

**IN THE HIGH COURT OF SIERRA LEONE**  
**(GENERAL CIVIL DIVISION)**

BETWEEN:

SIGMA ENGINEERING AND CONSTRUCTION  
SERVICES LIMITED

- PLAINTIFF

AND

FIRST INTERNATIONAL BANK (SL) LIMITED  
**( Now called: VISTA BANK (SL) Limited)**

- DEFENDANT

INTERNATIONAL PROCUREMENT AND  
CONSTRUCTION SERVICES

- THIRD PARTY

COUNSEL:

L. JENKINS – JOHNSTON ESQ

- PLAINTIFF

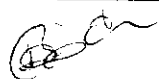
M. DUMBUYA (MS)  
(LAMBERT & PARTNERS)

- DEFENDANT

C. F. EDWARDS ESQ (LATE)

- THIRD PARTY

**JUDGMENT DELIVERED THIS 20<sup>TH</sup> DAY OF November 2020 BY MS. JUSTICE F. BINTU  
ALHADI JA**



This action commenced before me on the 19<sup>th</sup> of June 2017 for a directions hearing; after being remitted from the Court of Appeal on the 2<sup>nd</sup> of March 2017. The parties complied with the directions Order and filed all the relevant documents.

It is an action that initially commenced by Writ of Summons dated the 18<sup>th</sup> day of December 2012 in which the Plaintiff claimed the following reliefs:

1. Recovery of the sum of Le 378,872,586.00 (Three Hundred and Seventy Eight Million Eight Hundred and Seventy Two Thousand Five Hundred and Eighty Six Leones) being owed as payment for the construction of the Makeni Government Hospital Phase 1 and completion of additional facilities for the Makeni and Moyamba Government Hospitals Phase 2 (therein called "the works").
2. Interest on the said sum at the rate of 25% per annum from the 26<sup>th</sup> of November 2010 to the date of judgment.
3. Any further or other Orders that the Court may deem fit.
4. Costs.

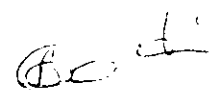
On the 15<sup>th</sup> of January 2013 Notice of Appearance was filed; and on the 1<sup>st</sup> of March 2013 a Defence and a Counterclaim were filed.

The Defendant's Counterclaim inter alia averred that:

1. The Plaintiff breached clause 2.3 of the contract dated 17<sup>th</sup> August 2010 as a consequence of which the Defendant suffered loss and damage.

Particulars of Special Damage

- i) Clause 2.3 of the Agreement dated 17<sup>th</sup> August 2010 provides that were the construction of the Makeni Government Hospital Phase 1 and additional facilities for the Makeni and Moyamba Government Hospitals Phase 2 was not completed by the 16<sup>th</sup> of November 2010 the Plaintiff is to pay the Defendant " liquidated damages at the rate of 2.5% of the contract sum per week for every week or part of a week during which works remain uncompleted."



- ii) The contract sum for the construction of the Makeni Government Hospital Phase 1 and additional facilities for the Makeni and Moyamba Government Hospitals Phase 2 is Le 600,000,000.
  - iii) The Plaintiff failed to complete the said construction work on the agreed date and has failed to complete the said construction work.
2. The Plaintiff has failed/refused to pay such liquidated damages to the Defendant.

Whereof the 1<sup>st</sup> Defendant claims against the Plaintiff:

1. Special Damages at the rate of 2.5% of the contract sum of Le 600,000,000 per week from the 17<sup>th</sup> of November 2010 till payment.
2. Any further or other Orders.
3. Costs.

On the 28<sup>th</sup> of February 2013 a Third Party Notice was filed by the Defendant thereby instituting an action against the 3<sup>rd</sup> Party. The Defendant's claim against the 3<sup>rd</sup> Party was thus:

1. Recovery of the sum of Le 378,872,586.00 (Three Hundred and Seventy Eight Million Eight Hundred and Seventy Two Thousand Five Hundred and Eighty Six Leones) being claimed as payment for the construction of the Makeni and Moyamba Government Hospitals Phase 2 (therein called "the works")
2. Interest on the said sum at the rate of 25% per annum from the 26<sup>th</sup> day of November 2010 to the date of judgment.
3. Any further Order(s) that the Court may deem fit.

This was followed by a Notice and Memorandum of Appearance on behalf of the 3<sup>rd</sup> Party dated the 4<sup>th</sup> of March 2013.

### Summary of Submissions by Mr. L. Jenkins - Johnston Counsel for the Plaintiff

In his address to the Court, Counsel submitted that the Plaintiff's complaint is that by a contract dated the 17<sup>th</sup> of August 2010, the Defendant employed the services of the Plaintiff as "Contractor" to complete the construction of the Makeni Government Hospital Phase 1 and completing the additional facilities for the Makeni and Moyamba Government Hospitals Phase 2 (therein referred to as "the works").

It was agreed that the Defendant would make further payment when a certificate has been presented for such payment by the consultant; Tropical Environmental Design Associates (hereinafter referred to as TEDA) employed by the Defendant.

The Defendant made an advance payment of Le 280,730,025.00 upon the consultant presenting a certificate for the said payment. On the 26<sup>th</sup> of November 2010, the consultant presented a payment certificate to the Defendant for the sum of Le 378,872,586.00. The Defendant however refused to pay the Plaintiff the said or any sum of money despite several demands made by the Plaintiff through its solicitors.

On the 16<sup>th</sup> of April 2013, summary judgment was delivered in favour of the Plaintiff. The Defendant being dissatisfied with that judgment appealed to the Court of Appeal and which said appeal was upheld and the matter remitted to the High Court for trial.

Counsel argued that the contract between the Defendant and the Plaintiff (Exhibit A) is the only contract between the parties. Page 1 of the said contract reads thus " This Agreement is made the 17<sup>th</sup> day of August 2010 between First International Bank (SL) Limited (hereinafter called the employer) of the one part and Messrs Sigma Engineering and Construction Services (hereinafter called the Contractor..." He pointed out that there is nothing in the contract to indicate that the contract is secondary, supplemental to or dependent on any other contract between other parties.

He said that the document is unambiguous and the nature of the agreement is clear. He submitted that none of the exceptions to the parole evidence rule which Counsel for the Defendant has outlined in their address apply. He said that by refusing to honour the payment certificate, the Defendant made it impossible for the Plaintiff to continue with the other stages of the works. He pointed out that clause 4.1 of the contract states that the advance payment of Le 280,730,025.00 was mainly "to assist the contractor with his mobilization cost, purchasing of key materials and for setting up site" which the Plaintiff did in order to commence work.

Counsel submitted that the Plaintiff performed its obligations under the contract between itself and the Defendant and that the Defendant failed to perform its own obligations thereby breaching the contract.

### **Summary of Submissions by Ms. M. Dumbuya - Counsel for the Defendant**


In her written address, Counsel for the Defendant, Ms. Dumbuya, submitted that the entire case borders on whether exhibit A, the agreement between the parties is the only document that defines the contract between the parties; and whether evidence within and outside of Exhibit A can be adduced to prove that the Defendant has a good case by bringing in extrinsic evidence that does not form part of Exhibit A.

She submitted that the Defendant showed evidence that notwithstanding Exhibit A and even under Exhibit A, the Plaintiff, the Defendant and the 3<sup>rd</sup> party herein all together conducted themselves prior to the signing of exhibit A, in such a way that by their collective action in furtherance of the construction work on the Makeni Government Hospital Phase 1 and additional facilities for the Makeni and Moyamba Government Hospitals Phase 2, could be deemed as falling within the exceptions to the rule against extrinsic evidence.

Ms Dumbuya argued that the Defendant gave evidence about the existence of exhibit L, which refers to a tripartite meeting held on the 6<sup>th</sup> of August 2010 and during which it was agreed collectively that: the sum of Le 600,000,000 would be release for the completion of the project; that Mr Hamilton of SIGMA Construction would be in charge of the project and all funds would be released to him by the Contractor IPCS; and that the disbursement would be done in tranches, reviewed and approved by the consultants before further disbursements.

She said that in this regard, interalia, the Defendant has shown evidence that the Defendant bank was acting as Surety/Guarantor, which was further buttressed by the existence of exhibit P, which is the Advance Payment Guarantee from the Defendant to the Procurement Manager of the Ministry of Health and Sanitation.

She argued that the contract dated 17<sup>th</sup> August 2010 was secondary to an agreement between the Government of Sierra Leone and the 3<sup>rd</sup> Party herein for the construction of the Makeni Government Hospital Phase 1 and additional facilities for the Makeni and Moyamba Government Hospitals Phase 2. Ms Dumbuya also opined that notwithstanding that in cross-examination, the Plaintiff denied working with the 3<sup>rd</sup> party, the evidence in totality throughout the



trial revealed that the 3<sup>rd</sup> party worked with the Plaintiff and the Defendant in furtherance of the project work.

Ms Dumbuya maintained that the surrounding circumstances of the matter, does not differ from what is contained in exhibit A. She said that the surrounding facts and circumstances are not in contradiction to the content of Exhibit A. What it does she opined, is that they clarify exhibit A especially regarding what was arrived at and agreed at various preliminary meetings.

### **Counter-Claim**

Counsel for the Defendant, Ms Dumbuya, submitted that she relied on all the evidence presented to the Court for the Defence and also its counter-claim against the Plaintiff for failing to adhere to the terms of clause 2.3 of Exhibit A.

She also espoused that, according to Exhibit A, the Plaintiff contracted to pay the Defendant liquidated damages for failure to complete the project within the said stipulated time at the rate of 2.5% of the contract sum per week of every week or part of a week during which the project works remain uncompleted. The Defendant's Counterclaim therefore she submitted, is for the said liquidated damages.

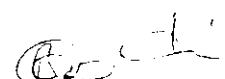
### **Third Party Proceedings**

Ms Dumbuya submitted that throughout the trial, there is uncontroverted evidence that the 3<sup>rd</sup> party is liable to the Defendant for failing to have a liquidated account with cash inflow to enable the Defendant to honour agreed/accepted requests for payment.

She said that there was no dispute throughout the trial about the existence and legality of the Advance Payment Guarantee, Exhibit J, issued to the 3<sup>rd</sup> party by the Defendant and signed by the Company Secretary and Director of the Defendant. She referred to exhibit L which shows that the 3<sup>rd</sup> party is a key party to the entire process; and to exhibits E and F where the 3<sup>rd</sup> party was mentioned in both exhibits from the Plaintiff and the Defendant.

### **Summary of Submissions by Mr. C. F. Edwards (Late) Counsel for the Third Party**

No submissions were made by Counsel.



## **ANALYSIS AND FINDINGS**

The first question that arises is this: does exhibit A, which is the agreement signed between the Plaintiff and the Defendant on the 17<sup>th</sup> of August 2010, constitute the only agreement between the two said parties? Counsel for the Defendant, Ms. Dumbuya argues otherwise. She submitted that, since the said parties together with the third party had conducted themselves prior to the written agreement of the 17<sup>th</sup> August 2010 in such a way as to deduce that, by their collective action in furtherance of the construction work on the Makeni Government Hospital Phase 1 and additional facilities for the Makeni and Moyamba Government Hospitals Phase 2, it could be deemed as falling within the exceptions to rule against extrinsic evidence.

As a general rule, where the parties have entered into a contract in writing, the terms of the written contract shall govern the operation of the contract and as such, extrinsic evidence is not admissible to add to, or subtract or vary the contract. As Lord Denman CJ in Goss v Lord Nugent (1833) 5. B. & Ad. 58,64 stated: " if there is a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract."

However, there are exceptions to the rule usually known as "parole evidence" rule. This is where under certain circumstances, "parole evidence" can be applicable; and Ms Dumbuya submits that some of the issues in this case, rest on the exceptions such as: evidence as to the true nature of the Agreement and Evidence as to Supplementary or Collateral terms.

In my considered opinion, there is no doubt and the Plaintiff has not denied this, that a tripartite meeting was held on the 6<sup>th</sup> of August 2010 in which there were discussions about Mr. Hamilton of Sigma Construction completing the projects and being in charge; and that Le 600 Million would be released to him. However, I am not convinced that this was an agreement that was a collateral or supplementary term to the main contract that was signed on the 17<sup>th</sup> of August 2010; neither was it evidence as to the true nature of the agreement. If this was the case, judging that this meeting happened before the main agreement/contract was signed on the 17<sup>th</sup> of August between the Plaintiff and the Defendant; why were the terms purported to have been agreed not included in the later written agreement of 17<sup>th</sup> August 2010?

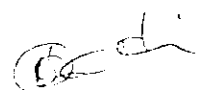


Exhibit K is a credit facility to the 3<sup>rd</sup> party by the Defendant bank dated 1<sup>st</sup> of November 2010. This facility was granted after the contract of 17<sup>th</sup> August 2010 between the Plaintiff and the Defendant. Whilst Exhibit L is a letter addressed to the 3<sup>rd</sup> party stating that the account of the 3<sup>rd</sup> party is being credited with the sum of Le 280,730, 025; which was the 1<sup>st</sup> tranche of payment and which was to be released by the 3<sup>rd</sup> party to the Plaintiff; (letter dated 17<sup>th</sup> August 2010). The letter referred to a meeting on the 6<sup>th</sup> of August 2010, a tripartite meeting where it was agreed, according to the letter, that the 3<sup>rd</sup> party will release funds to the Plaintiff. The question that arises is why was this purported agreement not made a part of the written contract between the Plaintiff and the Defendant or even attached as an appendix; since it was held earlier on the 6<sup>th</sup> of August 2010? Why was the letter written to the Plaintiff by the Defendant on the 21<sup>st</sup> of September 2010, not copied to the 3<sup>rd</sup> Party, when it was copied to the consultant – TEDA?

I also note that on the 6<sup>th</sup> of August 2010, a letter was written by the 3<sup>rd</sup> party to the Defendant that did not refer or include the plaintiff, nor was a copy of the letter sent to it. Since the Plaintiff was part of this meeting and he supposedly agreed to the resolutions of that meeting, why were the terms so agreed not incorporated into the written contract of the 17<sup>th</sup> of August 2010?

Also, given that the Defendant is a properly constituted corporate institution in which transactions are formal and documented, where are the minutes and resolutions of the meeting in which the Plaintiff agreed and signed? In my mind there are more questions than answers to the conduct of the Defendant bank. It is clear that the Plaintiff entered into an agreement in writing with the Defendant bank. Why should it be the responsibility of the 3<sup>rd</sup> party to pay the Plaintiff? It just doesn't add up!

From the letter of the 22<sup>nd</sup> of September 2010 written by the Plaintiff to the Defendant, on the completion of Makeni Government Hospital, the Plaintiff copied the consultant but not the 3<sup>rd</sup> party. This was clearly a statement that the agreement was between the Plaintiff and the Defendant and not the 3<sup>rd</sup> Party (Exhibit N).

In a letter dated 8<sup>th</sup> December 2010, the Plaintiff wrote to the Defendant referring to a request for payment from the consultant to pay to the Plaintiff the sum of Le 378,872,586 with regard to the completion of outstanding works and correction of defects at Makeni Government Hospital (phase 1).



The supplementary or collateral terms should have been identified as such and signed by the parties involved including the Plaintiff and the Defendant. Additionally, the evidence of a signed guarantee to the Government of Sierra Leone on behalf of the 3<sup>rd</sup> party is not the business of the Plaintiff. The Plaintiff's agreement is between the Plaintiff and the Defendant.

PHIPSON ON EVIDENCE at p 1900 paragraph 1901 states that: 'where a contract .....purports to be contained in a document which the court infers was not intended to express the whole agreement between the parties, proof may be given of any omitted or supplemental oral term, expressly or impliedly agreed between them before or at the time of executing the document.....' It is my view that there is no evidence or proof to show that there was any omitted or supplemental oral term, expressly or impliedly agreed between them either before or at the time of executing the agreement.

Did the Plaintiff meet the deadline for the certificate to be issued and paid upon? From the facts of the case, he was late in completing some stages. However, it is clear that the Plaintiff was being starved of funds by the Defendant and it became impossible for him to carry on his duties. In other words, the Defendant was clearly in breach of its own obligations to the Plaintiff.

### **Counterclaim**

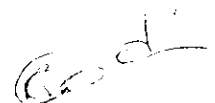
For reasons stated above, there is no case here for a counterclaim by the Defendant.

### **Third – Party**

On the issue of the 3<sup>rd</sup> party, there has been no representation except that Counsel, C. F. Edwards Esq (of blessed memory) only entered appearance. No Defence or any other process was filed. It is the opinion of the Court that, from the facts of the case, there appear to have been a contractual relationship between the Defendant and the 3<sup>rd</sup> party. I therefore find in favour of the Defendant in the 3<sup>rd</sup> party proceedings in the sum of Le 378,872,586 (Three Hundred and Seventy Eight Million Eight Hundred and Seventy Two Thousand Five Hundred and Eighty Six Leones).

### **Conclusion**

It is my considered opinion that this is really a matter between the Defendant and the third party. It appears that this is some kind of a botched up work by the third party. The bank had given some guarantees to the Government on behalf of the third party and the third party failed to perform. In order to save the bank from being called upon to pay back the advance payment guarantee and the



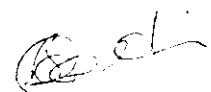
performance bond to the Sierra Leone Government; the plaintiff was called in to save the situation. The Plaintiff became aware and agreed to do the construction work but on an agreement dated 17<sup>th</sup> August 2010. I do not believe that the meetings that were held in which the Plaintiff was present was collateral to the said main contract. It did not form an exception to the parole evidence rule. I believe the witness when he gave evidence to say that he was starved of funds to complete the project. Where the Defendant was the first to breach the said agreement, I cannot see why it should want to claim damages for the plaintiff's breach. Therefore, "the Defendant's failure to honour payment on the certificate submitted to it in accordance with the terms of the agreement between the Plaintiff and the Defendant is a breach of the contract between the two parties....."

I agree with Counsel for the Plaintiff when he said in his skeleton argument that, "the contract between the Plaintiff and the Defendant contained in the document dated 17<sup>th</sup> day of August 2010 contains no term to indicate that it is secondary, supplementary or dependent on any other contract between any other parties. The document is clear and unambiguous and the nature of the agreement is clear." I also concur that the agreement falls within the parole evidence rule which states that "once the parties have elected to enshrine their contract in a written document, the courts have held that as a general rule, the parties cannot adduce extrinsic evidence to add to, vary or contradict the written document; the document is the sole repository of the terms of the contract;" Jacobs v Batavia & General Plantations Trust Ltd [1924] 1 Ch. 287.

It is therefore my considered opinion that, the Plaintiff was aware of some relationship between the Defendant and the third party; but no evidence was adduced in court to show that the Plaintiff was bound by the terms of that relationship. The relationship between the Plaintiff and the Defendant was a separate agreement, which was in writing, signed and dated by both parties.

In conclusion therefore, in view of the aforementioned, I make the following Orders:-

1. The Plaintiff is to recover from the Defendant, First International Bank (SL) Limited (Now called Vista Bank (SL) Limited) the sum of Le 378,872,586.00 (Three Hundred and Seventy Eight Million Eight Hundred and Seventy Two Thousand Five Hundred and Eighty Six Leones) being owed as payment for the construction of the Makeni Government Hospital Phase 1 and completion of additional facilities for the Makeni and Moyamba Government Hospitals Phase 2 (therein called "the works").



2. Interest on the said sum at the rate of 10% per annum from the date of commencement of court proceedings to the date of judgment.

3. Costs of Le 100,000,000 (One Hundred Million Leones) to the Plaintiff's Solicitor.

On the Counterclaim:

4. No order as to the counterclaim.

On the Third- Party Action

5. The Defendant is to recover the sum of Le 378,872,586.00 (Three Hundred and Seventy Eight Million Eight and Seventy Two Thousand Five Hundred and Eighty Six Leones) from the Third-Party, International Procurement and Construction Services.

6. Interest on the said sum of 10% per annum from the commencement of proceedings date to the date of judgment.

7. Costs of Le 100 Million to the Defendant's solicitor by the Third Party.

Signed: B. B. Ch.  
Justice F. Bintu Alhadi JA

Date: 20/11/2020

B. B. Ch.