MISC APP 1/2015

IN THE SUPREME COURT OF SIERRA LEONE

SUPERVISORY JURISDICTION

IN THE MATTER OF AN APPLCATION PURSUANT TO SECTION 126(b) OF THE CONSTITUTION OF SIERRA LEONE, ACT NO. 6 OF 1991

BETWEEN:

INTERNATIONAL CONSTRUCTION CO. LTD - PLAINTIFF/ RESPONDENT

AND

ZAKHEM INTERNATIONAL CONSTRUCTION COMPANY LIMITED - DEFENDANT/APPLICANT

CORAM:
THE HONOURABLE MR JUSTICE V V THOMAS, ACTING CHIEF JUSTICE
THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT
THE HONOURABLE MS JUSTICE V M SOLOMON
JUSTICE OF THE SUPREME COURT
THE HONOURABLE MR JUSTICE P O HAMILTON
JUSTICE OF THE SUPREME COURT
THE HONOURABLE MR JUSTICE A CHARM, JUSTICE OF APPEAL

COUNSEL:
J B JENKINS-JOHNSTON ESQ (with him, LEON JENKINS-JOHNSTON ESQ) for the Defendant/Applicant

A E MANLY-SPAIN ESQ (with him, S KATTA ESQ) for the Plaintiff/Respondent

JUDGMENT DELIVERED THE 14th DAY OF MAY,2015

BROWNE-MARKE, JSC

THE APPLICATION

1. The Defendant/Applicant (hereafter, "The Defendant"), has come to this Court by way of Notice of Motion dated 12 January,2015 for this Court, comprising 5 Justices, to vary its decision dated 15th December,2014

delivered by this same Court then constituted by 3 Justices. The Application is made pursuant to Section 126(b) of the Constitution of Sierra Leone,1991 which reads, in part:*".....three Justices of the Supreme Court acting in its civil jurisdiction may exercise any power vested in the Supreme Court not involving the decision of a cause or matter before the Supreme Court, save that: (a).....(b) in civil matters, any order, direction or decision made or given by the three Justices in pursuance of the powers conferred by this section, may be varied, discharged or reversed by the Supreme Court constituted by five Justices thereof."*

2. The Order which the Defendant wishes to be varied reads as follows: *" That the funds transferred out of the Respondent's account at Ecobank (SL) Ltd and paid into the Applicant's Account at Rokel Commercial Bank (SL) Ltd, namely, Le157,180,726/55, and the sum of US$177,058/76 transferred out of the Respondent's Account at Ecobank (SL) Ltd and paid into the Applicant's account at Guaranty Trust Bank pursuant to the said Default Judgement dated 23rd May,2014 and subsequent garnishee proceedings, be refunded forthwith by the Applicant and the said total sums paid into an interest bearing Leone account (for the Leone component of the funds) and into an interest bearing US Dollar account (for the US Dollar component of the funds) which accounts are to be opened in the joint names of the Solicitors for the Applicant and the Respondent at Sierra Leone Commercial Bank in Freetown."*
3. The Defendant prays that this Order be varied to read: *" That the funds transferred out of the Respondent's Account at Ecobank (SL) Ltd, namely Le157,180,726/55 and US$177,058/76 pursuant to the said Default Judgment dated 23rd May,2014 and subsequent Garnishee proceedings, BE REFUNDED FORTHWITH and paid back to the Respondent's said Account at Ecobank (SL) Ltd consequent upon the setting aside of the Default Judgment dated 23rd May,2014 and the subsequent Garnishee proceedings."*
4. There was a second Order which the Defendant now seeks to be discharged: it reads as follows: *"Until the dispute between the parties is finally resolved, no withdrawals should be made out of the said Accounts unless by a specific order of the Court to that effect."*
5. No reason has been stated on the face of the Motion why the full Court should vary the decision of the Court comprising three Justices. In other words, the Defendant has not stated what was wrong with the first

Order of that Court that it now wishes to vary; and as regards the second Order, what was wrong with it, that it now wishes the same to be discharged. The questions the Defendant poses amount to this: Can this Court vary its decision, given by a Bench of three Justices, 'willy, nilly', or, is there an implied requirement that the Applicant should show that there was something wrong in Law or in principle with the Orders made, whose variation and discharge, respectively, it now seeks? This Court should also bear in mind that the Application herein, is not an appeal, even though the Constitutional provision permits the full Court to reverse the decision of the Court made up of three Justices.

DEFENDANT'S AFFIDAVITS

6. The Application is supported by the respective affidavits of Brenda Jones, deposed and sworn to on 12th January,2015 and of Mr Jenkins-Johnston, deposed and sworn to on 17th February,2015.
7. Mrs Jones' affidavit sets out the history of the case – how it got to this Court, it having begun in the High Court. Exhibited to her affidavit are, copies of the writ of summons issued on 3rd March,2014, exhibit "A"; the default Judgment dated 23rd May,2014 – exhibit "B"; the Garnishee Order Nisi dated 30th May,2014 – exhibit "C"; transaction records showing the debiting of the Defendant's respective accounts with the Leone and Dollar amounts, respectively – exhibits "D" & "E", respectively; the Order made on 6th August,2014 by SHOWERS, JA setting aside the default Judgment – exhibit "F". Exhibits "G" & "H" respectively, are copies of the exchange of correspondence between Solicitors on both sides; and exhibit "J", is a copy of this Court's decision, dated 15th December,2014. The drawn-up Order of Court has not been exhibited.
8. In that Ruling, the Learned Justices did dismiss the Plaintiff's Application for an Order of Certiorari to issue against the Order made by SHOWERS, JA, sitting as a Judge of the High Court, and then went on to make the Orders complained of. According to Section 125 of the Constitution,1991, this Court, in the exercise of its supervisory jurisdiction, "....*shall have power to issue such directions, orders or writs including writs of habeas corpus, orders of certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers.*" It is our view, that this Constitutional provision, authorised and empowered this Court to make the Orders it made in December,2014, consequent upon its

refusal to set aside the Ruling of SHOWERS, JA. Of course, it is now the duty of the full Court to determine whether it was the right decision, and if not the right decision, whether we should vary and discharge, respectively, its component parts.

9. Turning to Mr Jenkins-Johnston's affidavit, he refers to the Order of this Court for the respective transfers to be made, and deposes that the Plaintiff had not, two months after the Order was made, complied with its terms fully, in that the joint account had not been opened as Ordered by this Court.

PLAINTIFF'S AFFIDAVITS

10. The Plaintiff/Applicant (hereafter, "the Plaintiff"), opposes the Defendant's Application, and has filed two affidavits deposed and sworn to by Moufid Ibrahim Rashid, its Managing Director, on 17 February,2015, and by Mr Manly-Spain, deposed and sworn to on 24th February,2015, respectively.
11. In his affidavit, Mr Rashid explained the nature of the contractual relationship between both companies. According to him, only the Dollar amount was paid into the Plaintiff company's account pursuant to this Court's Order of 15th December,2014. This was proved to be true, in the end. He deposed further, that as of the date of the affidavit, the Defendant company, had not filed a defence to his company's claim. During the course of argument, Mr Jenkins-Johnston did say this had been done, but there is no affidavit evidence in proof of this. Mr Rashid deposed in paragraph 6 of his affidavit that the Defendant company, being a foreign entity, had begun to close down its business in Sierra Leone, and was intent on leaving this jurisdiction, as its local representatives had not been within the jurisdiction for over six months prior to the date of his affidavit. He ended by saying that the Order made by this Court was just, as in the event the Plaintiff company succeeds in its claim against the Defendant company, there will be funds within the jurisdiction on which the Plaintiff could fall for satisfaction of the judgment debt.
12. Mr Manly-Spain's affidavit dwelt on the opening or non-opening of the accounts as Ordered by this Court. He deposed that the accounts were not opened because he could not secure the cooperation of Mr Jenkins-Johnston. The impasse which had developed between the parties with regards to compliance with this Court's Order was eventually settled in

between hearings. At the hearing on 24th February,2015 the Learned Acting Chief Justice Directed that the hearing would not proceed unless this was done. At the adjourned hearing on 4th March,2015, it was confirmed that this had been done, and Mr Jenkins-Johnston was then allowed to proceed with his Application. It was also confirmed that the Leone component of this Court's Order, had not indeed, been debited from the Defendant's account.

MR JENKINS-JOHNSTON'S ARGUMENTS & COURTS' ASSESSMENT OF THE SAME

13. Mr Jenkins-Johnston's arguments, went as follows: Consequent upon the setting aside of the default judgment, and the Garnishee Order absolute, all monies recovered under judgment, ought to be refunded to the Defendant. There was no further legal basis for holding onto the Defendant's funds, in any form, whatsoever. In fact, the Defendant had filed a defence and counterclaim, three days prior to the date of hearing, i.e. on or about 1st March,2015. Again, we must emphasise, that no written proof of this was offered by Mr Jenkins-Johnston. He said also that there had not been any trial of the action so far.
14. This brings us to the propriety of this Court's December Order. It is true, as argued by Mr Jenkins-Johnston, that the setting aside of a default Judgment in a Court of first instance, invariably results in the recission of all Orders, writs or proceedings flowing from that judgment. This Court did hold that the High Court was not wrong in setting aside the default Judgment, and therefore upheld its decision. Our view, is that as a matter of practice, when a Judgment is set aside in a Court of first instance principally, on the basis that the Defendant has a good defence on the merits to the Plaintiff's claim, consequential Orders, such as , that a defence be filed within a stated period of time, are usually, or, ought to be made. This was a case in which the default judgment was set aside by the High Court, based on the affidavit evidence: no proposed defence was filed in the Application before that Court. The Order of Court, exhibit F to Mrs Jones' affidavit, contains no directions as to the future conduct of the action. The only direction SHOWERS,JA gave was that the Defendant "*.....do file a fresh motion (sic) of the one dated 21st March,2014 within seven days of this Order.*" This Court, in its December Ruling, rightly decided that this direction was unnecessary and in any event, redundant in view of the decision it had reached.

15. The position then, before 15th December,2014 and between that date and 1st March,2015, was that a default Judgment and recovery proceedings had been set aside, but the Defendant had not been called upon to do anything in return other than to pay Costs. How then, should the Plaintiff have been expected to proceed? Even the Defence filed, if we are to accept without more, Mr Jenkins-Jenkins asseveration that it has been filed, was filed without the sanction of the Court, as it was out of time. A specific Order was required to permit the Defendant to do so. So, we do not know where that pleading stands now.
16. There was therefore, nothing stopping the Defendant company, in the event that the monies debited from its account were refunded, from closing shop here, and then opening shop elsewhere, far beyond the reaches of our Courts. It had tasted defeat once, in the form of the default judgment; it is reasonable to conclude that it may have thought that there was a possibility it might, at the end of an inter partes trial, lose again. If such a possibility were to become a reality, would it not be wiser to take its funds out of the reach of our High Court, and make unenforceable its judgment? Such a surmise is not mere speculation, or far-fetched. It is a possibility which, according to Mr Rashid, in his affidavit, is very real.
17. Paragraph 9 of Mrs Jones' affidavit perhaps, inadvertently and unwittingly, supports such a hypothesis. There, she deposes: "*That since the Company's Bank Account was emptied in August 2014 the employees of the Defendant Company including myself have not been paid, thereby causing us untold hardship and distress.*" That affidavit was sworn to on 12TH January,2015. Mrs Jones was here saying that for <u>five months</u>, she and other members of staff had not received salaries because there was no more money in the coffers of the Defendant company. No monies had been transferred here from abroad to offset such a liability, which was recurrent. Was this not clear evidence that perhaps the company, as claimed, by Mr Rashid in his affidavit, was about to fold its tent, and go elsewhere, and thus render any judgment obtained against it, nugatory? The Plaintiff's claim in the High Court, is for the respective sums of US$360,199/53 and US$595,673/82 plus Damages for Detinue and/or Conversion, and for breach of contract and the Costs of the action. If the Defendant were to lose the action in the High Court, its total liability on the basis of these figures alone, will be close to US$1million, a sum far in excess of the sum US$ 177,000 debited from its account. Yet still, it

could not afford to find money to pay its staff. And yet still, the Defendant asks that we release this amount of money to it, unconditionally. As we have said above, we are of the view that the Bench of three of our Brothers and sister were quite right in making the Orders they made, based on the affidavit evidence before them. Should we therefore reverse their decision?

THE LAW AS EXPLAINED IN THE CASES

18. In order to answer this question, we must turn our attention to some of the authorities in this area of the Law. The relevant provision for this type of Application, as we have stated above, is Section 126(b) of the Constitution. This provision, in our view, stands independently of the related provision in Section 122(2) of the Constitution, to wit: "*The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears right so to do.....*"

19. This Court was invited to overrule its previous decision in Sup Ct C No. 3/2005 - NORMAN v SLPP & ORS - Judgment delivered by SIR JOHN MURIA on 7th September,2006. The previous decision was that in Sup Ct C No. 2/2005 - NORMAN v SLPP & ORS. The facts in both cases were essentially the same, save that in the later case, the election for the flag-bearership in the 2007 Presidential election had already been conducted, and Mr Berewa had won the same. The earlier action was brought to stop him contesting that election, and the later action, to over-turn his election as flag-bearer for his party. The determining issue in the first action was the lack of locus standi on the part of the plaintiff. SIR JOHN MURIA observed at page 38 of his Judgment that: "*One obvious feature of the present case is that it is based on the same factual circumstances as those in SC2/2005...*" He cited the case of MOGUL OF IRELAND v TIPPERARY (NR) COUNTY COUNCIL [1976] IR 272 where, HENCHY,J in declining to over-rule the case of SMITH v CAVAN AND MONAGHAN COUNTY COUNCIL [1949] IR 322, said at page 272 of his Judgment: "*There are no new factors, no shift in the underlying considerations, no suggestion that the decision has produced untoward results not within the range of the court's foresight. In short, all that has been suggested to justify a rejection of that decision is that it is wrong. Before such a volta face could be justified, it would first have to be shown that it was clearly wrong.....They should show that the*

decision in Smith's case was clearly wrong and that justice requires that it should be overruled....."

20. We are of the view that the reasoning of the respective Courts in the dicta cited, apply with much more force to a case such as the one under consideration: where, what the full Court is called upon to do, is to reverse the decision of the three man-court, without any additional facts or circumstances being prayed in aid of the application. All that the Defendant seems to be asking, is that we should differ from the 3 man Court.

21. In dealing with the duty of a five man panel when reviewing the decision of a three man panel, JOKO-SMART, JSC had this to say in SC Misc Appl 1/2000 - MOHAMED JUMA JALLOH v T KRISHNAKUMAR at page 4 of his Judgment: " *....For my part, it will be absurd to conceive that Parliament, aware of the limitations on the composition of the Court inherent in section 121 of the 1991 Constitution, would have created a parallel situation in which applicants can indulge in forum-shopping at will without any apparent legal reason but merely with the expectation that the full Court might be more favourably disposed to them after they have tried with the Court of three to no avail. On this issue, I cannot but agree more with WARNE, JSC when this matter came up previously before five justices. At that time, in a unanimous ruling of the court, he said: 'In my view, this sub-section presupposes that the three Justices erred in law or other wise to enable the applicant to invoke the provision of section 126(b) of the Constitution....'"* At page 6 of his Judgment, he concluded on the same note by saying that: "*...for an application against the order of three Justices to succeed, the applicant must show that they erred in law or otherwise...."*

22. WARNE, JSC returned to the requirements for an application for review to succeed in: Sup Ct Misc App 8/99: KORA SESAY & 2 ORS v ALLIE KAMARA & 2 ORS - Judgment delivered 28th March,2000. At page 6 of his Judgment, he had this to say: "*Be that as it may, what the motion is seeking to achieve is an order that the Order of this Honourable Court dated the 30th day of September,1999 be varied, discharged or reversed by the full court pursuant to Section 126(b) of the Constitution.....The words used in this motion are the same as those provided in Section 126(b) aforesaid, that is to say, "varied, discharged or reversed." In order to apply any of these terms, the grounds for the relief sought must be "good and substantial reasons". These good and substantial reasons*

must be set forth in the affidavit of the applicant...." At the bottom of page unto page 7, the Learned Justice had this to add: "*...In order to invoke the provisions of Section 126(b) of the Constitution, the applicant ought to show that he is aggrieved by the order made by the three Justices and must give grounds for being so aggrieved.*" We have of course noted above, that the Defendant's respective affidavits were silent on these twin issues: the grievance, and the reasons for the grievance with the Order made by the three member Court.

23. This Court decided the other way in Sup Ct Misc App 4/2000 – REV DANIEL ADEMU JOHN v ABU BLACK LUGBU & 2 ORS – Ruling delivered 24th October,2000. There, the issue was whether a stay of execution of judgment which had been granted by a three member Court, should continue when no appeal had been filed by the Appellant in this Court's Registry. Counsel for the Applicant in that case, conceded that the complaint was not about any irregularity in the Ruling delivered by the three member panel. The Applicant had come to the full Court for a review of that decision because this was the only way the Order made by the 3 member Court could be varied or reversed. The Order made by the 3 member Court on 22 September,1999 was therefore discharged. Clearly, the merits of this case warranted a discharge of the Order for stay of execution granted by the 3 member Court. The beneficiary of the Order for stay, had done nothing to prosecute the appeal, the basis on which the Order had been granted.

CONCLUSION

24. To conclude, we are of the view, and we so hold, that the Defendant has not clearly established that the 3 member Court was wrong in any aspect of its decision of 15th December,2014. For the reasons stated above, we are of the view also, that the Defendant's Application, lacks merit.

25. In the premises, the Defendant's Application dated 12th January,2015 is dismissed with Costs, such Costs assessed in the sum of Le3,000,000.00.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE V V THOMAS, ACTING CHIEF JUSTICE

THE HONOURABLE MS JUSTICE V M SOLOMON
JUSTICE OF THE SUPREME COURT

THE HONOURABLLE MR JUSTICE P O HAMILTON
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE A CHARM, JUSTICE OF APPEAL