complied with Rules 13 and 14 of the Court of Appeal Rules which the Registrar of this Court had indicated ought to be complied with before 3rd May 2016. This is an inordinately long period of time and inexplicably so.
12. Counsel for the applicant has stressed that they are eager to proceed with the appeal and that their eagerness is evidenced by the fact that they have already filed the synopsis of the submissions they intend to rely on at the hearing of the appeal. Apart from the fact that none of the brethren on this panel had received the said filing or any evidence of it (and it must be noted that the appeal is not before this panel) such a filing can truly be of little help when the records which they ought properly to refer to are yet to be settled. One can only imagine how such synopsis may be used without settled records or how halted the process will be to use them when the records finally become available. Any time which was intended to be saved by the eager filing of this synopsis (which has not been received) would certainly be lost as amendment after amendment will be made to ensure that it reads in tandem with the still unsettled records when they in fact become available.
13. From the foregoing one can conclude that even if the life of the stay granted depended on the applicant's conduct it would appear that the applicant could have done more than what they actually did to "facilitate" the settling of the court record. However, it is important to stress, that "facilitating" the settling of the court records must not involve any unapproved, illegal or corrupt conduct on the part of any party.
14. Considering that the appeal here is but an interlocutory appeal from the FTCC and considering also that one of the orders of 18th April 2016 was for the "appeal to be expedited" it would appear from the time which has elapsed since, that the expressions "fast track" and "expedited hearing" have lost all meaning whatsoever. If they had any how can the parties be arguing the extension of the time within which to settle the record some six (6) months after the time limited for same.

15. It cannot be over emphasized that this matter is substantively before the FTCC and it is important to remind the parties that;

> *"The Commercial and Admiralty Court* ***will apply strict time schedules*** *for pre-trial settlements and trial hearings. Adjournments will be discouraged and where for good cause shown a hearing has to be adjourned it shall not exceed seventy-two hours"*

16. The FTCC Manual recently referred to sets a tone of accelerated processes and it captures one of the "overriding objectives" set in the English Rules of 2000 which though merely persuasive in our jurisdiction makes the point aptly that the purpose of the rules and timelines is: *"the cure of the time honoured twin scourges of civil justice: they are delay and costs".*

17. Those rules further set as their purpose:

> *".....ensuring that cases are dealt with expeditiously greater emphasis than previously is placed on keeping procedural time limits. The clearest reflection of this is the unqualified power which the court has to strike out a statement of case where there has been a failure to comply with a rule practice direction or court orders"*

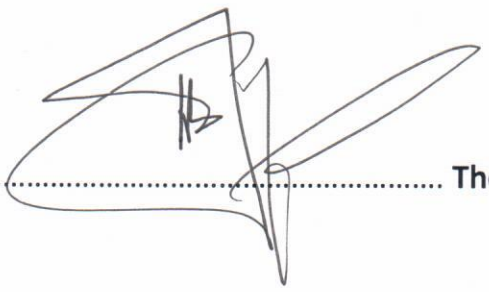
18. When the court gave its orders of 18th April 2016 these concerns about delay were already being actively considered so much so that though the discretion to grant a stay of the proceedings below were exercised in favour of the applicant the court did so *"being mindful of the dangers of delay and possible stagnation whilst a stay of proceedings is in force.."* The time limits were in fact given to avoid this delay.

19. It should be noted that in circumstances where a party seeks to enlarge an order as it has in this application it is possible for the court in its discretion to repeat its orders usually with the addition of a condition requesting the asking party to pay some money into court. This may have been the first option if this application were being heard on 2nd June 2016 as stated on the face of the motion papers. Lord Jessel M.R. did suggest in **Eaton v Storer (1882) 22 Ch.D 91** that excessive delay may induce a court in its discretion to refuse to extend time when asked.

20. I am of the opinion that a fast-paced and zero tolerance to delay posturing should govern not only the FTCC but also all courts dealing with processes and applications which touch and concern matters which may continue to be substantively before that court. This attitude cannot admit the present

application which seeks six (6) months after the time fixed for the doing of an act for that time to be enlarged or renewed.

21. With respect to the argument that lifting the stay would result in processes between the same parties over the same subject proceeding below and in the court of appeal I take the view that the risk of parallel process is a lesser evil when compared to the complete inertia which a stay of proceedings below in the absence of settled records before us would have resulted in.
22. Court orders must be treated seriously. If they are treated with levity the whole judicial structure is put at risk of becoming inefficacious. Parties may then be forced to look elsewhere for solutions to their legal problems. Society will then begin to crumble at its fringes. This court will not contribute to such deterioration. On the contrary it will seek to send a signal halting any such.
23. I find that the time limits set out in the orders of 18th April 2016 were sufficient for the records of the court below to be settled especially with counsel facilitating same. Even if those time limits were insufficient the parties have used up without recourse to the court a further six (6) months in the least within which these records – records of an interlocutory appeal could have been settled and placed before a panel. Regrettably this had not been achieved.
24. I am concerned that permitting an application in these circumstances will not merely subvert the "fast track" concept but will certainly make utter nonsense of it. However and considering that the records of the appeal are now ready for hearing I join my brethren in extending the stay granted by this court on 18th April 2016 the same to last pending the hearing and determination of the appeal. The Respondent will have the costs of this application.



..... **The Hon. Mr. Justice Reginald Sydney Fynn JA**