

CIV. APP 1/2014

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN: -

FIRST INTERNATIONAL BANK (SL) LTD - APPELLANT

AND

SIGMA ENGINEERING AND CONSTRUCTION

SERVICES LTD - RESPONDENT

AND

INTERNATIONAL PROCUREMENT AND

CONSTRUCTION SERVICES - THIRD PARTY

CORAM

HON MRS JUSTICE N. F. MATTURI-JONES , JSC

HON MRS JUSTICE A. SHOWERS, JSC

HON MR JUSTICE M. F. DEEN-TARAWALLY, JA

ADVOCATES

Miss M. Dumbuya for the Appellant

J. B. Jenkins-Johnston Esq.(now deceased) for the Respondent



**JUDGMENT DELIVERED THE 2<sup>ND</sup> DAY OF MARCH, 2017.**

**SHOWERS, JSC**

The Appellant herein has appealed against the judgment of Edwards J (as he then was) dated 16<sup>th</sup> April 2013 refusing the Appellant leave to defend the action instituted in the High Court by the Respondent against the Appellant. Judgment was accordingly granted the Respondent for the recovery of the sum claimed, interest thereon and costs.

The facts of the case are briefly that by a contract dated the 17<sup>th</sup> August 2010 made between the Appellant Bank therein called "the Employee" and the Respondent Company therein called "the Contractor", the Appellant employed the Respondent's services to complete the construction of the Makeni Government Hospital Phase 1 and complete the additional facilities for the Makeni and Moyamba Government Hospitals Phase 2, therein called "the Works". It was agreed that the Employer shall make payments to the Contractor as and when agreed and when a certificate has been presented for such payment by the Consultant who were TEDA of 63 Wellington Street Freetown employed by the Appellant. The Appellant made an advance payment of Le280, 730, 025 upon the Consultant presenting a certificate for the said payment.

On the 26<sup>th</sup> November 2010 the consultant presented a payment certificate to the Appellant for the sum of Le378, 872, 586. The Appellant refused to pay the said amount despite several demands made by the Respondent through its solicitors.

The Respondent commenced this action in the High Court by writ of Summons dated 18<sup>th</sup> December 2012. See pages 1-4 of the Records. The Appellant entered appearance dated 18<sup>th</sup> January 2013 pages 8-9 of the Records and issued a third party notice dated 28<sup>th</sup> February 2013, pages 35-36 of Records against the International Procurement and Construction Services (IPCS) on the ground that the contract between the Appellant and the Respondent herein was secondary to a contract between the Government of Sierra Leone and the third party, IPCS for which the Appellant granted IPCS overdraft facilities to undertake and complete the construction of the Makeni Government Hospital Phase 1 and additional facilities for the Makeni and Moyamba Government Hospitals Phase 2. The Third Party defaulted on its obligations under the said ~~contract with the Government of Sierra Leone and consequently works on the~~ said projects at the Makeni and Moyamba Government Hospitals came to a halt.

The Respondent filed a judges summons dated 31<sup>st</sup> January 2013, pages 10-32 of the Records praying that judgment be entered in its favour against the Appellant for the amounts claimed in its writ of summons in the sum of Le378, 872. 586 owed it as payment for the construction of the Makeni Government Hospital phase 1 and the completion of additional facilities for the Makeni and Moyamba Government Hospitals phase 2; interest on the said sum at the rate of 25% per annum from the 26<sup>th</sup> November 2010 to the date of judgment.

The said judges summon was supported by an affidavit sworn to by **GEORGE PAJU HAMILTON**, Managing Director of the Respondent Company. He deposed to the facts leading to the institution of the action and to the fact that the Appellant, the Defendant therein has no defence to the action.



On 1<sup>st</sup> March 2013 the Appellant heretofore filed its Defence and Counterclaim- pages 37-39 and also filed an affidavit in opposition to the judges summons filed on behalf of the Respondent. The affidavit in opposition - pages 40-53 was sworn to on 1<sup>st</sup> March 2013 by **CHIKA CHIKEZIE**, banker at the Appellant's bank. He deposed that the contract dated 17<sup>th</sup> August 2010 was secondary to an agreement between the Government of Sierra Leone and IPCS, the Third Party herein for the construction work concerned. That the said Third Party was a customer of the Appellant Bank and was granted overdraft facilities by the said Bank to facilitate the said construction work. That the actual construction work was subcontracted to the Respondent by the Third Party. That by the 16<sup>th</sup> August 2010 the said construction work remained incomplete. That the Appellant Bank with a view to eventually recovering the loan granted to the Third Party when the said work was complete entered a Tripartite arrangement with the Respondent and the Third Party whereby the Appellant would provide the sum of Le600 million for the completion of the said construction work on the guarantee by the Third Party that all fees to be paid by the Government of Sierra Leone for work done at the said Government hospitals would be paid into the Third Party's account at the Appellant bank.

That the Appellant bank did make an advance payment to the Respondent in the sum of Le278,872,586 and did receive an "Interim certificate" dated 26<sup>th</sup> November 2010. That the Appellant bank during the contract period expressed its dissatisfaction with the pace of the work being done by the Respondent. That the Respondent failed to complete the work within the time limited for doing so and that the said work remains incomplete to date of the affidavit. That the Third Party is currently indebted to the bank in the sum of Le3 billion as a consequence of the said overdraft facilities granted to it by the Appellant bank. That upon the instructions of the Appellant bank, its solicitors issued a Third Party notice against the Third Party herein and filed a Defence and Counterclaim on behalf of the Appellant bank dated 28<sup>th</sup> February 2013 and 1<sup>st</sup> March 2013 respectively. That the deponent is informed by their solicitors that the Appellant has a good defence to the action.

All the relevant documents referred to therein were exhibited to the said affidavit in opposition Appearance was entered to the said Third Party notice on 4<sup>th</sup> March 2013.

An affidavit in reply to the affidavit in opposition was sworn to on 5<sup>th</sup> March 2013 by **GEORGE PAJU HAMILTON**, Managing Director of the Respondent Company. He deposed that contrary to the averment made by **CHIKA CHIKEZIE** in his affidavit in opposition, the agreement dated 17<sup>th</sup> August 2010, the subject matter of the action was made solely between the Appellant Bank and the

Respondent Company and that there were no third parties involved. That the contract speaks for itself and IPCS Ltd was not a party to the said contract. That whatever problems the Appellant bank has with the Third Party has nothing to do with the Respondent Company as it has done what it was required to do. The Respondent Company therefore demands the monies due it as certified by the consultant "TEDA" of 63 Wellington Street Freetown as provided for at clause 4.2 of the Agreement. That the Interim Certificate dated 26<sup>th</sup> November 2010 was issued by TEDA as required by the Agreement and it states that it is in respect of works executed and that the sum of Le378, 872, 586 is due for payment by the Appellant bank. That the Appellant bank having procured its services and utilized same is now seeking to evade its contractual liability to the Respondent thereby causing it financial loss.

The judges summons came up for hearing on Wednesday, 13<sup>th</sup> February 2013 and divers dates thereafter (pages 98-104 of Records). Judgment was delivered in favour of the Respondent (pages 105-108 of Records). The Appellant being dissatisfied with the said judgment has appealed to the Court of Appeal on the grounds set out in the Notice of Appeal (pages 128-129 of the Records).

The grounds of appeal are as follows

- a) That the learned Judge erred in law when he held that parole evidence to vary or add to the terms of the contract dated 17<sup>th</sup> August 2010 between the Plaintiff and that Defendant was inadmissible in reaching the conclusion that the Defendant had raised no triable issues and granting the Plaintiff leave to enter summary judgment against the Defendant.
- b) That the learned Judge failed to adequately consider the Third Party Proceedings commenced in this matter.
- c) That the learned Judge failed to avert his mind to Articles 1 and 2 and clauses 1, 2, and 6.2 of the contract dated 17<sup>th</sup> August 2010 between the Plaintiff and the Defendant taking into consideration the uncontroverted evidence that the construction of the Makeni Government Hospital phase 1 and Moyamba Government Hospital remains incomplete in holding that the Defendant had raised no triable issues and granting the Plaintiff leave to enter summary judgment against the Defendant.
- d) That the learned Judge failed to adequately consider the Defendant's Counterclaim.

- e) That the learned Judge erred in law when he ordered that the Defendant pay to the Plaintiff interest on the sum of Le378,872,586 at the rate of 25% per annum, no evidence having been provided in support of the assessment of the said rate of interest.
- f) That the judgment was against the weight of the evidence.

The Appellant prayed that the judgment dated 16<sup>th</sup> April 2013 be set aside and that the court orders that this matter proceeds to trial.

The facts of this matter have been set out as gleaned from the affidavits filed by both parties herein.

#### **GROUND (a)**

The Appellant's case is that the agreement dated 17<sup>th</sup> August 2010 made between the Appellant bank and the Respondent is secondary to a contract made between the Government of Sierra Leone and IPCS and that notwithstanding the contents of the contract, extrinsic evidence ought to be adduced to understand the true nature of the contract and to establish that there is another collateral agreement to be considered.

Counsel for the Appellant submitted that notwithstanding the terms of the contract, the Appellant presented to the High Court parole and extrinsic evidence in the defence and counterclaim as well as the affidavit in opposition filed in the application for summary judgment – pages 40-41, 51-53 of the records.



Counsel also referred to the contract, clause 1.1 which made mention of the "original contract document" page 73 of the Records and where reference was made to the contractor's obligation, materials and workmanship, of the quality and standards specified in the original contract document. She stressed that this reference to another contract document not in the contract brings up the issue of the existence of a third party in the contract. She maintained that the averments in paragraph 3-13 of the affidavit in opposition disclose that there was third party involved and in that vein extrinsic evidence ought to be adduced.

Counsel for the Appellant submitted further that the issue here falls under the exceptions to the general rule that the terms of a written contract govern the operation of the contract and as such extrinsic evidence is not admissible to add to or vary or subtract from the contract. She stated that the exceptions to the rule which are applicable in this case are evidence as to the true nature of the agreement; evidence as to the supplementary or collateral terms; evidence to explain the written usage. Counsel relied on **Chitty on Contracts** 23<sup>rd</sup> ed. for this submission.

She submitted that the said reference to the original contract document must clearly be a reference that is not within the four corners of the agreement the subject matter of this action and therefore falls within the exception of the parole or extrinsic evidence. She contended that the intention of the parties in the contract at page 73 of the records is that the agreement between them was to be in writing but could be found in separate documents.

The quality and standards of the works are specified in the "original contract document", she stressed.

She further maintained that the averments contained in the Defence and counterclaim pages 37-39 of the records as well as the affidavit in opposition pages 40-41 of the records and the exhibits attached to the said affidavit in opposition in totality contain evidence of parole evidence which should be admissible and are triable issues that require a full trial.

Counsel for the Respondent in reply to the above submissions argued that the contract between the parties was made between the Appellant bank and the Respondent company and that there is nothing in the said contract to indicate that the contract is secondary, supplementary or dependent on any other contract between the parties. He maintained that the document is unambiguous and the nature of the agreement is clear. He further submitted that this agreement does not fall within the parole evidence rule and that none of the exceptions which counsel for the Appellant relies on apply. He relied on the case of **Jacobs vs. Batavia & General Plantations Trust Ltd** [1924] 1 Ch 287 and **Chitty on Contracts**, 22<sup>nd</sup> ed page 254 paragraph 585.

Let me at this point state that there is indeed reference made in the agreement under "Intention of the parties" Contractor's obligations in clause 1.1 to the original contract document (see page 73 of records). Counsel for the Appellant has referred to this original contract and submitted that the agreement between the parties herein is collateral to that original contract.

Counsel for the Respondent disagreed and contended that the said collateral contract, if any, is a separate and distinct contract executed between two different parties and has no bearing on the contract which is in issue in this appeal. He maintained that assuming without conceding that this collateral contract was supplementary to the contract in issue, there was no *animus contrahendi* on the part of the Respondent to be bound by the said agreement especially as regards payment/consideration for the contract in issue. Counsel relied on the case of **Herbert Symons & Co. vs. Buckleton** [1913] A. C. 30. He stressed that neither the Appellant nor the Respondent is a party to the contract and the Appellant failed to provide any evidence of the terms of the said contract or to show that the Respondent agreed to be bound by the terms of this collateral contract. Further he argued that even if this contract exists and its terms are as the Appellant has said that the Respondent stands to obtain no consideration/benefit from the said contract whereas the Appellant does and that it is therefore trying to cut its losses by refusing to honour its obligations under the contract with the Respondent.

I believe from these submissions made by counsel for the Respondent he has conceded that there was a collateral agreement to the agreement in issue and therefore the exception to the parole evidence comes into play. It seems to me that there is a need for evidence to be adduced as to the true nature of the agreement, evidence as to the supplementary or collateral terms as well as evidence to explain the agreement between the parties herein.

Furthermore the Defence and counterclaim filed by the Appellant disclose that there are triable issues (See pages 37-39 of records) which ought to be considered in a full trial.

#### **GROUND (b)**

The Appellant complained that the learned trial Judge failed to adequately consider the Third Party Proceedings commenced in this matter. Counsel for the Appellant submitted that throughout the entire ruling of the court (pages 105-108 of the records) the Learned trial Judge failed to adequately address the issue of the Third Party Proceedings and that although he acknowledged the existence of the Third Party Proceedings at page 105, the learned trial Judge merely stated that the Third Party was not a party to the agreement the subject matter of the dispute. Counsel relied on Order 19 rule 3(4) of the High Court Rules 2007 and in her synopsis proceeded to quote the said rule. I have to point out that the wrong rule number was quoted and the rule that was actually quoted was rule 6(1) of Order 19 which is more relevant to the point made by counsel.

Order 19 rule 6(1) of our High Court Rules does provide as follows

*“Where in any action a defendant has served a third party notice the court may at or after the trial of the action or if the action is decided otherwise than by trial, on an application by summons or motion order such judgment as the nature of the case may require to be entered for the defendant against the third party or for the third party against the defendant.”*

Counsel for the Appellant submitted that the learned Judge did not deal with the Third Party application as is required by the said rule whilst dealing with the application before him made by Judges Summons for summary trial.

In my judgment the learned Judge ought to have considered the third party notice and dealt adequately with the Appellant’s claim set out therein as provided for by the rules. This he failed to do and made no pronouncement in respect of the said claim.

**GROUND (c)**

~~The~~ <sup>The</sup> Appellant complained that the learned Judge failed to avert his mind to Articles 1 and 2 and clauses 1, 2, and 6.2 of the contract between the Appellant and the Respondent taking into consideration the uncontroverted evidence that

the construction work remains incomplete in holding that the Appellant had raised no triable issues and granting the Respondent leave to enter summary judgment against Appellant.

Counsel for the Appellant again raised the issue of the reference in the agreement to original contract documents not before the court which by itself raise triable issues. The main thrust of this ground of appeal is that the construction works remain incomplete. Counsel for the Appellant referred to Article 2 of the agreement which she submits defines the quantum and life span of the construction works which is six months. (See page 15 of records) She referred the court to correspondence exchanged between the parties. See pages 45 – 48 of the records. It is clear from those correspondence that there was discussion about the pace of work and completion of the works.

Counsel for the Respondent argued that the Appellant on the one hand claimed that it failed to pay the Respondent because of lack of funds as was expressed in their letter of 8<sup>th</sup> December 2010 (page 82 of the records). But that on the other hand it also claimed that the certificate of payment was not honoured because the Respondent failed to complete the works. He went on to submit that the Appellant has not furnished this court and the court below with any correspondence to show that at any time before this action was commenced in 2012 it wrote to complain about the incomplete state of the works or to ask the Consultant (TEDA) to do a certificate of non-completion.

I am of the view that these are all triable issues which ought to necessitate a full trial of the action. From the evidence, it is not merely a case of the Respondent performing its obligations under the contract and the Appellant failing to perform its own obligations. Several issues have been raised relating to the agreement itself, issues pertaining to payment and the non-completion of the works for which a full trial is necessary.

I believe the conditions under which leave to enter summary judgment in this jurisdiction have been fully considered in the leading case of **Aminata Conteh vs. APC**, 2005 unreported decision of the Supreme Court.

In that case Mrs. Justice V. A.D. Wright, JSC in dealing with the Order in the Rules of Court giving the court power to grant leave to enter summary judgment stated as follows:

*“The object of the order is to ensure a speedy conclusion of the matters or cases where the plaintiff can establish clearly that the defendant has no defence or triable issues. This draconian power of the court in preventing the defendant putting his case before the court must be used judiciously. A judge must be satisfied that there are no triable issues before exercising his discretion to grant leave to enter a summary judgment. The judge is also obliged to examine the defence in detail to ensure that there are no triable issues.”*

In this case it is my view that the Defence and counterclaim filed by the Appellant does raise triable issues in addition to the third party notice filed. The matter ought to have gone to trial so that the issues raised would have had full adjudication. Having said that, there has therefore been no need to consider the other grounds of appeal.

For all the reasons given above, the appeal is upheld and the judgment dated 16<sup>th</sup> April 2013 is hereby set aside. It is hereby ordered that the matter herein be remitted to the High Court for the matter to proceed to trial. The matter to be listed for hearing within 30 days of the date of this judgment. No order as to costs.

*A. Showers*

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HON, MRS JUSTICE A. SHOWERS, JSC.

*N. F. Matturi-Jones*

I AGREE -----

HON. MRS. JUSTICE N. F. MATTURI-JONES, JSC

*M. F. Deen-Tarawally*

I AGREE -----

HON. MR. JSUTICE M. F. DEEN-TARAWALLY, JA.

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