

C.C. 98/11                      2011 A.      NO.    30  
IN THE HIGH COURT OF SIERRA LEONE  
(COMMERCIAL & ADMIRALTY DIVISION)

BETWEEN: -

AFRICAN SUNSHINE LIMITED    - PLAINTIFF/RESPONDENT

AND

ACDI/VOCA (SNAP PROGRAM)    -DEFENDANT/APPLICANT

M.P. Fofanah Esq. for the Plaintiffs/Respondents

L. Jenkins Johnston Esq. for the Defendant/Applicant

RULING DELIVERED THE 20<sup>th</sup> DAY OF January, 2012

This is an application by Notice of Motion dated 17<sup>th</sup> November 2011 filed on behalf of the Defendants/Applicants seeking the following Orders:

1. That the action intituled CC98/11 A. No. 30 be struck out for failure to comply with Order 28 rule 1(i) of the High Court Rules 2007.
2. That further and in the alternative the action intituled CC98/11 A. No. 30 be struck out on the grounds that same discloses no reasonable cause of action, is scandalous, frivolous and is vexatious, in line with Order 21 rule 17(i) of the High Court Rules 2007.
3. That if 1 and 2 above are refused that the matter herein be disposed of on point of law as provided by Order 17 of the High Court Rules 2007.

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4. Any further or other order as the court may deem just in the circumstances.

In support of the application is the affidavit of **MOUSTAPHA GAYE**, Chief of Party (Snap Program) of the Defendant Company sworn to on 17<sup>th</sup> November 2011. The deponent therein deposed to the facts leading to the application which can be summarized as follows:-

That the parties hereto entered into an agreement dated 25<sup>th</sup> October 2010 but signed on 10<sup>th</sup> November 2010 for the sale by the Defendants to the Plaintiffs of 5500 metric tons of rice. The said Agreement is exhibited to the said affidavit as Exh "MG3". The terms of payment for the said rice are set out in paragraph 3.2 (i) and 3.2 (ii) of the said Agreement. The Plaintiffs are alleged to have failed to make the necessary payment and provide the required Bank guarantee within the stipulated period of time and the Defendants therefore cancelled the contract. A copy of the letter of cancellation is exhibited as Exh "MG5". The Defendants thereupon proceeded to sell the said rice to a third party. There then followed an exchange of correspondence between the solicitors for the parties culminating in the issue of a writ of summons by the Plaintiffs claiming a declaration that the Defendants are in breach of the said agreement and damages for breach of contract.

Counsel for the Defendants/Applicants referred to court to the conditions for payment of the purchase price set out in paragraphs 3.2 (i) and in particular those set out under the rubric "Advance Payment" which required a

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down payment of 10% of the purchase price ~~was~~ to be made on the effective date which is 10<sup>th</sup> November 2010 and ~~the~~ three instalments payments by bank guarantee within three days of the effective date. He submitted that the Plaintiffs failed to make the said payments within the said period or at all. Consequently he contended they breached the fundamental terms of the said Agreement which enables the Defendant to terminate it. He therefore submitted that in those circumstances the action brought by the Plaintiffs can only be frivolous and vexatious and an abuse of the process of the court.

In response to these submissions counsel for the Plaintiffs referred to his affidavit in opposition sworn to on 7<sup>th</sup> December 2010 in which he deposed that he had filed a Notice of Motion seeking the amendment of the statement and particulars of claim in the writ of summons filed on behalf of the Plaintiffs before the Defendants filed the present Notice of Motion. He stated that the amendment became necessary as a result of certain information which came to the knowledge of the Plaintiffs after the writ of summons had been filed. He exhibited the document as Exh "MPF3" to his affidavit in opposition. He deposed further that an application for an amendment can be made at any stage of the proceedings and that it will be in the interest of justice and fairness if the amendment is allowed.

The deponent went on to state that he could <sup>not</sup> have ~~not~~ applied for directions earlier as the parties had made interlocutory applications which had gone on appeal and also that the court's long vacation had intervened.

In his affidavit in opposition he deposed further that an application for an amendment can be made at any stage of the proceedings and that it will be in the interest of justice and fairness if the amendment is allowed.



With regard the submission that the contract had failed as the Plaintiffs had breached a fundamental term thereof, counsel for the Plaintiffs submitted that there is contention of the date of execution. He referred the court to the contract and the letter from the Plaintiffs' previous solicitor, Exh "MG6" in which he had raised these issues. He also relied on the document Exh "MPF3" which he submitted showed that it was the intention of the parties that the terms of payment could be dictated by the circumstances of the transaction. He pointed out that the said document Exh "MPF3" was signed by both parties.

He maintained that the Plaintiffs should be allowed to amend their pleadings and further to provide evidence to show the course of dealings between the parties and prove that the contract being subject to changes was unlawfully terminated by the Defendants.

With respect the issue of going to arbitration, he submitted that the requirement for going to arbitration did not oust the jurisdiction of the court in determining whether either party breached the contract. He therefore prayed the court to dismiss the application.

The first Order prayed for herein is for the action to be struck out for failure to comply with Order 28 rule 1 (i) of the High Court Rules 2007 which requires the Plaintiff to take out a summons for directions within one month of the close of pleadings. The rules are quite clear and give an option to the Defendant to take out the said summons if the Plaintiff fails to do so.

They further provide that the court may either dismiss the action on terms or deal with the application as if it were a summons for direction. In this case the Defendant ought really to have taken out the summons where the Plaintiff failed to do so. In any event the Plaintiff has given sufficient reasons for not taking out the said summons. In the circumstance I would refrain from dismissing the action.

With regard the second order prayed for counsel has relied on Order 21 rule 17(i) of the High Court Rules 2007. It is evident that Defendants have terminated the contract alleging that the Plaintiffs have breached a fundamental term thereof. The Plaintiffs on the other hand have raised certain issues regarding the effective date of the contract and intend to produce evidence relating to the course of dealings of the parties to the contract.

It is my view that the Defendants contention that the Plaintiffs have no case is not as clear cut as they believe. I refer to the Plaintiff's solicitor's letters Exh MG6 and MG8 which in my view raise certain contentious issues for determination by the court. The Plaintiffs ought therefore to be given a fair chance to put their case to the court for its hearing.

In the circumstance the application is refused and the Defendants are at liberty to proceed with their application for leave to amend their pleadings.

ORDERED BY THE COURT. The Plaintiffs ought therefore to be given a fair

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The Plaintiffs are also at liberty to make a substantive application in respect of their third relief prayed for in the Notice of Motion.

Costs in the cause.

*A. Showers*  
**SIGNED: - A. SHOWERS** 20/1/2012  
**JUSTICE OF COURT OF APPEAL**