



IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION
FAST TRACK COMMERCIAL COURT

THE MATTER BETWEEN:

Case No: FTCC 058/15

TIMIS MINING CORPORATION (SL) LIMITED

-PLAINTIFF

AND

DAWNUS (SL) LIMITED

-DEFENDANT

REPRESENTATION:

M. P. Fofanah Esq for the Plaintiff

Sorie & Bangura for the Defendant

BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA J.
RULING DELIVERED ON THE 4TH MARCH, 2015

RULING

This ruling concerns two separate applications filed on behalf of the parties. With consent of the parties, the said applications were consolidated on the 22nd February, 2016.

1. Application dated 15th December, 2015, filed for and on behalf of the Defendant

In this application, Counsel for the Defendant/ Applicant is praying that leave be granted for it to appeal to the Court of Appeal from the Order of this Court dated 2nd December, 2015 and that a stay of all proceedings be granted pending the hearing and determination of the Appeal. The Applicant further applies for an interim stay of all proceedings in the matter pending the hearing and determination of the present application

(a) Affidavit in Support

The Applicant's application is supported by the affidavit of Nick Glaze sworn to on the 15th day of December, 2015 together with the exhibits attached thereto. Nick Glaze swore to the fact that the Applicant applied for a stay of proceedings in this matter which application was refused. The said Applicant is now applying to this Honourable Court for leave to appeal to the Court of Appeal against that refusal

The Applicant exhibits a Notice of Appeal which it intends to file should this application succeed- Exhibit "C"

It is important to note that the Applicant had filed exhibit "C" in the Registry of the Court of Appeal before filing this application for leave to appeal as required by Rule 10 of the Court of Appeal Rules, 1985. However, after the procedural irregularity was brought to the notice of the Applicant's Solicitors by the Respondent's Solicitors, the said Notice of Appeal was discontinued.

(b) Affidavit in Opposition

The Respondent opposes the application and relies on the affidavit of Mohamed Pa-Momo Fofanah sworn to on the 15th day of January, 2016. Mr. Fofanah deposes that the Notice of Appeal exhibited lacks merit and is intended to further delay the proceedings in this matter. He also swore that the affidavit in support of the

application entirely fails to show any special circumstance to warrant a stay of proceedings.

2. APPLICATION DATED 15TH DECEMBER, 2015 FILE FOR AND ON BEHALF OF THE PLAINTIFF/ APPLICANT

In this application, Solicitor for the Plaintiff is applying for an Order authorizing the Defendant to open its accounts and records to the Plaintiff and its nominees for inspection and verification, including all and any agreements between the Defendant and its sub-contractors as well as between the Defendant and Plant equipment, and machinery suppliers in accordance with clause 14 of exhibit 2/3 of the Letter of Intent made between the Defendant and the Plaintiff herein { described as "payment and cost schedule" inclusive of its revised version by the Defendant} dated 10th November, 2014 pending the hearing and determination of this action. The Plaintiff is also applying for an Order that the costs/expenses of the said inspection and verification of accounts and records be borne by both parties on the condition that the successful party to this action shall be repaid such costs/expenses incurred by it for the exercise upon the final determination of this action.

a. AFFIDAVIT IN SUPPORT

The application is supported by the affidavit of Mohamed Pa- Momo Fofanah sworn to on the 15th December, 2015. In the said affidavit, Mr. Fofanah deposes that in order to properly determine the issues in dispute between the parties, it will serve the interest of justice and fairness to both parties herein for the Orders prayed for to be granted

b. AFFIDAVIT IN OPPOSITION

The Defendant opposes the application and relies on the affidavit of Ibrahim Sorie sworn to on the 28th day of January, 2016 Mr. Sorie deposes that prior to the filing of the present application, he had applied for leave to appeal the ruling of this Court dated the 2nd December, 2015 and so it will be a waste of scarce judicial resources and time to grant the said application if the appeal ends up successful

3. ISSUES FOR DETERMINATION

The following are, to my mind, the issues for determination in this application:-

1. Whether the Defendant has established sufficient grounds for this Court to grant leave to appeal to the Court of Appeal from its ruling dated 2nd December, 2015.
2. Whether there exist reasonable grounds to grant a stay of proceedings pending the hearing and determination of the appeal
3. Whether it will serve the interest of justice for this Honorable Court to Order the Defendant to open its accounts and records to the Plaintiff and its nominees for inspection and verification

4. DETERMINATION OF THE SAID ISSUES

- a. Mr. Ibrahim Sorie for the Defendant argues the first and second issues together. His argument essentially is that it will be a waste of scarce judicial resources to have parallel proceedings in this Court and in the Court of Appeal.
 - b. Mr. Mohammed P Fofanah on the other hand argues that as provided for in Rule 10{1} of the Court of Appeal Rules, 1985 and Section 56 of the Courts Act 1965, a party wishing to appeal to the Court of Appeal must first apply to the Court below for leave to do so. The rationale is for that Court below to see the merits of the grounds of Appeal. He submits that the appeal lacks merit and leave ought not to be granted. On the issue of parallel proceedings argued by Mr. Sorie, Mr. Fofanah refers this Court to the Court of Appeal Rules, Rule 28 which provides that an appeal does not act as stay of proceedings
 - c. Mr. Sorie in reply argues that the Rules of the Court of Appeal were not the operating rules for the High Court. Furthermore, Rule 28 of the Court of Appeal Rules, 1985 refers to stay of “execution of judgement” and not of “proceedings”. He concludes that this Court has inherent jurisdiction to stay proceedings.
5. It is established law that the Court of Appeal cannot entertain an appeal from an interlocutory order of the High Court unless an application for leave has been made to the Court below. Where leave to appeal is required, a valid notice of appeal cannot be served unless and until leave to appeal has been granted {see CUMBES-V- ROBINSON {1851} 2 KB 83 C.A; also paragraph 59/14/17 of the English Supreme Court Practice, 1999. This paragraph continues “an intending appellant cannot stop time for serving a Notice of Appeal from running {where leave to appeal is required} by serving a notice. Based on the foregoing, Counsel for the Defendant is right in discontinuing the Notice of Appeal he had already filed before seeking leave from this Court to appeal against its ruling dated 2nd December, 2015.

6. What are the circumstances in which leave may be granted? In answering this question, I will seek guidance from the English Supreme Court Practice, 1999 paragraphs 59/14/18. Though this paragraph deals with the test the Court of Appeal will apply in an application for leave, it is my view that they will equally apply to the High Court. The general test which the Court applies in deciding whether or not to grant leave is that Leave will normally be granted unless, the grounds of appeal have no realistic prospect of success- SMITH-V- COSWORTH CASTING PROCESS LIMITED {PRACTICE NOTE}{1997} 1 WLR, 1538. Leave may also be granted if the question is one of the general principle, decided for the first time or as decided in BUCKLE V HOLMES {1926} 2 KB 125 at 127 per BANKES LJ” a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage.” Contrary to the unfortunate comment made by Counsel for the Defendant that I would not agree with the proposed grounds of appeal as they are against my discision, my view is that for the development of our Jurisprudence, the right to appeal should not be encumbered unless such grounds are frivolous, vexatious and waste of judicial time. For this reason, I am inclined to grant leave to appeal to the Court of Appeal, from the Order of this Court dated 2nd December, 2015.

7. I have only one comment to make on this point. In a similar case in the High Court of Justice, Queens Bench Division of England and Wales intituled DAWNUS SIERRA LEONE LIMITED AND TIMIS MINING CORPORATION SIERRA LEONE and TIMIS MINING CORPORATION SIERRA LEONE LIMITED {2016} EWHC 236 {TCC} 11TH FEBRUARY, 2016. Counsel for Dawnus {SL} Limited created the impression that this Court has placed this matter in a Fast Track, “with directions for speedy trial and an abridged procedure apparently dispensing with disclosure and witness statements and without giving any reason for doing so, the case was just “hurling towards trial in an informal way and was dealt with too laxly” giving legitimate concerns to Dawnus (SL) Limited. This is a misrepresentation of how Sierra Leonean Courts operate. The Commercial and Admiralty Court Rules, 2010 provide that “after a reply has been filed or if the time of reply has elapsed, the Deputy Master and Registrar shall, within 3 days assign the claim to a judge for Pre-Trial Settlement Conference - Rule 5 {1}. At the time I gave my ruling on the 2nd December, 2015, pleadings had closed and by our Rules, the matter must proceed to Pre-Trial Settlement Conference. Furthermore, no appeal was stayed in the Court of Appeal as alleged as none

was properly before that Court. It is unfair how attempts are made to discredit our legal system and create the impression that it is sub-standard.

8. On whether there exist reasonable grounds to grant a stay of proceeding pending the hearing and determination of the Appeal filed, Counsel for the Plaintiff relies on the Court of Appeal Rules, 1985, Rule 28 thereof. The Defendant on the other hand argues that the Rule relates to “stay of execution” and not “stay of proceedings” which are two different things. Definitionally “stay of proceedings” simply put is a ruling by the Court in Court proceedings halting further legal process in a trial whilst “stay of execution” is a Court Order to temporarily suspend the enforcement of a Court judgement or Court Order” In order to determine which of the two views expressed by Court is correct, I shall state the provisions of Rules 28 in extension:

“An appeal shall not operate as a stay of execution of proceedings under the judgement 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.

It is my view that the Rule clearly relates to both “stay of execution” and or stay of proceedings”. The inclusion of the word “of” instead of the more appropriate “or” is a typographical error- a clerical mistake. I say so because a similar provision can be found in Order 59, Rule 13 of the English Supreme Court Rules, 1999- Rule 13 provides as follows:-

1. Except so far as the Court below or the Court of Appeal or a single Judge may otherwise direct,
 - (A) An appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below
 - (b) No intermediate act or proceedings shall be invalidated by an appeal.

Indeed, the English Supreme Court Practice, 1999. Paragraph 59/13/1 has as its heading “stay of execution or of proceedings”

9. Counsel for the Defendant also argues that the Court of Appeal Rules, 1985 are not the operating Rules for the High Court. Whilst I agree that the two Courts have their own different sets of Rules, it will be misrepresenting the law to argue that in a situation where a provision of the Court of Appeal Rules clearly

deals with proceedings in the High Court, such Rules should not be applied. Rule 28 deals with stay of execution or of proceedings in the lower Court {The High Court} and so for this purpose, the Rule can be safely applied to the High Court.

10. Another argument put forward by the Counsel for the Defendant is that if the stay is not granted there would be parallel proceedings in the Court of Appeal. I disagree with this argument. The proceedings in the High Court is at a Pre- Trial Settlement Conference level, under the provisions of the Commercial and Admiralty Court Rules, 2010. The purpose of the Conference is to get the parties to settle issues or some of the issues in dispute without going to trial. When parties settle any or all of the issues in dispute, it becomes an Order of Court signed by a Judge of the Commercial Court. The Order of this Court the Defendant intends to appeal against relate to “Stay of Proceedings” in Sierra Leone and for the matter to be subject to the non- exclusive jurisdiction of England and Wales. The Pre-Trial Settlement Conference by its very nature will in no way be parallel to the appeal proceedings. In any event, unless a person is a soothsayer nobody can predict with certainty, the outcome of the appeal. If the Court of Appeal therefore upholds the Orders of this Court dated 2nd December, 2015, it would amount to a waste of everybody’s time if a stay had been granted of the Pre-Trial Settlement Conference.
11. The principles governing the grant of a stay of proceedings execution are clearly stated in paragraph 59/13/2of the White Book, 1999. They are as follows:
 - a. An appeal does not operate as a stay of the Order appealed against except to the extent that the Court below or the Court of Appeal otherwise directs
 - b. Neither the Court of Appeal nor the Court below will grant a stay unless there are good reasons for doing so
 - c. As was stated in ANNOT LYLE {1886} 11 P. 114 at 116, the Court does not “make a practice of depriving a successful litigant of the fruit of his litigation, and locking up funds to which prima facie he is entitled” pending an appeal and this applies not merely to execution but to the prosecution of proceedings under the Judgement or Order appealed from.
 - d. The Court is likely to grant a stay where the appeal would otherwise be nugatory

- e. The question whether or not to grant a stay is at the discretion of the Court and the Court will grant it only where the special circumstances of the case so require.
12. Based the forgoing reasoning, I hold that the Defendant has not provided good reasons for this Court to depart from the stated principle that the successful party shall not be deprived of the fruit of the Judgement or Order in his favour. In the circumstance, I exercise my discretion in favour of refusing a stay.
13. In the United Kingdom the matter which I have already mentioned elsewhere DAWNUS {SL} LTD –V- TIMIS MINING CORPORATION & ANOR, a Ruling was delivered on the 11th February 2016. In that matter, the ruling of this Court dated 2nd December, 2015 was extensively discussed. The Judge in the said matter refused to grant, a non-suit injunction against the Plaintiff herein in respect of this present matter. The Court held the view that although an anti-suit injunction would operate in personam against Timis Mining Corporation, it would invariably affect the proceedings in Sierra Leone
14. The final issue is whether it will serve the course of justice for the Defendant to be ordered to open its book for inspection by the Plaintiff or its nominees and that both parties bear the cost of the inspection and verification.

The proceedings are at a Pre- Trial Settlement conference stage. The Commercial and Admiralty Court Rules, 2010 makes provision for:

- A. The Pre-Trial Judge to invite experts to assist at a pre Trial Settlement Conference- Rule 5{4}.
- B. The pre-trial Judge may if the parties wish that a particular person or body settle the claim
- i. Refer the claim to that person or body and
 - ii. Give directions and period for settlement of the claim- Rule 7{1}.

As the Pre- Trial Settlement Conference is a forum where parties to a claim are given the opportunity to settle any claims through negotiation, mediation or arbitration, the interest of the parties will be best served if the Orders sought herein are granted. It should be noted that any disclosures made at a Pre- trial Settlement conference shall be without prejudice- Rule 4{5}

DECISION

Based on the reasons I have outlined above, I hereby Order as follows:-

1. Leave is hereby granted to the Defendant to appeal the Order of this Honourable Court dated the 2nd December, 2015 to the Court of Appeal.
2. Application for stay of all proceedings in this matter pending the hearing and determination of the appeal before the Court of Appeal is refused.
3. That the Defendant is hereby Ordered to present at the Pre- trial Settlement Conference all its account and records, including, where relevant to this matter, all and any agreement between the Defendant and its sub contractor as well as between the Defendant and Plant, equipment and machinery suppliers in accordance with clause 14 of exhibit 2/3 of the Letter of intent between the Defendant and the Plaintiff herein { described as "payment and cost schedule" inclusive of its revised version by the Defendant} dated 10th November, 2014.
4. That both Plaintiff and the Defendant jointly appoint a trained and qualified Accountant to carry out the inspection and verification of the said accounts and records and the costs and expenses thereof be shared by both parties.
5. That if both parties fail to agree on the appointment of a trained and qualified Accountant, the Court shall make the appointment
6. That the cost of the application be cost in the cause.
7. Matter adjourned to Friday, 11th March, 2016


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Hon. Mr. Justice Sengu Koroma J

Date

04/03/2016