OSMAN THOMAS SONS AND BROS. LTD v BASRONE & FIRMINGER

IN THE SUPREME COURT OF SIERRA LEONE

ON 28th day of April. 1983

(S.C. CIV. aPP. NO. 7/81) [1983] SLSC 2 (28 April 1983)

CORAM

THE HONOURABLE MR. JUSTICE E. LIVESEY LUKE, *Chief Justice. –*

PRESIDING THE HONOURABLE MR. JUSTICE C.A. HARDING- *Justice of the Supreme* Court

THE HONOURABLE MRS. JUSTICE A.V.A.AWUNOR-RENNER- *Justice of the Supreme Court*

THE HONOURABLE MR. JUSTICE S. BECCLES DAVIES - *Justice of the Supreme Court*

THE HONOURABLE MR, JUSTICE F.A. SHORT - *Justice of the court of Appeal.*

Between

OSMAN THOMAS SONS AND BROS. LTD

Appellants

ANBASRONE & FIRMINGER (EXPORT) LTD

Respondent

Livesey Luke C.J:

The respondents to this appeal (hereinafter called Bastone) issued a specially indorsed writ of summons against the appellants to this appeal (hereinafter called Osman Thomas) on 7th. September, 1977 claiming the sum of Le78,477.66 as amount due and owing for goods sold and delivered. It will be useful to give a narrative in some detail of the various procedural steps taken up to the delivery of judgment in the High Court. Appearance was entered on behalf of Osman Thomas. On 6th October, 1977 pursuant to an application for summary judgment under Order XI(1) of the High Court Rules, Williams J. after hearing counsel for Bastone, granted leave to Bastone to enter final judgment for the sum of Le78,493.58 with interest at 7 per cent per annum from the date of the issue of the writ of summons plus costs to be taxed. Osman Thomas was not represented at the hearing of the application for summary judgment although their solicitor had been duly served with the summons and affidavit in support.

On 13th December, 1977 solicitor for Osman Thomas filed a Notice of Motion applying inter alia that the Order dated 6th October, 1977 granting Bastone leave to enter final judgment be set aside and that Osman Thomas be at liberty to defend the action. In the affidavit in support of the Notice of Motion, it was deposed inter alia that Osman Thomas had a good Defence to the action and a proposed Defence was exhibited to the affidavit. The motion was heard by Williams J. in the presence of counsel for both parties. . The hearing took three days during which the deponent of the affidavit in support of the application was cross-examined and counsel made submissions. At the end of counsel's submissions on 17th February, 1978, the learned judge ordered inter alia that the judgment ordered on 6th October-, 1977 be set aside, that leave be granted to Osman Thomas to defend the action as a short cause, that the action be set down for speedy hearing by him, and that the date for trial be then fixed by consent of counsel having regard to the convenience of his court; that the costs thrown away be paid by Osman Thomas, and that the costs of the application, agreed at Le200, be paid by Osman Thomas, The judge then added "Adjourned to 4.4.78" Presumably that was the date fixed by counsel having regard to the convenience of the court in accordance with the order previously mentioned.

The case was called before Williams J. on 4th April, 1978. Counsel for both parties were present. By consent an adjournment was taken to 17th April, 1978. The next time the case was called was not 17th April, 1978 but on 6th June, 1978 before Williams J. On that occasion counsel for Bastone was present but there was no appearance by or on behalf of Osman Thomas. The learned judge adjourned to 19th June, 1978 and ordered that Notice be served on the solicitor for Osman Thomas. When the case was called before Williams J. on 20th June, 1978 Counsel for both parties were present. Counsel for Bastone then proceeded to open his case in the course of which he asked leave to abandon part of the claim and ended by saying that the revised claim amounted to Le23,53.02. Counsel for Osman Thomas then made certain submissions in the course of which ho applied for an adjournment to the following day. The Judge granted the application and adjourned to 21st June, 1978.

On 21st June, 1978 when the case was called before Williams J. counsel for Bastone proceeded to call two witnesses. The first witness was Terrenee John Calcutt a Director of Bastone. In the course of his evidence in chief he deposed about the various transactions between his company and Osman Thomas and produced a number of invoices and other documents. The witness was cross-examined by counsel for Osman Thomas. The second witness was a formal witness one Randu Deen a clerk of the Administrator & Registrar General's Department. At the end of the evidence-in-chief of that witness, counsel for Bastone closed the plaintiff's case. The case was then adjourned.

On 4th July, 1978 counsel for Osman Thomas called Abdul Lasite Thomas, the General Manager of Osman Thomas. He gave evidence on the transactions between the parties. He was cross-examined by counsel for Bastone, at the end of which counsel for Osman Thomas closed the case for the Defence. The judge then adjourned the case to 5th July, 1978. Counsel for both parties addressed the court in their turn on 5th July, 1978 at the end of which the learned judge reserved his judgment. The learned judge delivered his judgment on 12th October, 1978 dismissing the plaintiff's claim with costs. Bastone appealed to the Court of Appeal against that judgment.

The appeal was heard by the Court of Appeal in March, 198l. Judgment was delivered on 16th April, 1981 allowing the appeal and setting aside the judgment of Williams J. The court ordered inter alia that the Master & Registrar or his Deputy hold an inquiry into the transaction between the parties and into the accounts made by the plaintiffs to determine what amount if any had been paid by the defendants to the plaintiffs with liberty to both parties to surcharge or falsify.

Osman Thomas has appealed to this court against the decision of the Court of Appeal on the following grounds:-

1. That the learned Justices of the Court of Appeal failed to consider adequately or at all the burden of proof which lay on the Respondent herein in the High Court especially having regard to the principle of law contained in the maxim "Ei incumbit probatio, qui dioit, non qui negat."

2.That the learned Justices of the Court of Appeal failed to consider adequately or at all the Defence of the Appellants herein in the High Court.

3. That the learned Justices of the Court of Appeal were wrong in law to have ordered an inquiry between the parties having regard to the totality of the evidence led in the High Court.

4. That the learned Justices of the Court of Appeal were wrong in law to have set aside the Judgment of Williams J. in the High Court in the light of all the evidence which was before the Learned Trial Judge.

Cases were filed by counsel for both parties, counsel for Osman Thomas contending inter alia that the Judgment of Williams J. should be restored and counsel for Bastone contending inter alia that the Judgment of the Court of Appeal be upheld.

Mr. Jenkins-Johnston, learned counsel for Osman Thomas argued the appellants' case with much eloquence, and Mr. Anthony learned counsel for Bastone was equally eloquent in arguing the Respondents' case. It was during Mr. Anthony's argument that the Court had cause to call for the original High Court records. It was then discovered that no Defence had been filed or delivered by or on behalf of Osman Thomas and that the action had not been entered for trial. Counsel on both sides agreed that that was the state of affairs. The court thereupon called upon Counsel to address us on the legal effect of such lapses on the part of both parties.

Mr. Jenkins-Johnston while conceding that no Defence to the action had been filed or delivered submitted that since a trial had taken place this court should overlook the non-compliance with the rules and uphold the judgment of the High Court. Mr. Anthony submitted that the defendants having failed to file a Defence, the trial was a nullity in view of the fact that the judge purported to act on a non-existent. Defence. But learned counsel was not prepared to take his submission to its logical conclusion. He urged the court to rescue the self-same proceedings which he had submitted were a nullity.

It will be recalled that a proposed Defence was exhibited to the affidavit in support of the Notice of Motion dated 13th December, 1977. It was on the basis of that affidavit, including the proposed Defence, that the learned judge set aside the judgment on 6th October, 1977 and granted Osman Thomas leave to defend the action. The proposed Defence was never delivered and filed. I am aware that under Order XIVB of the English Rules of the Supreme Court, 1960, as applied in our jurisdiction, in a case where a specially indorsed writ has been issued, a judge may in certain circumstances order trial without further pleadings. But the provisions of that order are not applicable to the instant case. No application was made for trial without further pleadings and no order was made dispensing with further pleadings. In those circumstances Osman Thomas were obliged to deliver and file their Defence within the time limited for that purpose. This they failed to do and that omission on their part still continues.

Our High Court Rules(hereinafter referred to as the es") are quite clear as to the course of action be taken in a case where a party fails to file and deliver and file a pleading. Order XXIII of the Rules spells out the action to be taken where one party to an action has made default in delivering and filing within the time allowed for that purpose a pleading which he is obliged to deliver and file .There is no doubt that the cliam in the instant case is for a debt or liquidated demand. In those circumstances the rule applicable is Order XXIII r. 2 which (reads as follows:-

"2. If the plaintiffs' claim be only for a debt or liquidated demand and the defendant does not, within the time allowed for that purpose deliver a defence, the plaintiff may, at the expiration of such- time, enter final judgment for the amount claimed with

So what should have happened in this case was that at the expiration of the time limited for delivering and filing a Defence after the order dated 17th February, 1978 (granting leave to defend), Bastone should have entered final judgment for the amount claimed with costs, Osman Thomas having defaulted in delivering and filing a Defence. If final judgment had been entered, then when the case came up on 4th April, 1978 the judge should have been so informed and he would have then realized that there was nothing for him to try. The necessity of adjourning the

case to a later date and of embarking on a full scale trial on 20th June, 1978 would then not have arisen.

The learned judge seems to have overlooked the fact that no Defence had been delivered and filed. If no Defence had been delivered and filed it meant that there was no issue to be tried. So even though final judgement in default had not been entered, the plaintiffs' claim had not been put in issue in a Defence duly delivered and filed. It follows that there was no issue before the court to be tried and the learned judge should not have embarked on a trial. And even assuming that a Defence had been delivered and filed, it would have been necessary to enter the action for trial in accordance with Order XXV of the Rules, It is only after an action to which a Defence has been delivered and filed has been entered for trial that it is ready for trial. It is only then that it can be entered on the Cause List in accordance with Order XXV r. 9 of the Rules or on the Special List in accordance with Order XI r. 7 of the Rules, And it is only after such an action has been entered on the Cause List or the Special List, as the case may be, that it can come on for trial. So even if a Defence had been delivered and filed in this case, it was not ripe for hearing because the action was never entered for trial,

In those circumstances the judge should not have embarked on a trial of the action.

In my judgment therefore the trial was unnecessary and the whole proceedings commencing from 20th June, 1978 to 12th October, 1978 when judgment was delivered were invalid. In my opinion the determination of the issue raised by this court effectively disposes of this appeal. In the circumstances, I do not consider it necessary to deal with any of the grounds of appeal lodged by Osman Thomas.

It is regrettable that a lot of time, effort and expense were wasted on an unnecessary and abortive trial before the High Court, and in the proceedings before the Court of Appeal. But unfortunately there is nothing that can be done to rectify the situation. In my opinion the purported trial was a nullity: See Macfoy v. U.A.C. Ltd. (1961) 3 W.L.R. 1405. In the circumstances there is no alternative but to set aside the proceedings before Williams J. commencing on 20 in June,1978 including his judgment and orders. I would also set aside the judgment and orders of the Court of Appeal. Interview of all the circumstances, I think that it is but fair and just, that each party should bear their costs in this court and the courts below.

In conclusion I can only express the hope that' the parties or their solicitor will now take the proper steps as provided in the Rules to ensure the speedy disposal of this 16ng outstanding matter.

(Sgd.)Hon.Mr.Justice E. Livesey Luke, C.J. I agree ... (Sgd.)Hon Mr. Justice C.A. Harding, J,S.C. I agree.. (Sgd.) Hon.Mrs.Justice A.Awunor-Renner, J.S.C. I agree ....Sgd.) Hon. Mr. Justice S. Beccles Davies ,J.S.C.

Cases Referred to

Macfoy v. U.A.C. Ltd. (1961) 3 W.L.R. 1405.

Legislation referred to

English Rules of the Supreme Court, 1960, Order XIVB

High Court Rules Order XI(R1), XI(R7) XXIII, XXIII (R2), XXV, XXV (R9).