FTCC MISC.APP 005/20 2020 D. NO. 2

IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION
IN THE MATTER OF A CONSULTANCY AGREEMENT BETWEEN DYVN STRATEGIES LIMITED AND SUNBIRD BIOENERGY (SL) LIMITED
AND
IN THE MATTER OF A JOINT VENTURE AGREEMENT BETWEEN DVYN STRATEGIES LIMITED AND SUNBIRD BIOENERGY (SL) LIMITED

BETWEEN:

DVYN STRATEGIES LIMITED - PLAINTIFF

AND

SUNBIRD BIOENERGY (SL) LIMITED - DEFENDANT

COUNSEL:

B. Jones Esq - for the Plaintiff/Applicant

A. B. Bangura Esq - for the Defendant/Respondent

JUDGMENT DELIVERED THIS 30th DAY OF June 2022 BY THE HON. JUSTICE F. BINTU ALHADI J.A. (Sitting as a High Court Judge).

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JUDGMENT

1. On the 12th of February 2021 an application was made to the Court by way of Originating Summons dated the 5th day of March 2020 by Dvyn Strategies Limited, the Plaintiff/ Applicant against Sunbird Bioenergy (SL) Limited, the Defendant/Respondent, praying for the following Orders:

   i) That the Defendant do immediately pay the Plaintiff the Leones equivalent of the sum of US$165,670.00 (One Hundred and Sixty Five Thousand Six Hundred and Seventy United States Dollars) due and owing the Plaintiff under Consultancy Agreement dated 3rd October 2016.

   ii) That the Defendant do immediately pay the Plaintiff the Leones equivalent of the sum of US$417,900 (Four Hundred and Seventeen Thousand Nine Hundred United States Dollars) being sum due from the Defendant under a Joint Venture Agreement dated 21st October 2016.

   iii) Interest

   iv) Any further Order(s)/relief(s) that this Honourable Court may deem fit and just.

   v) That the costs of and incidental to this action be provided for and that the same be borne by the Defendant.

2. The application was supported by the affidavit of Oluniyi Robbin-Coker of No 12 Main Main Motor Road, Congo Cross, Freetown in the Western Area of the Republic of Sierra Leone and sworn to on the 5th of March 2020 together with 8 exhibits attached thereon.

3. Counsel for the Defendant/Respondent, A. B. Bangura Esq, filed an affidavit in opposition sworn to by Mr. Karpagam Govindaswany Kandaswamy, the newly installed Chief Executive Officer of Sunbird Bioenergy (SL) Limited on the 21st day of July 2020.

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4. Summary of the Plaintiff's Case

a. The Plaintiff avers that the Defendant offered it a consultancy that commenced on the 3rd of October 2016 for the provision of inter alia Government relations and management services. (Exhibit A) He said that the key terms of the offer were as follows:
b. That the tasks to be performed will be agreed upon on a quarterly basis.
c. That the consultancy rate per day is US$1,000 (One Thousand US Dollars) subject to annual review.
d. That the services of the Plaintiff will be retained for 25 days per quarter.
e. That the agreement will subsist until terminated in writing by a 90 days' notice.
f. That the Defendant will pay the Plaintiff the sum of US$ 100,000 (One Hundred Thousand Dollars) for work done and expenses.
g. That the Defendant will further pay the Plaintiff the sum of US$25,000 (Twenty-Five Thousand US Dollars) for the completion of the Deed of Variation.

5. According to the Plaintiff, this offer was accepted and communicated by letter to the Defendant on the 6th day of October 2016. (Exhibit B) Invoices were then issued to the Defendant in respect of the consultancy services, prior work, and completion of the Deed of Variation. Payment on the invoices were not met despite promises made by the erstwhile general manager and the finance manager to pay. (Exhibit D and E) (In July 2018, the Defendant acknowledged the indebtedness through its new director, Andrew Gee Exhibit F).

6. Furthermore, the Plaintiff stated that it had a joint venture arrangement comprising "Binding and Irrevocable Heads of Terms" with the Defendant dated 21st October 2016. (Exhibit G) That based on the meter units billed by the Defendant for the periods 2017 and 2018 and the revenue sharing formula contained in the joint venture agreement, the Plaintiff became entitled to the sums of US$ 138,770 for the calendar year of 2017; and the sum of US$ 279,130 for the calendar year of 2018. (Exhibit H).

7. Invoices based on the sums due under the joint venture agreement were also not honoured.

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Summary of the Defendant's Case

8. In his affidavit in opposition, the newly installed Chief Executive Officer of Sunbird Bioenergy (SL) Limited, on behalf of the Defendant, averred that the erstwhile management of the Defendant company entered into a consultancy agreement with the Plaintiff consultant entity commencing 3rd October 2016 for the provision among others of Government relations and management services generally related to the restart, operations, and expansion of the Defendant's bioenergy plant in-country.

9. The assignment description of the Plaintiff constituted specific tasks to be performed by the Plaintiff for the period ending December 2016. These were as follows:

a. Assistance to obtain the necessary comfort letters.
b. Assistance to obtain a letter from the Ministry of Energy requesting for power to be supplied in January 2017.
c. Assistance to open letter of credit (L/C) for power.
d. Assistance to settle the tariff of the PPA from years 11 to 20 years.
e. Assistance to extend the tax incentive agreement.
f. Assistance to negotiate an increase in the increased offtake or power under the PPA.
g. Assistance with engaging the Government of Sierra Leone for Sunbird's participation in Magbass.

10. These were not reviewed after the 31st of December 2016 for the Plaintiff's engagement and performance. The Defendant averred that the Plaintiff failed to assist the Defendant get expected outcomes in his government relations and management service duties. He said that the Defendant was dissatisfied with the lack of progress with the Electricity, Distribution and Supply Authority (EDSA) on the very issues for which the Plaintiff was consulted and contracted.

11. These include among others the failure by EDSA/Government to open letters of credit in favour of the Defendant in respect of payment for supplied energy to the national grid and the continuing failure of the Government to make the agreed payments for electricity supplied without unconscionable delays. Exhibit KGK 1 A-H shows the letters between the Defendant and the Government and energy sector-wide players on issues touching the Plaintiff's assignment description.

12. The Defendant argued that the invoices (exhibits C 1-6) were not in place or earned and were not honoured. That Exhibits D and E in paragraph 6 of the Plaintiff's affidavit do not go to the root of the issue of liability raised by the Plaintiff. He said that exhibit F of the Plaintiff's affidavit, which is a letter

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of 13th July 2018, was orally requested by the managing director of the Plaintiff company to help him provide comfort to his bankers and was never actually a reflection of the reality between the Plaintiff and the Defendant. (Exhibit KGK 2 – copy of email of Andrew C. H. Gee, then Director of the Defendant, on the issue.)

13. He said that the Plaintiff and the Defendant further had a joint venture understanding to provide all necessary local government relations that will facilitate the restart, operation, and future expansion of the Defendant's project in Sierra Leone. The understanding was to be converted into a substantive agreement within 180 days from the 21st of October. It was the parties' understanding, inter alia, that:

(a) The joint venture shall be structured on a revenue sharing basis.

(b) The revenue share shall be calculated using the formula of $0,01 per KWh of electricity that is purchased and paid for by the Government of Sierra Leone whilst the plant is operating within its design specification (e.g., total power generation is by utilisation of biomass), at the current PPA tariff of $0.20c per KWh.

(c) The Plaintiff will assist the Defendant with timely payment for power, etc.

14. He said that the Plaintiff is by no means entitled to the sums of $138,770.00 and $279,130.00 for the calendar 2017 as claimed by reason of the fact that tariff calculation of $20c per KWh was not sustained in addition to the Plaintiff's failure to assist the Defendant with timely payment for power. The meter billing marked exhibit H referred to by the Plaintiff, is not correct and emanated not from the Defendant. (Exhibit KGK 3) a copy of the record of analysis of EDSA's payment trend showing the inordinate payment delays which are outside the spirit of the joint venture understanding of the parties.

15. That the failure of the Plaintiff to assist the Defendant in its crucial phase of restarting, operating, and expanding its project as provided for in the consultancy agreement and their understanding has caused the Defendant great hardship.

The Defendant pray that the Orders prayed for by the Plaintiff are unconscionable and should be discountenanced in the interest of equity and justice.

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DECISION OF THE COURT

Analysis of the law and evidence

16. I have considered the application before the court together with its affidavit in support and exhibits attached thereon; the affidavit in opposition and its exhibits attached thereon as well as the oral and written submissions made by both counsel.

17. The questions that arise are twofold: Firstly, was there a contract? What does a contract mean in law? The most basic definition of a contract in law is, that it is a promise or set of promises which the law will enforce; Pollock, Principles of Contract 13th edition [1950] at p 1. Or 'it is an agreement giving rise to obligations which are enforced or recognised by law;' Trietel, The Law of Contract, 11th edition [2003] at p. 1. In other words, these are promises between parties, mutual obligations created thereby and the rights that emanate from the fulfilment of the promises.

18. Counsel for the defendant submitted that, for there to be a binding contract between the parties, there must be an offer and an acceptance, and for the acceptance to be valid, it must mirror the exact terms of the offer, and no more or less. Furthermore, he relied on Cheshire, Fifoot and Furmston, "Law of Contract" 16th edition at page 11 which stated that, "whatever the difficulties and however elastic their rules, the judges must, either upon oral evidence or by the construction of documents, find some act from which they can infer the offeree's intention to accept, or they must refuse to admit the existence of an agreement. "

19. "This intention, moreover, must be conclusive. It must not treat the negotiations between the parties as still open to the process of bargaining. The offeree must unreservedly assent to the exact terms proposed by the offeror. If while purporting to accept the offer as a whole, he introduces a new term which the offeror has not had the chance of examining, he is, in fact merely making a counter-offer. The effect of this in the eyes of the law is to destroy the original offer."

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20. From the facts of the case, exhibit A of the affidavit in support which is an offer letter addressed to the Plaintiff herein from the Defendant, stated the terms of the consultancy agreement as stated on pages 3 and 4 under the heading "Summary of the Defendant's case." It amounts to an offer letter from the defendant, Sunbird Bioenergy (SL) Limited dated 3rd October 2016. The subject matter of the said letter is "Consultancy Agreement."

21. It read in this way: "....Sunbird Bioenergy Africa would like to offer you a consultancy engagement commencing on today's date to provide Government relations and management services to Addax Bioenergy Sierra Leone (to be renamed Sunbird Bioenergy Sierra Leone in Q4) we shall agree the exact tasks on a quarterly basis..... I understand that your consultancy rate is $1,000 per day. Sunbird Bioenergy would like to retain your services for 25 days per quarter. "

22. When the Plaintiff, Dvyn Strategies Limited replied, which is Exhibit B of the affidavit in support, dated 6th October 2016, it stated inter alia that " I hereby accept the consultancy assignment per the said letter and confirm the terms of compensation as follows: "a signature bonus in consideration of prior work of US$100,000 to be paid immediately; bonus for deed of variation US$25,000 to be paid on completion of deed of variation; quarterly compensation assuming 25 day per quarter at discounted rate of US$1,000 per day to be paid quarterly in advance."

23. By doing this, the Plaintiff destroyed the original offer, or it rejected the original offer; Hyde v Wrench.... which could be referred to as a purported acceptance of the offer, it did not mirror the exact terms of the offer and it was not unequivocal. It did not unequivocally assent to the exact terms offered by the defendant/offeror. The reply, the said exhibit B, introduced new terms. By stating such terms that did not mirror the exact terms of the offer, the plaintiff introduced new terms, and this could be described as a counter-offer."

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24. In this respect, I cannot say that there was a valid and binding contract between the parties; United Dominions Trust (Commercial) Limited v Eagle Aircraft Services Limited [1968] 1 WLR 74. I cannot say that it was an acceptance of the offer. The plaintiff, Dvyn Strategies Limited, did not unequivocally assent to the exact terms offered by the offeror.

25. Secondly, assuming that there was a contract, did consideration move from the promisee/offeree? Did the plaintiff perform its own side of the bargain? For a contract/agreement to be deemed legally binding, there must be consideration on the part of every person or company who enters the contract. Consideration is the benefit that each party gets or expects to get from the contractual agreement. In other words, each party gives up something in exchange. When a contract lacks consideration, the court could step in and declare that a contract is unenforceable because it lacks consideration.

26. The purpose of the doctrine of consideration is to put some legal limits on the enforceability of agreements even where they are intended to be legally binding and are not vitiated by some factor such as mistake, misrepresentation, duress, or illegality; 'Chitty on Contracts' [29th edition, 2004] vol 1, General Principles, London, Sweet & Maxwell publishers at 215.

27. The law limits the enforceability of agreements (not in deeds) by reference to a complex and multifarious body of rules known as "the doctrine of consideration." The traditional definition of consideration concentrates on the requirement that 'something of value' must be given and accordingly states that consideration is either some detriment to the promise (in that he may give value) or some benefit to the promisor (in that he may receive value); Currie v Misa (1875); Midland Bank & Trust Co Ltd v Green [1981] AC 531; R v Braithwaite [1983] 1 WLR 383, 391. Usually, this detriment and benefit are merely the same thing looked at from different points of view.

28. Thus, payment by a buyer is consideration for the seller's promise to deliver and can be described either as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer. It should be emphasised that these statements relate to the consideration for each promise looked at separately. For instance, the seller suffers a 'detriment' when he delivers the goods, and

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this enables him to enforce the buyer's promise to pay the price. What this law is concerned with is the consideration for a promise – not the consideration for a contract; Chitty on Contracts (supra) at 217.

29. From the facts of the case and the evidence adduced by the parties, there is nothing before the court to show evidence of the Plaintiff's performance. Counsel for the Plaintiff, Mr. Jones submitted that, "the offer contained in exhibit A and acceptance of the terms in the offer in exhibit B including the services performed by the plaintiff completes consultancy agreement and confirms it to be a valid contract between the parties." (Page 3 at paragraph 10 of his written submission). Apart from the fact that the said acceptance was indeed a counter-offer and not an acceptance, counsel failed to show the court, evidence of the work performed by the Plaintiff; or the services performed. No evidence was adduced by the plaintiff to prove that the expected outcomes in government relations, opening of letter of credit, assistance to extend tax incentive agreement and so on, were met.

30. The general rule is that a party to a contract must perform exactly what he undertook to do; Chitty (supra) at 1233. When an issue arises as to whether performance is sufficient, the court must first construe the contract to ascertain the nature of the obligation (which is a question of law). The next question is to see whether the actual performance measures up to that obligation (which is a question of "mixed fact and law" in that the court decides whether the facts of the actual performance satisfy the standard prescribed by the contractual provisions defining the obligation); Margaronis Navigation Agency Ltd v Henry W. Peabody & Co of London Ltd [1965] 1QB 300, 318.

31. This means that although an appellate court, or a court reviewing the decision of an arbitrator, may not normally question a finding of pure fact by the lower court or arbitrator, it may review the construction of the contract and draw its own conclusion as to whether the facts amount to performance; Pioneer Shipping Ltd v B.T.P. Tioxide Ltd [1982] AC 724.
The fact that a party to a contract has, in purported performance, acted in a way which may appear, in a commercial sense, to be just as valuable to the other party as the way specified in the contract does not amount to performance in law; Arcos Ltd. v E. A. Ronaasen & Son [1933] AC 470.

32. In its affidavit in opposition, the defendant deposed that the plaintiff did not meet the expected outcomes in government relations, etc. As a result of the Plaintiff's non-performance, the defendant became dissatisfied with the lack of progress of the Electricity, Distribution and Supply Authority. Exhibits KGK 1A to H, which are evidence of letters between the Defendant

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and the government of Sierra Leone on the duties that the Plaintiff was supposed to have done but failed to do. As a result, the invoices to the Defendant by the Plaintiff were not earned by the Plaintiff and the defendant could not see why payment should be made on the said invoices.

33. Apart from the Defendant being dissatisfied with the lack of progress, I am still at a loss in ascertaining what the nature of the obligations were. This is a case in which the purported agreements are not transparent and as such unenforceable.

34. Looking at the correspondences between the parties and even by way of proof, nothing has been produced to this court to show that the plaintiff carried out the completion of the deed of variation or the other tasks that it had promised. Furthermore, there is no document before the court that says the consultancy fees and so on would be paid in advance.

35. Counsel for the Plaintiff, Mr Jones argued that "the court must construe the contents of the agreement to be sacred between the parties and to enforce the terms therein." He said that "further reliance is placed on the Latin maxim 'Pacta Sunct Servanda' which means the parties must adhere to the agreement in every many and very details." The court disagrees with Counsel since the court cannot enforce a contract that is questionable and unenforceable.

36. Counsel for the Defendant, Mr. Bangura, expressed some doubt as to whether the whole agreement was valid. He argued that for the agreement to be valid, it should be enforceable in law. I agree with counsel, Mr. Bangura, in this respect since on a true construction of the documents, the true nature of the agreement as mentioned above is opaque. The aspect of sharing revenue generated by the Electricity and Distribution Authority is questionable.

CONCLUSION

37. Having considered that an outstanding payment of US$100,000 (One Hundred Thousand United States Dollars) for some previous work undertaken by the Plaintiff was paid to the Plaintiff, Dyvn Strategies Limited in August 2016, and having considered the salient issues in this case, it is my view that this case must fail for the reasons stated above. There was no enforceable contract between Dyvn Strategies Limited (the Plaintiff) and Sunbird Bioenergy (SL) Limited. I therefore make the following Orders:

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(i) Judgment is entered for the Defendant herein.

(ii) The Defendant is not obliged to pay the Plaintiff the sum of US$165,670 (One Hundred and Sixty-Five Thousand Six Hundred and Seventy United States Dollars).

(iii) The Defendant is not obliged to pay the Plaintiff US$417,900 (Four Hundred and Seventeen Thousand Nine Hundred United States Dollars).

(iv) No Order as to interest.

(v) Costs of US$ 20,000 or equivalent in Leones to be borne by the Plaintiff.

Signed:_____ Date: 30th June 2022

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