



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

OFF WALLACE JOHNSON STREET-GOVERNMENT WHARF

FTCC 055/15

CATERING INTERNATIONAL & SERVICES (SL) LTD

PLAINTIFF

AND

AFRICAN RAILWAY & PORT SERVICES (SL) LTD

DEFENDANT

REPRESENTATION:

WALTER NICOL ESQ.

COUNSEL FOR THE PLAINTIFF

K. LISK ESQ.

COUNSEL FOR THE DEFENDANTS

BEFORE THE HON. MR. JUSTICE SENGU KOROMA JA.
JUDGMENT DELIVERED ON THE 14TH JUNE, 2017

1. This is an application by way of Judge's Summons dated the 26th day of November, 2015 for the following Orders:-

1. That this honourable Court enters judgment for the Plaintiff/Applicant pursuant to Order 16 Rule 1 of the High Court Rules, 2007 for the sum of US \$ 2,657,491/88 being part of the amount claimed in the statement of claim on the ground that the Defendant/Respondent has no defence to that part of the Plaintiff's /Respondent's claim herein.
2. That the costs of this application be borne by the Defendant/Respondent.

The Plaintiff/Applicant relied on the affidavit of Walter Nicol sworn to on the 26th day of November, 2015.

BACKGROUND

2. The Plaintiff/Applicant (hereinafter referred to as "the Applicant") issued a writ of summons witnessed on the 5th day of August, 2015 against the Defendant/Respondent (hereinafter referred to as "the Respondent") claiming the following:-

1. The immediate payment of the sum of US D \$ 3,440, 411.20 by Defendant being sums due to the Plaintiff by the Defendant in respect of services rendered by the Plaintiff.
2. Interest pursuant to the Law Reform (Miscellaneous Provisions) Act Cap 19 of the Laws of Sierra Leone 1960.
3. Costs.

3. Under the Particulars of Issued Invoices, the Applicant listed 48 of such Invoices with their numbers and values.

4. The Applicant also claimed for the Goods and Services Tax in respect of the services rendered to the Defendant in the sum of US \$ 782, 919/32 during the period of November, 2013 to March, 2016 present Application.

5. The Firm of BMT Law Chambers gave notice of appearance on behalf of the Respondent on the 12th August, 2015. A defence was filed on the 26th August, 2015. It is not in dispute that these pleadings were served on the Applicant.

6. In the defence filed, the Respondent admitted that there was a contract between it and the Applicant dated 25th September, 2012 by which the Respondent had been making payments to the Applicant. There is an exception regarding invoices not received. The defence in paragraph 2 averred as follows ... "but can categorically state that not all invoices were received." My understanding of that defence is that the Applicant had honoured all invoices save those not received-there were therefore outstanding invoices-the words "can categorically state that not all invoices were received" says it all.

7. The Respondent in paragraph 6 of the defence denied deliberately refusing or neglecting to pay the outstanding sum as alleged but did not acknowledge the debt of US \$ 2, 657, 491/32.

8. The Respondent finally denied every other claim made by the Applicant in its Writ Of Summons.

THE PRESENT APPLICATION

9. The Applicant herein relied on the affidavit of Walter Nicol sworn to on the 26th day of November, 2015.

10. In paragraph 3 of the said affidavit, the Applicant referred to an agreement dated the 25th day of September, 2015 between the Applicant and the Respondent under which the Applicant was to provide catering and camp services at the operating sites of the Respondent and its sister company, Tonkolili Iron Ore (SI) Limited. These services were provided and Invoices submitted.

11. The Deponent in the affidavit in support swore that he had been informed by Petit Dufrenoy, a director of the Plaintiff Company that sums due from the Respondent to the Applicant for the period of November, 2014 to May, 2015 were in the total of US \$ 2, 657, 491/88. Copies of the Invoices and the statement of the accents of the Respondent were exhibited as WN4 ¹⁻³⁷ and WN 5.

12. The Deponent further swore that he had been informed by Petit Dufrenoy, a director of the Plaintiff/Applicant that the Defendant/Respondent has failed to settle the invoices referred to in paragraph 6 of his affidavit in support.

13. The Deponent finally swore that he verily believed that the Defendant had no defence to that part of the Plaintiff's claim for which judgment is sought.

14. The affidavit in opposition was sworn to by Hilary Nelson on the 8th December, 2015.

15. Mr. Nelson swore that he was the Legal Counsel in the Defendant Company and was duly authorized to make the said affidavit. The most relevant parts of this affidavit are as follows:-

That the Plaintiff issued a Writ of Summons against the Defendants on the 5th August, 2015 for the sum of US \$ 3,440,411 inclusive of US \$ 782,919.82 in respect of GST which ought not to have been the case making the total sum claimed by the Plaintiff incorrect.

That the solicitor for the Plaintiff in his affidavit made mention that payments were being made by the Defendant/Respondent from time to time putting the grand sum in doubt.

That as a matter of fact, the total sum of US \$ 3, 440, 411 claimed by the Plaintiff/Applicant in this matter appears to be the same as the subject-matter of another claim for which payment has been made in another Garnishee Proceedings between St. Mary's Supermarket -v- Catering International Services with the Defendant as 1st Garnishee.

That the information received from Axel Petit Dufrenoy by the Solicitor for the Plaintiff cannot be true as the figures are miscalculated and inflated.

That he verily believes that they have a good defence to the action.

15. A supplemental affidavit in opposition was sworn to by Sam Kambo, Finance Manager of the Defendant Company. The relevant parts of his affidavit are as follows:-

That contrary to what is deposed in paragraph 6 of the said affidavit (that is, the affidavit of Walter Nicol) the amount claimed substantially varies to the actual amount on our invoices. This is more so in the light of Garnishee payments made by the Defendant to two of the Plaintiff's creditors namely St. Mary's Supermarket and Foodland Supermarket respectively. Copies of bank transfer authorizations and Court Orders were produced and marked as Exhibit "SK 1A & B", and "SK 2A, B & C" respectively.

That consequent upon an internal validation of the Plaintiffs' claim in respect of invoices, the actual amount now due and owing the Plaintiff was US \$ 2,633.19, USD. A copy of invoice reconciliation was produced and marked Exhibit "SK3".

SUBMISSION OF COUNSEL

16. Mr. Walter Nicol, Counsel for the Plaintiff relied solely on the affidavit in support of his application. He referred to Exhibit W4 1-17 as outstanding invoices issued by the Plaintiff to the Defendant in respect of services rendered but were still outstanding. As averred in paragraph 4 of the Exhibit WN 5, the invoices outstanding amounted to US \$ 2657,491.88. This amount was the same claimed by the Plaintiff in its application for Summary Judgment.
17. Mr. Walter Nicol also referred to Exhibit WN3, copy of the contract between the parties which provides in Article 19 (2) (c) thereof that if the Defendant disputes any invoices, he must notify the Plaintiff. No such notification was given by the Defendant to the Plaintiff.
18. Counsel for the Plaintiff also referred to the English Annual Practice, 1999 Order 14 (3), 14(4) (i) and 14 (4) 2 and the case of Aminata Conteh –v-The A.P.C.
19. The matter was adjourned on several occasions at the instance of the Defendant. At certain times, Counsel for both parties agreed on adjournments with a view to settle the issues in dispute. When this effort failed, Counsel for the Defendant Mr. Kweku Lisk answered the application on the 14th December, 2016 by two affidavits and oral submissions.
 - a) Affidavit sworn to by Hilary Nelson dated 1st December, 2016.
 - b) Supplemental affidavit sworn to by Sam Kamboi dated 7th December,
20. On the issue of liability, Mr. Lisk submitted that the Defendant was not denying indebtedness but was questioning the quantum. He referred to the supplemental affidavit in support sworn to by Sam Kambo in which the Deponent averred that the Defendant owes only \$ 2,663,019.00. attached to the said affidavit is Exhibit SK A-C-copies of bank authorizations and Court Orders relating to payments to the Plaintiffs' creditors after garnishee proceedings; Exhibit SK 3-internal validation of the Defendant's claim in respect of invoices of the actual amount now due and owing the Plaintiff which stands at US \$ 2, 663.19.

- 21.** Counsel relied on the case of *Standard Bank of South Africa v Nompolozo* (L 12 ED 301/2012) and Order 16 Rule 4 of the High Court Rules 2007.
- 22.** Mr. Nicol in reply submitted firstly that there is nowhere in the defence filed does the Defendant make reference to payment made to the Plaintiff's creditors following a garnishee Order Absolute. In any event, the garnishee proceedings were carried out before the present action.
- 23.** Counsel while making reference to the English Annual Practice 1999, Order 14 (4) (5) page 669 of *BULLEN AND LEAKE* submitted that the Defendant does not have a good defence to the action, at best, the defence was evasive.
- 24.** Mr. Nicol concluded that the sum of Le 1.3 billion Leones could be deducted from the total sum due and the balance paid to the Plaintiff.

ISSUES FOR DETERMINATION

- 25.** An analysis of the affidavit filed and submissions of Counsel will reveal that the following issues are to be determined in Order to arrive at a fair and just determination of this matter.
- a) Was there a contract between the Plaintiff and Defendant for payments to be made to the former by the latter on invoices submitted?
- 26.** It is not in dispute that there was a contract between the Plaintiff and the Defendant dated 25th September, 2012 for the Plaintiff to render catering and company management services to the Defendant at its operating sites and payments to be made on the submissions of invoices-Exhibit WN 3.
- b. Whether the Defendant honoured the invoices submitted by the Plaintiff.
- 27.** This is the most contentious aspect of this application. Walter Nicol in his affidavit in support has averred that he was informed by Mr. Axel Petit Dufrenay as per Exhibits "WN4 1-47" and "WN 5" that the sum due from the Defendant and the Plaintiff for the period November, 2014 to May, 2015 is in the sum of US \$ 2, 657, 491/88.
- 28.** This amount alleging due is denied by several averments in the affidavit of Hilary Nelson sworn to on the 8th December, 2015 and the supplemental affidavit of Sam Kambo sworn to on the 7th December, 2016. Mr. Nelson in his affidavit averred that payments have been made on behalf of the Plaintiff to its creditors pursuant to Garnishee Order Absolute. He also averred that the total

claimed is based on a miscalculation. The supplemental affidavit more or less emphasized the foregoing averments.

29. It is worthy to note that the Respondent has admitted liability to the tune of \$ 2,663.19 which the Applicant apparently rejected while submitting that it would not contest the deduction of the sum of Le 1.3 billion (payments made as the result of Court Orders), from the amount claimed. This is apparently contradiction of the earlier submission of the Applicant's Counsel relating to the Garnishee Orders.
30. This is the state of affairs between the Plaintiff and the Defendant. The question at this stage is whether this issue can be determined summarily.

THE LAW

31. Order 16 of the High Court Rules provide for the preliminary requirements for an application for Summary Judgment. 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 judgment against the Defendant on the ground that the Defendant has no defence to a claim outlined in the Writ of Summons, 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.
32. Summary Judgment is a discretionary remedy. In *NRMA INSURANCE Ltd-v- AW EDWARDS PEY. Ltd* (1995) 11 BCL 200, it was held that in Summary Judgment applications, "...although detailed argument may be necessary to determine the hopelessness of the Defendant's case, the more complex and arguable the legal point, or the more dependent it may be on debatable factual premises, the less likely that summary disposed will be appropriate". The question should be whether the Defendant has a defence or not which is pretty straight forward.
33. In the instant case, the Respondent is denying liability for the full amount claimed by the Plaintiff but admitting owing \$ 2,663.09. The Applicant on the other hand has no problem with the Court deducting the sum of Le 1.3 billion from the sum claimed. It can be seen from this that there is some doubt that

the Plaintiff is entitled to the full sum claimed. The Defendant has admitted to owing the Defendant some amount but is so insignificant as compared to the main claim that it will not in any way narrow the fundamental issue in dispute if it is awarded here. It will be in the interest of justice for the whole claim to be tried.

34. The Defendant has therefore shown that he has a fair case for defence. Here the Respondent is challenging the amount of his liability. In the English Annual Practice, 1999 paragraph 14/4/11 under the rubric "Question of Fact", this head is one of the grounds for which the Courts will grant the Defendant leave to defend.

35. Furthermore, determining the quantum of money owed to the Applicant by the Respondent may require the intervention of a trained and qualified Accountant agreed by the parties, failing which the Courts.

In the circumstances, I Order as follows:-

- 1) Application for Summary Judgment for the sum of US \$ 2, 657, 491.88 is hereby refused.
 - 2) That the parties shall close pleadings in this matter not later than 7 days from the date of this Order.
 - 3) The following directions are hereby given for the future conduct of this matter.
 - a) That each party serves upon the other list of all documents to be relied upon in this action.
 - b) That each party serves on the other copies of all documents to be tendered and used at the trial within 21 days from the date of this Order.
- 36.** That parties prepare the usual Court bundle for use at the trial within 21 days from the date of this Order which bundle shall comprise of:-
- a. Copies of the pleadings and any amendment thereto.
 - b. List of issues in dispute
 - c. Admissions of facts (if any) arising out of those issues.
 - d. Nature of the evidence to be relied upon (oral or documentary) and includes any agreed evidence.

- e. List of witnesses to be called at the trial and their witness statements.
4. That each party shall lodge with the Court two copies of skeleton argument not later one week before the hearing of this matter.
 5. That the parties jointly appoint a qualified accountant to assess the claims of both parties.
 6. That these directions be placed before this Court on the 18th September, 2017 with a view to fixing the actual date of the trial.
 7. There shall be liberty to restore the matter for further directions.
 8. Matter adjourned to 18th September, 2017 at 9:30 am.



Hon. Mr. Justice Sengu M. Koroma -JA