CIV APP 30/2010

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

MARIE STOPES SIERRA LEONE - APPELLANT

AND

GLORIA MAC-CONTEH - RESPONDENT

CORAM:
THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT
THE HONOURABLE MR JUSTICE V M SOLOMON
JUSTICE OF THE SUPREME COURT
THE HONOURABLE MRS JUSTICE A SHOWERS
JUSTICE OF SUPREME COURT (Acting) (now retired)

COUNSEL:
ADY MACAULEY ESQ for the Appellant
J B JENKINS-JOHNSTON ESQ (since deceased) for the Respondent

JUDGMENT DELIVERED THE 5th DAY OF FEBRUARY, 2019

BROWNE-MARKE, JSC

THE HIGH COURT JUDGMENT

1. This is an appeal brought by the Appellant, Marie Stopes, Sierra Leone, against the Judgment of C L TAYLOR, J delivered on 15th July, 2010. At the outset, I must state that the most outstanding feature of the Judgment, is its brevity: no attempt was made by the Learned Presiding Judge to analyse the merits of the case before her, nor, to refer to any principle of law, relating to the cause of action before her, or to the manner in which applications for summary judgment under Order 16 of the High Court Rules, 2007 - HCR, 2007, should be dealt with. This is the whole of the Judgment as found on page 160 of the Record:
"Court Ruling:
UPON HEARING L JENKINS-JOHNSTON of Counsel for the plaintiff/applicant by way of judge's summons dated 4th June, 2010 together with the affidavit in support sworn to on the 4th June, 2010 and

the supplemental affidavit sworn to on the 9th July,2010 with the exhibits attached thereto;

UPON HEARING Ady Macauley of Counsel for the defendant/respondent on the affidavit in opposition sworn to on the 30th June,2010 together with the exhibit attached thereto;

AND having considered the submissions made by both Counsel and authorities cited I hereby order as follows:

1. *That the Defendants do pay to the Plaintiff the sum of Le31,377,066 being salary and leave pay to which she is entitled up to 1st January,2012.*
2. *That the interest thereon is at 25% per annum as from the 5th February,2010 until payment.*
3. *That the damages for breach of contract are assessed at Le5m.*
4. *That the cost of this action assessed at Le3m is to be borne by the defendants."*

2. *There is no indication as to how the Learned Presiding Judge arrived at these conclusions. No evidence was led as to what rate of interest she should award, nor how she came to the conclusion that Le5m was a fit and proper sum to award as general damages over and above the sum of Le31,377,066 awarded as specific damages.*

THE APPEAL

3. The Appellant's Notice of Appeal was filed on 16th July,2010 though the appeal itself was only heard in 2012. It is at pages 163& 164. The Grounds of Appeal are as follows:
   (1) That the decision of the Learned Trial Judge is against the weight of the evidence.
   (2) That the Learned Trial Judge erred in Law in giving judgment in favour of the Plaintiff in an application for summary judgment, notwithstanding that the Defendant has shown cause against the application and there being sufficient evidence before the Court to show that the Defendant has a defence to the action.
   (3) That the judgment of the Learned Trial Judge dated the 15th day of July,2010 is a vacant judgment in that the Learned Trial Judge failed to give reasons for her decision (ratio decidendi) and failed to state which case authority cited by Counsel or an Order of the High Court Rules she relied on in granting the orders as contained in the said judgment.

4. The reliefs sought by the Appellant are as follows:
   (1) That this Court grants a stay of execution of the Judgment of dated 15th July,2010.
   (2) That the Judgment be set aside.
   (3) That the Appellant herein be given leave to defend the action.
   (4) Any further or other relief
   (5) Costs.
5. They reliefs sort in this Court, are really the sort a party would seek in a Court of first instance, not in an appellate tribunal. The setting aside of a judgment of a lower Court by an appellate tribunal automatically results in a stay of execution of that judgment, because it would no longer stand. Also, this Court is not in the business of granting any other relief. It may, if the circumstances so warrant, make any Order it may deem fit or, necessary. Also, the use of the expression, '*vacant judgment*' is not one which Counsel should properly use in describing a Judgment of any Court. Where is the so-called vacancy? The best he could have done, was to have said, for instance, that the judgment lacked legal or juridical basis. Having made these preliminary points, we shall now turn to the substance of the appeal itself.

THE HIGH COURT PROCEEDINGS

6. The Respondent sued the Defendant by way of writ of summons issued on 7th May,2010 (pages 1-3) for the sum of Le31,377, 066/00 being salary and leave pay to which she was entitled up to 1st January,2012; interest on this sum at the rate of 25% per annum with effect from 5th February,2010 until payment; Damages for breach of contract assessed at Le20m; any further or other Order; and the Costs of the action. The Respondent was employed as a Project Assistant by the Appellant on a fixed term basis, by letter dated 19th December,2008. The contract was to subsist from 2nd January,2009 to 1st January,2012, a period of three years. On 1st October,2009 her appointment was confirmed in writing. On 5th February,2010 the Appellant terminated her employment by reason of redundancy. The Respondent claimed that there was no provision for redundancy in her contract of employment, and that in any event, someone else had been appointed to the office after she had been terminated. She averred further that the redundancy was a deceitful ploy to get rid of her. The Ministry of Labour intervened and requested the Defendant to either reinstate her, or pay her all monies due her

under the fixed-term contract of employment. The Appellant insisted it had a right to terminate her employment. Appearance was entered for and on behalf of the Defendant on 17th May,2010. There was a preliminary skirmish: the Appellant applied to the Court to set aside the writ on the ground of irregularity in that the address of the Plaintiff was not stated on the writ as required by Order 6 Rule 1(2) HCR,2007. On 18th June,2010 TAYLOR, J refused the application on the ground that the Plaintiff's address was stated on page 3 of the writ.

SUMMONS FOR SUMMARY JUDGMENT

7. By Judge's Summons dated 4th June,2010, but filed on 7th June,2010, pages 17 - 39, the Respondent applied for summary judgment to the Court below in the terms stated in the writ of summons. The Summons was supported by the affidavit of the Respondent. Exhibit A, pages 20 -22, was the letter of appointment. Clearly, it was a fixed term contract. Paragraphs 13 and 14 at page 21, deal with discipline & grievance and notice period.
   "13. *Please refer to MSSL's Disciplinary and Grievance Policies & Procedures. The notice period is to terminate your employment by either you or MSSL are as follows: During Probation - the appointment can be terminated by either of the two parties with one month's notice.*
   14. After Probation - Support Staff - 1 (one) month's notice or salary in lieu of notice. MSSL shall also give the above notice period or salary in lieu, where employment is terminated except in the case of summary dismissal which may include termination without notice."
   So, there was provision for an early termination of the contract. Exhibit B, page 23, was the letter dated 1st October,2009, confirming the Respondent in her position.
8. Exhibit C, was the letter of redundancy dated 5th February,2010. Part of it reads as follows:
   "Dear Gloria,
   Letter of Redundancy
   We write to refer to the above and to conversations (in Dec 2009 & Jan 2010), and interview test (22.01.2010) you took and had with the Team Development Manager, National Programmes Manager & the Finance & Admin Director in the respective and latter case. The various and respective discussions held were inclusive of the following:

- *Due to the demands of the programmes unit, the role of Project Officer has been upgraded t the role of Project Administrators.*
- *The new role is a more senior role that requires a change in the type of skills, qualification and experience.*
- *The role of Project Officer will be made redundant effective February,2010.*
- *The job description of the post of Project Administrator was discussed with you and you expressed your interest in applying for the position and you were interviewed on the 22nd January,2010*
- *It was made clear that whether you are successful or not, the role of Project Officer will be made redundant and the role of the Project Administrator will be a new employment.*

Against this backdrop and as per the results of the interview, we hereby inform you that you were unsuccessful in your application for the role of Project Administrator.

In view of the above, this letter serves to make redundant and subsequently terminate your employment with MSSL effective 9th February,2010.

As previously discussed by the Team Development Manager, MSSL will thus abide by the full terms of its obligations in terms of notice period, end of service and redundancy benefits (please see attached calculations). Your end of service benefits will include:

Payments:

- *End of Service/Severance Benefit for duration 1year 2 months*
- *Redundancy benefits*
- *3 months salary in lieu of notice*
- *February 2010 monthly salary pro rat (7 working days.....)*
- *Leave allowance for 26 working days (January,2009 - February,2010)*
- *Leave Pay for 26 working days (January,2009 - February, 2010)*
- *Accrued 13th salary for pro rata for 2 months (Jan - Feb 2010)*

On behalf of MSSL, I hereby thank you for your service to MSSL. An end of Employment Certificate and very good reference (on request) will be prepared and given to you when you receive your final payment on Tuesday 9th February,2010....."

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9. The MSSL Severance Pay Calculation is at pages 25 - 29. It shows that the Respondent's total benefits amounted to Le10,191,326 as calculated in the letter set out in paragraph 8, supra. This amount was credited to Rokel Commercial Bank savings account 01-6161223 on 12th February,2010.
10. On 19th March,2010, the Commissioner of Labour wrote to the Appellant - pages 30 & 31, requesting that the Appellant pay the Respondent what she was due up to the end of the contractual period. On 29th March,2010, the Respondent's Solicitors wrote to the Appellant, pages 32&33, demanding payment of the total sum of Le31,377,066 as salary and leave for the period up to 1st Janaury,2012. They did not state how they had arrived at this total figure. They also demanded compensation for unlawful termination in the sum of Le20m and Costs in the sum of Le5m. The Appellant's Solicitors responded by letter dated 7th April,2010 - pages 34 & 35. They drew the attention of Respondent's Solicitors to paragraph 14 of exhibit A, and ended by rejecting the Respondent's claim for the increased sum of money. The action then followed.
11. On 7th June,2010, the Appellant filed what its Counsel described as a Defence and Counterclaim at page 42. In truth, it was merely a defence, as there was no counterclaim. The main plank of the defence filed was that the Appellant had acted within its rights in terminating the Respondent's services.
12. On 30th June,2010, Mr Macaulay deposed and swore to an affidavit in opposition, on the Appellant's behalf - page 66. It was very brief. All he said was that the Appellant had filed a defence, and the same was exhibited thereto as AM1.
13. The Respondent deposed and swore to a further affidavit on 9th July,2010 - page 46. She deposed that after she was made redundant, the Appellant again advertised her position. A copy of the advertisement is exhibited as "GMCI" at pages 47 - 51. The position advertised was actually that for Project Administrator, and not Project Assistant, which was the position held by the Respondent until her termination.

PROCEEDINGS BEFORE TAYLOR, J

14. These were the facts and issues in dispute which went before TAYLOR,J. The hearing into the Judge's Summons commenced on 28th June,2010 - page 157. At the top of page 158, Mr Jenkins-Johnston is noted as submitting that the Respondent was employed for a fixed term, and that her services could not be terminated before its expiration. At a later

hearing on 9th July,2010, Learned Counsel referred the Court to Sup Ct C 7/1979 - GITTENS-STRONGE v S L BREWERY LTD and specifically to page 7 of the judgment of LIVESEY LUKE, CJ. On the following page, he referred to page 12 of the Learned Chief Justice' s judgment.

15. Mr Ady Macauley in answer, at page 159, referred to Sup Ct C 4/2004 - AMINATA CONTEH v APC and argued that the Appellant had a defence to the Respondent's claim which had real prospects of success. The Learned Judge adjourned for judgment. On 15th July,2010 she delivered the Judgment at page 160. The handwritten Judgment is at page 67, and the printed version is at page 160. I shall now reproduce it in all its brevity:

"UPON HEARING L JENKINS-JOHNSTON of Counsel for the plf/Applicant by way of Judge's Summons dated 4th June, 2010 together with the affidavit in support sworn to on the 4th June, 2010 and the supplemental affidavit sworn to on the 9th July, 2010 together with the exhibits attached thereto; UPON HEARING ADY MACAULEY of Counsel for the Defts/Respondents on the affidavit in opposition sworn to on the 30th June, 2010 together with the exhibits attached thereto; AND HAVING CONSIDERED the submissions made by both Counsel and authorities cited, I hereby order as follows: -

1. That the Defendants do pay to the Plaintiff the sum of Le31,377,066/00.... Being salary and leave pay to which she is entitled upto 1st January, 2012.

2. That the interest thereon is at 25% per annum as from the 5th February, 2010 until payment.

3. That the damages for breach of contract is (sic) assessed at Le5m

4. That the Costs of this action assessed at Le3m be borne by the Defendants. C.L Taylor, J. 15.07.10."

16. No attempt was made by the Learned Trial Judge to assess the interest payable on the principal sum awarded, nor to explain how she arrived at the sum awarded for general damages. Damages cannot be plucked out of a hat - they have to be awarded on the basis of proper assessment.

ORDER 16 HIGH COURT RULES, 2007

17. We shall now turn to the Rules relating to the application which was before the Court below. The relevant rules are in Order 16 HCR,2007.

"Order 16

Rule 1(1) Where in an action to which this rule applies a defendant has been served with a statement of claim and has entered appearance, the plaintiff may, on notice, apply to the Court for judgment against the defendant on the ground that the defendant has no defence to a claim included in the writ, or, to a particular part of the claim except as to the amount of any damages claimed.

Rule 2(1) An application under rule 1 shall be made by summons supported by an affidavit verifying the facts on which the claim, or the part of the claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or nor defence except as to the amount of any damages claimed.

Rule 3(1) Unless on the hearing of an application under rule 1, either the Court dismisses the application or the defendant satisfies the Court with respect to the claim or the part of the claim, to which the application relates, that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

Rule 4(1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court."

Rule 4(3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit."

WHETHER THERE WAS A SERIOUS ISSUE TO BE TRIED

18. It seems to us that there was a serious legal issue to be tried, to wit: Could the Respondent be declared redundant where she had been employed on a fixed term contract and the same still had nearly two years to go?; and if she could, was she entitled to payment of salary for the whole contractual period? How much was she actually due, if she was entitled to the last mentioned payment? And further, was she entitled to General Damages, and if so, what should have been the quantum of such Damages? And how was the Court to arrive at such a figure? These were all questions which the Court below should have decided before making an award, but which it clearly failed to do. Order 14 in the English Supreme

Court Practice, 1999 - White Book,1999, is in very similar terms to our Order 16, and the notes to that Order, suggests what the practice should be. In note 14/4/5, the Learned Editors state: The defendant's affidavit must:

"*condescend upon particulars*", and should, as far as possible, deal *specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on to support it. It should also state whether the defence goes to the whole or part of the claim, and in the latter case it should specify the part....*".

The Appellant's defence, in effect was that the Respondent had been paid off in full after she had been made redundant, and that there was provision in her contract for her services to be terminated before its expiration. i.e. clause 14, by giving the requisite notice, or, by making payment to her in lieu thereof. In other words, the Appellant's position was that the Respondent could be declared redundant at any time, even after the probationary period had expired.

19. There was also affidavit evidence, which went unchallenged, that the management of the Appellant had held conversations with the Respondent in December, 2009 and January, 2010 about the upgrading of the Respondent's then position of Project Officer, to that of Project Administrator. She was interviewed for the new position on 22nd January, 2010, but she was unsuccessful. It was also made clear to her at that interview that whether she was successful or not, her then current position as Project Officer would be made redundant. This is all stated in the letter of termination dated 9th February, 2010 and set out in extenso above at paragraph 8 and at page 24 of the Record. Management discussed her failure with her; it was only thereafter she was made redundant. She did exhibit a copy of what appears to be an advertisement for the position which had been made to vacate. It is at pages 48 to 51 of the Record. The closing date for applications was 25th March, 2010. At the date of the hearing of the Summons, there was no evidence before the Court that any person had been engaged in that position by the Appellant. It would matter whether anyone had been so engaged in the new position. If no one had been engaged at the time action was brought, this should have strengthened the Respondent's claim that redundancy had been used as a ploy to force her out of her job.

20. In the affidavit to which that advertisement was exhibited, deposed and sworn to by the Respondent on 9th July, 2010, at page 100 of the Record, she deposes at paragraph 2, as follows: *"That after I was made redundant by the Defendants, they advertised my position (sic) I was to go to. A copy of the advertisement is exhibited and marked "GMCI"* As stated above, she had been interviewed 'in house' for that job, but she was unsuccessful. So, the true position is that she was first interviewed for that very job, and when unsuccessful, was told to go. These were matters which the Learned Judge should have taken into consideration. But the judgment was in the bare terms set out above.

FINDINGS

21. It seems to this Court, that this was a contention which ought to have been tried at a full hearing. No reasons were given for the Learned Trial Judge's decision. The Learned Trial Judge therefore erred in this respect. We are of the view that that the issue of whether or not the Respondent's contract was determinable in circumstances where a redundancy situation had arisen, was one which the Learned Judge should have decided, before going on to award damages. The judgment in Order 16 proceedings is final, and it due consideration has to be given to the law relating to the issue in dispute. Sadly, this was not done by the Learned Trial Judge.

AMINATA CONTEH v APC

22. Counsel for the Appellant cited to us *S.C. Civ App 4/2004 - AMINATA CONTEH v APC, judgment delivered 27th October, 2005 by WRIGHT, JSC.* That case was decided on the precursor to the present *Order 16 HCR, 2007, i.e. Order XI, HCR, 1960.* It was a case for possession, and the respondent in that appeal had sought to evict the Appellant from their property at 27 Pultney Street. The respondent issued a summons for summary judgment in the High Court. It was successful. The Appellant appealed against that judgment to the Court of Appeal. That Court dismissed the appeal, not on the ground of whether the action was one fit for adjudication summarily, but rather, on the merits of the defence filed by the Appellant in the High Court. At page 3 of her judgment, the Learned Justice explained the purpose and purport of Order XI proceedings, thus:

" 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 from 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...."

Later, at the bottom of page 3, unto the top of page 4, she stated the position in English Law post the Lord Woolf reforms to civil procedure. She said this:

"However, recently the English Courts have gone one step further in their endeavor to ensure a speedy conclusion of matters under this order in the spirit of what is now commonly known as the Woolf reform. The test is not that there should only be a triable issue, but that the defence should have a real prospect of success as distinct from a fanciful prospect of success (See Swain v Hillman and another reported in 1 Al England Reports [2001] page 91 at page 95 paragraph J). It is therefore the duty of the judge to examine the issues of Law and of facts raised and determine whether the defendant has a good chance of success."

23. The Learned Justice ended her judgment on page 5, stating: *" The Learned Justices of the Court of Appeal should not have gone into the substantive matter and also, not to have upheld the judgment since there were triable issues....."* Both judgments of the Court of Appeal and of the High Court, were, consequently, set aside

24. As regards the true test in Order 16 proceedings, NATIONAL WESTMINSTER BANK plc v DANIEL & others [1994] 1 All ER 156, CA is also instructive. There, GLIDEWELL, LJ adopted the reasoning of ACKNER, LJ in BANQUE De PARIS etc (SA) v de NARAY [1984] 1 Lloyd's Rep 21 CA, at page 23 of the Report:

25. *" It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court*

that there is a fair or reasonable probability of the defendants' having a real or bona fide defence." Clearly, this mode of reasoning was absent in the Learned Trial Judge's Judgment.

26. We are of the view that the Court below should have tried the issue of whether clause 14 of the Respondent's contract of employment was enforceable in the circumstances which have been set out above: namely, that, her then current job was being phased out; she was interviewed for the higher position, but had been judged unsuccessful; and she had been therefore asked to leave her then current position. But, the Learned Trial Judge did not consider any of these issues. Bland judgments where there serious issues to be tried ought not to be enforced.

27. For these reasons, we have come to the conclusion that the appeal ought to be allowed, and that the case be remitted to the Court below for trial. The defect in the Judgment was not the fault of Counsel on both sides, but that of the Learned Judge. We do not think therefore that Costs should be awarded in this appeal.

28. We ought too, on closing, to refer to the manner in which execution was levied by Bailiffs, as it affects the view we have taken on the award of Costs. This was an issue which came up before me during the hearing into the Appellant's application for a stay of execution of the High Court Judgment. At page 154 of the Record is a copy of an email addressed by Mrs Blanche Gooding to Mr Ady Macauley relating to what transpired when Bailiffs went to the Appellant's premises to levy execution. Also, at pages 151 - 153, is a copy of the affidavit of Sebastian Barraud, the then Country Director of the Appellant. In paragraph 10, he deposed as follows: "*That on Thursday 26th August, 2010, bailiffs from the office of the Under Sheriff accompanied by Shaiku Fofanah and the Plaintiff, went to our office and threatened to evict everyone including maternal patients from our Head Office and Obstetrics Centre at No. 1A&B Ahmed Drive, Off Sir Samuel Lewis Road, Freetown. This caused a lot of embarrassment for us and had cause to give out a cheque for Le10m to Messrs Jenkins-Johnston and Co and Le2million to the bailiffs Charles Davies and Sorie Fofanah.*"

29. Whether one likes or, approves of all of the medical services which the Appellant provides, or, provided at that point in time, does not really matter here. But to threaten to evict patients from a clinic or a hospital because of non-payment of a judgment debt, is a serious matter. Patients could die or, their conditions could worsen as a result of such an action.

But, the medical facility would still continue to exist and to function. It is troubling that the Respondent is said by Mr Barraud to have been present when these threats were made. She did not deny during the stay of execution proceedings that she was indeed present. She, as a former employee was in a better position to understand what driving patients out of the facility would entail. We think execution could have been levied without threats being made to innocent persons who were patients at this time. We therefore affirm the Order made on 1st September, 2010 that the Bailiffs should return the sum of Le2million paid to them by the Appellant.

30. In the result, the Order of the Court is as follows;

(1) This Honourable Court allows the appeal of the Appellant, Marie Stopes Clinic against the Judgment of the High Court dated 15th July, 2010. It is further Ordered that the case be remitted to the High Court for Trial.

(2) Consequently, the Respondent is entitled to retain the amount of Le10m paid to her by the Appellant, and no more.

(3) The sum of Le2million paid to the Bailiffs on 26th August, 2010 shall be refunded to the Respondent immediately, if this has not already been done.

(4) Any Costs awarded by the Court below, if already paid by the Respondent to the Appellant, shall be refunded to the Appellant.

(5) In the exercise of our discretion, and as we have indicated in paragraph 25 supra, each party shall bear its, and her own Costs in, and of this Appeal.

6/12/19

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE

THE HONOURABLE MS JUSTICE V M SOLOMON, JSC