IN THE SUPREME COURT OF SIERRA LEONE

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Sierra Leone Oxygen Factory Limited — Plaintiffs/Appellants

And

P. B. Pyne-Bailey — Defendant/Respondent

Judgment delivered on Friday day the 10th day of May, 1974.

Browne-Marke, J.S.C. — This appeal is from the judgment of the Sierra Leone Court of Appeal dated the 25th day of May, 1972, dismissing an appeal from an Order of the High Court dated 30th November, 1971, ordering that the judgment in default of appearance obtained on the 14th day of June, 1971 be set aside.

The proceedings were commenced by a Writ of Summons accompanied by a Statement of Claim and dated the 24th day of March, 1971. The appellants claimed on the said Writ, damages for breach of contract and for wrongful detention of goods. In the statement of claim signed by their Solicitor the appellants alleged the following:-

"On or about the 26th day of October, 1969 the Defendant collected from the Plaintiff for rewinding one (1) 85 Horse Power Electric Motor No. 027490 made by Enrico Bazzi of Milan in 1965 which the Defendant examined and agreed to rewind at the sum or cost of One thousand three hundred and fifty leones (Le.1,350.00). The Plaintiff paid to the Defendant the whole of the sum of Le.1,350.00 in advance at the Defendant's request on the 7th November, 1969.

2. It was an implied term of the contract that the machine would be properly and efficiently re-wound and the Defendant impliedly represented and held out to the Plaintiff that he had the necessary skill and knowledge to do so.

3. The motor was being used at the Plaintiff's premises in the manufacture of oxygen and time was of the essence of the contract.

4. After a considerable delay and in early 1970, the Defendant returned the motor to the Plaintiff, but the work had been so inefficiently carried out that the inductor wire would not even fit in the case and the motor was unusable. The Plaintiff thereupon forthwith informed the Defendant who after a few days inspected the motor and subsequently collected it for re-winding.

5. Up till the 31st August, 1970, the Defendant neither repaired the motor nor refunded the sum of Le.1,350 notwithstanding several requests by the Plaintiff for the Defendant to do so.

6. In the result the Plaintiff incurred considerable loss while the machine was in the possession of the Defendant and had to secure a replacement motor to enable it to execute its contracts.

The Plaintiff has suffered loss and damage thereby.

7. On or about the 19th day of August, 1970, the motor was collected by the Plaintiff and repaired by another firm at the cost of Le.548.

Particulars of Loss and Damage

(a) Cost of obtaining another motor Le.3,000.00

(b) Loss of Sales of manufactured products 1,500.00

8. The Plaintiff therefore claims:

(a) Special damages of Le.4,500.00

(b) A refund of the deposit of Le.1,350.00

And the Plaintiff claims general damages.

The affidavit of service sworn by one David Momoh on 11th June, 1971 states that the Writ of Summons was served on the Respondent at his place of business Sierra Engineering Agencies, 14, Palemba Road, Freetown, on the 25th March, 1971. The said David Momoh swore to a second affidavit of search on the same date which states that no appearance had been entered by or on behalf of Respondent.

Judgment in default was obtained as to part of the claim on 14th June, 1971, for Le.1,350.00, damages to be assessed and costs to be taxed. The judgment was signed by Mr. William Johnson, Master and Registrar.

On the 25th day of October, 1971, the Solicitor for the appellants made an application for a Writ of Fieri Facias endorsed to levy Le.5,850.00 and interest thereon at the rate of Le.10.00 per cent per annum as from 14th June, 1971. The Deputy Master and Registrar signed the writ of Fieri Facias on behalf of the Master and Registrar to levy execution for Le.5,850.00 with interest at 4 per cent per annum.

By notice of motion dated 2nd November, 1971, Mr. K. O. Mackay applied to the High Court on behalf of the Respondent for an Order that the judgment in default of appearance dated the 14th day of June, 1971, be set aside and execution there-under be stayed for the reasons shown on the affidavit of the Respondent sworn on the same date. Further that the Statement of Defence exhibited by the Respondent be filed and served on the appellants' Solicitor.

The application came up before Ken During, J. on 5th November, 1971, but Mr. Mackay on behalf of Respondent/Applicant requested an adjournment on the ground that it was short served. The adjourned date was 9th November, 1971, on which date Dr. Marcus-Jones appeared for Appellants/Respondents and Mr. Mackay on behalf of Respondent/Applicant.

After hearing Counsel for both parties and reading the affidavit filed in support by the Applicant/Respondent the application was refused. No mention was made of the Statement of Defence which was exhibited.

On 10th November, 1971, Mr. Mackay entered an appearance in the Master's Office on behalf of the Respondent. On the same date he filed another notice of motion for an Order that for the reasons shown in the affidavit of the Respondent/Applicant which was also filed, the Writ of Fieri Facias and the whole proceedings be set aside on the ground of irregularity.

On the 12th day of November, 1971, before Tejan, J., Mr. Rogers-Wright with Mr. Mackay appeared on behalf of Respondent/Applicant. Counsel for Appellants/Respondents raised a preliminary objection that the motion was short served and Tejan, J., ordered an interim stay of execution of the writ of Fieri Facias.

On 30th November, 1971, the said motion came before Tejan, J., and after hearing Counsel for both parties, the learned judge ruled as follows:-

> "I have considered the arguments of both Counsel. There is no doubt a breach of the rules has been committed. In the interest of Justice, I allow the application to set aside the judgment. Costs in the cause."

On 10th December, 1971, Tejan, J. granted an application by Counsel for Appellants/Applicants for leave to appeal against the interlocutory judgment of the 30th November, 1971. The application was supported by an affidavit sworn by the Solicitor for Appellants on 7th December, 1971.

The ground of appeal as recorded was

> "That the Learned Trial Judge had no jurisdiction to entertain the Respondent's Notice of motion dated 10th November, 1971, by reason of the fact that on the 9th day of November, 1971, the High Court of Sierra Leone by an order of the Hon. Mr. Justice Ken O. During had dismissed a similar application made by the Notice of motion dated 2nd November, 1971, which said order remains in full force and effect."

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The appeal was heard by the Sierra Leone Court of Appeal on 24th and 25th May, 1972. The judgment of the Court (Cole, C. J., Harding and Davies JJ/A) was as follows:-

> "In the interest of Justice we feel that the matter should go to trial. We therefore invoke our powers under Rule 36 of the Court of Appeal Rules and dismiss the appeal. No order as to costs."

Counsel for Appellants applied to that Court for leave to appeal from its judgment of 25th May, 1972 dismissing the appeal of Appellants. Conditional leave to appeal to the Supreme Court was given on 30th June, 1972 and Final leave on 13th July, 1972.

In the case for Appellants the principal question raised were

(i) That the judgment of Ben During J., of 9th November, 1971, was regular and that the High Court in exercising its undoubted discretion found no merit in the application to set it aside and properly refused leave to the Respondent to defend action. That in the circumstances a further application to the same tribunal was inappropriate and untenable except by way of leave to appeal.

(ii) That the effect of the Order of Tejan, J., was to reverse the decision of Ben During, J., although the Respondents' Counsel had specifically stated that it was a motion for an order to set aside judgment obtained on 14th June, 1971, on the grounds of irregularity.

That the grounds of irregularity alleged with respect to the judgment of 14th June, 1971, were neither set out in the motion dated 10th November, 1971, as required by Order 50 Rule 3, nor was any shown in the arguments of Counsel, nor any specified by Tejan, J., as justifying his order to set aside.

(iii) That the remedy, if any, open to the Respondent was to apply for a stay of the Writ of Fieri Facias (Order 30 Rule (16a) or to appeal to the Court of Appeal from the Order of During, J.

(iv) That judges of equal jurisdiction could not reverse each other whether on a matter involving exercise of discretion or otherwise.

Counsel for Appellants submitted:-

That since the appeal before it was from the judgment or order, of Tejan, J., the Court of Appeal could not properly or validly have exercised its powers under Rule 36 of the Court of Appeal Rules.

In the case for the Respondent the principal questions raised were:-

(i) Whether the Deputy Master and Registrar on 25th October, 1971, had jurisdiction to sign a Writ of Fieri Facias for the sum of Le.5,850.00 when the judgment of 14th June, 1971, referred to in the said Writ was for the sum of Le.1,350.00

(ii) Whether the application before Ken During, J., was the same as that before Tejan, J.

It must be stated at this point that the application by Respondent dated 2nd November, 1971, was for an order that the judgment in default of appearance dated 14th June, 1971 be set aside and execution thereunder stayed for the reasons stated in the affidavit. The second application was for an order that for the reasons shown in the affidavit of the Respondent sworn on the 10th November, 1971, the Writ of Fieri Facias and the whole proceedings be set aside on the ground of irregularity.

The Deputy Master and Registrar on behalf of the Master and Registrar signed a writ of Fieri Facias on 25th October, 1971, but no mention was made of it in the notice of motion dated 2nd November, 1971.

By order 23 Rule 15 of the High Court Rules "Any judgment by default whether under this order or under any other of these Rules, may be set aside by the Court upon such terms as to costs or otherwise, as such Court may think fit." By order 50 Rule 3 "Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or Notice of Motion." The application before Ken During J. of the 2nd November, 1971, did not question the regularity of the judgment; although the writ of Fieri Facias had already been issued, the respondent only requested that the statement of defence exhibited be filed and served on appellant's solicitor. Ken During J. in his order gave no reasons for refusing the application and one cannot speculate that he considered the intended statement of defence before deciding. In this application respondent relied on Order 23 Rule 12 which provides that "Any verdict or judgment where one party does not appear at the trial may be set aside." It is not clear as to whether this rule led Ken During J. to refuse the application. The appearance entered on 10th November, 1971 was unconditional. The application before Tejan J. was made on the

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In it the respondent requested "that for the reasons shown on his affidavit sworn on the 10th day of November, 1971, and filed, the writ of Fieri Facias and the whole proceeding be set aside on the ground of irregularity."

It seems from the second application that the complaint was not concerning the regularity of the judgment of Hon. Durin, J. but instead that the whole proceedings including the writ of Fieri Facias was irregular.

No further action was taken after the judgment of 14th June, 1971 until application was made to the Master and Registrar on 25th October, 1971, for a writ of Fieri Facias and no action was taken to amend the amount claimed although it was palpably incorrect.

The appellant being dissatisfied with the judgment and order of Tejan J. appealed to the Sierra Leone Court of Appeal to have the judgment set aside. Section 56 of the Courts Act No. 31 of 1965 provides:-

> (1) Subject to the provisions of this section, an appeal shall lie to the Court of Appeal -
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> (a) from any final judgment, order, or other decision of the Supreme Court given or made in the exercise of its original, prerogative or supervisory jurisdiction in any suit or matter; and
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> (b) by leave of the Judge making the order or of the Court of Appeal, from any interlocutory judgment, order or other decision, given or made in the exercise of any such jurisdiction as aforesaid:

In my view both applications were based on different facts and although the rules provide that the irregularities complained of must be specified the Court cannot close its eyes to a patent irregularity in the proceedings by which a greater amount was claimed than that for which judgment was obtained.

It is settled law that in certain circumstances a Court can vacate its own judgment.

In Thynne vs. Thynne reported in (1955) 3 All E.L.R., 129, Morris, L.J. in the course of his judgment said at page 145

> "I respectfully agree with what was indicated by Hodson, L. J. in Meier v. Meier (19) (1948) p. at (1948) 95):
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> 'I prefer not to attempt a definition of the extent of the court's inherent jurisdiction to vary, modify or extend its own orders if, in its view, the purposes of justice require that it should do so.'

"Without in any way purporting to categorise and certainly without indicating any limits, a few illustrations in regard to the court's powers may be mentioned. (a) If there is some clerical mistake in a judgment or order which is drawn up there can be correction under the powers given by R.S.C., Ord. 28, R. 11, and also under the powers which are inherent in the jurisdiction of the court. (b) If there is some error in a judgment or order which arises from any accidental slip or omission, there may be correction both under Ord. 28, R. 11, and under the court's inherent powers. (c) If the meaning and intention of the court is not expressed in its judgment or order then there may be variation. In Lawrie v. Lees (10), Lord Penzance said (7 App. Cas. at p. 34):"

> 'I cannot doubt that under the original powers of the court, quite independent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the court to vary them in such a way as to carry out its own meaning and, where language has been used which is doubtful, to make it plain. I think that power is inherent in every court.'

"To the same effect were the judgments in Re Swire (15). Lindley, L. J., said (30 Ch. D. at p. 246):"

> '..... if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right ..... It appears to me, therefore, that, if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the court has ample jurisdiction to set that right, whether it arises from a clerical slip or not.'

At page 146 Morris, L. J. continued.

> "A court may in the exercise of its inherent jurisdiction in some circumstances of its own motion (after hearing the parties interested) set aside its own judgment."

Again in the case of Attoh-Quarshie vs. Okpoto reported in (1973) 1 G.L.R. (59) the following principle was laid down at page 60.

> "(3) Tradition has sanctioned three areas where the court generally invokes its inherent powers. First, where the exercise of the powers is necessary for the maintenance of the court's dignity and independence, such powers include the power to punish for contempt and enforce obedience to its mandates and judgments and orders. Secondly where the powers are necessary to ensure the control of its officers (including lawyers) the power to hold its officers to a proper accountability and any default or misfeasance in the execution of its process. Thirdly powers to prevent wrong or injury being inflicted by its own acts or orders or judgments including the power of vacating judgments entered by mistake and of relieving judgments procurred by fraud, and a power to undo what it had no authority to do originally."

Hayfron-Benjamin J. in the course of his judgment in the same case said at page 65

> "Having found that the provisions of Order 9, R. 17 are [illegible] it is now necessary to consider whether or not the submission of counsel that the court has an inherent power to vacate its own

invalid orders is well founded. Inherent power is an authority not derived from any external source, possessed by a court. Whereas jurisdiction is conferred on courts by constitutions and statutes, inherent powers are those which are necessary for the ordinary and efficient exercise of the jurisdiction already conferred. They are essentially protective powers necessary for the existence of the court and its due functioning. They spring not from legislation but from the nature and constitution of the court itself. They are inherent in the court by virtue of its duty to do justice between the parties before it. The scope of inherent powers however cannot be extended beyond its legitimate and circumscribed sphere. The safest guide lines are precedents."

Unfortunately the judgment of the Appeal Court did not provide any guide lines on which this court may arrive at its decision but there appears to be two important issues which must be considered.

(1) Is it proper for a second application to be made before Tejan, J. the first application having been refused by Ken During, J.

(2) Is the amount for which judgment was obtained on 14th June, 1971 liquidated or unliquidated damages.

With regard to (1) having found that the applications before both Judges were not the same, I hold the view that it was proper for the Court to vacate the judgment in default in the light of the authorities cited above.

On the second point if the amount claimed was for liquidated damages then execution could be levied for the amount for which final judgment was obtained. If, on the other hand, the amount claimed should in fact be for unliquidated damages then it is subject to assessment by the court. From the particulars in the statement of claim it could easily be deduced that there was some consideration moving from the promisee.

Paragraphs 4, 5 and 7 already recited refer.

According to appellants, the work was inefficiently carried out but not that no work was in fact done.

I am of the opinion that this matter should proceed to trial for the following reasons:

1. Judgment in default was for liquidated damages which was not supported by the statement of claim, and as I have held that the claim was for unliquidated damages, such damages must be assessed.

2. Despite the requirements of order 50 rule 3, of the High Court Rules, Order 50 rule 1 provides as follows:-

"Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court shall

so direct, but such proceedings may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner and upon such terms as the court shall think fit."

The appeal is hereby dismissed. Costs to the respondent in this Court and ~~in the Court below~~.

N. E. Browne-Clarke
Justice of the Supreme Court

I agree
President

A. Macaulay

I agree
[illegible] Davis