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IN THE COURT OF APPEAL OF SIERRA LEONE

CIVIL DIVISION

CIV. APP. 75/17

VITAFOAM (SL) LTD	APPELLANT/APPLICANT
AND	
LEONE CONSTRUCTION & GENERAL ENGINEERIN SERVICES	RESPONDENT /RESPONDENT

REPRESENTATION:

G.K.THOLLEY & CO.	COUNSEL FOR THE APPLICANT
YADA WIILIAMS & ASS.	COUNSEL FOR THE RESPONDENT

CORAM:

HON. MR. JUSTICE R.S. FYNN	JA (PRESIDING)
HON. MR. JUSTICE D.B. EDWARDS	JA
HON. MR. JUSTICE SENGU KOROMA	JA

RULING DELIVERED ON THE 22ND FEBRUARY, 2018 BY HON. MR. JUSTICE SENGU M. KOROMA JA.

1. This is an application by Notice of Motion dated the 9th day of October, 2017 for the following Orders:-

i. That this Honourable Court grants an Order staying the proceedings at the Fast Track Commercial Court in the matter intituted FTCC 004/17 2017 V. No. 7 pending the hearing and determination of this application

ii. That this Honourable Court grants an Order staying the execution of the Orders of the Fast Track Commercial Court dated the 26th day of July, 2017 and 28th day of July, 2017 respectively pending the hearing and determination of this application

iii. That this Honourable Court grants an Order staying the proceedings at the Fast Track Commercial Court in the matter instituted "FTCC 004/17 2017 V. No. 7" pending the hearing and determination of the appeal herein

iv. That this Honourable Court grants an Order staying the execution of the Orders of the Fast Track Commercial Court in the matter aforesaid dated the 26th day of July, 2017 and 28th day of July 2017 respectively pending the hearing and determination of the appeal herein.

v. Any other or further Order(s) as this Honourable Court may deem fit and just in the circumstances

vi. That the costs of and occasioned by the Application be costs in the cause

2. The application was supported by the affidavit of Sahr Bernard Mondeh sworn to on 9th day of October, 2017 and a supplemental affidavit sworn to on the 24th October, 2017 together with the exhibits attached thereto.

BACKGROUND

3. The Appellant/Applicant (hereinafter referred to as 'the Applicant') commenced this action at the Fast Track Commercial Court by way of Originating Notice of Motion dated the 25th day of April, 2017 against the Respondent/Respondent (hereinafter referred to as "the Respondent") herein praying inter alia, that the Award/Decision/Order of the Arbitration Panel of the Sierra Leone Institute of Architects in favour of the Respondent dated the 27th day of March, 2017 be set aside.

4. The Application to set aside the Award/Decision/Order of the Arbitration Panel was refused by Samba J. on the 25th day of July, 2017 and on the 26th July, 2017 granted an application for the said Award to be enforced against the Applicant herein in the same manner as a Judgment or Order of the High Court. The Learned Judge also gave an Order attaching all debt due and accruing from the Garnishees listed in the Notice of Motion dated the 24th July, 2017 in answer to the Arbitral award granted on the 27th March, 2017 and the Order of Court dated 20thJuly, 2017

5. The Applicant filed a Notice of Appeal in the Court of Appeal against the Orders of Samba J. dated 20th of July, 2017 and a Notice of Motion in the Fast Track Commercial Court (FTCC) dated the 31st July, 2017 praying for a Stay of Execution of the Rulings of the Samba J. dated 26th day of July, 2017 and 28th day of July, 2017 respectively. This application was refused on the 29th September, 2017 by Wright J.

THE PRESENT APPLICATION

6. The present application was moved by Ms Oredola Martyn on behalf of the Applicant. She relied on the affidavit of Sahr Bernard Mondeh sworn to on the 9th October, 2017 together with the exhibits attached thereto.

7. In her submission, Ms. Martyn referred to Exhibit SBM 8^{A-D} - the Ruling of Wright J. refusing the Stay of Execution of the Orders of the Fast Track Commercial Court dated 26th and 28th July, 2017 respectively and submitted that it took a period of one month and a half to deliver the said Ruling while

Execution of the said Orders was ongoing. She also referred to Exhibits SBM 6 and 7; the Notice of Appeal which to her, raises serious grounds of Appeal because of the irregularities complained of therein.

8. Ms. Martyn further submitted that the Respondents were indebted to various Banks and so if any payment was made to them, it would be difficult to recover same in the event of the Appeal succeeding. It would therefore be prudent for the Judgment sum to be paid into the Judicial Sub-Treasury pending the determination of the Appeal.

9. She concluded by submitting that the Application was made pursuant to Rules 31 and 32 of the Court of Appeal Rules, 1985

10. In his response, Mr. Yada Williams, Counsel for the Respondents submitted that in an application for a Stay of Execution, the Applicant had the burden to prove:-

(i) That there were prima facie good grounds of Appeal; and

(ii) The existence of Special Circumstances.

11. He argued that the Applicant had not shown special circumstances. Paragraph 11 of the affidavit in support, which he relied on was sworn to by a Solicitor and not anybody in the Company to depose to the facts. In any event, the irregularities complained of in the said paragraph do not amount to special circumstances.

12. In support of the foregoing submission, Mr. Williams referred to Exhibit "M" attached to the supplemental affidavit in Opposition sworn to on 23rd October, 2017 which is a letter written by the Sierra Leone Institute of Engineers dated 15th March, 2017 inviting the Applicant to face the Arbitration Panel on Monday 20th March, 2017. Paragraphs 2 and 3 of the said letter stated that the Applicant's consultant had given his consent for the Arbitration to proceed. He also referred to Exhibit "C" attached to the affidavit in opposition to prove that the Applicant was represented at the Arbitral Proceedings. There was again Exhibit P attached to the affidavit of Idrissa Kabba sworn to on 23 rd October, 2017 which is a copy of the Judge's

Notes on the Cross-examination of Ola Ogunfeyitimi dated 18th June, 2017 which confirmed that the Applicant was informed of the Arbitral Proceedings.

13. On the indebtedness of the Respondent, Mr. Williams admitted that they were indeed indebted to the Union Trust Bank but asked whether that would help the Applicant's case

14. Mr. Williams drew the attention of the Court to Exhibit SNB6 A&B attached to the affidavit in support- Appeal against the Ruling of Samba J. dated 20th July, 2017 and Exhibit Q – Appeal against the Refusal by Wright J. to grant a stay and submitted that the Applicant was here pursuing a multiplicity of actions.

15. Mr. Williams submitted that the Appeal was frivolous and vexatious and must be struck out. He referred to Order 21 Rule 17 (1) (b) and (d) of the High Court Rules, 2007 and the decision of Tolla-Thompson JA. in the case of ALHAJI ABDUL WAHD V. FATMATA FLOYD & ORS. delivered on the 11th November, 2003. Mr. Williams reminded the Court that the Court of Appeal was bound by its previous decisions.

16. Mr. Williams concluded by praying the Court to dismiss the application with costs.

17. Mr. G.K. Thorley, who took over from Ms. Oredola Martyn in reply argued that if the Applicant was abusing the process of this Court; the Respondent should have taken a preliminary objection. He referred to Rule 31 of the Court of Appeal Rules, 1985 which he considered as instructive. This also answered the contention that Sahr Bernard Mondeh, a Solicitor, should not have sworn to paragraph 11 of the affidavit in support. He was not a member of the Company and so was not aware of the facts.

18. Mr. G.K. Thorley also referred to Order 46 Rule 11 of the High Court Rules, 2007 and Rule 31 of the Court of Appeal Rules, 1985 and submitted that it would be prudent for the Judgment sum to be paid into Court.

19. He referred to Exhibit 13 dated 23rd February, 2016 and submitted that peculiar circumstances of the case were so compelling as to amount to special circumstances.

20. This application was basically praying for:

a) Stay of Proceedings in the Fast Track Commercial Court 004/17 2017 V. No. 7 pending the hearing and determination of the appeal herein

b) Stay of Execution of the Orders of the Fast Track Commercial Court dated the 26th day of July, 2017 and 28th July, 2017 respectively pending hearing and determination of the appeal herein.

21. I shall first of all deal with the prayer for Stay of Proceedings. Definitionally, "Stay of Proceedings" simply put is a ruling by the Court in Court Proceedings halting further legal process in a trial. Rule 28 of the Court of Appeal Rules, 1985 which is ipsisima verba Order 59 Rule 13 of the English Supreme Court Rules, 1999 provides as follows:

"An appeal shall not operate as a stay of Execution or of proceedings under the Judgment or decision appealed from except so far as the Court below or the Court may order and no intermediate act or proceeding shall be invalidated, except so far as the Court below or the Court may direct."

22. Considering that "Stay of Execution" and Stay of Proceedings were two different processes, the Applicant was correct to pray for each of them separately. The question however is, was it necessary. To my mind, it was not. The Trial in the Fast Track Commercial Court had been completed and Judgment given. A subsequent application for a stay of Execution of the said Judgment was refused. It follows that there were no proceedings in the High Court to stay. In the circumstances, the prayer for a Stay of Proceedings in the Court below is hereby discountenanced.

23. The second, and most relevant issue here was the application for Stay of Execution of the Orders of the Fast Track Commercial Court dated 26th day of July, 2017 and 28th day of July respectively.

24. The Applicant by a Notice of Motion dated 31st July, 2017 applied to the Court below for amongst others, Stay of Execution of the Orders of the said Court dated the 26th day of July, 2017 and 28th day of July, 2017 respectively. This application was refused by Wright J. on the 29th day of September, 2017 on the main ground that the Applicant had not shown special circumstances. I have not considered the prayer in the Court below to set aside the Orders of that Court dated 24th day of July, 2017 simply because if the Applicant was dissatisfied with those Orders, he should have appealed to the Court of Appeal instead of applying to a Court of concurrent Jurisdiction. The learned Judge in the Court below, with respect, should not have entertained that aspect of the application as she clearly did not have the Jurisdiction to do so. It would have been different if the application was to vary the said Orders.

25. Having said that, I shall now consider whether this is a proper matter in which a stay should be granted. Counsel for the Respondent argued that the Applicant had not shown exceptional circumstances to warrant a stay. Furthermore, that the grounds of appeal support their position and the application was frivolous.

26. It would be important to dispose of the contention that the grounds of appeal were an abuse of process because if they were, there would be no need to determine whether the Applicant was entitled to a stay.

27. The principle is that the mere fact that the grounds of appeal are weak was not sufficient to bring the case within the category of abuse of process. As stated in Paragraph 59/3/7 of the English Supreme Court Practice, 1999:

"The Court of Appeal has inherent Jurisdiction to strike out a notice of appeal where the appeal is plainly incompetent or where the appeal is frivolous, vexatious, or an abuse of the process of the Court – BURGESS V. STRAFFORD HOTEL LIMITED (1990) 3 All E.R. 222, (Court of Appeal). An appeal can be struck out, in the exercise of that Jurisdiction, if **there is no possibility that the grounds are capable of argument** (Emphasis mine.) "

28. It should be added that in the **BURGESS CASE**, the Court of Appeal observed that the Jurisdiction to make Orders striking out Notices of Appeal is one that was just as capable of abuse as the power to put in hopeless Notices of Appeal... **"The power to strike out should be confined to clear and obvious cases"** (Emphasis mine)

29. The foregoing are the tests to be applied in an application to strike out an appeal on the ground of abuse of process

30. In applying the above tests to the instant case, I must first of all remind myself that I need not consider the merits of the appeal. As I stated in the case of FEMI HEBRON AND WHITE LION COMPANY LTD & BAMI BAKER CIV. APP 50/17 (Court of Appeal) delivered on the 27th September, 2017, " The grounds of appeal must be cogent and arguable." A perusal of the grounds of appeal herein to my mind would reveal that they are capable of argument. They could therefore not be put in the category of abuse of process. Such ignominy could only be "confined to clear and obvious cases of abuse".

31. Counsel for the Respondent also argued that the Applicant ought not to have filed multiplicity of appeals – Exhibits SBM 6A&B and Exhibit Q as this also amounted to abuse of process and frivolity. I, with respect, hold a contrary view. As a general rule, separate Notices of Appeal are not mandatory in respect of appeals made in the same proceedings at the same trial or hearing. Where, however, Orders are made in an action, but not at the same trial or hearing, separate notices of appeal will be required. This principle was laid down in the English case of HAWES –V- CHIEF CONSTABLE OF AVON AND SOMMERSET CONSTABULARY (1993) THE TIMES, MAY 20. (English Supreme Court practice 59/1/31A) I hold that the Applicant acted properly in filing two different notices of appeal, without prejudice to the Merits thereof. In the instant case, though the matter was the same, separate hearings were held before two different Judges.

32. Counsel for the Respondent further submitted that the Applicant has not shown Special Circumstances

33. In the FEMI HEBRON & ORS. Vs. WHITE LION COMPANY LTD & Anor. (ubi supra)matter and the case of FATME MOURTADA V- FADEL ABASS MOURTADA & DAYOUB TRADING (SL) LTD MISC. APP 13/17 delivered on the 26th October, 2017 (Court of Appeal), I reviewed the various authorities on Stay of Execution of Judgment and concluded by opining that "my research has revealed that whilst most of our decisions on applications for Stay of Execution mention special circumstances, most if not all have not clearly established the boundaries thereof. Whilst I agree that the category of special circumstances are not closed, it is my view that there must be a general standard, a benchmark in determining what it is." In paragraph 5 of the FATME MOURTADA V- FADEL ABASS MOURTADA case, I identified that general standard as "circumstances if not considered could lead to injustice."

34. Aside from the need to prove Special Circumstances, the Applicant must also prove there are prima facie good grounds of appeal. I have already stated that the said grounds were not frivolous and an abuse of process as they are arguable. This is the minimum test to be satisfied in an application of this nature. Stay of Execution have been granted in cases where refusal to do so would render the appeal nugatory.

35. Applying these principles to the facts, the Applicant in the affidavit in support relied on the following averment as 'Special Circumstances':

a) That there were procedural flaws in the Judgment/Ruling dated the 20th July, 2017 and the entire proceedings pursuant to which the successive Orders dated 26th and 28th July, 2017 were made... it would be inequitable and against public interest in the administration of Justice ...for the said Orders to stand.

b) That enforcement of the Judgment dated the 20th July, 2017 and subsequent Orders would destroy the subject-matter of the appeal thereby rendering any Order of this Court nugatory.

c) That enforcement of the said Orders would paralyse the operations of the Applicant's business.

It is my view that the issues raised by the Applicant, in the affidavit in support amount to special circumstances. Public interest dictates that when, questions of law and procedure are raised in any proceedings the Court is bound to take note of them as circumstances "beyond the ordinary" in that their determination in a higher Court would lay to rest all questions relating thereto in the present and other matters. In this sense, public interest is synonymous with the interest of Justice.

36. As I mentioned earlier, there are no clear limits as to what the Judge in the exercise of his discretion would regard as Special Circumstances. It must be determined on the peculiar facts of each case. As was put in LINOTYPE –HELL FINANCE LTED –V- BAKER (1992) 4 All ER 887 and endorsed in WINCHESTER CIGARETTE MACHINERY LTD –V- PAYNE (NO. 2) (1993) THE TIMES DECMBER 15, "indication in past cases should not fetter the scope of the Court's discretion." My understanding of this is that a Judge could broaden or limit the scope of Special Circumstances depending on the facts of the case as long as it would not amount to injustice noting that the exercise of discretionary power has its roots in equity.

DECISION

37. I have perused the Notice of Motion and the supporting and opposing affidavits and listened to Counsel. I believe that this is an appropriate case for this Court to invoke its discretionary power and grant a stay.

38. This is a money Judgment and so in granting a stay, I should be mindful of the fact that if the appeal fails, the Respondent must be paid without delay. This can be achieved by ensuring that the Applicant is prevented from depleting its assets in the meantime.

39. For this reason, I order as follows:

1. Stay of Execution of the Orders of the High Court dated the 20th day of July, 2017 and 28th day of July, 2017 respectively is hereby granted subject to the Applicant paying the sum of US$150,000.00 into the Judiciary Sub-Treasury on or before 30th March, 2018 pending the hearing and determination of the Appeal
2. That the Appeal be speedily heard
3. There shall be liberty to apply
4. Costs in the cause

..... HON. MR. JUSTICE SENGU M. KOROMA JA.

..... HON. MR. JUSTICE R. S. FYNN JA (PRESIDING)

..... HON. MR. JUSTICE D. B. EDWARDS JA