MISC. APP.019/22 2022 Z. NO.1

IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION)
FAST TRACK COMMERCIAL COURT

BETWEEN:

UMARU ZOKER & OTHERS - PLAINTIFFS/RESPONDENTS
32 CANTONMENT ROAD
FREETOWN
AND
LINCON CONSTRUCTION & - DEFENDANTS/RESPONDENTS
& LOGISTICS & ANOTHER
BOTH OF 75C SMART FARM
OFF WILKINSON ROAD
FREETOWN

JUDGEMENT DELIVERED BY THE HONOURABLE JUSTICE M.P. MAMI J.A DATED 28TH DAY OF FEBRUARY, 2024.

COUNSEL

TEJAN-COLE, YILLAH & PARTNERS -FOR THE PLAINTIFFS/APPLICANTS

HARDING, SESAY & PARTNERS -FOR THE DEFENDANTS/RESPONDENTS

This court is seised of an application dated 4th of August 2022 filed by Messrs. Tejan-cole, Yillah & Partners solicitors for the plaintiff/applicant praying for the following orders, as contained on the face of the motion to wit:

1. Whether the defendants are in breach of the agreement otherwise described as a memorandum of understanding dated 23rd September, 2016 expressed to be made between the plaintiff herein on the one part and Lincon Construction & Logistics (represented by the second defendant herein) on the other part
2. Whether the plaintiffs are entitled to recover the sum of $121,000/= (One Hundred and Twenty-one Thousand United States Dollars) being the sum due and owing the plaintiff by the defendants.
3. Whether the plaintiffs are entitled to interests on the said sum?
4. Whether in light of the breach of the said agreement the plaintiffs are entitled to damages from the defendants, for the breach of the aforementioned agreement?

In light of the above questions, the plaintiffs seek the following relief: -

1. Recovery of the sum of 121,000/= (One Hundred and Twenty-one Thousand United States Dollars) being the sum due and owing the plaintiff by the defendants.
2. Interest from the date sum was due until judgement
3. Interest from the date the judgement until payment pursuant to the law Reform Miscelleanous Provisions Act Cap.19
4. Damages
5. Any further order (s) that this Honourable court may deem fit and just in the circumstances
6. costs.

The application is supported by the affidavit of Umaru Zoker, one of the plaintiffs herein with the following exhibits.

Exhibit "UZK" – A photostat copy of the memorandum of Understanding

Exhibit "UZ2" – A photostat copy of breakdown of funds transferred by the government of Sierra Leone to the defendants

Exhibit "UZ3" – A photostat copy of the letter of demand

Background

The matter proceeded to ADR on with the initial agreement of the parties, on the 21st March, 2023, and same was terminated by mutual consent of the parties as they were practicable impossibility between the parties to proceed with same.

The matter thereafter proceeded to full trial, with the consent of both parties.

With leave of this court a supplemental affidavit was filed to the affidavit in support, with the following exhibits attached thereto.

Exhibit "UZ4" A photostat copy of the M.O.U.

Exhibit "UZ5" – A photostat copy of the Bank of Sierra Leones exchange rate for the month of March, 2022

There is an affidavit in opposition filed by M.S. Legal Advisory solicitors for and on behalf of the defendants herein with the following exhibits

Exhibit "HAEA 1[1-2]" – A photostat copy of the M.O.U

Exhibit "HAEA 2"- A photostat copy of contract agreement

Exhibit "HAEA 4" – A photostat copy of a letter dated 5th April, 2021.

There is a supplemental affidavit filed with leave of this court dated 11th day of July, 2023 with exhibit "MB5" – A copy of the termination letter.

There is notice to cross-examine Habib Abess Eli-Ali on his affidavit sworn to on the 23rd day of January, 2022

There are also four (4) affidavits in reply sworn to by Umaru Zoker, one of the plaintiffs herein, the other by Emmanuel Eddie Watts a human resource coordinator, Ibrahim Sillah trained and experience contractor.

The 1st plaintiff Umaru Zoker was cross-examined on his affidavit by counsel for the defendants to the following effect in its full, all of which I will rehash herein to wit:

Umaru Zoker (SOK)

XX Yes, I consulted my solicitors to institute the action.

XX Yes, I gave to Mr. Thomas, the M.O.U.

XX Yes, I decided to litigate based on issue in the M.O.U.

(Witness referred to Clause 7 of the M.O.U)

XX Yes, I am familiar with the name Moi Moi Sakwee. He was one of the engineers that worked on the site

(Witness asked to peruse the exhibits attached to the affidavit in support)

XX The M.O.U was prepared before Mr. Sakwee came in

(Witness referred to exhibit UZ 2)

XX I procured an engineer on the site

XX We were all working as a group so there was no need for a separate contract.

XX The date on the M.O.U is 23rd September 2016. This M.O.U was prepared before we started the contract.

(Witness asked to Read U2 in its entirety)

XX That's your opinion that is making of a registration number.

XX The M.O.U was registered

XX We all worked as a team, save that we had differences which brought us before this court.

XX I was aware that Mr. Sakwee a sub-contractor with the defendant company to fulfil the demonstration as a site administration.

(END)

(Re-examination by Mr. Tommy)

XX Mr. Sakwee's role is that site was to administer and be in charge of the site, and pay workers, hire machines, Mr. Watt was his assistant.

So all the funds government gave that went into the defendant's accounts, I then asked Mr Sakwee an estimate for the main accounts, so he submitted the accounts.

XX I then said we should search for a reliable, dependable that the contract would have been completed within the timelines

XX The 2nd plaintiff recommended the defendant company, which is the 1st defendant. I gave him four (4) days to search for the person, we sat down there and so discovered, the 1st issue I raised was for us, and we had pre-contractual issues.

XX Sillah was there, Mammoi was there and there were other engineers (myself and the 2nd plaintiff brought Sillah and the other engineers.

(END)

(Cross-examination) (DW1)

XX Yes, I signed the affidavit in opposition dated 23rd January, 2022.

(Witness referred to paragraph 3 of the affidavit in opposition) also referred to the M.O.U clause 7)

XX In the first instance, this M.O.U was prepared by mygoodself with the understanding that the defendant company will do the whole job at the site, because it was my company, which had the contract and I signed the contract.

The 2nd plaintiff approached me before 2016 because I was not conversant with government construction issues, so Mr. Turay came to my office and told me about the demolition of the U.N Building that there was emergency funds available by the government for these building to be brought down.

XX I clearly told him that I worked for private companies and individuals because of the intricate difficulties of that of government payment.

The plaintiff assured me that it well be part of their responsibility to ensure that payment of government, they will move from office to office to ensure payment of these monies.

In that case I told then that they are the primary people who have the source of these contracts. They were working on the basis of commission from proceeds of this contract.

XX So I started the financing for us to have the contract. I singlehandedly finance the contract with their guidance. With the assistance and guidance, we were able to secure this contract. After we had secured this contract. I was of the notice that payment was to be made as per the contract. It was at this juncture, that Mr. Zoker has a friend, by the name of Mr. Victor he signed a contract with Mr. Saquee as well.

XX I was not aware of the sub-contract, I gave mobilisation on site, and I was surprised when I invited, that was the time, I knew Mr. Saquwee they were going to get more money, that's how Mr. Saquwee came into the picture. I went there myself.

XX I insisted that sub-contractors had to go through the defendant company and not otherwise.

XX One Hon. Kai-Kai asked me to calm down, that Mr Saquwee had already started spending monies on the project. I saw evidently that somebody had started spending money, I had audience with Mr. Saquwee, I told him, there should be a sub-contract.

XX I was only trying to protect my company's name image, and I was the one, disbursing funds as need be. I made an agreement with Mr. Saquee and they witness that agreement in my office. From then onwards, this M.O.U was done before all those that transpired.

As you can see, there are other parties to the M.O.U and none of them took penny from this contract. I know that this was a contract obtained min the previous Regime and Hon. Kai-Kai was quite influential in the resuscitation of this contract.

XX It was during the new regime, that we started getting monies on this contract. It was Le800,000,000.00 (Eight Hundred Million Old Leones). that was on the contract. In my office, I told them it was impossible to get this contract done, on that amount of money.

XX It was the plaintiff who convinced me that Mr. Saquee had done assessment and agreed that amount of money and made a contract with Mr. Saquee.

XX I told them after 800, that an additional monies it will be deducted from their share, and they agreed at the time.

XX Yes, we worked as a team at that time, priority been the demolition of the property.

XX After the meeting I issued cheques to their accounts which is not in the M.O.U, as we had deviated from the M.O.U from day one, they been my friends, I did put emphasis on this particular project. I told Mr. Zoker to monitor the project, as I never had a contract with government. The funds that I had transferred to Mr. Saquee's accounts.

(Witness referred to exhibit "HAE2"). The plaintiffs to knowledge are not shareholders in this company.

XX This was an agreement signed by myself and Mr. Saquee.

XX The plaintiffs are not signatories.

(Witness referred to his affidavit in opposition paragraph 9)

XX Yes, I made payment to the plaintiff.

XX The payment were done after the M.O.U.

xx The contractors were brought after the signing of the M.O.U.

(Witness referred to paragraph 8 of his affidavit)

XX Government owes me, it's about 1.5 to 1.8 Billion Old Leones.

(Witness referred to AAE3)

XX It's a letter of notification from the Ministry of Works; Notifying that our company, had been awarded the sum of Le5,897,000,000 old Leones.

XX Yes, I have received a minimum of 4 Billion Leones less tax and retention fees.

XX It was from that amount, that we paid monies to the plaintiff.

XX The contract was and has been terminated.

(Witness asked to look at all the exhibits attach to the affidavit)

XX There is no evidence of transfer from my company.

XX I don't know why this company was registered.

XX The monies transferred were not put as in fulfillment of the M.O.U, Mr. Sillah spent his money as if it was his own money.

XX I was not the one who brought in Mr. Sillah.

XX I meant the payment was of good faith, as the M.O.U had something been breached. But because of the relationship that existed between us at the time, I deemed it fit that whenever there were monies from government and we had put the contract issue as at timely whatever funds required.

XX I don't know the total sum that is on the contract, it's been a while in total approximately above 2.5 Billion Leones.

XX I transferred to Monies nearly 60% to 70% of monies that was paid to me, and we have not been paid about 80% by the government of Sierra Leone.

XX The government has paid a little above 60% of the total sum.

XX It was out of the 60% that we made payment to the plaintiff.

XX The plaintiffs were only given these for two (2) reasons:

(1) They were taking things out of the site that was not meant for them
(2) Disrupting the free flow of work, to a company that we sub-contracted, they had no input.

XX The security were private security.

XX We did not file police report, and we don't know whether Lincon did not file a report

XX I have met Mr. Sillah. was at the site, for an initial period. I paid Mr. Sillah through Morris, and they were paid a commission for their workers.

XX When I received payment, I paid them

XX Morris investment Group were to be paid 800 Million or thereabout.

XX The contract sum is nearly 6 Billion Leones. if you noticed, the amount I transferred to Mans Group to that account by far than what is on the contract.

XX Yes, I have received at least 60% of the sums from the government.

XX That Memorandum of Understanding was no longer effective.

XX Its on record when the contract was terminated (terminated 29th August, 2022)

XX Even on the inception that M.OU. was initially signed, there are other parties in the M.O.U, that were not in play anymore, when the contract was signed.

XX The contract was terminated when the contract was reinstated, it was other players that caused the contract to be reinstated, I decided to still go with the contract that has been terminated twice.

XX There is no cancellation of the M.O.U

(No re-examination)

CROSS-EXAMINATION OF MOIMOI BONO SAKWEE (SOB)

(Witness show supplemental affidavit sworn to on the 11th day of July, 2023)

XX That's my signature

XX I stand by everything in this affidavit, I know the plaintiffs in this matter.

XX I am not aware about any M.O.U. It was since they spoke about it (the plaintiffs and the defendants)

XX My company is Mans Investment, and the company was registered in 2018.

XX I am a businessman and I specialize in project management and planning

(Witness referred to paragraph 16 of the supplemental affidavit)

XX I am not an Auditor of the 1st defendant company.

XX I have no access to the bank statement of the defendants, and I have never seen an audited statement of the 1st defendant.

XX Most of the monies went through my bank accounts to them

XX I gave them the money in cash

XX As a matter of fact, I was present in most of their deliberations and I acted as a buffer when they had arguments.

XX I was part of the deliberations, when they agreed that the plaintiff was entitled to part of the contract sum.

(Witness referred to paragraph 18 of the supplemental affidavit)

XX The total monies received by the defendant was approximately 1.6 Billion Old Leones, the 2nd payment was 600 Million Old Leones, and the 3rd payment was 1.2 Billion Old Leones, about 3.4 Billion Old Leones.

(Witness referred to exhibit "MBS5" the 2nd paragraph)

XX I disagree with the letter as it is not even legal

XX Myself was the lead demolition expert on site.

XX My role was to make sure, that the contract was executed. My 2nd role was to sit with the Ministry to make sure the methodology for the demolition, of the building was the right methodology. We had a meeting and we changed the methodology which the Ministry preferred and they accepted for the demolition. The Ministry actually accepted the methodology.

XX The actually demolition was done by myself, done by workers supervised by me

XX I know Mr. Sillah, he was one of those who worked on the site, and he was my supervisor on site. He worked directly under me.

XX Mr. Sillah was an employee,

XX There was no letter of employment issued to any of the workers.

XX Mr. Mohamed Turay (the 2nd plaintiff) introduced Mr. Sillah to me.

XX Mr. Sillah received sums of money from me.

XX Every payment on that site was made by me.

XX We only had a contract with a demolition team of 12 experts, and Mr. Sillah was not part of the demolition team, and Mr. Sillah was never contracted.

XX He participated in the demolition exercise.

XX The 20 Million Old Leones that was paid was compensation paid which Mr. Turay (the 2nd plaintiff asked) us to give to him.

XX It was terminated before even this contract was terminated by the Government of Sierra Leone.

XX I received monies many times from the defendant and passed them on to the plaintiffs.

XX Whenever the government made payment we sat down together, we decided on how the monies should be shared.

XX The plaintiffs visited the site, and the plaintiffs made their own little contribution.

XX 800 Million Old Leones was the total contract sum.

XX We have received all of the monies.

XX The demolition exercise is still ongoing, they are still working.

XX The contract is still active and are still working on the site.

XX We have received all 800 Million from the demolition exercise.

XX The government had disbursed 3.4 Billion Old Leones to the plaintiffs.

(Witness referred to paragraph 21)

XX We now know that the contract was not terminated.

XX In light of paragraph 21 which I have just read government has charged us Le66,000,000 (Six-six Million Old Leones)

XX We filed a complaint to the police, when there was the fit. I came back on site late, and that Mr. Sillah stealing items on the site.

Analysis of the Contentions and Evaluation of the Evidence before the Court

The contention before this court and the evaluation/analysis of the evidence will be grouped under the following heading.

(1) Whether the Memorandum of Understanding fulfils the requirement in law to constitute a valid contract.

Exhibit "HAE1" is a Memorandum of Understanding, the recitals or background to the M.O.U provides:

"This memorandum of understanding is made between Mr. Habib Abess representing Lincon Construction and Logistics of No.75C Smart Farm, Off Wilkinson Road, Freetown and Mr. Mohamd Turay of 147 Wilkinson Road, Freetown and Mr. Umaru Zoker of 79 Bass Street, Freetown (Party A facilitator) while Mr. Sayibu Abu and Mr. Dauda D. Sawaneh of No.4 Ndoeka Drive Cockle Bay Freetown (Party B facilitor) for the award of a contract to demolish a 7 storey building located at Siaka Steven street.

It is trite law, as so established over the period, that the courts in agreements between parties.

However, where situations demands that the court should it will adjudicate on the subject matter before it and with reference to the agreement between the parties.

As both counsel are aware, inorder to determine whether, in any given case, it is reasonable to infer the existence of an agreement, it has long been usual to employ the language of "offer" and "acceptance".

Inotherwords, court examines all the circumstances to see if the one part may be assumed to have made a firm "offer" and if the other may likewise be taken to have "accepted" that offer.

Exhibit "HAN1"- Which is the M.O.U is dated 23rd September, 2016, there is an agreement therewith contained in 7 paragraphs, containing obligations and representations.

I must emphasised however, that there are cases where the courts will certainly hold that there is a contract eventhough it is difficult or impossible to analyse the transaction in terms of offer and acceptance. Lord Wilberforce has said in New Zealand Shipping Company Ltd V. A.M. Satterwaiter & Co. Ltd (1975) AC 154 at 167 (1974) 1 All ER 1015 at 1020.

> **"English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit, uneasily into the marked lots of "offer", "acceptance" and "consideration".**

The first task of the plaintiff is to prove the presence of a definite offer made either to a particular person or as in advertisement of rewards for services to be rendered to the public at large.

It is but important at this stage to set out the facts of this matter, the contentions therewith as contained in the affidavit in support to the summons.

Facts

That by an agreement or a legally binding Memorandum of Understanding dated 23rd September 2016 expressed to be made between the plaintiff herein on the one part and Lincon Construction & Logistics (represented by the second defendant herein) on the other part, the defendants agreed to pay the plaintiffs (otherwise referred to as party A, facilitators in the M.O.U) The sum of $181,000 (One Hundred and Eighty-one Thousand United States Dollars) for their professional and technical contribution to a civil works project, that the obligation of the plaintiff under the agreement or memorandum of understanding included, among other things.

> **"Providing an engineer to be on the project site at all times and at their own expense"**

That in addition to having assigned an engineer to the project site, the plaintiff also provided immense technical and professional support to the project. That they also contributed to negotiating and or facilitating the transfer of the contents funds from the government of Sierra Leone to the defendant's account, that it was also a term of the agreement otherwise referred to as memorandum

of understanding that the defendants herein would pay the said sum in a number of instalments.

Proportionate to the percentage of funds transferred to the defendants by the client- the government of Sierra Leone.

That although the defendant have so far received must of the funds from the client (government they have only paid the sum of $60,000 (Sixty Thousand United States Dollars) to the plaintiffs which is far less than what is due them relative to the amount of money. The defendants have received from the client. The plaintiff even exhibited a breakdown of funds transferred by the government of Sierra Leone to the defendants (exhibit "UZ2").

That several demands have been made by the plaintiffs to the defendants in order that they may liquidate their indebtedness to the plaintiff, but all demands have proved futile. That the plaintiff have suffered several financial hardship, as the said money was needed.

The defendant's contention as contained in the affidavit in opposition dated 23rd day of June, 2022 avers as follows:

"That the plaintiffs are placing reliance on a memorandum of understanding in other words a gentleman agreement which lacks and/or does not meet the threshold to be constructed/constitute a binding contract."

"That the plaintiff at no point in time provided any professional or technical contribution to any civil works projects involving the defendants nor were they requires to so do by any clause in M.O.U (Exhibit HAEA1[1-2])

"That the plaintiff at no point in time provided an engineer to be on the site at all times and at their own expenses" the only engineer sub-contract, the site to one Moimoi Gbondo Saquee of Morice Investment Company (M.I.C) whose liabilities are the sole obligation of the defendants by contract dated 1st April 2019. (Refers to exhibit HAEA2[1-4])"

"That the plaintiffs seek to exercise right and institute reliance and enforcement of monies emanating from a contract solely between the defendant and the government of Sierra Leone, to which they the plaintiff are in no way a party to. (reference exhibits "HAEA4")"

"That the contract was subsequently terminated at some point, restored, meted out by delays in monies past due all of which resulted in an increase of execution cost and significant up lift to other financial

expenses such as payment of salaries, running cost etc. for a period well past that anticipated in the contract."

"That a significant amount of monies remains due to the defendants by the client (GOSL) notwithstanding invoices having been issued for same."

"That the contract, contractors bid, letter of notification, notification of contract award, bid price, quotation of demolition only references the defendants and the client government of Sierra Leone any agreement with the plaintiff was solely platonic, the defendants therefore made the initial payment in a showcase of good faith."

"That no loss has been suffered as all loss including but not limited to ancillary costs associated with the implementation and execution of contract have been the responsibility of the defendants, but the plaintiff only responsibility to provide an engineer on site was not fulfilled."

"The circumstances of whether the M.O.U has to be looked at for the perspectives of the facts set out, and this court mindful that a demonstrable effect of whether the parties intended to be legally bond, could not reply on affidavit evidence, but the totality of facts gleaned from the evidence/testimonies earlier set out."

The plaintiff in his testimony intimated the detriment he has suffered, and the obligations incurred in furtherance to the execution of the M.O.U.

Infact, he told this court that he went ahead and contracted an engineer on the site, and took further steps to fulfill the objectives, but further as a support to the enhancement of the principal contract between the government of Sierra Leone and the defendant.

When cross-examined, the plaintiff further told this court, that he was aware that Mr. Sakwee was a sub-contractor with the plaintiff company all to fulfill the demolition as a site administrant.

On re-examination, the plaintiff further threw light on the role of Mr. Sakwee, which he said was to administer and be in charge of the file and pay workers, hire machines, and Mr. Watt was his assistant. That all the funds government gave went into the defendant's accounts.

This court in its reasonable estimation decipher that in the furtherance of the contracts the parties took steps jointly as a team to achieve the objectives of the demolition exercise, the defendants want this court to believe, that all engineers bought to the site were ones brought by the defendant, and that whatever

obligations they had with the plaintiff had long since been settled with the payment of the monies.

Infact, the CEO of Lincon Construction (the 2nd defendant) the 1st defendant told this court that the M.O.U was signed as a parole agreement in aid to the execution of the main contract with the government of Sierra Leone.

He unwittingly told this court, that he relied on the experience and expertise of the plaintiff to undertaking the demolition exercise, the question this court will ask is could the defendants have carried out the demolition exercise, without support from the plaintiff and their support staff?

He told this court, in very clear terms that it was with their assistance that they were able to secure the contract with the government of Sierra Leone.

He further told this court in clear terms when cross-examined that he discovered that some monies and mobilisation had taken place on the project, and the depth of the work, the plaintiff comes often to the site. He further narrated how complex government contract are, and how useful the plaintiff was in the execution of the project.

It is without doubt that the plaintiff's goodwill and resources were expended in the execution of the project, and its further lends evidence to the fact, that the M.O.U reached between the parties, was far from a mere statement of intent, but the clauses has contained therein, as from all the testimonies and the affidavit filed herein intended to be legally binding. Consideration had clearly flowed between the parties. The underlying assumption of English law is that a contract is a bargain. If a person furnishes no consideration, he takes no part in a contract. Consideration has been defined as 'the act or promise offered by the one party and accepted by the other as the price of that other's promise', clearly consideration moved from the plaintiff. It was clearly an executed consideration as there was a detriment incurred and as benefit received by the defendant company at their own very request.

Eventhough the M.O.U is not clear or prescience/apt, but this court is clearly focused on the intent of the parties from the express words used thereat. Party B, referred to in the contract (Mr Sayibu Abu Kan and Mr. Dauda D. Sawaneh) is silent except where the 1st defendant mentioned in cross-examination, that they 'never showed up'.

Clause 2& provides for sharing arrangement between the party's view of apportionment of funds as provided for in Clause 4.

"Since payment will be done in phases, Lincon Construction & Logistics will also transfer funds in phases to party A&B which will be calculated in percentage of the funds Lincon Construction & Logistics receives."

It is abundantly clear, that this was an arrangement/M.O. U not drawn-up or drafted elegantly, but this court in furtherance of the principle of freedom of contract., is not concerned with the drafting, but the intention of the parties as expressed therein.

It is clear that there was consideration to support the agreement between the parties.

In commercial agreements, which was as in the instance, the presumption is that the parties intended to create legal relations and make a contract. this presumption may be rebutted by

(1) It is common enough to advertise goods by flamboyant reports of their efficacy and to support these by promises of a more or less vague character if they should fail of their purpose.
(2) The parties may make an agreement on a matter of business or of some other transaction normally the subject of contract, but may expressly declare that it is to be binding in law.

The M.O.U does not fall into any of the aforementioned exceptions, and reservations. Clause 7 of the M.O.U further indicate the obligations of the parties. Since they are of the other part of the contract to:

"Part A & B are (one) engineer to be at site at all times at their expense."

The 1st defendant told this court in clear terms whilst been cross-examined that he made payment to the plaintiff.

The 1st defendant further confirmed that, he made payment to the plaintiff, and this was after the Memorandum of understanding, the 1st defendant also told court, that he has received minimum of 4 Billion after tax and retention, and that it was from that amount that they paid the plaintiff what he has received, which was at odds with his earlier testimony.

It is also quite clear that steps were taken in furtherance to the M.O.U, for which Mr. Sillah was brought as part of the obligation of the plaintiff (to superintend the demolition exercise)

This court clearly rejects the contention of the 1st defendant that the M.O.U was breached from day one as clearly the parties were on they own accord.

Be that as it may, that the express terms of the contract provides a duration of three (3) months, the obligations/responsibilities summarised thereafter, as Clause 8 provides for circumstances where amendment or charges were to be therefrom. It is clear that the contract as with most contractual situations in this country suffered overruns and consequently made worse by the changes of government in 2018, wherein traditionally the succeeding government, is also circumspect about continuing with contracts entered prior thereto.

- He told this court, that the contract sum is nearly 6 Billion Leones. Its also quite clear on its characteristics of contract with their overruns, that they became state, and clearly not uncharacteristic of this contract.
- He told this court when further cross-examined that he has received over 60% of the sums from government.
- He further told this court that the contract has been terminated twice, and further affirmed that there has been no cancellation of the M.O.U.
- Consequently, however, the contention counsel for the defendant want this court to believe as not a contract or an agreement, but merely an intention to enter into a contract as untenable. It is clear that this M.O.U was not a letter of intent sets down in writing.

What the parties want to form the basis of a formal contract between them, but clearly the terms of a contractual relationship that governed the parties and their conduct.

It is clear that the terms were so intended to be binding, steps were taken, the contract reliance placed upon them, and detriment suffered thereby. The defendants cannot approbate and reprobate, to say the M.O.U at one breath was never functional, but later inform the court that the M.O.U was never terminated. The M.O.U is binding as all the conditions of a valid contract are all in existence i.e. offer, acceptance, consideration, intention to be bound by the terms of the contract.

Therefore, by parity of reasoning, there was a parole contract that was in aid of the demolition exercise with the government of Sierra Leone.

There is nowhere indicative from the dealings of the parties as from the testimonies before this court that either of the parties intended it was to be a conditional assent to an offer which necessitates does not constitute acceptance. It is legally acceptable, that a man who though content with the general details of a proposal transaction, facts that he requires expert guidance before committing himself to a binding obligation, often makes his acceptance conditional upon the advice of some third party, such as a solicitor, the result is that neither party is subject to an obligation. A common example of this in everyday life occurs in the case of a purchase, or a lease of land. Here is the common practice to incorporate the terms, after they have been

settled, in a document which contains some such incantation as 'subject to a contract' or 'subject to a formal contract to be drawn up by a solicitors' unless there is cogent evidence of a contrary intention, the court's construe these words so as to postpone the incidence of liability until a formal document has been drafted and signed. As regards enforceability the first document is not worth the paper it is written on. It is merely a proposal to enter into a contract- a transaction which is a legal nullity- and it may be disregarded by either party with nullity. Until the completion of the formal contract both parties enjoy a locus paeritentiae (Winn V. Bull (1877) 7 CH D 29.

In the case of BRANCA V. COBARRO (1947) KB 954 (1947) 2 ALL ER 101, the court was presented with a delicate question of construction:

> **"A vendor agreed to sell the lease and goodwill of a mushroom farm on the terms of written document, which was declared to be a provisional agreement until a fully legalized agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed"**

The Court of Appeal held, that by using the word 'provisional', the parties had intended the document to be binding from the outset, though subsequently to be replaced by a more formal contract.

This court justifies the interference of a complete and final agreement. There is no way the terms of the M.O.U would be regarded as an inchoate agreement. There is incontrovertible evidence that the parties have acted upon the faith of the M.O.U, this court is bound that the terms of the said M.O.U embodies a definite intention to be bound, and they will strive to implement its terms.

In Hillas & Co. Ltd V. Arros Ltd. Hillas & Co had agreed to buy from Arros Ltd

"22,000 standards of softwood goods of fair specification over the season 1930. The written agreement contained an option to buy 100,000 standards in 1931, but without particulars as to the kind or size of goods or the matter of shipment. No difficulties arose on the original purchase for 1930, but when the buyers sough to exercise the option for 1931, the sellers took the point that the failure to define those various particulars showed that the clause was not intended to bind either party but merely to provide a basic for future agreement.

The House of Lords held that the language used, interpreted in the light of the previous course of dealings between the parties, showed a sufficient intention to be bound.

The dictum of Lord Tomlin is quite instructive and same will be set out herein.

"The problems for a court of construction, must always be as to balance matters, that without the violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not inccur the reproach of being the destroyer of bargain."

The object of this court is to do justice between the parties, and it is certain that there is ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and more form, the test of the intention is to be found from the words used in the contract.

The test of intention it to be found from the words used in the M.O.U solidly backed by incontrovertible evidence of the plaintiff of steps taken, detriment suffered, and benefits expected for which the 1st defendant in his testimonies could not thwart.

The parties negotiated against a background of commercial or local usage where terms were to secure the contract and to jointly carry out the demolition exercise. This rule which is often called the "Parole evidence" rule (though the evidence excluded by it is not merely to contract, but it can within its proper limitation be regarded as an expression of the objective theory of the contract.

The M.O.U has been scanty about how it was to aid the main contract with the government of Sierra Leone. So therefore the oral evidence of the 1st defendant and the plaintiff could be admissible to add to or prove a custom or trade usage and one which the parties wished it possess.

It is clear that the parties, were in their joint task willing to do a joint bid for the success of the project notwithstanding that it was with the 1st defendant.

The question is at bottom one of intention and like, all such situation elusive and conjectural. It would see, however, that the more recent tendency is to infer, if the inference is at all possible, that the parties did not intend the writing to be exclusive but wished it to be read in conjunction with the testimonies of the plaintiff and the 1st defendant.

Even the recitals in the M.O.U "the demolition contract between the government of Sierra Leone and so is the entirety of intendment of the M.O.U, which totally displaces the issue of privity of contract as since claimed by counsel for the defendants, both parties intended that it was to "facilitate" the demolition exercise.'

It is without doubt that the M.O.U came into existence and its sustenance and therefore was to a condition subsequent. In Head V. Tatterhall (1871) L.R. 7 Exch.

The plaintiff bought from the defendant a house, guaranteed to have been hunted with the 'Bicester hounds' with the understanding that he could return it up to the following Wednesday, if it did not answer the description, while in the plaintiff's possession, but without fault on his part, the house was injured, and even then found never in fact to have been hunted with Bicester hounds.

The plaintiff returned it within the time limited and sued for the price he had paid.

It was held that a contract of sale had come into existence, but that the option to return the house operated as condition subsequent of which the plaintiff could take advantage.

It is clear that there was a contract formed alongside thereby.

It is also without doubt that the M.O.U between the plaintiffs and the defendants had certainly of terms, and consequently by the defendants not living up to the terms thereof, there was a binding contract.

This court also as to the issue of certainty of terms. This courts repeat the contention by counsel for the defendants that what the parties intended to be a commercial agreement is too uncertain to be of contractual effect.

As counsel for the defendant may be aware it is the business of the court, to resolve uncertainty; Refers: to Durham Tees Valley Airport Ltd V. Bonibaby Ltd (2010) EWCA CIV. 485 (2011) 1 Lloyds Rep.68.

Where the agreement provided that the defendant airline would support "a x2 based aircraft operating exclusively from the claimant's airport. Significant losses were incurred by the airline in the performance of the agreement and it discontinued its operations from the airport. The airline's case was that the agreement was too uncertain to be enforced as it specified no minimum number of flights to be undertaken under it and as many operational detail (such as the number of flights and their destination) were left to the appeal rejected these arguments and held that the agreement was sufficiently certain to be enforced and that the airline was in breach of it. The court reached this result by construing the airline's obligation to operate as being one to "fly commercially" by concluding that token flights or a complete absence one to "fly commercially", they invoked the general principle that courts were reluctant to strike down what were obviously intended to be commercial agreements, and by making the point that it was not uncommon for such agreements to give one party or the other "a large degree of discretion" as to the conduct of operation.

It is the considered opinion of this court therefore that the terms of the M.O.U was sufficiently certain to create contractual obligations, and the terms of the M.O.U as, the facilitator and the role played by the parties, particularly that of the plaintiff, there is no evidence before this court to suggest, that there was a postponement of obligation of the parties, mindful of the role played by the plaintiff, from the testimonies before this court.

Reference therefore to the preamble the M.O.U therefore, where party A & B are referred to as "facilitators" for the award of this contract, which necessitated the implementation of the terms of the contract, this court is of the very firm view that the counsel for the plaintiff has led cogent evidence for which no contrary intention is shown by the defendants.

The plaintiff has received some payment, and has contended strongly that it is not in sync with the M.O.U, for which this court finds in their favour.

Consequently, this court orders as follows:

1. **That the 1st and 2nd defendant are liable to the plaintiffs for breach of contract and orders as follows:**

- **Recovery of the sums of $121,000/- (One Hundred and Two-one Thousand United States Dollars, payable within three (3) instalments effective from the 15th March, 2024, the 2nd installment 15th of April 2024 and the 3rd instalment to be paid on the 15th day of May 2024.**
- **That if any of the two (2) instalments becomes due, the entire sums become payable immediately.**
- **Damages for breach of contract to be assessed.**
- **Interest from the date it was due till payment.**
- **Solicitors costs of Nle60,000 (Sixty Thousand New Leones)**
- **Costs of the action of Nle60,000 (Sixty Thousand New Leones)**

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THE HON. JUSTICE M.P. MAMI J.A.