

Neutral Citation Number Misc. App. 520/20

M29 General and Civil Division
Case No: Misc App 520/20

IN THE HIGH COURT OF SIERRA LEONE
HOLDEN AT FREETOWN
GENERAL AND CIVIL DIVISION

Law Court Building
Siaka Stevens Street
Freetown

Date: 24 June 2021

Before:

THE HONOURABLE MR JUSTICE FISHER J

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Between:

Masada Waste Management Co Ltd **Plaintiff**

-and-

National Public Procurement Authority **Defendant**

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Mr F Gerber of Counsel for the Plaintiff
A M Conteh, State Counsel, for the defendant

Hearing date: 14th ,17th June 2021

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APPROVED ORDER

I direct that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FISHER J

The Honourable Mr Justice Fisher J:

1. By way of a notice of motion, dated the 11th day of June 2021, the defendant/applicant has prayed for a number of orders as set out on the face of the motion which can be summarised as follows.
 1. That an interim stay of execution of the judgement dated 19th April 2021, be granted pending the hearing and determination of this application.
 2. That a stay of execution of the said judgement be granted pending the hearing and determination of the civil appeal filed in this matter to the Court of Appeal.
 3. That all garnishee/execution proceedings against the defendant be set aside for non-compliance with section 21(1)-(4) of the State Proceedings Act 2000.
 4. Any other orders the court deems fit.
2. The application is supported by the affidavit of Aaron Mansa Conteh, state counsel in the Law Officers Department, sworn to on the 1st day of June 2021, in which he deposed to the fact that judgement was given against the defendant/applicant on 19th April 2021 and instructions were given for a notice of appeal to be filed against the judgement. He also deposed to the fact that the notice of appeal raises serious questions of law and a decision from a higher court would provide clarity regarding the area of regulation of the public procurement environment. He also deposed to the fact that garnishee proceedings are underway against the defendant/applicant and that the said garnishee proceedings contravene section 21(1)-(4) of the State Proceedings Act 2000.
3. Following the judgment given by this court on the 19th April 2021, the Plaintiff/respondent filed a garnishee application with respect to the court order. The defendant/applicant then filed a stay of execution of the judgement, upon the grounds stated above.

Principles governing the grant of a stay of execution

4. In *Hammond Suddards Edge v Agrichem International* 2001 EWCA Civ 2065, the court held that a stay of execution could only be warranted on the facts of the case after considering the risks inherent in granting it or refusing it. In the case of *Shang Dong Steel v Mustapha Joseph Kamara* SC.CIV.5.2018, a decision of the Supreme Court by which this court is bound, the Learned Chief Justice DB Edwards CJ, distilled the well settled principles of law that courts apply in dealing with stays of execution and the circumstances under which such stays are granted. He stressed that it is in the discretion of the court to grant or refuse a stay and that such a stay will only be granted where the applicant can convince the court that special circumstances exist.
5. He referred to Halsbury's laws of England 3rd Edition Vol 16 para 51 at page 35 as to the absolute and unfettered discretion of the court to grant or refuse a stay. He also referred to the dictum of Gelaga King JA in the Lucy Decker case. Further, the powers of the court to grant a stay of execution are well settled. In *Vitafoam (SL) v Leone Construction and General Engineering Services (CIV.APP 75/17) [2018] SLCA 1275 (22 February 2018)*; The Court of Appeal held:

"I shall first of all deal with the prayer for Stay of Proceedings. Definitionally, "Stay of Proceedings" simply put is a ruling by the Court in Court Proceedings halting further legal process in a trial. Rule 28 of the Court of Appeal Rules, 1985 which is ipsissima verba Order 59 Rule 13 of the English Supreme Court Rules, 1999 provides as follows:

"An appeal shall not operate as a stay of Execution or of proceedings under the Judgment or decision appealed from except so far as the Court below or the Court may order and no intermediate act or proceeding shall be invalidated, except so far as the Court below or the Court may direct".
6. The learned judge went further to say in *Femi Hebron and ors v White Lion Company Ltd* 26th October 2017 that the Court of Appeal considered that stay of executions are normally granted on the basis of the applicant showing that there are special circumstances existing such that a court ought to grant a stay where

such special circumstances were established. Whilst there was a need to prove special circumstances, the Applicant must also prove that there are prima facie good grounds of appeal and that there are circumstances which if not considered, could lead to injustice.

The submissions of counsel.

7. Before me counsel for the defendant/applicant relied upon the dictum of Gelaga King JA in *Africana Tokeh Village Ltd and John Obey Investments Misc App 1994*. Specifically, counsel relies upon the argument that the NPPA is covered by the provisions of the State Proceedings Act 2000 and that enforcement action cannot be taken without reference to section 21 of the said Act. It is therefore necessary for me to consider this issue as it is essential to the exercise of the discretion to grant a stay of execution of the judgement.

The State Proceedings Act 2000

8. The said legislation was enacted in 2000, to provide for the exercise of jurisdiction in respect of claims against the Government. It is noteworthy to mention that the State Proceedings Act 2000 does not define who or what Government is. In order to determine who Government is, consideration has to be given to any laws that define the same. I have had regard to the Interpretation Act 1971, section 4(1) which defines "Government" in the following terms.

"Government means, the Government of Sierra Leone (which shall be deemed to be a person) and includes, where appropriate, any authority by which the executive power of the state is duly exercised in a particular case."

9. I have reviewed the Constitution of Sierra Leone Act No 6 of 1991, in a bid to determine whether there is a legal definition of the word Government. There is no such provision. Consideration therefore has to be given to the legal status of the defendant/applicant, in a bid to determine whether it can be considered as the Government of Sierra Leone, in law and therefore subject to the enforcement proceedings of the State Proceedings Act 2000.

The Legal Status of the National Public Procurement Authority

10. The National Public Procurement Authority, hereinafter referred to as the ‘NPPA’ is a creature of statute established under the provisions of the Public Procurement Act 2004 and the Public Procurement Act 2016. Its key function is to regulate and harmonise public procurement processes in the public service and to decentralise public procurement to procuring entities. A procuring entity is defined in the following manner as, *“means any organ of the State or regional and local authorities as well as statutory bodies, public sector corporations which are majority owned by the Government, public utilities using revenue collected by the sale of public services, as well as any other natural or legal person to whom funds have been allocated for use in public procurement”*;

11. Section 3 (2) of the 2016 Act defines the NPPA in the following terms”

“The Authority shall be a body corporate having perpetual succession and capable of acquiring, holding and disposing of any property, whether movable or immovable, and of suing and being sued in its corporate name and, subject to this Act, of performing all such acts as bodies corporate may by law perform”.

12. The NPPA by section 3 (2) is a corporate body in law, albeit carrying out functions of a public nature. It cannot by this very statutory provision, be deemed to be Government in that sense, as Government by its very nature cannot be a corporate body. Consideration also must be given to the question of who exercises the executive power of the state. Reference must be made to the 1991 Constitution, specifically part 3.

The 1991 Constitution

13. Section 53 of the 1991 Constitution, Act No 6 provides as follows:

“53. (1) Subject to the provisions of this Constitution, the executive power in Sierra Leone shall vest in the President and may be exercised by him directly or through members of the Cabinet, Ministers, Deputy Ministers or public officers subordinate to him.

14. It is clear from the above that the executive powers of the Government of Sierra Leone as provided for by the above section when interpreted in the light of section 4(1) of the Interpretation Act 1971, vests in the President and in the exercise of those powers which vests in him, he has the authority to cede some of those powers to be exercised by cabinet ministers, ministers, deputy ministers and public officers subordinate to him. The next question to ask is who are public officers? The constitution makes provision for who a public officer is. In section 171 (1) of the said constitution, a public officer is defined as “a person holding or acting in a public office”. Public office is defined in the same section 171(1) as “including an office the emoluments attaching to which are paid directly from the consolidated fund or directly out of moneys provided for by parliament.

15. It is clear from the above that the NPPA is arguably a public authority which is subordinate to the President, and so are its officials, ie the Chief Executive. The question for consideration is whether the executive authority of the presidency is being exercised by the presidency through the NPPA. It is of particular significance that subsection 5 of section 53 is relevant. The said subsection provides:

“(5) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the President.

16. Whereas section 53 (1) provides for the president to exercise the executive powers which he has by virtue of the provisions of this section, subsection (5) creates a separate and distinct power that is given to Parliament to confer by statute, functions on persons and authorities, aside from the power of the president, to directions. This is made abundantly clear in section 73(2) of the 1991 Constitution which provides *“subject to the provisions of this Constitution, the legislative power of Sierra Leone is vested in Parliament.”*

17. It is clear from the above that where the Constitution vests executive powers in the Presidency who in turn exercises such powers through subordinate public officials, Parliament has the power and has exercised those powers by expressly conferring functions on other authorities, outside of the powers of the President. Where such powers are conferred by Parliament on a public authority, it cannot be argued that

where such authority exercises its functions conferred upon it by Parliament, such functions are being exercised through those authorities by the President.

18. The President issues directives in the exercise of his executive powers but does not issue legislation in the exercise of his executive authority. That power is exclusively within the domain of Parliament. In the exercise of those powers by Parliament, consideration must be given to the Public Procurement Act 2016, which was enacted by Parliament. In that regard, by the enactment of this legislation by virtue of the provisions of section 73 (2) of the 1991 Constitution, Parliament has conferred the functions of regulating and harmonising public procurement processes in the public service, by decentralising public procurement to procuring entities. In those circumstances, it is unarguably the case that the powers conferred by the NPPA to regulate public procurement in general, was conferred upon them by Parliament through legislation and not by directives issued by the President, in the exercise of his executive power pursuant to section 53(1) of the Constitution, Act No 6 of 1991.
19. Having regard to the provisions of section 4 (1) of the Interpretation Act 1971, it is clear that the Government shall be deemed to be a person, ie the President and includes an authority by which the executive power of the state is duly exercised. Where an authority is not exercising such powers, they clearly cannot come within the definition of "Government". In the light of such a conclusion, regard must now be had to the provisions of the State Proceedings Act 2000 and its enforcement provisions.

The enforcement provisions of the State Proceedings Act 2000.

20. Counsel for the state has relied upon section 21(1-4) of the said Act. He argued that there has been non-compliance with the said sections. In the light of this ruling, I do not consider the NPPA to be the Government of Sierra Leone as they clearly are not exercising their powers on the basis of directives issued by the President, but on the basis of legislation enacted by Parliament. The submission by counsel for the state that the garnishee proceedings should be set aside for non-compliance with the provisions of section 21(1)-(4) of the State Proceedings Act

2000, is rejected as unarguable in law and the application to set aside the said garnishee proceedings is dismissed.

Disposal

21. It has become apparent that in a number of proceedings before the courts, a number of public authorities have placed reliance on the provisions of the State Proceedings Act 2000, in order to seek protection from litigation in some instances and enforcement in other instances. In many instances, such protection is wholly underserved. During the course of the hearing I discussed with counsel the fact that I was unaware of any authorities that clarified the law on whether public authorities albeit statutory authorities, can be regarded as “the Government of Sierra Leone” for the purposes of the State Proceedings Act 2000.

22. It is therefore desirable and expedient for this ruling to be considered by the court of Appeal in the context of an appeal, in order to clarify the law on this point and to create a binding precedent. There must be certainty in the law and litigants and lawyers have a right to know what the correct law is and not what it appears to be, as to when a statutory body can attract protection of the State Proceedings Act 2000, prior to taking a decision to litigate against a public authority. In the circumstances, and for this reason alone, I will stay enforcement of garnishee proceedings against the defendant/respondent, pending the hearing and determination of the appeal in the Court of Appeal. I shall also grant a stay of execution of the judgment, pending the hearing and determination of the hearing in the Court of Appeal.

HAVING HEARD AM CONTEH ESQ OF COUNSEL FOR THE STATE AND F GERBER OF COUNSEL FOR THE PLAINTIFF:

IT IS HEREBY ORDERED AS FOLLOWS:

1. That a stay of execution of the judgment of this court dated 19th April 2021, is stayed, pending the hearing and determination of the appeal filed in the Court of Appeal.

2. That a stay of execution of the garnishee proceedings against the Defendant/Applicant is granted, pending the hearing and determination of the Appeal filed in the Court of Appeal.
3. That the defendant/applicant shall cause this order to be served upon the garnishees banks forthwith, whereupon the garnishee banks shall forthwith unfreeze the accounts which are subject to the earlier order of this court.
4. The costs of this application shall be in the cause.

The Hon Justice A Fisher J