

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN

SIERRA RUTILE LTD - APPELLANT/RESPONDENT

AND

TRANSCEND INTERNATIONAL RESOURCES LTD - RESPONDENT/APPLICANT

CORAM:

HON. MRS. JUSTICE JAMESINA E. L. KING J.A (PRESIDING)

HON. MR. JUSTICE KOMBA KAMANDA J.A.

HON. MRS. TONIA BARNETT J.A.

COUNSEL:

M. Garber Esq. & B. Michael Ms. – Respondent/Applicant

A.C. Thompson Esq – Appellant/Respondent

RULING DELIVERED THIS 19TH DAY OF JULY 2022

1. This is an application on behalf of the Respondent/Applicant by Notice of Motion dated 13th June 2022 for clarification that the "*bond guaranteeing payment*" mentioned in Order 3 of this Court's Ruling of 24th February 2022 and 7th June 2022 shall be by a bond issued by any Commercial Bank in Sierra Leone in favour of the Applicant.
2. The application is supported by the affidavit of Basita Michael sworn to on 13th June 2022 with the exhibits attached thereto which are the Ruling of 24th February 2022, certified copy thereof, Ruling of 7th June 2022, a letter dated 6th June 2022 and the bond certificate of the Appellant attached thereto.
3. It is Ms. Michael's belief that it was never the intention of the Court for the Appellant/Respondent to provide a personal bond, rather the intention of the Court was for the Respondent to provide a Bank Guarantee or a bond issued by a bank consistent with the commercial and banking practice in Sierra Leone. She further stated that in the circumstances the bond issued by such a judgment debtor is worthless.
4. There is an affidavit in opposition sworn to by Maurice Cole on 28th June 2022. Mr. Cole stated that as a Chartered Accountant and finance expert for the past 30 years, he verily believes that a bond that is to be provided by a corporate institution is materially and functionally different from a Bank guarantee and one could not be intended for the other as the bond creates a primary obligation on the Appellant/Respondent Company to pay the bond holder.
5. He further stated that contrary to paragraph 8 of the affidavit in support, the bond issued is not worthless as the company has sufficient finance and assets to satisfy the enforcement of any bond that is issued, especially as the company can issue bonds which will be debentures

acknowledging a debt and creating an obligation on the part of the Company. He referred to the withdrawal notice of suspension of the Appellant/Respondent and asserted that the Company is operating profitably, and none of its assets are the subject of any security.

6. He is reliably informed by the Solicitors of the Appellant/Respondent and verily believes that the intention of the court is manifestly and plainly stated in the order of 24th February 2022 and what is being sought will materially change the substance of the referred Court order. According to him the referred order did not order a Bank Guarantee or any bond from any commercial bank, but specifically directed that the Appellant/Respondent provides the bond guaranteeing the payment which they did. He concluded that it is in the interest of justice and fairness for the court to dismiss the application as what the Respondent/Applicant is trying to do is to alter the meaning, effect and scope of the referred court ruling.

Decision

7. The submissions of Counsel on behalf of the both parties consistent with the respective affidavits filed and the authorities cited have been duly considered by this Court. This is an application by the Respondent/Applicant for clarification of Order 3 of the terms of stay granted by this Court which has become necessary as a result of its implementation by the Appellant.
8. It is a general rule and settled law that a Court does not have jurisdiction to revisit and or review its own final judgment or order. See the case of *Francess Smith v. Smith* (Civ. App. 48/2017) cited by Counsel for the Appellant/Respondent. Counsel for the Appellant has also referred to Halsbury's Laws of England 4th Edition Vol. 26 page 279 at para. 556 to the effect that a court has inherent jurisdiction to vary or clarify the order so as to carry its meaning or make it plain unless it would change the substance of the judgment.
9. Counsel for the Appellant has argued that a bank guarantee is a totally and completely different instrument from a bond and it is that distinction that will invariably lead to a change in the circumstances of the judgment. He submitted that the Court will no longer be clarifying but replacing one type of commercial instrument with another. He argued that the Court Order being a perfected order the Court is *functus officio*.
10. For ease of reference, Order 3 of a Certified Copy of the drawn up order of the Court dated 24th February 2022 granting a stay of execution of the judgment of 19th August 2021 pending appeal states as follows

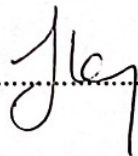
"3. Within 30 days of this order, the Appellant/Applicant shall provide a bond guaranteeing the payment of the Respondent of the rest of the judgment debt and interest thereon."

11. The implementation of this order is the attachment to Exhibit BM4 which is a bond certificate signed by the Chief Executive Officer and Chief Financial Officer of Sierra Rutile Limited, the Appellant dated 3rd June 2022 guaranteeing the payment of the sum of US\$1,620,000.00 (One Million Six Hundred and Twenty Thousand United States Dollars) to Transcend International Resources Limited the Respondent, that the sum will become payable in the event that the appeal is unsuccessful and it is adjudged that the bond be enforced, then the Appellant should pay the referred sum to the Respondent in satisfaction of a final judgment of the Court of Appeal.
12. It is not in dispute that the above is a bond provided by the Appellant but the question is at the time this Order was made was this the intention of the Court for the bond to be issued by the Appellant. To assist this Court in arriving at its intention this Court will refer to relevant portions of the said Ruling Exhibit BM1, in particular paragraphs 19 – 20 which highlights the

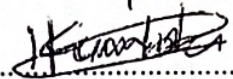
very serious financial difficulties the Appellant is facing and is at risk of insolvency if its engagement with potential investors and government does not bear fruits.

13. Furthermore, the Court noted in the said Ruling, that whilst the Appellant has pointed to assets that are almost ten time more than the judgment sum, full disclosures had not been made regarding its financial liabilities to convince the court that they are unencumbered and in good condition and will be immediately available for execution should the appeal become unsuccessful.
14. In this application, Mr. Maurice Cole has in his affidavit referred to the assets of the Appellant to satisfy the enforcement of the bond. Is Exhibit BM4, the bond provided by the Appellant, guaranteeing payment if the appeal is unsuccessful. Clearly a bond guaranteeing payment had to be provided by the Appellant does not necessarily have to be a bond issued by the Appellant. The Court ordered the Appellant to provide a bond guaranteeing payment, after it had ~~asked~~ expressed its concerns about the assets of the Appellant company, whether they are unencumbered and readily available for execution. h
15. In providing this clarification, this Court's consideration is limited to the status quo existing at the time of the application, based on the affidavit evidence and its findings on the same. It was against this background that the Court ordered a bond guaranteeing payment.
16. Having expressed concerns about the financial status and assets of the Appellant, it was an omission on the Court's part not to have specifically described the bond to be issued by a Commercial Bank in Sierra Leone in favour of the Respondent Applicant. This Court in making this clarification is not seeking to reverse its order or change its substance as was done in the *Smith v Smith* case rather it is seeking to give efficacy to Order 3 within the context and spirit of the entire ruling.
17. This Court therefore provides clarification that the bond referred to in Order 3 above should be a bond guaranteeing payment by a Commercial Bank in Sierra Leone in favour of the Respondent/Applicant. This clarification should guide the parties in the implementation of the said Order, noting the Court previous clarification on 7th June 2022 that costs should be included in Order 3.
18. In view of the above, the Respondent/Applicant's application in respect of the Notice of Motion dated 13th June 2022 is granted and this Court makes the following orders:
 1. Within 30 days from the date of this order, the Appellant shall provide a bond issued by a Commercial Bank in Sierra Leone guaranteeing the payment of the Respondent of the rest of the judgment debt, interest thereon and costs.
 2. No order as to costs.

HON. MRS. JUSTICE JAMESINA E. L. KING J.A (PRESIDING)

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HON. MR. JUSTICE KOMBA KAMANDA J.A. I AGREE

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HON. MRS. JUSTICE TONIA BARNETT J.A. I AGREE

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