

CIV. APP. NO.9/2021

IN THE SUPREME COURT OF SIERRA LEONE

IN THE MATTER OF SECTION 12(2) OF THE ARBITRATION ACT (CAP 25) OF THE
LAWS OF SIERRA LEONE 1960

AND

IN THE MATTER OF THE AWARD/DECISION/ORDER OF THE ARBITRATION
PANEL OF THE SIERRA LEONE INSTITUTE OF ARCHITECTS DATED THE 27TH DAY
OF MARCH 2017 IN THE MATTER BETWEEN VITAFOAM MANAGER AND LEONE
CONSTRUCTION & GENERAL ENGINEERING SERVICES FOR WITHHOLDING
PAYMENT

AND

IN THE MATTER OF AN APPLICATION BY VITAFOAM (SIERRA LEONE) LTD FOR
AN ORDER SETTING ASIDE THE AWARD/DECISION/ORDER OF THE
ARBITRATION PANEL OF THE SIERRA LEONE INSTITUTE OF ARCHITECTS
DATED THE 27TH DAY OF MARCH 2017 IN THE MATTER BETWEEN VITAFOAM
MANAGER AND LEONE CONSTRUCTION & GENERAL ENGINEERING SERVICES
AFORESAID

BETWEEN:

VITAFOAM (SIERRA LEONE) LTD

- APPELLANT/APPLICANT

AND

LEONE CONSTRUCTION &
GENERAL ENGINEERING SERVICES

- RESPONDENT/RESPONDENT

Coram:

Hon: Justice V.M. Solomon JSC – Presiding

Hon. Justice G. Thompson JSC

Hon. Justice A. Sesay JSC

Counsel: G.K. Tholley and S.B Mondeh for the Appellant
Y.H Williams for the Respondent

Ruling dated 7th November 2023.

V.M Solomon JSC

1. This case has a long and chequered history but for present purposes I shall just summarise it. The Appellant and the Respondent in this matter entered into an agreement dated 5th April 2012 for the construction of an industrial complex comprising factory and warehouse etc. at Hastings village in the Western Area of Sierra Leone. The Appellant employed Eburn Elliotts Associates as their quantity surveyor and project manager. Work commenced on the 27th of April 2012 and was to be completed by 26th April 2013. The Appellant's case was that the works were not completed by the contractual date and remained incomplete by the subsequent extension dates. In 2014 the roof of the main structure was blown away by gale force winds. The project manager after an inspection and after agreeing that some remedial work needed to be done issued a certificate of practical completion on the 17th of February 2015 and a certificate of final completion on the 8th of November 2016. He then advised his employers, the Appellant in this matter, to pay the remainder of what was due to the Appellant. Counsel for the Respondent took time to take the court through these letters from Eburn Elliott associates urging that payment be made by the Appellant to the Respondent. These letters can be found in exhibits G,H, I and J attached to the affidavit of Idris Kabbah project manager for the Respondent sworn to on the 15th February 2023.
2. In 2016 the Appellant being dissatisfied with the non-payment of the final instalment on issuance of the final certificate invoked the dispute resolution clause of the agreement (Clause 4). This clause states as follows:

"..... disputes or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties or, failing agreement within 14 days after either party has given to the other when request to concur in the appointment of an arbitrator, a person to be appointed on the request of either party by the president or a vice president for the time being of the Sierra Leone Institute of Architects."
3. The parties were unable to agree on the appointment of an arbitrator so the Sierra Leone Institute of Architects acting on a request by the Appellant appointed Mr Kemoh Tarawalli and informed the parties of his appointment by

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a letter dated 19th August 2020. On the 24th of August 2020 solicitors acting for the Appellant wrote to the President of the Institute of architects informing him that they were pleased to hear about the appointment but stated that there were outstanding issues which needed to be resolved. They asked for a stay of all proceedings pending the resolution of these outstanding matters. This letter is exhibit D of the affidavit of Idriss Kabbah sworn to on the 13th February 2023 in support of the Respondent's case. Counsel for the Appellant informed the court that in fact they voluntarily asked for the matter to be stayed until everything had been resolved. Counsel for the Appellant later took a jurisdictional objection to the appointment of the arbitrator on the basis that his appointment is contrary to section 6(a) of the Arbitration Act Cap 25 of the laws of Sierra Leone 1960. This objection was resisted by the Appellant who contended that as the parties were unable to meet and agree on an arbitrator, they approached the Institute as per the agreement between the parties.

4. Mr Kemoh Tarawalli proceeded with the arbitration. The Respondent's claim was upheld and the Appellant was ordered to pay the sum of \$290,577 .28 plus interest. The Appellant then instituted an action in the High Court for revocation of the appointment of the arbitrator Mr Tarawalli. The Respondent then filed contempt proceedings against the Appellant in the Court of Appeal. Those proceedings are still outstanding.

The Road to this Court

5. The Appellant then applied to the Fast Track Commercial Court (FTCC) to have the award set aside for impropriety. This application was refused by a judgment handed down on the 20th July 2017 and the Appellant subsequently appealed to the Court of Appeal. Meanwhile the Respondent filed proceedings in the FTCC to have the arbitration award enforced as a judgement of the High Court and for a garnishee order in respect of the sum awarded by the Arbitrator. The application was granted on the 26th and 27th July 2017. The Respondent levied execution on the strength of that judgement and the garnishee order absolute.
6. By a Notice of Motion dated 31st July 2017 and another one dated 3rd August 2017 the Appellant applied to the Court of Appeal to stay the execution of the orders of the High Court dated 26th and 27th of July 2017. The application was refused by the High Court on the 29th of September 2017 and the Appellant appealed to the Court of Appeal and for a stay of execution. The Court of Appeal by a ruling dated 22nd February 2018 upheld the Appellant's application for stay of execution of the judgement and successive orders subject to the Appellant paying the sum of US\$150,000 into the Judicial Sub-Treasury on or before the 30th March 2018

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pending the hearing and determination of the appeal. That order was subsequently varied so that the money was paid into an escrow account held in the joint names of the Appellant and the Respondent at a commercial bank in Sierra Leone. The Union Trust Bank was nominated and the money was deposited by the Appellant into that account. It is the return of that money that is the subject of this application and which I shall deal with later.

7. On the 20th of June 2020 the Court of Appeal upheld the Appellant's appeal and overturned the judgement of the High Court (FTCC). The Court ordered the parties to go back to arbitration pursuant to the arbitration clause in the agreement that is the agreement dated 5th April 2012. By a Notice of Motion dated 21st July 2020 the Appellant sought the refund of the monies which were recovered by the Respondent from its bank accounts pursuant to the garnishee order mentioned above and the return of the US\$150,000 that was being held in this escrow account that which was paid as a condition of the stay of execution referred to above. The Respondent contended that the Court of Appeal was now *functus officio* after delivering its judgement on the 20th of July 2020 and that the Appellant's application was an abuse of process. The Appellant issued another notice of motion dated 28th July 2020 replacing its previous application for a stay of the arbitration proceedings pending reimbursement of the US\$ 150,000. On the 29th of September 2021 the Court of Appeal struck out the Notice of Motion filed by the Appellant on the 28th of July 2020 and ordered the parties to proceed to arbitration. It is this ruling of the Court of Appeal that is the subject of the appeal to the Supreme Court.

The Notice of Motion

8. The appellant applied to this court by way of notice of motion for the following orders:
 - i. That this court grants an order staying all proceedings at the High Court in the matter intituled C.C 92/22 2022 L. No. 2
 - ii. That this honourable court grants an order compelling the Managing Director of Union Trust Bank to submit to this honourable court detailed statement of account of the escrow account being number 00400101499720494 held in the joint names of the Appellant/Applicant and the respondent within 48 hours or such time as this honourable court may direct on the ground that it was just a convenience to do so.
 - iii. That this honourable court grants an order restraining the parties herein, the agents or privies and the Managing Director of Union Trust Bank (Sierra Leone) Ltd not to debit or credit or howsoever interfere with the funds held in the escrow account aforesaid pending the hearing and

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determination of this application pursuant to the inherent jurisdiction of this honourable court and on the following grounds:

- a. that it is just inconvenient to do so at this stage and
 - b. in order not to render this application a nugatory
- iv. That this honourable court grants an order restraining the parties hearing, the agents or previous and the Managing Director of Union Trust Bank (Sierra Leone) Ltd not to debit or credit or howsoever interfere with the funds held in escrow account bearing number 004001014997120494 aforesaid pending the hearing and determination of this appeal pursuant to the inherent jurisdiction of this honourable court and on the following grounds:
- a. that it is just inconvenient to do so at this stage and
 - b. in order not to render this appeal nugatory
- v. That this honourable court grants an order staying proceedings in the High Court in the matter intituled CC.C92/22 2002 L. No 2 between the Appellant/Applicant herein and the Respondent herein pending the hearing and determination of this appeal pursuant to the inherent jurisdiction of this honourable court and on the grounds that it is just and convenient to do so at this stage.
- vi. Any other or further orders as this honourable court may deem fit and just in the circumstances
- vii. That the costs of and occasioned by this application be costs in the cause.
9. The Appellant relied upon the affidavit of Temitayo Odeyemi sworn to on the 14th day of November 2022 and the Appellant filed an affidavit in opposition sworn to by Idriss Kabbah on the 13th of February 2023. Both parties filed supplemental affidavits - the Appellant's sworn to on the 23rd of March 2023 and the Respondent on the 4th April 2023.

Counsel's oral submissions

Appellant:

10. Counsel for the Appellant referred to his motion paper dated 15th November 2022 and prayed for all the orders therein relying on the aforementioned affidavit of Temitayo Odeyemi sworn to on the same date together with the exhibits therein referred to and as filed. He laid emphasis on paragraphs 25 & 26 respectively. The affidavit contains 15 exhibits "TO1 to TO15" respectively. The application is made pursuant to Rule 34 of the Supreme Court Rules 1982.

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11. Counsel submitted that this application is an interim preservation order which can be made pursuant to Order 35(1)(1) of the High Court Rules 2007 (hereinafter referred to as "The Rules"). He submitted that there is a pending appeal in this Court and it is "just" and "convenient" at this stage for the sum of US\$150,000/00 now held in the Union Trust Bank to be paid to his client in the light of the judgment of the Court of Appeal dated 20th June 2020. He relied on the American Cyanamide case (1975) and its guidelines at page 396 thereof per Lord Diplock. He submitted that there is a serious issue to be determined by the parties. He relied on exhibit "TO1" (the appeal to this court) and that this dispute emanated from the judgment of the Court of Appeal dated 20th June 2020. The question is what is the status of the funds held in the escrow account at the Bank upon which execution was levied in the light of the judgment of the Court of Appeal? He submitted that he did not have the opportunity to ask for consequential orders from the court as the judgment was delivered remotely. He filed exhibit "TO2" but it was struck out.
12. On whether there is a serious issue to be tried counsel referred to exhibit "TO13" in which the stay of execution of the judgment was conditional on the said sum of US\$150,000/00 be paid into an escrow account at the Bank. It was to secure the judgment debt in case the appeal failed. The appeal succeeded and so sums should be refunded.
13. On the issue of where the balance of convenience lies counsel submitted that it lies in favour of granting the orders prayed for in the motion paper otherwise the appeal in this court will be rendered nugatory and will be an academic exercise. On the other hand, counsel submitted that damages will not be adequate to compensate his client having regard to the peculiar circumstances of the Respondent.
14. Counsel then addressed the court on the supplemental affidavit of his client sworn on 23rd March 2023. Counsel relied on the exhibits "TO14 to TO22" respectively. He laid emphasis on exhibits "TO16, 17, & 18" and submitted that the respondent is not in a financial position to reimburse this sum to him in the event the appeal is successful. By exhibit "TO18" the Respondent is indebted to the Union Trust Bank and Standard Chartered Bank in the sums as set out. He refuted the allegations that his client caused this indebtedness of the Respondent and referred the court to exhibit "TO19", the contract. He submitted that the Respondent was paid 30% in the sum of US\$777,197/00 of the contract price so there was no need for the Respondent to have obtained a loan. He submitted

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that the Appellant objected to the process of the appointment of the arbitrator pursuant to Section 6(a) of Cap 25 of 1960.

15. In reply to Mr Williams, submission, Counsel reiterated his position relative the American Cyanamide case in which he submitted that the balance of convenience lies in favour of the granting of his application. He submitted that the contract was for a fixed period and the time had lapsed and structural defects were detected on the property. He submitted that his client has not acted in contempt and that since the Court of Appeal struck out his application he filed this application in this court which is the final court. He finally prayed that his application be upheld and orders granted.

Respondent:

16. Counsel relied on the affidavits in opposition as filed which were sworn on 13th February and 3rd April 2023 respectively. He submitted that the Appellant's appeal was successful in the Court of Appeal and several orders granted including the order in paragraph 4 that the matter be remitted back to arbitration with a fresh panel. Counsel submitted that there were exchanges of letters between both counsel relative the appointment of the arbitrator and since they could not agree he wrote to the institute of architects to appoint one. After his appointment the arbitration proceeded and an award was granted on the 6th April 2022. He submitted that the Court of Appeal ordered the matter to proceed to arbitration but ordered the judgment in the High Court be set aside.
17. Counsel laid emphasis on the affidavit of 13th February 2023 exhibits "D-J" respectively. He submitted the following: that by exhibits "F, G & H" the appellant admitted their liability to the respondent; that the original order of the court below was varied and payment of the sum of US\$150,000/00 was to be paid into an escrow account to be operated by both solicitors; that the Court of Appeal did not release the monies in the account as the Appellant had admitted to their liability and financial difficulties; that the conduct of the appellant is in contempt of the court and cannot constitute special circumstances under the American Cyanamide guidelines of; and finally that when a party is objecting to an order the latter must still be complied with until it is set aside. He finally prayed that the application be dismissed with costs.

Issues for Determination

18. There several issues between these parties culminating in a number of court applications with costs mounting up. However, the issue in this application is

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simply whether the Court of Appeal having ordered a stay of execution on condition that a deposit of the sum of US\$150,000 pending the hearing and determination of the appeal can order that the money is retained in the bank account even though the purpose for which it was ordered to be deposited is no longer relevant and secondly whether that money should be retained in that bank account until the end of the arbitration process.

19. I will paraphrase the orders prayed for in the Notice of Motion dated 9th October 2017 before the Court of Appeal as follows:
 - i. An order staying proceedings in the Fast Track Commercial Court pending the hearing and determination of this application.
 - ii. An order staying the proceedings in the Fast Track Commercial Court pending the hearing and determination of the appeal.
 - iii. An order staying the execution of the orders of the Fast Track Commercial Court dated 26th July 2017 and 28th July 2017 respectively pending the hearing and determination of the appeal.

20. The Court of Appeal ruled on the 22nd February 2018 as follows:
 - i. Stay of execution of the orders of the High Court dated 20th day of July 2017 and 28th day of July 2017 respectively is hereby granted subject to the Applicant paying the sum of US\$150,000 into the Judicial Sub-Treasury on or before 30th March 2018 ***pending the hearing and determination of the Appeal.*** [emphasis mine]
 - ii. That the Appeal be speedily heard.

21. The money was eventually deposited in the Union Trust Bank but the reasons for the variation of the order are immaterial for present purposes.

22. The appeal was subsequently heard and the judgment of the court delivered on the 20th June 2020, was to set aside the judgment of the Fast Track Commercial Court of the 20th July, 2017, to set aside the costs awarded by the Arbitration Tribunal and the learned Trial Judge and to remit the matter to Arbitration as provided for in the agreement between the parties with the proviso that a fresh panel be constituted. The court did not make any order regarding the sum of money it had ordered to be deposited by the Appellant. That determination took place on the 20th June 2020.

23. It is clear that the order of the Court of Appeal of the 22nd of February 2018 was not an open ended order but rather a condition for the granting of the stay. It was to ensure that the status quo remains until the court determined the substantive application. When an order says '*pending the hearing and*

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determination’ it usually means that whatever is ordered will expire after the substantive application, has been heard and determined. The condition of the stay of execution of depositing of the money was predicated on the granting of the final order and therefore expired on the final order. To put it simply any order made contingent upon the hearing and determination of a hearing expires or comes to an end and is no longer of any moment upon the final determination of the issue. In this case final determination was the Court of Appeal judgment of the 29th September 2021. There is no judgment or award pending to be stayed any longer and there can therefore be no legal basis for continuing to retain what was in effect a contingency fund. There is no stay necessary because the judgment which was stayed was set aside by the Court of Appeal on the 22nd February. What would be the point of preserving a condition for the granting of the stay, if the stay itself was is no longer applicable, is not an issue and was only an interim order which expired after the final order was made?

24. The situation would have been different if the money was held as a security for costs pending the final determination of the substantive issue between the parties. That was not so and in fact the money being held now is of no benefit to the Appellant because there is no order properly in place for holding the money in the Union Trust Bank or any other bank account.
25. Although Counsel for the Appellant relied on the American Cyanamid Case, this was only relevant to this court granting a stay of all proceedings and in any event this court made that order on Tuesday 17th January 2023. Similarly, this court was given assurances and saw evidence in the form of the bank statement to show that the money was still being held in the account at UTB, but that the signatories needed to change. There is therefore no need to revisit that issue.
26. This court therefore makes the following orders:
 - i. that the sum of US\$150,000.00 deposited by the Appellant and held in account number 004001014997120494 in the Union Trust Bank (Sierra Leone) Limited be returned to the Appellant together with all interest accrued from the date of deposit to date.
 - ii. That all current proceedings/matters/applications pending in any court be stayed pending the hearing and determination of the appeal in this court.
 - iii. That the Appeal be speedily heard so as not to stand in the way of the speedy resolution of this long drawn out matter between the parties.

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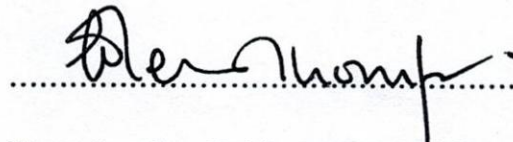
iv. Costs in the cause.

27. Finally, I should say that this matter was listed before a panel of 5 (five) judges. Two of the Judges were unable to be present at the final hearing. Mindful of the number of adjournments in this case and the delays these have caused; the parties were asked if they wished this application to be heard by a panel of 3(three). Both parties consented so the matter was heard by the 3 (three) Judges whose names appear in this ruling. I will only add now that this has been a long drawn out issue and we implore all parties to act with the necessary speed to ensure that this matter is heard and resolved speedily.



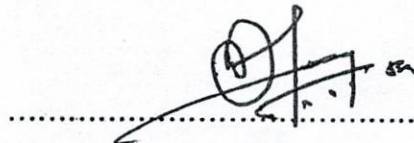
.....
Hon. Justice V.M. Solomon JSC

I agree



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Hon. Justice G. Thompson JSC

I agree



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Hon. Justice A. Sesay JSC

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