



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

Case No: FTCC 024/16

BETWEEN:

P.T.N SERVICES LIMITED

AND

AIRTEL SIERRA LEONE LIMITED

COUNSELS:-

F. Sorie (Mrs.) For the Plaintiff

A. Jones (Mrs.) For the Defendant

JUDGMENT DELIVERED THIS 26th DAY OF AUGUST 2016 BY THE HONOURABLE MRS. JUSTICE AMY WRIGHT J.

JUDGEMENT

P. T. N SERVICES LIMITED

V

AIRTEL (SL) LIMITED

(1) Introduction/Preliminaries

- The matter originally commenced by Writ of Summons dated the 29th day of January, 2016 wherein the Plaintiff claimed inter alia, a total sum of **Le 67,500,000 (Sixty-Seven Million, Five Hundred Thousand Leone)** plus Interest of 25% under Cap 19 Law Reform (Miscellaneous Provisions) Act of the Laws of Sierra Leone 1960.
- The Defendant in the action hereto entered an Appearance and subsequently filed a Defence to the Claim as contained in the above-mentioned Writ of Summons.
- Following from the filing of the referred Defence by the Defendant, the Plaintiff, by Judges Summons applied for liberty to enter Summary Judgement against the Defendant/Respondent for recovery of a total sum of **Le 67,500,000 {Sixty-Seven Million Five Hundred Thousand Leones}**
- The Defendant/ Applicant in response to the application by way of a Judges Summons filed an Affidavit-in-Opposition to the said Application.

(2) Summary of the Case and Submissions by Counsels

As was stated above, the application was by way of a Judges Summons dated the 8th day of June 2016 and was heard on diverse dates from the 14th of July 2016 for the following Orders:-

1. That pursuant to the provisions of Order 16 Rule 1 of the High Court Rules 2007, (HCR) this Honourable Court grants liberty to the Plaintiff/ Applicant to enter final judgement against the Defendant/Respondent herein for recovery of the following sums of money.

- i. The sum of **Le 23,000,000** being monies due and owing by the Defendant/Respondent being Salaries increased as per the National Minimum Wage Act pursuant to the provisions of the Statutory Instrument No. 6 of 2014.
 - ii. The sum of **Le 5,000,000** being monies due and owing to the Plaintiff/ Applicant by the Defendant/Respondent for refurbishment work done by the Plaintiff/ Applicant at the Lumley Beach Police Post.
 - iii. The sum of **Le 39,500,000** being monies due and owing to the Plaintiff/ Applicant by the Defendant/Respondent for security services provided by the Plaintiff/ Applicant at Joe Town for the period August through November, 2015.
2. Interest on the above-mentioned sums at a rate of 25% per annum.
 3. Any further Order of other reliefs that this Honorable Court may deem fit and just.
 4. Costs

At the hearing of the Application, the Plaintiff/ Applicant relied on the Affidavit of PONSFORD NIMNEH {the CEO of the Plaintiff/ Applicant} sworn to on the 8th day of June 2016 together with the following exhibits attached thereto.

- Exhibit PN 1- A Copy of the Writ of Summons dated 29th January 2016 and the Statement of Claim thereto.
- Exhibit PN 2¹⁻²- Copies of the Memorandum and Notice of Appearance filed by the Defendant.
- Exhibit PN 3- A Copy of the Defence filed by the Defendants dated 22nd February 2016.

- Exhibit PN4 ^{1&2}- A Copy of cover letter dated 19th February 2016 and a GTB cheque dated 19th February 2016 in the sum of Le 17,717,500 (which amount is the remainder after deduction of withholding tax from Le 18,650,000)
- Exhibit PN 5- A Copy of an e-mail dated 3rd September 2014, wherein the Defendant requested the revised cost of wages under the Cleaning Contract pursuant to the National Minimum Wage Act No. 6 of 2014
- Exhibit PN 6 ^{1&2}-copies of email dated 19th December 2014 and January 2015 respectively which contained the reversed cost as requested in exhibit {PN5} hereto.
- Exhibit PN 7 ^{1&2}-copies of a Proforma Invoice dated 02/06/14 for the refurbishment of the Lumley Police Post, and an email dated 5th March 2015.
- Exhibit PN 8- Copies of e-mail and Proforma Invoice for security services at Joe Town.
- Exhibit PN 9- Copy of e-mail from the CEO of the Company informing the Defendant of a cut-off date within which the Plaintiff will stop providing security services at the Defendant Joe town site.
- PN 10 ^{1&2}-A copy of an e-mail and Proforma Invoice to the Defendant for security services at the Defendant Joe Town site.

Submission by Mrs. Fatmata Sorie {F Sorie} Counsel for the Plaintiff/Applicant

F Sorie in her application/submission relied primarily on the entire contents of the Affidavit in Support of the Plaintiff's application herein.

Cleaning Service Contract

She submitted that, assuming without conceding that the contract (Exhibit HLW 1) was subsisting, that the said contract by an e-mail marked PN 5 & PN 6 1+2 was varied, and the new salaries which were to be paid in accordance with the new National Minimum Wage Act-Statutory Instrument No. 6 of 2014 and the new salary per Employee from January, 2015 was now **Le 750,000** inclusive of allowances, Exhibits PN 5, PN 6 1&2 supports the assertion that indeed, there was a variation of the cleaning contract, she added that the Defendant/Respondent was relying on certain Clauses in the cleaning contract which governs the variation of the contracts and the procedures thereof she said the contract was no longer in existence so could not be varied as it had expired 18 Months after execution.

F Sorie argued that the Defendant cannot rely on the contract's expiration and non-variation as a Defence when the Plaintiff continued to provide services to the Defendant on terms that were not reduced in written form for the period beyond the expiration of the contract.

She further argued that the Statutory Instrument which provided for the increase of the National Minimum Wage was law duly passed and everybody is obligated to comply with it. Because of the e-mail exchanges between the Plaintiff and the Defendant of which said e-mails the Plaintiff relied upon, as it made necessary changes to the Company's salary structure.

F. Sorie confirmed that after the expiration of the Cleaning Contract the mode of operation between the Plaintiff and the Defendant was by e-mail and telephone calls, had it been that the contract was still subsisting and the Plaintiff had revised the salary structure and demanded the shortfall from the Defendant then it would have amounted to a variation of its terms.

Refurbishment of the Lumley Beach Police Post

On the refurbishment of the Lumley Beach Police Post, F Sorie argued that the Plaintiff had completed the refurbishment of same in 2014 as per the date on the Invoice.

She said that as a result of the deposition in the Defendant's Affidavit-in-Opposition (sworn to by Hilary Lajaku- Williams) sworn to on the 23rd day of June, 2016 she is seeking leave from the Court to cross-examine the Deponent of the said Affidavit.

The Court granted leave to F. Sorie to cross-examine the Deponent of the Defendant's Affidavit-in- Opposition {Hilary Lajaku- Williams)

Cross Examination of Hilary Lajaku- Williams (HL-W)-Deponent of the Affidavit-in-Opposition sworn to on the 23rd day of June 2016.

During the Cross- examination, HL-W confirmed that there was no written agreement between the Plaintiff and the Defendant for the refurbishment of the Lumley Beach Police Post and was not sure of the actual date the contract was awarded to the Plaintiff.

HL-W confirmed that a visit was made by one Kamal Abass (a Management Staff of the Defendant) in April 2016 who confirmed to him that the refurbishment was indeed complete, but did not state by whom.

The Deponent confirmed that the assertion in paragraph 7 of his affidavit was based on information he had received from the said Kamal Abass but could not himself verify that the refurbishment had been complete.

He however confirmed that it was indeed Kamal Abass who had requested {by e-mail} a Proforma Invoice from the Plaintiff in March 2015 one year after the Plaintiff had provided an Invoice in June 2014.

Re- Examination of the Deponent - by Mrs. Audrey Jones (A. Jones)

A. Jones opted not to re-examine the Deponent but informed the Court that she was maintaining her position in her previous arguments.

She asked the Court not to rely on the arguments proffered on the diverse dates for request for invoice but the Court should rely on the actual invoice dated June 2014. she wanted the Court to use the oral assertions given in Court of the approximate date the contract was awarded to the Plaintiff.

F. Sorie Submission on her Application - Continued

F. Sorie argued that after the expiration and termination of the contracts between the Plaintiff and the Defendant, the mode of communication for the continued contractual relationship was by email and telephone.

She said that as a result of variation of certain terms of the cleaning contract which had been carved out from the original contract of 2008, which said variation where evidenced in the affidavit and email attached thereto and upon the Plaintiff relying on them, the Defendant is now claiming that the contract was not varied.

F. Sorie argued that for the Joe Town Site which the Defendant is claiming did not need additional Security Personnel as it only contained a Generator and a Tower, Exhibit "PN 10¹⁻²" clearly shows that there were discussions between the Plaintiff and the Defendant for the possible storage of shipping containers on the said site, this cannot be described as a "normal site" thus necessitating the raising of invoices for additional personnel.

Submission by Mr. Audrey Jones, (A. Jones) Counsel for the Defendant/Respondent - Cleaning Contract of 2008

A. Jones submitted that the Defendant is relying on the affidavit of Hilary Lajaku - Williams sworn to on the 23rd day of June 2016 and the exhibits attached thereto- Exhibits HL-W 1, HL-W 2, HL-W 3, HL-W 4, HL-W 5, HL-W 6, and HL-W 7.

A. Jones argued that the demand for payment of Le 23,000,000 must fail because the additional demand based on the National Minimum Wage Act was a variation of the contract, but the Plaintiff had failed to follow Clauses 6, 1-3 of the cleaning contract which provided for variations of the contract. She said the Plaintiff was relying on e-mail and telephone conversations as a means of varying the contract instead of utilizing the variation clauses in the contract.

Refurbishment of the Lumley Beach Police Post

A Jones argued that the Joe Town Site is a small site with only a Generator and a Mast and needs only 2 Security Personnel, thus the additional costs for additional Staff cannot be accepted because there was no need for additional

Staff as the terminated contract showed 122 Staff in the Urban Area for 64 sites. She further confirmed that the cost of the 2 Guards had been forwarded to the Plaintiff's Solicitor.

A. Jones said there were triable issues for which the action should go to trial and relied on the case- "Aminata Conteh V APC Party" S.C. Civ/App No. 4/2004

The Court's Observations and Conclusions

1. The Plaintiff was performing six different services/contracts for the Defendant, Placement of Booths, Dealing with Municipal Bodies- SLRA, Cleaning Service, Refurbishment of Police Posts (as Social & Corporate responsibility on behalf of the Defendant) security at Telecommunications Sites, and finally, servicing of the Defendants 'Air Conditioning Units, spanning from 2008.

This clearly shows a deep and long standing contractual relationship governed by several written contracts/agreements.

One wonders what went wrong with such a mutually beneficial relationship.

2. The Cleaning Service Contract expired in July 2009 and was not renewed in writing, though the Plaintiff continued to provide the service as if there was a contract in existence.

In this instance, the Defendant agreed to vary the terms of the now expired contract only in so far as costs were concerned using the expired contract's terms as a guideline.

The security services contract was terminated in July 2015, the rightness or wrongness of the termination is not why we are here. However, there was one site at Joe Town that was still manned by the Plaintiff's Personnel and was not taken over by the Defendant till 17th December 2015, 5 Months after the contract for security services had been terminated. Exhibits show several exchanges between the Plaintiff and the Defendant on the Defendant taking over its last site from the Plaintiff but it did not happen till 5 Months later.

The Defendant claimed it was or is a small site, needing only 2 Guards, but it was the same Defendant who wanted to pack shipping containers at this site which clearly shows that the site is not as small as the Defendant would have this Court believe. The Plaintiff duly informed the Defendant that they will be charged for the time the Guards spent at the site. After several calls from the Plaintiff to take over the site in December 2015, the Defendant had additional goods/items plus shipping containers on site that they wanted the Plaintiff to continue securing without an existing contract, just e-mails asking the Plaintiff to send his invoice. This arrangement can be called untidy and totally unprofessional on the part of the Defendant who is a multi-national Corporation, with better operational and governance structures.

3. For the servicing of the Defendant's Air Conditioning and/or Cooling Units, the Defendant, once again terminated the existing contract, and employed some of the Plaintiff's Staff who had been well trained and experienced to service the Defendant Units, leaving the Plaintiff without trained/professional man Power, and with cooling Units and auxiliary, equipment procured specifically for the Defendant's outfit and thus could not dispose of them elsewhere, again, the Defendants' operational and governance activities is questioned.
4. The Defendant has based its Defence and sworn to an Affidavit-in-Opposition to this Application with Exhibits showing expired and terminated contracts and agreements between the Plaintiff and the Defendant. It is a fact that by August of 2015, there were written/ express contracts and/or agreements between the Plaintiff and the Defendant.

The reality however, was that, the Plaintiff continued to provide services and perform contractual obligations to and for the Defendant.

The questions is, shouldn't the Plaintiff be paid for the services he continued to render after the written contracts/agreements had expired.

It is only fair that the Plaintiff should be paid especially as there are numerous e-mails requesting the Plaintiff to provide invoice for services provided after the expiration and or/termination of all its contracts.

5. The enactment of the National Minimum Wage Act No. 6 of 2014 placed a statutory obligation on all Employers in Sierra Leone. Both the Plaintiff and the Defendant and Employers nationwide are bound to comply with this legislation.

In some instances, adjustments had to be made for Agencies and these types of services. The Plaintiff duly informed the Defendant of this obligation, and the Defendant accepted the adjustment that had to be made by the Plaintiff and even went one step further to direct him as to the format he should utilize in providing the names and adjusted wages.

The Defendant claims that the Plaintiff varied the contract without employing the variation clauses as provided for in the contract, that was not in existence anymore.

The issue of a lump sum payment in the non-existent contract is also one of concern to the Court, even if payments were made in lump sums, the said sums were bound to be affected/increased in light of the enactment of a higher minimum wage legislation.

Furthermore, the Deponent of the Affidavit -in- Opposition, confirmed that the lump sum payments as stipulated in the contracts were not paid as such, but payments were made piecemeal and not in lump sums.

6. The numerous e-mails exhibited, contained exchanges governing contractual activities and services the Plaintiff was performing for and on behalf of the Defendant cannot be described as a means of variation unlawfully, what should the Plaintiff have done in the circumstances?

The Plaintiff had no reason to believe the Defendant would not honour its obligations based on the e-mails received from its Management Staff and

the telephone calls alluded to by the Deponent, and surely, nobody would believe that an outfit the size and stature of the Defendant would renege on its contractual obligations.

7. It is accepted that the best contract is one that is written and duly executed with express and implied terms, notwithstanding, there are numerous authorities buttressing the fact that contracts and agreements are made in numerous and “*unconventional*” ways but are, binding at law.

Authorities Utilized By Both Counsels

- 1) **Halsbury’s Laws of England Part 5, Section 1 No. 262** provides for the modification of contracts by Statute. According to F. Sorie “assuming the contract was in existence, thus the National Minimum Wage Act to all intents and purposes modified all contracts involving payment of wages to Employees and salaried workers.

One wonders what the Defendant expected the Plaintiff to have done in the circumstances when the obligation to increase all salaries was statutory.

- 2) **BRUMER v MOORE Ch. Div. 1903 B 1535**

In this instant case, it was held inter alia that

“..... there is nothing to prevent the Parties from coming to a subsequent agreement having the effect of extending the period of option, and such agreement need not be in writing but may be implied from a course of conduct. ...furthermore, and may be readily implied in the conduct of the party resisting the implication has induced the other to do work or expend money on the faith of a state of things existing under the old, and, even if no such agreement can be implied, the conduct may be of such a nature as to raise in equity against the party resisting.....”

This clearly shows that a subsequent and directly connected agreement or variation in this case need not be in writing and can be implied from the Party’s conduct.

The Plaintiff’s conduct in continuing to provide security services and other services to the Defendant even though the contracts governing such

services had either expired without renewal or terminated, can be defined as performance of a service.

The Defendant could have, if it so desired, immediately and without any further delay stopped the Plaintiff from continuing to perform any of the services it had been rendering under the several contracts they had, but it chose for unknown reasons to let the Plaintiff carry on providing the services.

In *Bruner v Moore* it was further held that:-

“..... if Parties who have entered into definite and distinct terms involving certain legal results, certain penalties or legal forfeiture-afterwards by their own act or with their own consent enter upon a course of negotiations which has the effect of leading one of the Parties to suppose that strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.....”

Farwell J. held that,

“in his opinion, the letters of March 7 and March 23, coupled with the intermediate and subsequent acts of the Parties, are evidence of consensus ad idem, namely that the option should extend to the end of the month of March.

- 3) In *Hughes v Metropolitan Railway Co*; the Judge said, *“he could see no grounds for supposing that the Defendant had any intention, or even idea, of inducing the Plaintiff to give his work and time for nothing, knowing that the option had expired, but said he was convinced from the evidence that both Parties treated and intended to treat the option as open until the end of this month.....”*

4. *Aminata Conteh V All Peoples Congress Party S.C. Civil App 14/2014.*

One of the questions in this case was whether *“Summary Judgement can be entered by the Court when there are triable issues raised and the Defendant has a good defence.*

“The primary objective of Order 16 Rule 1 is to ensure a speedy conclusion of a case, where the Plaintiff can establish that the Defendant has no defence or triable issues. This draconian power of the Court must be used judicially, the Judge must be satisfied that there are no triable issues before exercising his inherent discretion to either grant leave to the Defendant to defend the claim or for the Plaintiff to enter Summary Judgement”.

This remedy is a stringent one, and the affidavit required by the Order must show positively the facts of the case and even if it does satisfy the requirements of the Order, it should indicate a strong probability that the Plaintiff has a good case.

However, under the Woolf Reforms, the test is not that there should be triable issues but that the defence would have a real prospect of success as distinct from a prospect of success.

Furthermore, in **Home And Overseas Insurance Co Ltd V Mentor Insurance Co (UK) Ltd** 1 W.L.R. 153,158, **Parker Lord Justice**, made it clear that the purpose of an application for Summary Judgement is to enable a Plaintiff to obtain a quick judgment where there is plainly no defence to the claim, Lord Justice Parker said, *“if the Defendant’s only suggested defence is a point of law and the Court can see at once that the point is misconceived, or, if arguable, can be shown shortly to be plainly unsustainable, the Plaintiff is entitled to judgement.*

JUDGEMENT

Order 10 of the High Court Rules 2007 provides for the preliminary requirements for an application for Summary Judgement, these are as follows:-

- a. The Defendant must be served with a statement of claim and has entered appearance;
- b. The Plaintiff may, on notice apply to the Court for judgement against the Defendant on the grounds that the Defendant has no defence to a claim outlined in the Writ, or to a particular part of the claim except as to the amount of any damages claimed.
- c. The application shall be made by Summons supported by affidavit verifying the facts on which the application is based and that in the Deponent’s belief, there is no defence to that claim.

In the instant case, even though the Defendant has filed a defence to the action, and has submitted that there are triable issues, the Defendant has not been able to convince this Court that, there are triable issues firstly, and even if there are triable issues, the prospect of success if the Defendants' defence was put to the test is non-existent.

From the Affidavit evidence, the submissions of Counsel for the Plaintiff, and the oral evidence obtained from the Defendant through cross-examination of the Deponent of the Affidavit- in - Opposition sworn to on the 23rd day of June, 2016 and the submissions made by Counsel for the Defendant, the procedure and requirements in an Application for Summary Judgement have been complied with.

The Plaintiff has therefore proved its claim on a balance of probabilities and is there fore entitled to Judgement,

IT IS THEREFORE THIS DAY ORDERED AS FOLLOWS:-

1. That judgement be entered for the Plaintiff in the following sums:-
 - a) **Le 23,000,000 (Twenty Three Million Leones)**
 - b) **Le 5,000,000 (Five Million Leones)**
 - c) **Le 39,500,000 (Thirty Nine Million Five Hundred Thousand Leones)** (less the amounts received from the Defendant by cheque payments.)
2. Interest on the above-mentioned sums at a rate of 25% per annum from the date of commencement of the action till date of payment of the judgement debt.
3. Costs of **Le 7,500,000 (Seven Million Five Hundred Thousand Leones)**

 26/08/16'

Honourable Mrs. Justice Amy Wright J