

C.C 118/11 2011 S. NO . 19

IN THE HIGH COURT OF SIERRA LEONE
(COMMERCIAL AND ADMIRALTY DIVISION)

BETWEEN: -

EGERTON SMITH - PLAINTIFF
(CARRYING ON BUSINESS AS FEED
SALONE INTERNATIONAL)

AND

THE MINISTER OF MINES AND MINERAL RESOURCES

AND

AFRICAN MINERAL
(SIERRA LEONE LTD)

AND

TONKOLILI IRON ORE (SL) LTD -3RD DEFENDANT

A. F Serry Kamal Esq. for the Plaintiff

O. Kanu Esq. for the 1st Defendant

K. M. Lisk Esq. for the 2nd and 3rd Defendants

RULING DELIVERED THE 25th DAY OF October 2011

The Plaintiff herein has filed an application by Notice of Motion dated 5th July 2011 praying for the following Orders:

- (1) An interim injunction to restrain the 1st Defendant from giving the 2nd and 3rd Defendants permission to export the stockpile of iron ore concentrate at Pepel out of the jurisdiction pending the hearing and determination of this application.

- (2) An interlocutory injunction to restrain the 1st Defendant from giving the 2nd and 3rd Defendants permission to export the stockpile of iron ore out of the jurisdiction pending the hearing and determination of this application.
- (3) An interim injunction restraining the 2nd and 3rd Defendants from exporting or moving or interfering with the stockpile of iron ore concentrate at Pepel pending the hearing of this application.
- (4) An interlocutory injunction to restrain the 2nd and 3rd Defendants from exporting or moving or interfering with the stockpile of iron ore concentrate at Pepel pending the hearing and determination of this action.

In support of the application is the affidavit of **EGERTON SMITH**, the Plaintiff sworn to on 5th July 2011. He deposed to the facts in this matter which are briefly as follows: That sometime in 2009 the Plaintiff who is the proprietor and Executive Manager of Feedsalone International negotiated the purchase of about 100,000 metric tons of iron ore concentrate at Pepel with the 1st Defendant. He was informed that the draft agreement in respect of the said sale needed Cabinet approval and that a Cabinet paper had been prepared by the

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Permanent Secretary Ministry of Mines. In May 2010 he was informed by letter from the Permanent Secretary that Cabinet approval had been obtained and he thereupon put in motion a schedule to pay for the said stockpile and market the same. When the Plaintiff and his representatives travelled to Pepel to examine the stockpile they were refused access to the said stockpile by the 2nd and 3rd Defendants, their servants and agents even after the Permanent Secretary had written to the 2nd Defendant introducing the Plaintiff as having contracted with the Government of Sierra Leone for the purchase of the said stockpile. When Plaintiff got no response to the letter to the Permanent Secretary asking for an invitation to sign the formal agreement, he consulted solicitors in the firm of M.S. Turay & Associates who wrote to the Permanent Secretary and again there was no reply. Copies of all the above correspondence are exhibited to the said affidavit and marked Exh "ES1-ES10" respectively.

The Plaintiff then consulted his present solicitors who wrote to the 1st and 2nd Defendants and in addition addressed another letter to the Attorney General & Minister of Justice dated 3rd May 2011 giving notice of his intention to sue the Government of Sierra Leone. He was also shown a memorandum addressed to the Solicitor General which disclosed that the 1st Defendant had sold the said stockpile to the 3rd Defendant, a company in the same group of companies as the 2nd Defendant.

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Being dissatisfied with the treatment he has received from the Defendants, the Plaintiff has now instituted action against the Defendants claiming damages for breach of contract against the 1st Defendant and damages for inducing the 1st Defendant to breach his contract with the Plaintiff against the 2nd and 3rd Defendants. He now seeks the injunctions against the said Defendants as set out above.

The Defendants have opposed the application and filed affidavits in opposition thereto. The affidavit in opposition filed by Solicitors for the 1st Defendant had serious defects in that it was not sworn before a Commissioner for Oaths and is accordingly struck out.

In the affidavit in opposition sworn to by Kweku M. Lisk on 13th July 2011 and filed on behalf of the 2nd and 3rd Defendants he deposed that the said 2nd and 3rd Defendants were never privy to any draft agreement between the Plaintiff and the 1st Defendant. I should mention that the said draft agreement is exhibited to a supplemental affidavit sworn to by the Plaintiff on 6th July 2011 and filed herein.

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The deponent went on to depose that having regard to the pleadings in the action it is clear that the action is being brought against the 1st Defendant in his capacity as the Government of Sierra Leone and he referred to the letter of 3rd May 2011 addressed to the Attorney General and Minister of Justice by solicitor for the Plaintiff, Exh "ES10" in which it is stated therein that the letter is intended to serve as notice to initiate proceedings against the Government of Sierra Leone pursuant to the State Proceedings Act 2000. He deposed further that if that is evidence of such a notice, then the issue of the writ is premature as the mandatory period of 3 months prescribed by the said Act has not elapsed before the institution of the present action.

It was further deposed that on 6th November 2008 a lease agreement was made between the 1st Defendant and African Port and Rail Services (SL) Ltd, a private limited liability company which gave the said African Port and Rail Services exclusive right to the land upon which the facilities are situate at the port in Pepel and that the lease between the 1st and 2nd Defendants was completed some two years prior to the Plaintiff's first communiqué from the 1st Defendant.

The deponent further pointed out that at the material times the agreements between the 1st and 2nd Defendants were agreed upon, counsel for the Plaintiff was the Attorney General and Minister of Justice and also head of the Law Officers Department charged with the responsibility of advising the 1st Defendant on legal issues and/or was privy to the agreement by virtue of his position within the Government. He pointed out that the said counsel for the Plaintiff was a witness to the said agreements and may be called upon as a witness in the trial of this action as he was head of the Law Officers Department at the material time and by virtue of the fact that all the opinions in respect of the legal implications of the lease had emanated from that office, he submitted that the said counsel should recuse himself from the matter to avoid being professionally embarrassed.

With reference to the Plaintiff's allegation that he had no response to his several letters addressed to the Permanent Secretary, Ministry of Mines, the deponent referred to the memorandum from the Solicitor General, Exh "ES11" where he gave the reasons why the agreement between the Plaintiff and the 1st Defendant was never signed. He went on to state that it is clear from the Solicitor General's opinion expressed in the said memorandum that the 1st Defendant does not have an agreement with the Plaintiff for the sale of the said stockpile and further acknowledges the fact that the stockpile belongs to the 2nd Defendant.

The deponent expressed the view that all the Plaintiff has established is he had an offer from the 1st Defendant that was never accepted. In addition, he stated that the Plaintiff has failed to show that should the court grant the injunction prayed for he will be in a position to indemnify any of the parties, if it turns out the injunction ought not to have been granted. He stated that the 2nd Defendant's company is engaged in the business of large scale mining and exporting of iron ore and a significant contributor to the Sierra Leone economy and is one of the companies listed on the **FTSE 100**. He deposed that if an injunction of this nature is granted it will have prejudicial effect on the stock market value of the 2nd Defendant's shares against which the Plaintiff cannot adequately indemnify the 2nd Defendant Company. He stated that in the event it turns out the injunction ought to have been granted the 2nd Defendant undertakes to ensure the Plaintiff is so indemnified and that due to the fact that the Plaintiff's claim is monetary and can be easily quantified, the balance of convenience lies with the 2nd Defendant and the injunction ought not to be granted particularly as the Plaintiff has failed to establish any rights to the stockpile. He urged the court to refuse the application.

The first issue to deal with in this application is that raised by both counsel for the Defendants, namely whether or not the notice of intention to commence proceedings against the Government is required in this case pursuant to the provisions of s. 3(i) of the State Proceedings Act 2000.

Counsel for the Plaintiff has submitted that no such notice is required here. He submitted that in this case the 1st Defendant is the Minister of Mines and in submitting that notice is given pursuant to the said State Proceedings Act 2000, counsel have equated the Minister with the Government of Sierra Leone. He referred the court to the provisions of s. 133 of the Constitution of Sierra Leone, 1991 which gives an unlimited right to an individual to sue the Government without the grant of a fiat or the use of the Petition of Right. Counsel further relied on the Interpretation Act 1971 where Government is defined and he emphasized that Government is treated as a corporation sole with a right to sue and be sued. He also relied heavily on s. 47 of the said Interpretation Act 1971 which states that every Minister of Government shall be deemed to be a corporation sole and he maintained that one can sue a Minister of Government without giving the notice required by the State Proceedings Act. He relied on several decided cases in Sierra Leone the most recent of which is the High Court case intituled c.c. 107/2011 **Ali Serray Kamara & Anor vs. Capt. Saidu Alimamy Kamara & Ors.** where the court (Browne, Marke, J. A.) held that a Minister is not responsible for the whole of the Government and he is not one and the same as the Government. Consequently the learned Justice held that in ~~those~~ ^{these} circumstances no notice is required pursuant to s. 3 of the State Proceedings Act 2000 to commence proceedings against the Government.

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In this case, counsel for the 1st Defendant submitted that the notice pursuant to s. 3 of the State Proceedings Act is required. He referred the court to the letter addressed to the Attorney General and Minister of Justice dated 3rd May 2011 Exh "ES10" which is stated to serve as the required notice. He also referred to the draft agreement between the Government of Sierra Leone and Feedsalone Exh "ES16" and contended that the action is against the Government of Sierra Leone and not against the Minister as corporation sole. Counsel relied on the Supreme Court decision in the case **Nigerian Shipping Lines Ltd vs. Abdul Ahmed** where it was held that failure to comply with a statutory provision calls into question the very jurisdiction of the court.

It is now necessary to look at the circumstances of this case especially in what capacity it is brought against the Minister of Government. The claim against the 1st Defendant is for damages for breach of contract. There is evidence that a draft agreement has been made between the Plaintiff and the Government of Sierra Leone see Exh "ES16". It is evident that the Government of Sierra Leone must be represented in the making of the agreement by an individual in this case, the Minister of Mines and Mineral Resources. Can it therefore be said that in these circumstances where the Minister concerned is contracting for and on behalf of the Government he is not one and the same as the Government? Section 4 of the Interpretation Act, 1971 provides as follows:

“Government means the Government of Sierra Leone (which shall be deemed to be a person) and includes where appropriate, any authority by which the executive power of the State is duly exercised in a particular case.”

It is my view that the Minister in this case in contracting for and on behalf of the Government is acting as an authority by which the executive power of the State is exercised within the meaning of s. 4 of the said Interpretation Act. His role here is quite distinct from the role of the Minister of Local Government in the **ALI SERRAY KAMARA** case (supra)

As pointed out by both counsel for the Defendants here, the solicitor for the Plaintiff mindful of the provisions of s. 3 of the State Proceedings Act, 2000 did serve notice to the Attorney General and Minister of Justice of the Plaintiff's intention to sue the Government – Exh “ES10”. Counsel for the Plaintiff cannot now be heard to say that such notice is not required. The provision clearly states as follows

“3(i) Subject to section 4, no proceedings shall be commenced against the Government under section 2 until the expiration of three months after written notice of intention to commence the proceedings has been served by the claimant or his attorney or agent on the Attorney General.”

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The letter addressed to the Attorney General is dated 3rd May 2011 and the writ of summons instituting the action is dated 4th July 2011. It is quite apparent that the period required by the Act has not expired before the commencement of the action herein. The action is therefore premature. Section 4(2) of the said State Proceedings Act 2000 provides that where there is a failure to give the requisite notice, the court shall not dismiss the proceedings but shall direct the Plaintiff to give the Attorney General the said notice and adjourn the proceedings accordingly. In this case where the required notice has been given but nonetheless the Plaintiff has instituted the action before the expiration of the said period, I shall direct that no further action is taken in this matter until the requisite period of ^{notice} provided by the Act has expired. It so happens that this direction is no longer necessary as the required period of notice has expired at the date of delivering this Ruling.

Now the relief being sought here is an interlocutory injunction against the Defendants. Counsel for the Plaintiff has urged that he has satisfied the principal requirement for the grant of the injunction as he has shown that there is a serious question to be tried. He relied on the principles set out in the **American Cyanamid Co v Ethicon Ltd** case {1975} 1 All E. R. 504 and also referred the court to the notes found in the **Supreme Court Practice 1991** at pages 564-565. Let me therefore quote from the said notes at page 564.

They state as follows:

“According to the American Cyanamid Co case, when an application is made for an interlocutory injunction, in exercise of the court’s discretion an initial question falls for consideration. That is

1. is there a serious question to be tried? If the answer to that question is yes, then further related questions arise, they are:
2. would damages be an adequate remedy for a party injured by the Court’s grant of, or its failure to grant an injunction? If not where does the balance of convenience lie?”

It is clear that the Plaintiff has established that there is a serious question to be tried. The next question therefore is would damages be an adequate remedy for the Plaintiff. In the **American Cyanamid Co.** case (supra) it is stated as follows (Lord Diplock) at page 509

“The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action.”

The Plaintiff herein is seeking damages for breach of contract against the 1st Defendant and damages for inducing breach of contract against the 2nd and 3rd Defendants. It is therefore clear that damages in this case would be adequate remedy for the Plaintiff

in the event of his succeeding at the trial. The next question is whether the Defendant would be in a financial position to pay them.

Counsel for the 2nd and 3rd Defendant has urged that the 2nd Defendant is a company engaged in large scale mining and exporting of iron ore and a significant contributor to the Sierra Leone economy and furthermore has undertaken to ensure the Plaintiff is indemnified if it turns out the injunction ought to be granted. I believe the 2nd Defendant's Co is in a financial position to pay them for any loss caused by a refusal to grant the injunction prayed for. Indeed the loss suffered so far by the Plaintiff has been quantified. See the Plaintiff's solicitor's letter dated 3rd May 2011 addressed to the Managing Director, 2nd Defendant Company, Exh "E58".

In the circumstance I would refrain from granting the injunction prayed for on the ground that damages would be an adequate remedy and the Plaintiff would be adequately compensated in the event that he succeeds at the trial.

The 2nd and 3rd Defendants are however ordered to give an undertaking as the damages for any loss sustained by the Plaintiff if it turns out the injunction ought to have been granted. ~~Costs in the~~ *Ash*
~~cause.~~

The following Orders are made

1. ~~The~~ application for an injunction is refused on the ground that damages would be an adequate remedy and the Plaintiff would be adequately compensated in the event that he succeeds at the trial.
2. The 2nd and 3rd Defendants are to give an undertaking as to damages for any loss sustained by the Plaintiff if it turns out the injunction ought to have been granted. Such undertaking to be filed within 10 days of the date hereof.
3. 1st Defendant to file his defence within 10 days of the date of this Order. Other pleadings to take their course thereafter.
4. Costs in the cause.

A. Showers
SIGNED: - A. SHOWERS 25/10/2011
JUSTICE OF COURT OF APPEAL