

9,1981

O N A P P E A L

FROM THE GAMBIA COURT OF APPEAL

B E T W E E N

SHYBEN A. MADI and
 SHYBEN A. MADI & SONS LIMITED Appellants

- and -

C.L. CARAYOL Respondent

CASE FOR THE RESPONDENT

10 1. This is an appeal from a judgment of the Gambia
 Court of Appeal (Mr. Justice S.J. Forster JA., Mr.
 Justice E. Livesey Luke JA., Mr. Justice P.D. Anin, JA)
 dated the 1st day of December, 1978, which allowed an
 appeal of the Respondent against a judgment in the Supreme
 Court of Gambia (Sir Philip Bridges, CJ.) dated the 30th
 of June, 1977 whereby judgment was given for the Appel-
 lants on their claim with costs and the Respondent's
 Counterclaim was dismissed with costs. The Court of
 Appeal set aside the judgment below, dismissed the Appel-
 20 lants' claim and gave judgment on the Counterclaim for the
 Respondent for a total sum of D75,000. The Court of
 Appeal further ordered that the Respondent should have his
 costs in the Court of Appeal and in the Supreme Court and
 that upon payment in full of the judgment debt the Appellant
 should be entitled to the return forthwith of the books,
 documents and other papers in the possession of the Res-
 pondent, which had been the subject matter of the Appellants'
 claim.

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30 2. The substantial question raised by this appeal concerns
 the entitlement of an Appeal Court to vary findings of fact
 made by the trial judge and whether in the circumstances of
 this case the Gambia Court of Appeal was entitled to vary
 such findings.

40 3. The first Appellant was for many years a general
 trader and money lender in Gambia and the second Appellant
 is an incorporated company of the Gambia which took over
 the business of the Appellant in about 1975. The Respondent
 is now retired but he was for many years a Commissioner of
 Income Tax for the Gambia Government and after his retire-
 ment he established himself as an accountant and income tax

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consultant. It is not in dispute that as an income tax consultant and accountant he rendered services to both the Appellants over a number of years. The only issue with which this appeal is concerned is whether or not there was an agreement between the Appellants and the Respondent that for such services he should be paid a fixed fee or whether the Respondent was entitled to be paid upon a quantum meruit.

- p. 3 4. By their Statement of Claim the Appellants sought from the Defendant delivery up of books, papers and other documents which they alleged they had handed to the Respondent to enable him to carry out his work. The Respondent did not deny that he had in his possession a number of books and documents belonging to the Appellants but he asserted by his Defence :
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- p. 14, 1. 40 (i) that he had completed some 3,000 working hours for the First Appellant and some 300 working hours for the Second Appellant;
- p. 15, 1. 1 (ii) that there was no written contract between the parties;
- p. 15, 1. 1-10 (iii) that there was an oral agreement in relation to fees that his fees would be calculated by reference to what results were obtained by him at the conclusion of the investigation by the Commissioner of Income Tax, who was inquiring into the First Appellant's accounts and that until such inquiries had been concluded that the Respondent could from time to time make withdrawals of money;
- p. 15, 1. 15 (iv) that he had withdrawn from the Appellant the total sum of D10,450.
- By his Counterclaim the Respondent claimed the sum of D102,443.75b against the First Appellant and against the Second Appellant the sum of D9,225.00.
- p. 16-17 5. By their Defence to Counterclaim the Appellants did not deny that the agreement between the parties was an oral agreement but alleged that so far as it related to fees it had been fixed as follows :
- p. 17, 1. 1 (i) D2,500 for preparing balance sheets trading profit and loss accounts for covering a period of three years 1967, 1968 and 1969;
- p. 17, 1. 17 (ii) D1,000 per annum for the preparation of accounts for the First Appellant for the years 1971, 1972 and 1973;
- p. 17, 1. 21 (iii) D1,500 for the preparation of accounts for the Second Appellant.

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Respondent. He found that there was no written agreement in respect of fees but concluded that the basis of the contract was a straightforward matter of payment in accordance with a verbal agreement and that this was for a fixed sum or sums and not on a time basis. The learned trial judge was apparently driven to this conclusion, which he stated to be 'inescapable', because of the terms of Exhibit C.

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10. The judgment of the Court of Appeal was delivered on the 1st December 1978 by Patrick D. Anin, JA. By their judgment the Gambia Court of Appeal held that the learned trial judge had paid too much regard to Exhibit C and that his view that the "inescapable conclusion" upon consideration of that Exhibit was that the basis of agreement was for a fixed sum or sums was simply not warranted from a proper consideration of the Exhibit. The Court of Appeal considered that all the evidence should be looked at to determine the terms of the contract and that the learned judge had fallen into error in concentrating his attention so heavily, if not exclusively, upon the terms of Exhibit C. Secondly, the Gambia Court of Appeal were of the view that the probabilities of the matter lay in favour of there being no agreement that the fees should be fixed. Thirdly, the Court of Appeal were much impressed by the fact that on the Appellant's own case there had been overpayment to the Respondent. In the circumstances they held that the Respondent was entitled to claim upon a quantum meruit and upon the basis of the evidence which had been put before the trial judge the Court of Appeal awarded the Respondent judgment against the First Appellant for D70,000 and against the Second Appellant for D5,000.

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11. It is respectfully submitted that the Gambia Court of Appeal were entitled to come to their own view on the facts in the case, particularly since no issue of credibility arose upon the findings of the learned trial judge. It is submitted that the Court of Appeal were in just as good a position to come to a conclusion as the learned trial judge. It is apparent from the judgment of the learned trial judge that he paid inadequate regard to all the evidence which was before him and allowed himself to be misled by the significance he attached to one item of documentation in a case in which he himself commented that the documentation was poor and inadequate. Further since the trial judge had substantially, if not exclusively, based his judgment upon the construction of one document, the Court of Appeal were fully entitled to construe that document themselves and come to their own conclusion.

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12. Further it is respectfully submitted that even though the learned trial judge came to the conclusion that the contract was for a fixed sum or sums he made no finding as to what the fixed sum or sums were. It is submitted that had he addressed himself to this aspect of the case it would have been apparent that there was no material before him upon which he could make any such finding. For although the Appellant's case as pleaded and in evidence was that

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certain fixed sums had been originally agreed, it was also apparent from the pleadings and from the evidence that further sums had been paid, and although it was lightly suggested that such sums had been paid because the Respondent had refused to do any further work until he was paid more money, no plea was raised and no argument was addressed to the Court that such sums as had been paid were not lawfully retained by the Respondent. As a result it is respectfully submitted even if
 10 (which is denied) there was an original agreement for a fixed fee such agreement was surpassed by a subsequent arrangement between the parties that further sums should be paid and no agreement was reached as to the quantum of those sums. In the circumstances it is respectfully submitted that the true contractual position between the parties was that the Respondent should be paid a fee but that no fixed agreement was reached as to the amount of that fee. It follows that recovery on a quantum meruit was justified. Further it is submitted
 20 that it was inherently improbable that the Appellants would have employed the Respondent in 1973 and 1975 if as was alleged, he had demanded more than the agreed fee for his first assignment. At the very least they would have put their agreement in writing.

13. There was ample material before the Court of Appeal to come to a conclusion on the quantum of the Counterclaim, there being the evidence of a chartered accountant as to the basis upon which fees are normally paid, and the Respondent's own evidence.

30 14. The Respondent respectfully submits that this Appeal should be dismissed with costs for the following, among other :

R E A S O N S

1. BECAUSE the judgment of the Court of Appeal was right.
2. BECAUSE there was no evidence to justify a finding that a fixed fee had been agreed for the services of the Respondent and since there was no dispute that he was to be paid
 40 for his services a claim upon a quantum meruit was plainly open to him.
3. BECAUSE weighing all the evidence on the balance of probabilities no fixed fee had been agreed.

GEORGE NEWMAN

IN THE PRIVY COUNCIL

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LIMITED Appellants

- and -

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