



IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION
FAST TRACK COMMERCIAL COURT
OFF WALLACE JOHNSON STREET-GOVERNMENT WHARF

FTCC 077/15

LIDON BVC
NEFTEGAZ SERVIS RV

PLAINTIFF

AND

GOLDON CENTURY
DIMITRY PORTNOV

DEFENDANT

REPRESENTATION:

YADA H. WILLIAMS ESQ.

COUNSEL FOR THE PLAINTIFFS

MOHAMED P. FOFANAH ESQ.

COUNSEL FOR THE DEFENDANT

BEFORE THE HON. MR. JUSTICE SENGU KOROMA J.
JUDGMENT DELIVERED ON THE 10TH OCTOBER, 2018

1. The Plaintiffs herein instituted proceedings against the Defendants by Writ of Summons dated the 25th September, 2015. M.P. Fofanah Esq. entered appearance on behalf of the 3rd, 4th and 5th Defendants on the 6th October, 2015 and on the 11th October, 2015 filed a defence.
2. On the 24th April, 2017, the Plaintiffs applied to this Court for an amendment of the Writ of Summons and the application was granted on the same date.
3. In the amended Writ of Summons dated 25th April, 2017, the Plaintiffs claimed against the Defendant the following relief:-
 - 1) A declaration that all the machines, tools, equipment, gadgets, lorries, vehicles, helicopters etc. bought by the 1st & 2nd Defendants from the sums of US\$198,610.43 and £1,500,355.98 respectively given to the 1st & 2nd Defendants by the 1st Plaintiff under the "contracts on services" are held in trust for the 1st Plaintiff by the 1st - 5th Defendants;
 - 2) That all the machines, tools, equipment, gadgets, lorries, vehicles, helicopters etc. bought by the 1st and 2nd Defendants from the sums of US\$2,636,744.44 & £1,049,037.25 paid by the 2nd Plaintiff under the loan agreements to the 1st & 2nd Defendants are also held in trust for the 2nd Plaintiff by the 1st - 5th Defendants
 - 3) Recovery of the sum of US\$370,000.00 loaned to the 3rd Defendant by the 2nd Plaintiff.
 - 4) A declaration that the Plaintiffs have a lien on all the machines, tools, equipment, gadgets, lorries, vehicles, helicopters etc. registered in the names of the 3rd, 4th & 5th Defendants which were bought by the 1st & 2nd Defendants to be used by the 3rd Defendant in its mining exploration activities in Sierra Leone from the sums under the respective contracts on services and loan agreements.
 - 5) An Order that all the machines, tools, equipment, gadgets, lorries, vehicles, helicopters etc. registered in the names of the 3rd, 4th, & 5th Defendants which were bought by the 1st & 2nd Defendants out of monies provided by the Plaintiffs to be used by the 3rd Defendant be vested and transferred to the Plaintiffs as owners;
 - 6) Alternatively that the recovery of the sums due and owing the Plaintiffs be enforced by the sale of all the machines, tools, equipment, gadgets, lorries, vehicles, helicopters etc. registered in the names of the 3rd, 4th, & 5th Defendants which were bought by the 1st & 2nd Defendants out of monies provided by the 1st & 2nd Plaintiffs based on "Contracts on services" and loan agreements between the Plaintiff and the 1st & 2nd Defendants and that the proceeds of the sale be paid over to the Plaintiffs;
 - 7) Interest on the various amounts;

8) An Interim Injunction restraining the Defendants whether by themselves, their servants, agents or howsoever otherwise from selling, disposing, transferring, interfering or in any other way dealing with the machines, equipment, tools, spare parts, vehicles, moveable and immovable properties and every other item bought out of monies provided by the Plaintiffs to the 1st & 2nd Defendants that are currently in Sierra Leone in the name of the Defendants pending the hearing and determination of this application.

9) A perpetual injunction restraining the Defendants whether by themselves, their servants, agent or howsoever otherwise from selling, disposing, transferring, interfering or in any other way dealing with the immovable properties and every other items bought out of monies provided by the Plaintiffs to the 1st & 2nd Defendants that are currently in Sierra Leone in the names of the Defendants:

10) That the costs of the action be taxed; and

11) Further or other relief.

2. On the 20th day of June, 2017, the Plaintiffs applied to this Court by Judges Summons seeking the same relief as set out in the amended Writ of Summons.
3. This Judges commons was amended by Order of this Court dated the 24th April, 2017
4. The application is supported by the affidavit of Sizova Katarina sworn to on the 20th June, 2016 together with the exhibits attached thereto After the amendment, Counsel for the Plaintiffs additionally used the affidavit of Ibrahim Koroma sworn to on the 2nd day of May, 2017.
5. In the affidavit of Ibrahim Koroma, it is averred that:
 - i. That the 3rd, 4th and 5th Defendants are companies incorporated in Sierra Leone and are recipients/beneficiaries of machines, tools, equipment, gadgets, lorries, vehicles, helicopters etc bought by the 1st & 2nd Defendants out of the monies provided by the 1st & 2nd Plaintiffs based on "contracts of services" and loan agreements respectively between the 1st & 2nd Plaintiffs and the 1st & 2nd Defendants. Copies of the said "Contracts on services" are exhibited to the affidavit of Katerina Sizova marked Ex C, Ex D, Ex E, Ex F and Ex G
 - ii. That based on Contracts on services and addenda thereto, the 1st Plaintiff transferred the sums of US\$6,198,610 and £1,500,355.98 respectively to the 1st & 2nd Defendants for the purchase of machines, tools, equipment, gadgets, lorries, vehicles, helicopters etc to be used by the 3rd Defendants for its mining exploration activities in Sierra Leone and for general operational expenses.
 - iii. That though the 1st & 2nd Defendants bought some equipments but a substantial part of the monies provided by the 1st Plaintiff pursuant to the Contracts on services and by the 2nd Plaintiff pursuant to the loan agreement

remain unaccounted for by the 1st & 2nd Defendants thereby preventing the fulfilment of the directions given by the Plaintiffs

iv. That a substantial amount of machines, tools, equipment, gadgets, lorries, vehicles, helicopters etc bought by the 1st & 2nd Defendants based on the "Contracts on Service" and the loans advanced by the Plaintiffs were shipped imported into Sierra Leone and registered under the names of the 3rd, 4th, & 5th Defendants. An inventory of the Machines etc is exhibited to the affidavit of Katerina Sizova marked as Exhibit Z1-Z6.

v. That the Defendants have failed and/or refused to return to the 1st Plaintiff the machines, tools etc bought out of the monies provided by the 1st Plaintiff to the 1st & 2nd Defendants

vi. That the purpose of this affidavit is primarily to correct the mistakes in inter alia, paragraphs 10, 11 and 13 of the affidavit of Katerina Sizova sworn to on the 20th June, 2016 which referred to exhibit "Exh C" Exh D, Exh E, Exh F, Exh G of that affidavit as loans instead of "Contracts on service".

6. I am not comfortable with the fact that this supplemental affidavit was not sworn to by Katerina Sizova to correct the mistakes in the earlier affidavit. In the file is a Notice dated 13th July, 2017 to cross-examine Katerina Sizova on her affidavit. According to Plaintiffs' Counsel, the Deponent could not be cross-examined as she had long left the Jurisdiction. It is my view that the contents of the affidavit of Ibrahim Koroma do not stand well with Order 5 Rule 1 of the High Court Rules, 2007. The effect of the rule is to require that an affidavit must contain the evidence of the deponent as to such facts only he is able to speak of in his own knowledge, and to this extend, equating affidavit evidence to oral evidence given in Court (see English Supreme Court Practice, 1999, paragraph 41/5). There are however excepted cases but Order 16 applications do not fall within them.

7. Having said this, I shall now proceed to examine the exhibits attached to the affidavit of Katerina Sizova. The weight to be attached to the said affidavit is another matter. What is however clear is that there are signed loan and other agreements

a) Exhibit B - Contract of services No. 18/07/13 between Lidon Trade Limited and Golden Century. This is a contract between a Company registered under the Laws of the British Virgin Islands and another registered in Germany for the provision of services in Africa. In clause 6 of the said Agreement, the parties expressly agree that "All disputes arising out of or in connection with the contract are finally settled without recourse to the ordinary Courts under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators. The place of arbitration is Zurich (Switzerland), language of arbitration is English. The substantive laws are the applicable law"

- b) EXH "C" Addendum to Exhibit "B". This is to all intent and purposes governed by the Arbitration Clause in clause 6 of the main Agreement- purchase of additional equipment.
- c) EXH "D" -Addendum to Exhibit "B" -purchase of additional equipment totaling £2,000,000/00
- d) EXH "E" Addendum to Exhibit B- purchase of land etc totaling \$4,000,000/00
- e) EXH "F" Contract of services No. 19/07/13 between Lidon Trade Limited and Golden Century. Clause 6 thereof has the same Arbitration clause as Exhibit EXH "G" - Addendum to Exhibit "f"
- f) EXH "H" A loan Contract dated 28th October, 2013 between Neftegazservice Company Limited and Golden Century.
 - Clause 6¹ thereof provides that 1. "In the case of any dispute or disagreement between the Borrower and Lender associated with the failure or improper performance of this contract, the parties will attempt to resolve them through negotiations.
 - 6.². In the case of impossibility to settle disputes and disagreements through negotiations disputes shall be referred to the Courts at the location of the Plaintiff.

I note that the Plaintiff for this purpose is Neftegazservice Co. Ltd.

- g) EXH "I" Addendum Agreement No.1 to the Loan contract No. 25-N95. In this, clause 6 of Exhibit "H" also applies
 - h) EXH "J" Agreement between and Golden Century and Neftegazservice. This appears to be an amendment to the loan Agreement Exhibited as "H". From
 - i) Exhibit "K" to "Z" The Agreements are all between Golden Century and Neftegaz service and fall under Clause 6 of Exhibit "H"
 - j) EXH "AA" Loan Agreements between Neftegazservice Co. Limited and Lora Golden Wings (SL) Ltd. Clause 6 of the said Agreement contains the same provision as in Exhibit "H" The same terms extend from Exhibit BB to Exhibit "GG"
8. There are four sets of agreements involved in this application - Exhibits A-G which relate to contract of services between the first Plaintiff, Lidon BVC and the first Defendant, Golden Century (represented by Dimitry Portnov, the 1st Defendant).
 9. Clause 6 of the main agreement provides that any dispute should be arbitrated under the Rules of the International Chamber of Commerce. The clause also names the place of arbitration, composition, language of arbitration and the applicable substantive law.
 10. Clause 6 herein is consistent with the International Chamber of Commerce Rules amended in 2017. In Article 6 (1), it is provided "where the parties have agreed to submit to arbitration under the Rules, they are deemed to have

submitted ipso facto to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement."

11. Article 6 (2) thereof provides that "By agreeing to arbitration under the Rules, the parties have accepted that arbitration shall be administered by the Courts."
12. To my mind, this provision is binding on the parties to these agreements. By expressly agreeing to proceed to arbitration they have expressly ruled out the ordinary Courts as the forum to settle their disputes or disagreements
13. Article 35 (6) of the ICC Rules is also worth mentioning. This article provides that "Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." In accordance with this principle, the award of the arbitral tribunal is legally enforceable and gives rise to defences of res judicata in subsequent proceedings.
14. Once the arbitrator has made the final award under the ICC Rules, the arbitrator is functus officio as he or she has performed their duties. This prevents the re-examination of the award by the arbitral tribunal and provides the parties with finality.
15. In the instant case, the parties to those agreements are resident out of the country and all their assets are located out of the country. They have agreed to have their differences arbitrated out of the country. This means that proceeding otherwise would be against the concept of freedom of contract.
16. The next set of Agreements - Exhibit H-J have provisions for (a) negotiation and (b) litigation. However by Clause 6.2, if the disputes or disagreements are not settled through negotiation, the dispute shall be referred to the Courts at the location of the Plaintiff. Neftegazservice, the 2nd Plaintiff herein which is named as the Lender in the agreements exhibited as H through to J is located in Russia with an address at Kin-Uchena str. 44 "O", Khabarovsk. The 1st Defendant is located in Germany. Here again, the parties have expressly agreed that litigation should be conducted in the location of the Plaintiff which is in Russia. In this case again, the intention of the parties must be respected
17. In any event it would be advantageous for the parties to litigate in Russia which is closer to them.
18. The next set of agreements Exhibits " M-Y" have the same provision as in Exhibit H. The location of the Plaintiff should be the forum for litigation.
19. The final set of Agreements "AA" - "GG" are loan agreement and addenda between Neftegazservice Limited and Lora Golden Wings (SL) Ltd - a Company incorporated in Sierra Leone. Article 6 of Exhibit "AA" which is applicable in all

the others also makes provisions for a) negotiation and (b) litigation in the Courts at the location of the Plaintiff. In exhibit "A" attached to the affidavit of Sizova Ekaterina, the 2nd Plaintiff Neftegazservice is described Company incorporated in Russia. There is no evidence that it has any presence in Sierra Leone. So it would be a breach of Article 6 for the 2nd Plaintiff to litigate on this agreement in Sierra Leone.

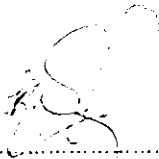
20. By reason of the foregoing, I hold as follows:-

1. That the enforcement of the Agreements listed in Exhibits A-G be arbitrated on under the International Chamber of Commerce Arbitration Rules as expressly agreed by the parties

2. That the enforcement of the agreements-Exhibits "H-J" and "M-Y" be litigated in a court at the location of the Plaintiff

3. That the enforcement of the Contracts marked Exhibits "AA" - "GG" between the 2nd Plaintiff and 3rd Defendant be litigated in a Court at the location of the said Plaintiff as expressly agreed by the parties.

4. No order as to costs.



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Hon. Mr. Justice Sengu Koroma (J.A.)