



IN THE COURT OF APPEAL OF SIERRA LEONE
CIVIL DIVISION

CIV. APP. 30/16

SHANG DONG STEEL (SL) LTD

APPELLANT

AND

MUSTAPHA JOSEPH KAMARA

RESPONDENT

REPRESENTATION:

BMT LAW CHAMBERS

COUNSEL FOR THE APPELLANT

COUNSEL FOR THE RESPONDENTS

CORAM:

HON. MR. JUSTICE A.S. SESAY

JA

HON. MR. JUSTICE J.B. ALLIEU

JA

HON. MR. JUSTICE SENGU KOROMA

JA

JUDGMENT DELIVERED ON THE ...1ST MARCH.. 2018
SENGU KOROMAJA

1. The Plaintiff (hereinafter referred to as the "Respondent") instituted proceedings in the High Court against the Defendant (hereinafter referred as "Appellant") claiming the following Relief:
 - a) End of Service Benefits and Entitlements totalling Le1, 204,874,705.45 (One Billion, Two Hundred And Four Million, Eight Hundred and Seventy Four Thousand seven hundred and Five Leones, Forty-Five Cents.
 - b) Interest thereon at the rate of 25% per annum until payment
 - c) Any other Order(s) as this Honourable Court may deem just.
 - d) Costs.
2. Judgment was given in favour of the Respondent on the 9th May, 2016 by Samba J. It is against this Judgment that the Appellant has appealed on the following grounds:-
 - 1) The Learned Judge erred in law in that she misconstrued the true requirements for Summary Judgment to wit:
 - i. That if a question arose which could not be easily determined without prolonged investigation and without the necessity of filling copious documents, the Court should lean towards granting unconditional leave to defend as this would in effect mean, that there was an issue or question in dispute which ought to be tried. The question of law which arose in this case was whether the Defendant Company had inherited the assets and liabilities of African Minerals Limited; and/or was the alter ego of the said African Mineral Limited, and was therefore liable for the indebtedness of the said African Minerals Limited, however it arose, to all persons including the Plaintiff in the action determined by her.
 - ii. Further, the Learned Judge failed to consider the legal effects of a Company being in administration, as was the case with African Minerals Limited and the effect this would have on all persons to whom it was indebted. Alternatively, once it had been made known to the Learned Judge by affidavit that African Minerals Limited was indeed in administration, and she had accepted this fact as proven, she was duty bound to conclude that there was an issue in dispute which ought to be

tried, to wit, whether the Defendant was the proper party to be sued, being that the Company whose assets it had taken over, was in administration. Further and/or alternatively, whether the Administrator of the said African Minerals was not the proper person to sue in all the circumstances of the case.

- iii. The Learned Judge, instead of requesting and/or demanding proper evidence about the status of the Defendant company, based her decision on the company's status on newspaper reports and other media output, exhibited to the Plaintiff's affidavit in support of his application. Such proper evidence should be Company documents filed in the registry of the Corporate Affairs Commission, and not just newspaper reports, and /or comments made by non-Company persons such as politicians and/or government officials. In fact, the Learned Judge failed to take into consideration or proper consideration, affidavit evidence filed by the Defendant Company showing that the Defendant Company was a separate entity, and not one and the same as African Minerals Limited.
- iv. That the Court was duty bound to consider also, whether there ought, for some other reason, to be a trial, bearing in mind the nature of the defence filed by the Defendant Company; that it was not liable for the debts of African Minerals Limited, it not being a successor company.
- v. Further and/or alternatively, the Learned Judge failed to consider and/or to give due weight and importance to the fact pleaded by the Plaintiff that he was originally employed in 2004 by SLDC. Nothing was said by the Plaintiff about the present circumstances of the said SLDC: whether it was still in existence or not; whether its assets and liabilities were taken over by African Minerals Limited; or, whether the said SLDC paid off the Plaintiff during its existence, thereby reducing substantially any entitlements or benefits due the Plaintiff from the said African Mineral Limited. All these were determinants of whether the Plaintiff was entitled to summary Judgment, or not

2) The Learned Judge erred in law and in fact in that she gave Judgment for the Plaintiff in an amount which was not proven by affidavit evidence. All that the Learned Judge had before her was the unsupported averment in the Plaintiff statement of claim that he was entitled to the sum of Le1, 204,874,704.45. No proof of whether nature was proffered as to how the said figure was arrived at. Notwithstanding that there was no specific denial by the defendant Company that the said sum was that to which the Plaintiff was entitled to, it was incumbent on the Learned Judge to request and/or demand concrete evidence from the Plaintiff that this was his proper and correct entitlement. The absence of such evidence of

such evidence provides further evidence that the action should have gone on to trial.

3) Further and/or alternatively, the Learned Judge erred in law that it was clear that the defence raised by the Defendant company, to wit, that it was a separate and distinct entity, was one of law, and that rather than enter Judgment for the Plaintiff in the sum awarded which remains unproven by factual evidence, she should have requested the Plaintiff, to apply for that issue to be determined in accordance with Order 17 of the High Court Rules, 2007; and/or decided that particular question of law first, before calling upon the parties to the action to address her on the quantum of damages and/or terminal benefits to which the Plaintiff was entitled.

4) Further and/or alternatively, the Defendant contends that save very exceptional cases, the question of whether a past employee is entitled to a specific quantum of terminal benefits is a process not available under Order 16 of the High Court Rules, 2007. Rather, it is one which is more appropriate to be dealt with at trial.

5) The Learned Judge's Judgment is unsupported by the affidavit evidence filed and used in Court.

3. Counsel for the Appellant, Kweku Lisk Esq argued that one of the questions of law which arose in this case was whether the Defendant Company had inherited the assets and liabilities of African Minerals (SL) Limited (AML) and/or was the alter ego of the said AML and therefore liable for its indebtedness to all persons including the Plaintiff (Respondent herein). He submitted that this point could not in the circumstances have been easily determined by the Fast Track Commercial Court (FTCC) without the need to call further evidence and witnesses in order to determine same. The Appellant referred to paragraph 1 of its defence Records that the Appellant was a separate and distinct legal entity and did not metamorphose nor did it acquire AML. Counsel submitted that because of this reason, the Learned Judge in the High Court should not have decided the matter summarily.

4. Mr. Lisk submitted that an Order 16 Application is designed for instances where it is clear from the pleadings that the Defendant's only suggested defence is a point of law, and if the Court can see at once that this point was misconceived or could be easily disposed of, the Plaintiff may be entitled to summary Judgment. However the Rule provides that if the question of law which arose could not be easily determined without prolonged investigation and without the necessity of

filing copious documents, the Court should lean towards granting unconditional leave to defend. In his view, the question of whether the Appellant was a separate entity and not one and the same as AML involve a tremendous amount of evidence and therefore could not be determined summarily.

5. Counsel for the Respondent, Ibrahim Yillah Esq. in his synopsis argued that the Learned Trial Judge adequately and properly considered whether the instant case falls for consideration under Order 16 of the High Court Rules, 2007. In particular, the Judge reproduced *ipsisima verba* the expressed wordings of Order 16 (1) which last sentence reads thus- "...this Rule applies to every action begun by writ other than an action which includes a clam by the Plaintiff for libel, Slander Malicious Prosecution, false imprisonment and seduction, and Admiralty Action in rem." He submitted that the instant case, which was a claim for end of service benefits, did not fall within that category.

6. On the Appellant's submission that their defence raised a point of law on the question of whether AML was a separate legal entity and so Shang Dong Steel (SL) Ltd (SSL) should not be held liable for its debts, Mr. Yillah argued that these issues were not requirements to determine the suitability of an application under Order 16. This also applied to the Appellant's submission that the volume of documents filed warranted further investigation and should have guided the Court towards granting leave to defend. He submitted that the Court below considered all the issues raised by Appellant and correctly concluded that there was no defence to the action on the merits.

7. Mr Yillah concluded on this point by citing the case of JOSEPH LEBBIE - V- AFRICAN MINERAL LIMITED, TONKOLILI IRON ORE (SL) LTD, AFRICAN RAIL AND PORT SERVICES (SL) and SHANG DONG STEEL (SL) LTD (unreported) in which the Appellant raised similar arguments as those canvassed in this Court. The FTCC concluded this matter on the basis of Order 16 and entered Judgment for the Plaintiff, who was also claiming end of service benefits.

8. The Appellant also complained that the Learned Trial Judge also failed to properly consider the effects of a Company in Administration and the legal effect this would have on all persons to whom it was indebted. Mr. Lisk argued that this was clearly an issue in dispute which could not be resolved summarily as its determination would have required more persons and evidence in the form of the Administrator to testify before the Fast Track Commercial Court. Further, the Respondent in his pleadings pleaded that he was originally employed in 2004 by SLDC; nothing was mentioned by the Respondent in his affidavit or otherwise about the existence or not of the said SLDC or whether its assets were taken over

by AML. Mr. Lisk also submitted that the determination of whether the Respondent was entitled to any benefits and if so whether the same was paid to the Plaintiff should not be done by affidavit evidence.

9 Mr. Yillah for the Respondent submitted that the Appellant had not provided any legal authority to support the contention that Judgment could not be obtained against a Company in Administration. In any event, a Company in Administration was not one of the exceptions listed in Order 16 (1).

10. Furthermore, the Appellant did not in its affidavit in opposition to the application for summary Judgment attach any evidence that AML was in Administration.

11. The Appellant complained that the Learned Trial Judge gave Judgment for the Plaintiff in an amount which was not proven by affidavit evidence. Mr. Lisk argued that it was incumbent on the Learned Judge to request and demand concrete evidence from the Respondent that it was his proper and correct entitlement. In the absence of that, the Court ought to have tried this issue given that the Appellant in its defence and affidavit went to extreme length to show the Court that it did not inherit AML and as a result was not a successor company.

12. Mr. Lisk submitted that unless in exceptional circumstances, the question of whether an employee is entitled to a specified amount is not one for determination summarily under Order 16.

13. He submitted that the Judge ought to have considered whether or not the Plaintiff had a claim from the Administrators of AML who was their lawful employer.

14. Mr. Lisk relied on the cases of AMINATA CONTEH -V- ALL PEOPLES CONGRESS SC.APP.4/2004 AND WELLINGTON -V-MUTUAL SOCIETY (1880) 5 AC page 690. He concluded by submitting that there were triable issues raised in opposition in the Court below which the Trial Judge ought to have taken into consideration.

15. On the complaint of the Appellant that the Trial Judge gave Judgment in an amount which was not proven by affidavit evidence, Mr. Yillah submitted that there was nowhere in the records where the Appellant challenged the sum claimed by putting forward a contrary calculation of the Respondent's end of service benefits.

16. On the relationship between AML and SSL, contrary to the contention of the Appellant that other than newspaper clippings attached to the affidavit in support of the application for summary judgment in the court below, there was nothing legal

before the Court to prove that the latter acquired the latter and thus liable for its debt, the Learned Trial Judge relied on Exhibit KML- a copy of questionnaire put out by SSL for continuation of service by the AML staff. This, Mr. Yillah submitted, was used by the Judge to conclude that it regularised the employment status of staff who worked for AML.

17. On the case of AMINATA CONTEH - V- ALL PEOPLES CONGRESS, Mr. Yillah submitted that the case does not serve as authority for the various propositions put forward by the Appellant. The case is good authority on the powers of the Court to give summary Judgment where the Plaintiff can establish clearly as in the instant case that the Defendant has no defence or triable issues.

18. Mr. Yillah concluded by praying that this Court dismisses the Appeal with costs.

ISSUE

19. This Appeal centres on one major issue: whether SSL (the Appellant) had a separate and distinct legal personality from AML and was therefore not a successor Company that inherited the liabilities of AML. A related issue is whether a determination of this question could be done summarily under Order 16 of the High Court Rules, 2007

20. To determine this issue, it is important that I first of give a background to the corporate relationship between AML and SSL.

21. It was not controverted that AML initially owned 100 percent of the Tonkolili mines in Sierra Leone. Shandong Iron and Steel Group agreed to pay \$1.5 billion to AML - \$800Million initially to be followed by two other cash payments, totaling \$1.5 billion. In return for the said payments, SSL would gain 25 percent stake in the Tonkolili Mines and two other related AML subsidiaries Tonkolili Iron Ore (SL) and African Port and Railway Services (SL) Ltd, leaving AML with 75 percent stake.

22. At its request, a group of banks including Standard Chartered and Citi loaned AML \$250M as pre-export finance (PXP). These banks later transferred their interest in the loan to Shandong Steel Hong Kong Zenith Limited, a subsidiary of SSL, which already owned 25 percent of the Tonkolili project.

23. When AML defaulted, SSL demanded an immediate payment of the outstanding balance on the debt amounting to \$166.7 Million which AML could not meet SSL then enforced its security over AML shares in the Tonkolili Iron Ore Limited and African

Railway and Port Services Ltd. There was a sale of the shares which led SSL to acquire the 75 percent stake in AML giving it 100 percent of the equity.

24. AML appointed an Administrator after failing to repay Shandong Steel and Iron Group.

25. I have given this brief background to help me ascertain the nature of the acquisition carried out by SS Ltd as it would help to determine the liability, if any of the Appellant. To do this, a distinction needs to be drawn between an Asset Purchase and a share Purchase.

26. An asset purchase involves the purchase of some or all of the assets owned by an entity and used in carrying on the business of that entity. Assets may include fixed assets, land, buildings, machinery, trading stock and intangible assets such as good will and intellectual property. Here an employee's current employment contract will usually be with the seller or entities controlled by the seller. When buying the assets, the employment relationship cannot be transferred from the seller to the purchaser as employment contracts are personal in nature.

27. A share purchase, on the other hand is slightly more complex than the purchase of business assets because with the shares come a range of potential liabilities, many of which may not be identified on the balance sheet of the entity. Share sales may involve sale of shares in a trading entity, related entities and occasional units of a unit trust. When a purchaser acquires 100 percent of the shares in an entity, the purchaser takes control of the entity and all the assets and liabilities.

28. In a share purchase, the Employees remain with the entity and purchaser. Apart from the possible provisions in the sale and Purchase agreement that may provide for redundancy of specific staff or specific benefits to be paid upon change of control of the business, the legal identity of the employer remains the same

29. Based on the description of the different types of purchase, it would be easy to discern that SSSL acquired the shares of AML and its subsidiaries thus gaining not only the assets but also its liabilities. It is uncontroverted that the Appellant acquired 75 percent of the shares of AML in addition to the 25 percent already held by them making it the owner of 100 percent shares.

30. By acquiring 100 percent shares in the AML, the Appellant had taken possession of the assets of the Company but was refusing to honour its liabilities. I hold that based on the principle of Company acquisition through shares, the Appellant had taken over the legal identity of AML as regards its Employees. Indeed the Learned Trial Judge in her Judgment analysed Exhibit KML 2 a questionnaire put out by the Appellant to the staff of AML. Paragraph 2 of the said Exhibit KML reads:-

"The Company puts high priority on the renewal of your contract of employment and protection of your end of term benefits. Our principle is to protect the staff benefits according to Labour Laws of Sierra Leone, therefore the Company will pay end of service benefits to employees who do not wish to continue working for Company"

31. The contents of this exhibit were never challenged by the Appellant. This is strange as it shatters all the arguments put forward by the Appellant in this matter.

32. On the issue of AML being in Administration, I shall quickly dispatch the Appellant's arguments. Paragraph 1 of the Particulars of claim in the Court below stated that "The Plaintiff was at all material times an employee of African Mineral (SL) Limited now Shandong Steel (SL) Limited". This means that the claim was against Shandong Steel (SL) Limited as successor Company of AML. It was not against AML as an entity and therefore it being in Administration has no effect on the matter, particularly in the light of Exhibit KML 2. The Learned Trial Judge was therefore right in discountenancing that argument.

32. On the issue of Summary Judgment, the Learned Trial Judge correctly stated the law relating thereto and had this to say:-
"Counsel for the Defendant did not contest the amount claimed. In fact in paragraph 5 of the affidavit of Kweku Melvin Lisk sworn to on the 15th January, 2015, commends the salary received by the Applicant." It was argued that the matter herein was unripe for an Order 16 Judgment. Counsel's main argument was that there was nothing in evidence to prove that the Defendant/Respondent Company, Shandong Steel Group (SL) Ltd had any direct link with African Minerals (SL) Ltd and was therefore not liable for payment of end of service other benefits claimed by the Plaintiff/Appellant.


33. I agree with the Learned Judge's analysis more so in the light of the fact that the Appellant acquired 100 percent of the shares of AML which gives it the identity of the Employees of AML. Furthermore, I agree with Counsel for the Appellant that a claim for payment of end of service benefits does not fall within the exceptions contained in the last sentence of Order 16 Rule 1.

DECISION

Based on the reasons given above, I make the following Orders:

1. The Appeal herein is hereby dismissed.

2. That the Appellant pays to the Respondent the sum of Le1,204,874,705.45(One billion, two hundred and four million, eight hundred and seventy-four thousand, seven hundred and five Leones, forty – five cents) being end of service benefits and entitlement to the Plaintiff, Mustapha Joseph Kamara
3. Interest on the said amount at the rate of 10 percent per annum from the 25th October, 2013 to date of Judgment in the Appeal.
4. The stay of Execution of the Judgment and Orders of the High Court dated 9th May, 2016 and all subsequent proceedings granted by Samba J. on the 15th day of July, 2016 are hereby set aside.
5. Costs of this appeal and that in the Court below to the Respondent; such costs to be taxed


..... HON. MR. JUSTICE SENGU KOROMA JA

I agree 
..... HON. MR. JUSTICE A.S. SESAY JA (PRESIDING)

I agree 
..... HON. MR. JUSTICE J.B. ALLIEU JA