FTCC 055/16 2016 S NO. 50

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

IN THE MATTER OF THE NATIONAL TELECOMMUNICATIONS ACT NO 9 OF 2006 (AS AMENDED BY THE TELECOMMUNICATIONS (AMENDMENT) ACTS NO. 8 OF 2009 AND NO. 1 OF 2015)

AND

IN THE MATTER OF AN APPLICATION FOR INTERIM MEASURES PENDING ARBITRATION PROCEEDINGS TO ENFORCE COMPLIANCE WITH THE SERVICE AGREEMENT DATED 12TH AUGUST 2014 AND THE AMENDMENTS TO THE SAME ENTERED INTO BETWEEN THE NATIONAL TELECOMMUNICATIONS COMMISSION OF THE ONE PART AND SLONE TELECOM LIMITED OF THE OTHER PART AND REGISTERED AS NO. 525/2014 AT PAGE 129 IN VOLUME 98 OF THE RECORDS BOOKS OF MISCELLANEOUS INSTRUMENTS KEPT AT THE OFFICE OF THE REGISTRAR-GENERAL IN FREETOWN

BETWEEN:

SLONE TELECOM LIMITED - PLAINTIFF
1 JOHNSON DRIVE, SUITE 100
ABERDEEN
FREETOWN

AND
NATIONAL TELECOMMUNICATIONS COMMISSION (NATCOM) - DEFENDANT
13 REGENT ROAD
HILL STATION
FREETOWN

Counsels:-
O. Jalloh Esq - Plaintiff
Y. H. Williams Esq
M. L. Tarawally Esq
A.S. Marrah Esq
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L.M. Farmah Esq - Defendant
O. I. Kanu Esq
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P. A. Williams Esq
A. Suwu Ms.

RULING DELIVERED THIS DAY OF 2016 BY THE HON (MS) JUSTICE F. BINTU ALHADI J.

The Plaintiff's action commenced by Originating Notice of Motion dated on the 19th day of February 2016 against the Defendant asking for a number of interim injunctions to be ordered against the Defendant. The Plaintiff failed to comply with Order 8 Rule 4 (2) in so far as the nature of the claim is; but included the relief or remedy required. The following Orders were prayed for. To wit:-

1. An Ex-Parte interim injunction be granted for seven days restraining the Defendant whether by itself, its Chairman, Commissioners, directors, managers, servants, privies, attorneys or agents howsoever otherwise from inviting tenders, bids, opening bids, unsealing tenders/bids, offering out, entering into negotiations, entering into memorandum of understandings, awarding contracts, executing contracts, alienating, disposing of or howsoever otherwise the rights, licences, permissions and authorisation in regard the design, build, delivery and operation of the International Gateway Monitoring Systems platform to monitor international and domestic voice and data telecommunications traffic terminating into and in the Republic of Sierra Leone.

2. An interlocutory interim injunction be granted restraining the Defendant whether by itself, its Chairman, Commissioners, directors, managers, servants, privies, attorneys or agents howsoever otherwise from inviting tenders, bids, offering out, entering into negotiations, entering into memorandum of understandings, awarding contracts, executing contracts, alienating, disposing of or howsoever otherwise the rights, licences, permissions and authorisation in regard the design, build, delivery and operation of the International Gateway Monitoring Systems platform to monitor international and domestic voice and data telecommunications traffic terminating into and in the Republic of Sierra Leone pending the hearing and determination of this application.

3. An injunction be granted restraining the Defendant whether by itself, its Chairman, Commissioners, directors, managers, servants, privies, attorneys or agents howsoever otherwise from inviting tenders, bids, offering out, entering into negotiations, entering into memorandum of understandings, awarding contracts, executing contracts, alienating, disposing of or howsoever otherwise the rights, licences, permissions, and authorisation in regard the design, build, delivery and operation of the International Gateway Monitoring Systems platform to monitor international and domestic voice and data telecommunications traffic terminating into and

in the Republic of Sierra Leone pending the hearing and determination of the intended arbitration proceedings against the Defendant.

4. An injunction restraining the Defendant, its Servants or agents from copying, altering, deleting, destroying or otherwise interfering with any or all books, documents, accounts, notes, memoranda, letters, files, computers, computer files, disks and any and all other record and documents of any kind whatsoever relating to the Plaintiff and which are now in the possession of the Defendant, Plaintiff or their servants or agents.

5. Any further Order/s or other relief/s that this Honourable Court may deem fit and just.

6. That the costs of and incidental to this application be borne by the Defendant.

The application was supported by the Affidavit of the Managing Director of the Plaintiff Company, David Thomas Navo, sworn to on the 19th day of February 2016.

Considering that there is no substantive claim before me, I still in accordane with Order 35 Rule 1 (1) and (3) and in order to assist the process in initiating arbitration proceedings according the agreement between the parties, having considered the Originating Notice of Motion on its merit and given the fact that the Defendant was about to contract out and open bids for the same services as provided by the Plaintiff and given that the Defendant failed to attend court, it was just and convenient to grant the interim measure in the first Order prayed for. This was granted on the 22nd day of February 2016.

On the 29th day of February 2016 the second Order prayed for was granted on the application of the Plaintiff to extend the validity of the first Order prayed for until the hearing and determination of the application.

On the 7th day of March 2016 the Defendant filed an Affidavit in Opposition deposed to by Osman Ibrahim Kanu Esq. No Exhibit was attached.

On the 14th day of March 2016, the Technical Director of the Plaintiff Company, Chris Joseph, filed in a (Supplemental) Affidavit sworn to on the 14th day of March 2016 together with exhibits attached thereon.

SUBMISSION BY COUNSEL FOR THE PLAINTIFF

1. Mr. Osman Jalloh, Lead Counsel for the Plaintiff, submitted to this Court that, he has not delved into the substantive complaint/grievance because the Court's jurisdiction to hear and determine it, is not being invoked at this stage. He submitted that what is being sought is the preservation of the status quo in respect of the international gateway systems contract pending the reference and determination of the arbitration in London.

2. Furthermore, Mr. Jalloh pointed out that the Plaintiff is not asking the Court to decide whether NATCOM was wrong in terminating the contract or that the contract should be given back to the Plaintiff. He told the Court that the Plaintiff seeks to protect the business relationship and ensure that it is not dissipated by opening it up to third parties.

SUBMISSION BY COUNSEL FOR THE DEFENDANT IN SUMMARY

1. The Lead Counsel for the Defendant, Mr. L. M. Farmah, opposed the Originating Notice of Motion. He objected to the jurisdiction of the Court to hear and determine the issues, based on the fact that the matter was pre-mature to be in Court, vexatious and frivolous.

2. He averred that the Court must not entertain this matter, since the Plaintiff and/or its solicitors knew that both parties to the contract and in this action, had entered into agreements which constitute Exhibits "D", "E" and "J" of the affidavit of David Navo and which prescribe the form that the 'Dispute Resolution' as the mechanism to resolve their differences should be conducted.

3. Counsel for the Defendant, Mr. Farmah, submitted that the Plaintiff failed to invoke the necessary mechanism that was agreed between them; but has instead invoked the wrong type of action. Counsel therefore declined the jurisdiction of the Court until certain actions as prescribed for arbitration were fully utilised.

MR. JALLOH'S REPLY

4. Counsel for the Plaintiff, Mr. Jalloh, submitted in reply that, both parties were in agreement that a dispute had arisen as a result of the way the contract to provide 'monitoring and quality of service of the international telecommunications gateway systems' was terminated.

5. He maintained that, the Plaintiff was not invoking the jurisdiction of the Court to hear and determine the substantive matter; but is asking the Court to preserve the status quo in regard the international gateway systems contract, pending the reference and the determination of the arbitration.

6. Furthermore, Mr. Jalloh argued that, the Plaintiff had sought the Court's protection because there was an apprehension that the assets of the Plaintiff would be dissipated and that the Defendant had been carrying on with preparations to open up the service and monitoring international contracts to other competitors in contravention of the agreement both parties had entered into.

THE DECISION OF THE COURT

The following issues need to be addressed before a ruling on the Orders prayed for can be given:

JURISDICTION

1. In view of the fact that the claim is not before this Court, the Court can still use its injunctive powers to assist a claim. "The High Court has no inherent jurisdiction to supervise the conduct of the reference and of the arbitrator. However, the High Court possesses various powers which may be invoked during the course of the reference. Without prejudice to the powers which may be vested in the arbitrator.....in these matters, the High Court has, for the purpose of and in relation to a reference, the same power of making orders as it has for the purpose of and in relation to an action or matter in the High Court in respect of the following: (1) security for costs; (2) the giving of evidence by affidavit; (3) the examination on oath of any witness before an officer of the High Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction; (4) the preservation, interim custody or sale of any goods which are the subject matter of the reference; (5) securing the amount in dispute in the reference; (6) the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein....." Halsbury's Laws of England, Vol 2, (Fourth Edition Reissue) paragraph 677.

2. In: Glidepath Holding BV and Others v Thompson and Others [2005] 1 All ER (Comm)at p 434 Justice Eady of the Queen's Bench Division held that: "the Court had inherent jurisdiction to grant interim relief where there was a need to do so; for example, for the purpose of protecting a party against the anticipated dissipation of assets, even though there was an arbitration clause which might at a later stage lead to a stay. Moreover, the inherent jurisdiction would not be so limited as that under the Arbitration Act, since the court's powers were not limited to preservation of assets, but extended to granting any injunction when it appeared to be just and convenient to do so." In the present case before this Court, there had been at the time the injunctive reliefs were granted, an arguable case on the Plaintiff's part of fear of dissipation of its assets and the contract they had entered into. Evidence was also disclosed which justified a reasonable apprehension of the dissipation of assets.

3. "The Court has power to grant an injunction against interference with trade where an illegal act has been committed; thus if a person, without just cause or excuse, deliberately interferes with the trade or business of another by unlawful means, then he is acting unlawfully, and in a proper case an injunction can be granted against him." Halsbury's Laws of England, Vol 24, (Fourth Edition Reissue) paragraph 816.

4. "An injunction by interlocutory order may be granted in all cases in which it appears to the court to be just or convenient that such an order should be made; and any such order may be made unconditionally or upon such terms and conditions as the court thinks just." Halsbury's Laws of England, Vol 24 supra parag 917.

5. "The words 'just or convenient' in the statutory provision must be read 'just, as well as convenient.' They do not mean that the court can grant an injunction simply because it thinks it convenient, but means that it should grant an injunction for the protection of rights or the prevention of injury according to legal principles. They confer no arbitrary nor unregulated discretion on the court, and do not authorize it to invent new modes of enforcing judgments in substitution for the ordinary modes." Halsbury's Laws of England, Vol 24 supra at parag 919.

6. I have quoted the law extensively here to rebut the contention that this Court has no jurisdiction to hear the Originating Notice of Motion filed on the 19th day of February 2016. It is to show also that, it is contrary to public policy for parties to a legally binding contract to attempt to oust the jurisdiction of the Court; McKendrick, E. 'Contract Law: Text, Cases and Materials' (3rd edition, 2008) Oxford University Press at p 289. The Defendant's argument therefore that this Court has no jurisdiction to hear this application at this stage is untenable.

ARBITRATION

7. Chapter (CAP) 25 of the Laws of Sierra Leone 1960 does not define arbitration clauses/agreements. Rather it discusses 'submission' which is 'a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.' Under the Act, the Court can appoint an arbitrator(s) and in accordance with paragraph (h) of the Schedule to the Act, the award by the arbitrator(s) is final and shall be binding on the parties and all persons who are claiming under them; although the parties cannot oust the ultimate jurisdiction of the High Court of Sierra Leone. Also, Section 13 of the Act, empowers the Court to enforce an arbitration award in the same manner as a judgment or order of a court.

8. In the matter between Slone Telecom Limited and National Telecommunications Commission, that is, the matter before this Court, the parties inserted arbitration clauses into the two agreements they signed. They did this of their own volition and under such circumstances the Court is guided by what the parties agreed rather than impose a strict adherence to Cap 25 of the Arbitration Act of 1960.

9. In the matter between Heyman v Darwins (1942) 1 All ER 337 the House of Lords laid down the scope of applicability of the arbitration clause in relation to the contract containing the clause. The House of Lords was of the view that " an arbitration clause is a written submission which is agreed to, by the parties to the contract. If the parties to the contract assert together that they have entered into a binding contract, but a difference arises between them, over whether there has been a breach by one side or the other or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as having arisen 'in respect of' , 'with regard to' or 'under ' the contract and thus should be referred to arbitration."

10. On a further analysis of the nature of an arbitration clause in a contract, the House held that "an arbitration clause is a collateral term in the contract relating to the resolution of disputes. That even if the performance of the contract comes to an end as a result of repudiation, frustration or breach of contract, the arbitration clause would survive for the purpose of resolving disputes arising from or in connection with the contract. Based on the submissions articulated earlier in this ruling, the parties are at one in asserting that they entered into a binding contract and differences have arisen as a result of the termination of the contract by the Defendant without any direct notice of such termination to the Plaintiff. Both parties have alluded to inserting dispute resolution mechanisms, which the Plaintiff has invoked by referencing the dispute to the International Chamber of Commerce after which it is alleged that attempts to engage the Defendant into negotiations have been rebuffed.

11. The dispute resolution mechanisms agreed between the parties are set out in : Clause 6.1 which states that "the parties shall attempt in good faith to negotiate a settlement to any dispute between them arising out of, in connection with the Contract within thirty working days of either party notifying the other of the dispute....." and in Clause 15. At Clause 15.3, they agreed that if they could not settle their dispute they shall refer it to mediation unless either party does not consider it suitable for resolution by mediation.

12. At clause 15.4 of the said agreement, the parties agreed on the procedure for mediation and the consequential provisions relating to mediation. They agreed that where they are unable or unwilling to agree on a mediator or vice versa, then within sixty (60) working days, either party shall apply to the International Chamber of Commerce to appoint a Mediator.

13. It is therefore clear that the Court need not impose Cap 25 of the Arbitration Act of 1960 on the Plaintiff and the Defendant in this matter because they are both in agreement on how they intend to settle the dispute that has arisen between them as a result of the termination of the contract initiated by the Defendant. Courts are usually reluctant to intervene into agreements that were entered into by rational parties, on their own accord and under no duress. Where the parties have included arbitration clauses, there is a presumption that the parties as rational businessmen were likely to have intended to have a legal relationship, where any differences that may arise are to be settled by

arbitration except were the language made it clear that certain issues were excluded for arbitration; Fiona Trust & Holding Corporation and Others v Privalov & Others (2007) HL at 1054.

14. It is therefore clear in my mind that, having heard counsel for the Plaintiff and the Defendant and having perused the agreements entered into, invoking the arbitration clauses in the contracts is the correct approach to take. Invoking the powers of the court in relation to arbitral proceedings and its inherent jurisdiction, where there was an imminent apprehension that the assets of the Plaintiff and agreement between the parties were about to be dissipated, were within the rights of the Plaintiff and were well founded.

15. I am satisfied that it was agreed between the Plaintiff and the Defendant that ultimately arbitration proceedings should be referred to the International Chamber of Commerce (ICC) for a mediator to be appointed. I am aware that Sierra Leone is not a contracting state to the New York Convention and that enforcement of the final decision of the ICC may be challenging. Whilst this Court has no inherent jurisdiction to supervise the conduct of the reference and the arbitrator, I am confident that a settlement would be reached.

16. Furthermore, the Court has received assurances from the Lead Counsel for the Defendant, Mr. Farmah, that the agreement was entered into in good faith and that they would abide by the dispute resolution mechanism. I have no reason to doubt the veracity of the assurances given to this Court by Mr. Farmah, a very senior, experienced and respected Law Officer of the State.

17. I also recall Monday the 14th day of March 2016, when Counsel for the Plaintiff and the Technical Director of the Plaintiff Company, submitted to this Court that having considered all the circumstances, they were satisfied that there is no risk of the Plaintiff's assets, in the possession and custody of the Defendant, being destroyed or dissipated. They also informed the Court that, in fact, the Plaintiff was still in a business relationship with the Defendant in respect of other contracts. These pieces of information were encouraging to the Court and buttressed my view that an amicable settlement would be reached between the parties in accordance with the dispute resolution rules they had carved out themselves and which have already been invoked.

18. In the premises, the interim measures have been exhausted and the parties have expressed their willingness to proceed to arbitration in accordance with the contract. The Court cannot force the Defendant either way on the International Gateway Systems Agreement, since this is the substantive issue that is already before the ICC for its hearing and determination.

19. In the circumstances, I make No Order.

Signed: _____

Hon. (Ms) Justice F. Bintu Alhadi.