

C.C. 191/12

2012

H No. 20

IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION

BETWEEN PAYLAK HAYRAPTYAN

- PLAINTIFF

AND

ASHOT SUKIASYAN

- DEFENDANT

COUNSEL:

L TAYLOR ESQ for the Plaintiff

M P FOFANAH ESQ for the Defendant

BEFORE THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF APPEAL

JUDGMENT DATED THE 5 DAY OF NOVEMBER, 2012.

1. This is an Application brought by the Plaintiff by way of Notice of Motion dated 16 October, 2012. The Plaintiff applied for a Warrant to Arrest the Defendant so that he could be brought before the Court so as to provide security for the sum of USD13million claimed by the Plaintiff herein, in the event judgment is given against him herein. He also asked that any Costs Ordered, be Costs in the Cause.
2. The Application is supported by the respective affidavits of Michael Allieu deposed and sworn to on 16 October, 2012; and of Mr Taylor, deposed and sworn to on 25, 27 & 29 October, 2012 respectively. Several documents are exhibited to these affidavits.
3. The brief facts of the case, as set out in these affidavits, are that both parties are citizens of the Republic of Armenia, Once a part of the Confederation of Independent States, and much earlier the Soviet Union. The Plaintiff granted Powers of Attorney (POA(s)) to the Defendant to deal with certain of his landed properties in Armenia. In the Power given on 27 July, 2010, exhibited as MA1 to Mr Allieu's affidavit, the Defendant was empowered to "pledge against performance", certain properties designated by the Plaintiff in the POA. He was also to be the Plaintiff's company's representative in "public and non-governmental authorities, ... bank, all court instances.....to conclude real estate pledge...." etc. By Deed of Mortgage dated 30 July, 2010, exhibit MA2, the Defendant, acting as Attorney for the Plaintiff and as Director of a "Productive Cooperative"

or entity known as Dzoragyugh, mortgaged these properties to the Ameriabank in Armenia for the loan of the sum USD12million ~ paragraph 1.6. The 'deadline for the fulfilment of main facility (was) 25 June,2020'. Clause 4.2 provided that "in case of the breach of any liability undertaken by the contract, the debtor upon the request of the Mortgagee pays penalty to the latter in the measure of AMD100,000..." This is contrary to what Mr Allieu deposes to in paragraph 5 of his affidavit. There, he deposes, inter alia, that "....the Defendant obtained a loan from the said Bank in the sum of USD12,...million which he was to pay in 2 years." In a document headed REFERENCE dated 10 July,2012 and exhibited to the second affidavit of Mr Taylor as LT3, it is stated therein that the overdue amount ~~on~~ the company, Dzoragyugh's indebtedness to Ameriabank, stood at USD637,134/07 as of 9 July,2012. LT4, is a copy of another document dated 26 October,2012 from the Ameriabank, in which 8 of the Plaintiff's properties are listed, two them, numbered 1 and 2 on the list, being said to have been confiscated because of non-payment of the loan.

4. The Application is opposed by the Defendant who has filed an affidavit deposed and sworn to by him on 27 October,2012. He deposes that Plaintiff and two other non-Sierra Leoneans conspired to have him detained at CID Headquarters. He denies personally borrowing money from Plaintiff, and claims that the Mortgage deed was executed by him as Agent and Attorney of the Plaintiff. He says that the Plaintiff commenced action against Ameriabank in Armenia, a year ago, but the action was unsuccessful. No details of that action, and of its outcome are given. He claims that this Court lacks jurisdiction over the Plaintiff's claim. He has exhibited as A, a copy of a writ of summons issued by him against the two non-Sierra Leoneans. He says the matter is presently pending before CHARM,J. He agrees that he is not resident in Sierra Leone, and is merely a visitor. He has exhibited his Sierra Leone visa as A.

DEBTORS ACT, CAP 24 and ORDER 54 HCR,2007

5. The jurisdiction to arrest a party to an action, and to impose bail conditions, is conferred on this Court by the Debtors Act, Chapter 24 of the Laws of Sierra Leone,1960 and by Order 54 of the High Court

Rules, 2007 - HCR, 2007. Section 4 of the Act states: "If a Plaintiff in any action or suit, brought or instituted in any Court for any cause of action of an amount or value.....shall, by the affidavit of himself or of some other person, show to the satisfaction of the Court that such Plaintiff has a cause of action against the Defendant..... and that such defendant is about to leave Sierra Leone, or, has disposed of or removed from Sierra Leone his property, or any part thereof, the plaintiff may, either at the institution of the action or suit or at any time thereafter until final judgment, make an Application to the Court that security be taken for the appearance of the Defendant to answer to any judgment that may be passed against him in the action or suit." Section 5 states as follows:

"If the Court, after making such investigation as it may consider necessary, shall be of opinion that there is probable cause for believing that the defendant is about to leave Sierra Leone, or that he has disposed of, or removed from Sierra Leone, his property or any part thereof, and that in either case by reason thereof the execution of any judgment or decree which may be made against him is likely to be obstructed or delayed, it shall be lawful for the Court to issue a warrant.....to bring the defendant before the Court, that he may show cause why he should not give good and sufficient bail for his appearance."

According to Section 6 of the Act: "If the defendant fail to show such cause, the Court shall order him to give bail for his appearance at any time when called upon while the action or suit is pending, and until execution or satisfaction of any decree or judgment which may be passed against him in the action or suit....." The two conditions which the

Plaintiff should satisfy before this Court can request the Defendant to put up bail or provide security, are that the Plaintiff has a cause of action against the defendant; that the defendant is about to leave Sierra Leone; or, that the defendant has removed, or has disposed of his property.

6. That Ashot Sukiasyan is the Defendant in the action herein, is clear from the writ of summons issued against him, and exhibited to Mr Allieu's affidavit as MA3. That he is a non -Sierra Leonean, and that he is ordinarily resident abroad, is evident from the contents of exhibit MA4 which is a copy of entries in his Armenian passport, and of the Immigration Department document dated 12 September, 2012 exhibited to his affidavit as A. Exhibit A shows that his visa should expire on 12

December, 2012. His exhibit B, i.e the writ of summons issued by his company, A B S Global Limited against Messrs G M C Global (SL) ,Mkrtychyan and Godlewski respectively supports his assertion that he came to this country for the purpose of pursuing his claim against the Defendants in that action. It follows that he has no real or personal assets within Sierra Leone. He only has an expectation: that he may obtain Judgment in the matter pending before CHARM, J. He has himself, in exhibit B, applied to this Court for the Defendants in that action, to provide security in similar terms as has been requested by the Plaintiff in this Court.

7. I must point out at once, that not every foreigner against whom litigation is brought in this country, will be required to provide security for his appearance, or to abide the outcome of litigation. To allow such a situation to develop, will mean that all a person resident in Sierra Leone, or a foreigner who comes into Sierra Leone needs to do to hamper or to frustrate another foreigner's legitimate claims, would be to apply for that person's arrest. Foreigners are by definition, persons who are citizens of other countries, and are usually, but not always, not resident in Sierra Leone. This means, they usually live abroad, and will of necessity, have cause to travel abroad. To Order that all such persons should be arrested, and be made to provide security for any claim which may be brought against them, whether the claim has merit or not, will make nonsense of the operations of the Law. When read carefully, both Sections 4 and 5 of the Act, and Order 54 of the HCR, 2007, are actually aimed at persons, citizens and residents alike of Sierra Leone, as well as non-citizens and non-residents of Sierra Leone, who intend to leave Sierra Leone, whilst a claim is pending against them, and by doing so, will thereby frustrate any attempt to execute judgment against them.
8. According to exhibit MA4, Plaintiff has indeed brought a claim against the Defendant. But the other documents exhibited to Mr Allieu's affidavit, and to Mr Taylor's affidavit, show that the mortgages granted in Armenia, were not granted to the Defendant, but to a company or entity Dzoraguyuh, of which he is Director. The claim has nothing to do with Sierra Leone. Further, it is not quite clear whether the debt has been called in or not. Non-payment of the amount given out as loan was, and is penalised in the manner set out in paragraph 4.2 of exhibit MA2,

and in exhibit LT3. The same penalty is imposed in the other Mortgage Deeds exhibited as LT5a & b respectively to Mr Taylor's third affidavit of 29 October, 2012. LT3 is directed not at the Defendant herein, but at his company, Dzoraguyh, which is the true debtor. LT4 which is the reference issued by the Ameriabank is dated 26 October, 2012 and appears to have only come into existence whilst the matter was before me. These are all issues which will go towards determining whether the Plaintiff's claim is genuine and supportable, or otherwise. What I have to decide, is whether, given these limitations, Plaintiff is entitled to security for any judgment which may be given in his favour.

ASSESSMENT AND FINDINGS

9. As in previous cases dealing with this same issue, I have been very reluctant to impose bail conditions where it appears to the Court that the intention there, is to obtain a procedural advantage on the part of the Plaintiff/Applicant. This is why in the case of *A V CARAT LTD v GLOBAL CARAT* Judgment delivered 12 January, 2011, I had no hesitation in discharging the Order for Arrest made against the two persons Ordered to be arrested by TAYLOR, J. The Defendant in that case was a limited liability company in which the two men, Messrs Trikazuik, Godlewski, and Mkrtchan were either shareholders or officials. They were not parties to that action. The remedy in Sections 4 and 5 of the Act, is available only against a defendant. The facts are, of course, different in this case. Here, the party liable in respect of the mortgage deeds executed in Armenia, is the company Dzoraguyh. That is the company to which the loans were given. The Defendant in the action herein is the person sought to be arrested, and so different considerations apply. Whether or not the Plaintiff can succeed, is a matter for the trial Court. Mr Fofanah has attempted to raise jurisdictional arguments against the granting of the Orders sought by the Plaintiff, relating to the fact that the cause of action arose outside the jurisdiction of this Court, to wit, in the Republic of Armenia. But I have pointed out to him that such arguments can only be raised in an Application brought for that particular purpose: to set aside the writ on grounds of lack of jurisdiction. On both accounts, that

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is, of both Plaintiff and Defendant, discussions are on-going between the two of them, with the Russian Consul, and both Solicitors and Counsel, involved. Why then this Application to have the Defendant arrested? I have noted Mr Taylor's claim in paragraph 5 of his affidavit of 25 October, 2012 that the Defendant threatened that he would "take the plaintiff half-way across the world like he did the last time if the plaintiff does not accept his payment plan". This shows that contrary to what is being canvassed in Plaintiff's Application, the parties have been discussing how Dzoraguyh's indebtedness in Armenia should be settled.

10. What perhaps I may have to ask myself is whether if the Plaintiff succeeds in his action herein, there is anything on which the Plaintiff could legitimately fall on in order to satisfy the judgment debt. The Plaintiff is fully aware, based on the affidavits he has filed, that there is nothing within Sierra Leone on which could fall, in that event. Whatever relief he may obtain, will be found in the Republic of Armenia. With this knowledge, the Plaintiff now seeks to obtain a tactical advantage against the Defendant, by invoking the Court's power to Order him to provide security; failing which, he should be kept in custody until such time as judgment may be obtained against him. I do not think this Court should be used for that purpose. It is my view, and I so hold, that Plaintiff's interest could be well protected by ensuring that the Defendant does not leave the jurisdiction without an express Order of this Court.
11. In the premises ~~the~~, the Plaintiff's Application is granted to the limited extent that the Defendant shall provide security for the Plaintiff's claim in the following manner: The Defendant shall deposit his Armenian passport with the Registrar of this Court until further Order. He shall not leave Sierra Leone without the express permission of this Court for which purpose, he is granted Liberty to Apply. The Costs of this Application shall be Costs in the course.



THE HONOURABLE MR JUSTICE N C BROWNE-MARKE