

ABI-JAOUDI & AZAR TRADING CORPORATION, through its President, ELIE J. ABI-JAOUDI, Appellant, v. **MONROVIA TOBACCO CORPORATION**, through its Managing Director, A. D. A. M'CORMACK, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT,
MONT'SERRADO COUNTY.

Heard: March 29, 1989. Decided: July 14, 1989.

1. Under the laws of Liberia, the Republic of Liberia cannot be held liable for punitive damages. It follows therefore that the State cannot be made a party to any suit where the outcome would involve the imposition of punitive damages.
2. The Constitution provides that the obligation of contract shall be guaranteed by the Republic and that no law shall be passed which might impair this right.
3. Where intervention is intended or perceived by the court to delay or prejudice the rights of the original parties, it will not be allowed.
4. The interest necessary to support intervention is generally an interest in the subject matter of the original litigation. It is an interest that is required to be direct and, not consequential, and it must be an interest which is proper to be determined in the action in which it is sought.
5. A person whose interest in the matter of litigation is not direct or substantial, but indirect, inconsequential, remote, conjectural or contingent, cannot intervene.
6. Pleadings identified as containing mixed issues of law and fact must properly be referred to a jury for determination under the direction of the court and may not generally be dismissed at the disposition of the law issues.

For the second time, this action of damages for breach of contract was appealed to the Supreme Court by the plaintiff/ appellant, following the dismissal of the action by the trial court. However, at the second trial on appeal, a third party, the Republic of Liberia, represented by the Ministry of Justice was, on application, permitted to be joined by the trial court as intervenor.

The action of damages for breach of contract was instituted in the December 1987 Term of the Sixth Judicial Circuit Court, Montserrado County, where pleadings were exchanged and rested at the amended reply. The basis of the action was that a distributorship agreement was entered into on November 30, 1984 between the appellant and the appellee, on the one hand, and the appellee and Liberian Distribution Company, on the other hand, whereby the appellant and the Liberian Distribution Company were appointed as "main and sole distributors for the sale and distribution, in Liberia, of Monrovia Tobacco Corporation's products." However, appellant alleged that in August 1986, the appellee began selling and

distributing its products directly to other persons and firms in total violation of the sale and distributorship agreement and that, as a result of this breach, the appellant had suffered special damages in the amount of \$778,215.00.

During the first hearing in the trial court, the case was dismissed at the disposition of the law issues, upon a motion filed by appellee. An appeal from the said dismissal was heard in the Supreme Court during the March 1988 Term, wherein the Court reversed the ruling of the lower court granting the motion to dismiss and remanded the case to the trial court for further proceedings, beginning again with the disposition of the law issues.

When the case was called for disposition of the law issues, the Republic of Liberia filed a motion to intervene along with an answer. The motion, which raised constitutional and statutory issues, was resisted, heard and granted. In ruling on the motion and resistance, the trial judge acknowledged that they contained mixed issues of law and fact, including constitutional issues. He nevertheless granted the motion to intervene and dismissed the action without ruling on the mixed issues of law and fact raised in pleadings to trial by a jury. The Supreme Court reversed the ruling granting the motions to intervene and to dismiss, and remanded the case to the trial court for trial of the mixed issues of law and fact raised in the complaint, answer and amended reply.

S. Raymond Horace, Jr. and Joseph Findley appeared for the appellant. *Philip A. Z Banks, Victor Hne, and Macdonald Krakue* appeared for the appellee.

MR. JUSTICE BELLEH delivered the opinion of the Court.

This is the second time this case has been dismissed by the lower court and brought before us on appeal. However this time it comes before us with another party having been added - the Republic of Liberia, by and through the Government of Liberia, represented by the Ministry of Justice, as intervenor.

The records of this case, certified and transmitted to us by the court below indicate that said case commenced with plaintiff/ appellant filing its complaint in an action of damages for breach of contract in the December A. D. 1987 Term of the Sixth Judicial Circuit Court, Montserrado County. The basis of the action, as gleaned from the complaint, was that a distributorship agreement was entered into on November 30, 1984, between defendant/appellee, on the one hand and plaintiff/appellant and The Liberian Distribution Company, on the other hand, whereby the latter two entities were appointed "main and sole distributors... for the sale and distribution in Liberia, of Monrovia Tobacco Corporation's product"; that starting in August 1986, appellee began selling and distributing its tobacco products to persons and firms other than appellant and the Liberian Distribution Company, which the appellant alleged was in violation or breach of the aforesaid distributorship agreement; and that as a result of this breach of the agreement, plaintiff/appellant suffered

special damages in the amount of \$778,215.50 as of the filing of its amended reply on January 20, 1988. This is the essence of appellant's case against appellee.

The facts of the case were set out at length in the previous opinion of this Court, read by Mr. Justice Junius who spoke for this Court on that occasion. See the *Abi-Jaoudi & Azar Trading Corporation v. The Monrovia Tobacco Corporation*, 34 LLR 22 (1988). Thus, we shall recall the essential details of the facts of the proceedings only briefly.

The action was instituted with the filing of the complaint, and rested on January 20, 1988 by appellant's filing of an amended reply. Meanwhile, defendant/appellee also filed a motion to dismiss appellant's action.

On January 19, 1988, appellant filed its resistance to the motion to dismiss. On the 26th of January, 1988, the judge of the lower court ruled dismissing the action. Appellant excepted to the ruling and announced an appeal to this Honorable Court, sitting in its March Term, A. D. 1988. After hearing of the appeal, this Court reversed the ruling of the lower court and remanded the case to the trial court with instructions to "resume jurisdiction and proceed with the hearing of the law issues presented by the parties; that is, the complaint, the answer and the amended reply." Here is what this Court said then:

"In reversing the ruling of the court below, we find ourselves constrained to remand the instant cause to the court below for further proceeding, beginning with disposition of law issues. However, in doing so, we wish to limit the lower court's authority and jurisdiction with respect to the two issues which were raised in the records certified to us and argued by the parties before us in order to obviate these issues coming before this Court again should this case be appealed a second time."

The case was resumed for the second time before His Honor.

J. Henrique Pearson, Assigned Circuit Judge of the Civil Law Court, Sixth Judicial Circuit, sitting in its September Term, A.D. 1988. Upon resumption of the case, the Republic of Liberia, by and thru the Government of Liberia, represented by the Ministry of Justice, by and through Jenkins K. Z. **B.** Scott, Minister of Justice, filed a motion to intervene and also filed an answer. Appellant filed its resistance and reply to the Republic of Liberia's answer. Arguments on the motion were heard and the motion was granted by the trial judge.

In the motion to intervene, the Republic of Liberia asserted that:

"(a) The Government is clothed with authority under the Constitution to enforce the laws of the Republic of Liberia and to manage the national economy and the natural resources of Liberia in such manner as shall ensure the maximum feasible participation of Liberian citizens under conditions of equality.

(b) It has come to the attention of movant that plaintiff instituted the foregoing suit based upon acts and action taken by movant consistent with Article 7, Chapter 2 of the Constitution of Liberia.

(c) Movant/intervenor has vested interest and stake in the outcome of the above cause of action as it grows directly out of the obedience by defendant to enunciated the policy of the Government of Liberia.

(d) The Tripartite Agreement not being consistent with the Liberianization Policy of the Government of Liberia is unenforceable.

(e) Movant/intervenor has a legal duty to ensure that contracts which run contrary to the laws and policy of the Republic of Liberia may not be enforced, and in the exercise of that duty, has the legal right to intervene.

(f) Movant/intervenor has a legal duty to protect persons and institutions whom it has directed to carry out its policies. The entire suit grows out of the policy implementation program of the Government of Liberia to Liberianize certain sectors of the Liberian economy and/or ensure greater participation by Liberians in certain sectors of the Liberian economy."

Appellant filed a twelve-count resistance, in which it contended that:

"(a) The entire motion, i.e. counts 1 to 7, had been passed upon by this Honorable Court during its March Term, A.D. 1988.

(b) The Government of Liberia has no standing under the law to intervene because the law on intervention relates to right of government agencies, not the Government itself, and maintains that even if this Honorable Court had not disposed of the issues raised in the motion, it is the Ministry of Commerce and not the Republic of Liberia, that should intervene under the appropriate circumstances.

(c) Plaintiff denies that it filed this action of damages for breach of contract based upon the acts and action taken by movant/intervenor.

(d) The Government cannot ordinarily be sued in keeping with the provisions of Chapter 66, Civil Procedure Law, Rev. Code 1.

(e) Plaintiff denies the averments contained in count 2 of the motion.

(f) The Liberianization policy referred to obviously was not intended to be implemented vicariously or substitutionally. The concept is based upon individual rights. Some person or persons, individual or individuals, company or companies are the ones referred to in the Constitution or as in the case of someone who has been granted such distributorship, not the Government serving as substitute.

(g) Intervenor has failed to indicate the laws and policies of the Republic of Liberia which the terms of the Agreement of November 30, 1984 are contrary to and that said contract is within the purview of the laws of Liberia, consistent with the general laws of contract and the Constitution of Liberia. And that the Government of Liberia is not clothed with authority under the Constitution to abrogate a contract between individuals, as the Agreement of November 30, 1984, by a motion to intervene.

(h) There must be some identifiable liability that Government would suffer from the judgment against defendant. Intervenor has failed to show any of its defined legal rights or other interest which would be violated, or adversely affected by plaintiffs recovery against defendant.

(i) The instant cause of action is entirely of a private nature and the intervenor's broad assertion that a Liberianization policy has been violated by the Agreement of November 30, 1984, is insufficient to permit the Republic of Liberia to intervene.

(j) The motion is untimely filed. According to the mandate, the judge was ordered to resume jurisdiction and proceed from hearing the law issues presented by the parties; that is, the complaint, the answer and the amended reply, nothing else. Hence, the trial court was without authority to entertain a motion to intervene."

In his ruling on the motion to intervene, the trial judge referred to section 1.3 of the Private Wrongs Law, Rev. Code 28, which provides that the Republic of Liberia shall not be liable for punitive damages. Although plaintiff in its complaint prayed for punitive damages, the judge permitted the Republic of Liberia to intervene as a party defendant. Moreover, Article 26 of the of the Constitution provides that suit against the Government shall originate in a Claims Court. The Private Wrongs Law, Rev. Code 28: 1.3(1), states:

"Subject to the exceptions stated in paragraph 2, the Republic of Liberia shall be liable for an injury caused after the effective date of this title by acts of its employees acting within the scope of his employment, but shall not be liable for punitive damages."

Article 25 of the Constitution also states that the "obligation of contract shall be guaranteed by the Republic and no law shall be passed which might impair this right." Under Chapter 5, sub-chapter E, sections 5.61 and 5.62 of the Civil Procedure Law, intervention is either a matter "of right" or is "permissible"; but in either event, it must be timely applied for. Civil Procedure Law, Rev. Code 1:5.61 and 5.62

Under the statutory provision making intervention a matter of right, it is stated that intervention shall be allowed "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the actions, or when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of or subject to the control of the court, or

where the statute provides an unconditional right to intervene to the applicant." The quoted provision, however relates to the right of a permanent officer or agency and not to the Republic itself. This is clearly set out by section 5.61(b) which states:

"When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a Liberian government officer or agency, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency shall, upon timely application, be permitted to intervene".

Moreover, in exercising its discretion on whether to grant or deny a motion to intervene, the court shall consider the timeliness of the application.

In that connection, section 5.62(2) of the Civil Procedure Law provides, as follows: "In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties". Rev. Code 1:5.62 (2).

Firstly, the intervenor has not alleged in its motion to intervene or answer that in the event the appellant prevails over the appellee, the intervenor would be liable to either the appellant or the appellee in the damages suit. Instead, the intervenor is attempting, in violation of the law of the land, to expose the Government to suits and liabilities, not only in this case, but also in future cases. To put it in a layman's language, the intervenor is begging for suits to be brought against the Government, contrary to the prescribed methods laid down for that purpose. This Court will not countenance or be a party to it.

Secondly, we note that intervenor, the Government of Liberia, has advanced and relied substantially as a basis for its alleged right to intervene in this action that it "has a vested interest and stake in the outcome of the above cause of action...." Therefore, it appears to us that the first line of inquiry by the trial judge of the lower court on the motion to intervene should have been a determination of the kind of interest that one who proposes to intervene in an action is required to show under the law. We are not helped by our body of case law on this point. Nevertheless, there is a Liberian statute on intervention and there is foreign case law on the interpretation of statutes which are similar to the Liberian statute on intervention. In this regard, we hereunder quote from 59 AM. JUR.2d:

"The interest necessary to support intervention is generally an interest in the subject matter of the original litigation..."

While the absence of any concise yet comprehensive definition of what constitutes a litigious 'interest' for the purpose of intervention has been noted, it has been declared that the interest in the subject matter of the litigation must be a substantial interest or an interest known and protected by law...One interested in an action is one who is interested in the outcome or result thereof because he has a legal right which will be directly affected thereby

or a legal liability which will be directly enlarged or diminished by the judgment or decree therein."

The interest here referred to is generally required to be direct and not consequential, and it must be an interest which is proper to be determined in the action in which intervention is sought" 59 AM JUR 2d, *Parties*, 138.

We also find the following in 59 AM. JUR.2d on the directness and immediacy of the character of interest required to be shown in order to be allowed to intervene:

"While, the intervention statutes of the states differ, there is a general concurrence in the decisions . . . that the intent which entitles a person to intervene in a suit between other parties must be in the matter of the litigation and of such direct and immediate character that the intervenor will either gain or lose by the first legal operation and effect of the judgment to be rendered between the original parties ...The interest must be one arising from a claim to the subject matter of the action or some part thereof. A person whose interest in the matter of litigation is not a direct or substantial interest, but is an indirect, inconsequential, remote conjectural, or contingent one cannot intervene..." 59 AM JUR 2d., *Parties*, § 139.

We have seen nothing in the records indicative of the kind and character of interest that the intervenor should have been required to show if it were allowed to intervene on the side of appellee. We also fail to see how the intervenor would be directly and immediately liable to pay any portion of a judgment which may be rendered against defendant/appellee. This action is an action of damages for breach of contract, a contract to which the intervenor was not a party and in which it has no direct pecuniary interest whatever. This is clearly shown from the pleadings of the parties.

Let us now look at the intervenor' s assertion that it has a "vested interest and stake" in the instant cause, and hence its right to intervene. The intervenor asserts that its right grows out of the "Liberianization Policy", as set forth in Article 7 of the Constitution of Liberia which states, as follows:

"The Republic shall, consistent with the principles of individual freedom and social justice enshrined in this Constitution, manage the national economy and natural resources of Liberia in such manner as shall ensure the maximum feasible participation of Liberian citizens under conditions of equality as to advance the general welfare of the Liberian people and the economic development of Liberia."

We cannot believe that the framers of the new Liberian Constitution intended that the above quoted provision, containing such a broad statement of national policy, would be applied directly so as to allow the Republic of Liberia to involve itself in litigations between private parties and thereby substantially and adversely affect their assertion of private contractual rights. Surely, it must have been intended that in order to give "teeth" to the above quoted

constitutional provision, enabling statutes would be enacted by the National Legislature and rules and regulations promulgated pursuant thereto, setting forth with some consistency such matters as the areas of the Liberian economy that are to be Liberianized, and when, how and under what conditions this process will take place.

Moreover this Court is of the opinion that the permission of the Republic of Liberia to intervene would certainly prejudice the interest of the Plaintiff and deprive it of an award of "punitive damages" which cannot be awarded against the Republic or the Government of Liberia in keeping with the Private Wrongs Law, Rev Code 28: 1.3, relied upon by the trial judge. The trial judge therefore committed a reversible error in granting the motion to intervene. Counts 6, 7, 8 and 9 of the bill of exceptions are therefore sustained. We hold accordingly that the motion to intervene should have been denied and is hereby denied.

Appellant also complains of the judge's ruling on the law issues in several counts of the bill of exceptions, some of which are as follows:

"1. That the judge did not pass upon the pleadings in reverse order and on all of the issues contained therein.

2. That although the case had been remanded with specific instructions that the court resume jurisdiction and pass upon the issues raised in the pleadings, the trial judge ignored said directive and dismissed the case without disposing of the issue of law.

3. That the judge reviewed issues of law that had already been passed upon in this Court's opinion of July 29, 1988, and ruled that the Government did have the right to interpose restrictions on a party exercising its right to a contract, which is a clear violation of Article 25 of the Constitution of Liberia.

4. That although this Honourable Court had ruled on the enforceability of the Tripartite Agreement of November 30, 1984, the trial judge ruled that said agreement was unenforceable because it was contrary to executive directives and public policy.

5. That the trial judge ruled dismissing plaintiff/appellant's action.

6. That although the Supreme Court had ruled that the contract upon which this suit is based is enforceable, the trial court ruled that it is contrary to the laws of the Republic of Liberia and thus illegal, void and unenforceable," without due regard to the Supreme Court's Ruling that the contention by appellee was untenable and that the breach complained of had occurred in August 1986, after Liberia had returned to democratic civilian rule. The judge ruled that the case involved 'attempt by the government of Liberia to Liberianize and have Liberians participate fully in certain areas of the Liberian economy', contrary to the averment in the complaint.

7. That whilst it is true that the government has an obligation to obey the commands of Article 7 of the Constitution, as the judge held, so also appellant maintains that the Government has an obligation to obey Article 11(a), (b) and (c) and Article 25 of the Constitution.

8. That the trial court held that under the executive laws, the President is granted broad powers and that said powers may be exercised by the issuance of Executive Orders or otherwise, depending on the circumstances of a particular situation to be taken, or he may act through any of the appropriate ministries or heads, as provided by statute, and that the trial court did not believe that certain sectors of the economy be opened to Liberians is a matter which requires any legislative enactment; and without any reference to any Executive Order of the President in this respect the trial court, dismissed appellant's suit.

9. That the court's ruling was clearly inconsistent with and contrary to Article 25 of the Constitution of Liberia which prescribes that obligation of a contract should be guaranteed by the Republic and no laws shall be passed which might impair this right.

10. That the trial court referred to several communications from the President of Liberia whereupon the trial judge based his ruling, without even hearing evidence.

11. That the trial judge, again without properly considering the issues raised in the intervenor's answer, dismissed the suit without hearing evidence on the communications pleaded and relied upon by the court in said ruling, and that although there were issues of 'mixed laws and facts' raised in the pleadings, the court determined said issues without the aid of a jury, contrary to Article 20(a) of the Constitution of Liberia."

Let us look at the ruling on the law issues. On sheet 2, paragraph 1 of the ruling, Judge Pearson stated: "To both answers plaintiff filed a reply and an amended reply. The issues raised in the reply to intervenor's answer are the same as were raised in the resistance to the motion to intervene and the motion to rescind and have already been disposed of in our rulings on the two motions. As to those issues therefore we shall only pass upon them in brief. Many of the other issues raised are mixed law and facts. Only those issues which are purely legal in nature shall therefore be made the subject of this ruling."

As can be seen from the foregoing, the judge maintained that appellant's reply to the intervenor's answer raised the same issues contained in its resistance to the motion to intervene which the court has already passed upon and which the court had already overruled; the judge also held that the other issues raised in the said pleadings are issues of "mixed law and fact." What is strange and baffling to this Court is why then did the learned judge dismiss the suit without referring said issues of mixed law and facts to a jury? The contradiction is obvious. Under the law of Liberia, such facts are determinable and should be determined by a jury under the direction of the court.

The statute provides that the right to jury trial "...shall be preserved inviolate...." Civil Procedure Law, Rev. Code 1: 22.1(1). In addition, Article 20(a) of the Constitution of Liberia provides:

"No person shall be deprived of life, liberty, security of the person, property, privileges or any other right except as the outcome of a hearing judgment consistent with the provisions laid down in this Constitution and in accordance with due process of law. Justice shall be done without sale, denial or delay; and in all cases not arising in courts not of record, under courts martial, and upon impeachment, the parties shall have the right to trial jury." LIB. CONST. (1986), art. 20(a).

Furthermore, the statute provides that "the court shall decide any issue not required to be tried by a jury unless it is referred to a referee to determine pursuant to chapter 24." Civil Procedure Law, Rev. Code 1: 22.1. Indeed this Court has held that cases involving constitutional issues can only be decided by the Supreme Court. It is therefore our holding that the judge erred in dismissing the suit without disposing of the mixed issues of law and facts with the aid of a jury. His ruling in this respect was reversible error and, hence, is hereby reversed.

The other part of the judge's ruling is, as we see it, a dissertation of his interpretation of certain articles of the Constitution. We refer specifically to articles 2, 3, 7, 95 and 11(c), which were referred to by the judge in his ruling on the motion to intervene and the intervenor's answer. Even though the judge's ruling thereon has already been overruled and reversed herein above, nonetheless, we deem it necessary to confirm that the Supreme Court shall be the final arbiter of constitutional issues. LIB. CONST. art. 66 (1986). Indeed this Court has held that cases involving constitutional issues are to be decided by the Supreme Court *en banc*. *Fazqab v. National Economy Committee et al*, 8 LLR 85 (1943)

Notwithstanding these clear guidelines, His Honour Judge Pearson went at length to interpret the constitutional issues raised by the intervenor in its motion and answer. However, since the ruling granting the motion with the intervenor's answer has been reversed, this Court does not find it necessary to deliberate further on those issues, as they have no further effect on the case as it stands between appellant and appellee.

In our opinion of July 29, 1988, this Court determined defendant's motion to dismiss this suit by reversing the ruling granting said motion. There being no dilatory issue raised in defendant's answer to defeat the complaint and dismiss the action and there being "mixed issues of law and facts" in the pleadings, it is our considered opinion that the ruling of His Honour, Judge Pearson, dismissing the case be and the same is hereby reversed and the case remanded with instructions to the court below to proceed with the hearing of the case before a jury under the direction of the trial judge on the mixed issues of law and facts raised and contained in the complaint, the answer and the amended reply.

Our distinguished colleague, His Honour Emmanuel N. Gbalazeh, Chief Justice of the Supreme Court of Liberia and His Honour Robert G. W. Azango, Associate Justice of the Supreme Court of Liberia, not being in agreement with our findings and conclusions, have each prepared separate and distinct dissenting opinions to be read and filed with the records of this Court.

The Clerk of this Court is hereby ordered to send a mandate to the court below to give immediate effect to this ruling. Costs ruled against appellee. And it is hereby so ordered.

Judgment reversed.

CHIEF JUSTICE GBALAZEH *dissents:*

I have again decided to withhold my signature from the majority opinion because it is preposterous to make the public believe that an Executive, a Liberian President, especially so under the 1986 Constitution, has no power to manage the economy and enforce the trade laws of his country. Furthermore, I fail to see, under the laws extant, where a judge is required to pass on all law issues raised in the pleadings before he can dismiss a case for lack of jurisdiction. In an attempt to address the issue, I present the facts as they are recorded in the court below.

The defendant, Monrovia Tobacco Company, and the plaintiff, Abi-Jaoudi & Azar Trading Corporation, on November 30, 1984, entered into a Tripartite Agreement by directive of the then Head of State and Chairman of the People's Redemption Council (PRC), C-I-C Dr. Samuel Kanyon Doe, as contained in his letter Ref. No. PRC-V/DM-2/321/"84, dated March 4, 1984.

I hereunder quote relevant portions of the letter, which gave birth to the tripartite agreement:

"...You will accordingly restrict the distribution rights for all tobacco products which your corporation is now marketing and may wish to market in Liberia, to the two rightful distributors, namely: The Abi-Jaoudi & Azar Trading Corporation and the Liberian Distribution Company with immediate effect."

Under the agreement, plaintiff was appointed the main and sole distributor for the sale and distribution in Liberia of Monrovia Tobacco Company's products, namely Captain Grant Shag Tobacco, the range of Gold Dollar cigarettes, and any other shag or cigarettes imported or packed by Monrovia Tobacco Company. The provisions of the tripartite agreement were respected until 1986.

Thereafter, the President of Liberia, Dr. Samuel K. Doe, issued a series of directives ordering that the defendant, Monrovia Tobacco Company, open the market to more

Liberians for the distribution of its locally-produced tobacco products. I quote the said letter for the benefit of this dissent:

"SKD-I/DM-4/164/'86

June 13, 1986

Madam Minister:

I have received several requests and reports regarding the distributorship of the Monrovia Tobacco Company's products. I have also noted that up to now there is no clear-cut policy regarding distributorship.

About two years ago, I issued a directive restricting distributorship of the Monrovia Tobacco Company's products to certain companies. At present there are several qualified and capable Liberian companies that could handle the distributorship now; two of which are the Sebah Rice Store and Win's Distribution Agency.

The previous directive is therefore rescinded. As of now, distributorship should be given to only Liberian companies that meet the necessary requirements.

Your immediate action is expected.

Faithfully yours,

Sgd. Samuel K. Doe.

PRESIDENT"

Predicated upon this directive from the President to the Minister of Commerce, the Minister of Commerce wrote and informed the defendant of the President's directives. The defendant wrote the President on the 7th day of July, A.D. 1986, informing him that it had "received a letter dated 23' June 1986 from the Acting Minister of Commerce in which he advised that it is your request that we appoint only Liberian companies as distributors of our products." The defendant, in its letter, also informed the President that "in compliance with your request in 1984, we had proceeded to appoint Messrs. Abi-Jaoudi and Azar Trading Corporation and the Liberian Distribution Company (LDC) as the two main and sole distributors authorized to lift stocks from our factory premises. Their appointment was based on a signed distributorship agreement, the terms of which require amongst other things a notice of nine (9) months from any of the parties in the event of a pending revocation to terminate the contract." The said July 7, 1986 letter state further: "We respectfully appeal to you to allow us a period of nine (9) months to enable us to honor our obligations under the present subsisting distribution agreement."

Following the July 7, 1986 letter to the President, the Deputy Minister of Commerce, Honorable Isaac L. George, on the 8th day of July, 1986, wrote the defendant the below quoted letter:

"I acknowledge receipt of your letter dated July 7, 1986, with reference to the President's mandate that the distribution of your products be given to only Liberian companies with particular reference to the Win's and Sabah Distribution Agencies.

In spite of our several discussions relative to the distributorship of these two agencies, you have consistently and deliberately refused to honor the directive of the President of the Republic of Liberia.

We consider your negative attitude in this regard as a direct challenge to highly constituted authority in the Republic. In view of your intransigence, we will have no other alternative but to order the closure of your factory and warehouse by Friday, July 11, 1986, at 12:00 p.m., if the President's directive is not implemented by entering into contractual agreement with, and the subsequent supply of your products to Win's and Sabah Distribution agencies.

The President has also been informed accordingly and you are therefore advised to govern yourself most appropriately.

Very truly yours,

Sgd.: Isaac L. George

DEPUTY MINISTER"

Upon the receipt of the July 8, 1986 letter, the defendant informed the plaintiff of Government's desire and defendant's predicament to include Liberian companies in the distributorship of its products. Because of defendant's dilemma, which was interpreted as a breach, the plaintiff instituted this suit of damages for breach of the distributorship (tripartite) agreement on the 4th day of December, A. D. 1987.

The plaintiff alleged that the defendant had violated the terms of the tripartite agreement by including other persons to distribute the defendant's products, which act it was alleged had caused losses to plaintiff. Plaintiff therefore prayed this court for special damages amounting to \$681,255.81, plus general and punitive damages.

The defendant contended, on the other hand, that the Government of Liberia had informed it that the said agreement of sole distributorship was in violation of the laws of Liberia, not in the best interest of the nation and against the public policy of the country, and the Government had warned that should the defendant persist in this violation of the laws, its businesses would be made the subject of closure. Accordingly, and in compliance with the directives of the Government of Liberia, defendant, while retaining plaintiff as a major distributor of its tobacco products, thus was forced to confer upon several other Liberian businesses the status of distributors. The defendant maintained further that the directive of the Government of Liberia, being in the category of *force majeure*, rendered the continued performance of the tripartite agreement impossible, and did not only excuse defendant from

the performance but made the said agreement legally invalid. Plaintiff, the defendant maintained could not therefore, as a matter of law, recover from defendant.

Defendant further asserted that the Government of Liberia had not only declared by statute unlawful agreements such as was executed amongst plaintiff, defendant and the Liberian Distribution Company, but it also made it a matter of public policy that only Liberians were eligible for consideration as sole distributors of tobacco products manufactured by defendant.

Plaintiff, being a foreign-owned enterprise, did not qualify for such sole consideration. Therefore, the tripartite agreement was rendered inoperative. Hence, defendant prayed that the entire cause of action be dismissed. To this answer, plaintiff filed a reply.

In addition to the answer, however, the defendant also filed a motion to dismiss the entire cause of action on the grounds that the trial court has neither the "power nor the jurisdiction over the present action, same being a subject growing out of acts done and performed by the appropriate Government authority".

To this motion, the plaintiff filed resistance contending that the action of the defendant was not based upon the orders of the Government of Liberia. After a careful review of the motion and the resistance the trial judge, His Honour Hall W. Badio Sr., sustained the motion and dismissed plaintiff's complaint and the entire action without reservation. To this ruling, exceptions were noted and an appeal announced therefrom to the March, A.D. 1988 Term of this Honorable Court.

During the aforesaid March A.D. 1988 Term of this Court, the appeal was heard and the Court ruled thus: "We find ourselves constrained to remand the instant cause to the court below for further proceedings, beginning with disposition of law issues. However, in doing so, we wish to limit the lower court's authority and jurisdiction with respect to the two issues which were raised in the records certified to us and argued by the parties before us in order to obviate these issues coming before this Court again, should this case be appealed a second time."

Immediately upon the resumption of the case in the court below, the Republic of Liberia, by and thru Counsellor Jenkins K. Z. B. Scott, Minister of Justice, filed a motion to intervene, together with an answer, contending that the action complained of and interpreted as a breach of the tripartite agreement was based upon the directive of the Government of Liberia, for the benefit of the Liberian People in keeping with the Constitution, and therefore prayed the trial court that the Republic of Liberia be made a party defendant.

A resistance to the motion to intervene was filed by plaintiff. The trial judge granted the motion and again dismissed the entire cause of action on grounds that the Constitution, having mandated the Government of Liberia, through the President, to formulate programs

by which Liberians can fully participate in the economic development of Liberia; the action of the President is legal. Therefore, the directive of the President being legal, an action of damages will not lie against the defendant. To this ruling, exceptions were again noted and appeal announced to the March A. D. 1989 Term of this Court.

After a careful study of the motion, resistance and the trial judge's ruling, I recognize the following issues, which were not considered by the majority in their judgment:

1. Whether or not the trial judge, His Honour J. Henric Pearson, erred when he granted the motion to intervene filed by the State and subsequently dismissed the entire cause of action?
2. Whether or not an action of damages will lie against the defendant/appellee under the facts and circumstances in the instant case?

In an attempt to address the issues stated *supra*, I shall commence with issue number one i.e. whether or not the trial judge, His Honour Henric Pearson erred when he granted the motion to intervene filed by the State and subsequently dismissed the entire cause of action? The answer is "no".

I strongly maintain that the trial judge, His Honour J. Henric Pearson did not err. Let us take a look at the authorities controlling intervention. According to Ballentine's Law Dictionary, the word "intervention" is defined as "the proceeding by which one not originally a party to an action is permitted on his own application to appear therein and join one of the original parties maintaining the action of defense, or to assert a claim or defense against some or all of the parties to the action as originally instituted." BALLENTINE'S LAW DICTIONARY (3'd ed. 1969) Moreover, our statute provides that:

"Upon timely application, any person shall be allowed to intervene in an action:

1. When a statute of the Republic of Liberia confers an unconditional right to intervene; or
- b) When the representation of the applicant's interests by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or
- c) When the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or an officer thereof" Civil Procedure Law, Rev. Code 1:5.61

Our statute further provides that: "When the constitutionality of an Act of the Legislature affecting the public interest is drawn into question in any action to which the Republic of Liberia or an officer, agency, or political subdivision thereof is not a party, the court shall so notify the Attorney General or a County, District, or Territorial Attorney, who shall have the right to intervene in support of the constitutionality of the statute." Civil Procedure Law, Rev. Code 1:5.64.

Additionally, this Court has held that under certain circumstances, a third party may be permitted to intervene in a case pending in a court prior to the rendition of the judgment where his rights and interests are or will be materially affected." *Jobns v. Witherspoon*, 9 LLR152 (1946). Furthermore, in the case *Gaddini v. Iskander et al.*, 19 LLR 490 (1970), this Court held that: "The right to intervene should be asserted within a reasonable time after knowledge of the suit in which it is sought is obtained. In exercising its discretion as to whether or not intervention shall be allowed, a court will consider whether intervention may unduly delay or prejudice the adjudication of the rights of the original parties to the suit."

Reference to the case at bar, the majority holds that the motion to intervene would certainly prejudice the interest of the plaintiff and de rive it of an award for punitive damages which cannot be awarded against the Republic or the Government, in keeping with the Private Wrong Law, Rev. Code 28: 1.3. (emphasis mine). This contention of the majority raises numerous doubts as to their interpretation of the statutory provisions and the holdings of this Court in the cases cited *supra*. This Court has held that in exercising its discretion as to whether or not intervention shall be allowed, a court should consider whether intervention may un-duly delay or prejudice the adjudication of the rights of the original parties to the suit. Does this mean then that only the interest of the plaintiff should be protected, or the interests of both parties, plaintiff and defendant? I am of the firm conviction that the interests of both parties should be taken into account if we wish to continue to be neutral as a Court. Considering further, the records show that the tripartite agreement was adjusted based upon the orders of the Government of Liberia, through the President, Dr. Samuel K. Doe, as can more fully be seen from the letters quoted *supra*. I maintain that the denial of the motion to Intervene certainly prejudiced the interest of the defendant, as it would be made to pay damages for an act which was beyond its control. Therefore, I am in complete disagreement with the majority.

The majority, relying on the Civil Procedure Law, Rev. Code 1: 5.62(2), in support of their holding that the appropriate agency of Government to intervene in the instant case should have been the Ministry of Commerce and not the Ministry of Justice since, according to them, the latter only serves as the prosecuting arm of Government, disappointingly failed to realize the existence of section 5.64, of the Civil Procedure Law, which clearly provides that when the constitutionality of an act of the Government or Government Agency is drawn into question, the Attorney General or County, District or Territorial Attorney, shall be invited to intervene in support of the constitutionality of the said act. Referring to the case at bar, the constitutionality of the President' s directive of June 13, 1986 is drawn into question. Which Agency of Government then is clothed with the authority to intervene? I strongly believe that that agency is the Justice Ministry, headed by the Justice Minister, and not the Minister of Commerce as erroneously contended by the majority. Hence, I disagree with the

majority in denying the motion to intervene simply because the Minister of Commerce did not intervene.

As to the point of the timeliness of the motion, I maintain that the motion was filed within reasonable time and, therefore there is no legal basis for the majority's decision to deny it.

Consequently, I consider the issue before this Court to be whether or not the President of Liberia had the constitutional right to direct and order the adjustment of the tripartite agreement to include Liberian companies. The Minister of Justice should have been permitted to intervene in support of the President's directive. Any attempt to deny the intervention of the State or Government to defend the constitutionality of the President's act amounts to declaring the said act unconstitutional by this Court of last resort. While addressing myself on this point, that is, whether or not the President, Dr. Samuel K. Doe, had the constitutional right to regulate commerce, enforce trade laws as well as recommend the termination of an illegal contract, I shall first of all take a brief historic look at the Liberian Judiciary in order to provide the answer to this question.

The history of the Liberian Judiciary dates as far back as the founding of this nation, and can be divided into several major periods. However, for the purpose of this dissenting opinion, I shall focus on the periods between 1950-1971, 1972-1980, and that which runs from 1986 to the present. During the period between 1950 to 1972, the President of Liberia, the late Dr. William V. S. Tubman adopted the Open Door Policy. Under that Policy, the primary objective of the nation was to encourage foreign investors. Hence, most of the opinions of this Honourable Court were aimed at encouraging and protecting the interest of investors, particularly foreign investors .

At the close of the Tubman era and the subsequent commencement of the Tolbert era, the Liberian society witnessed the maintenance of the Open Door Policy, but with the modification that Liberians be given the opportunity to fully participate in the economic development of the country. With the introduction of this concept, we again saw the decisions of the Honorable Supreme Court taking a new trend; that is, encouraging and protecting Liberian investors. The authors of the 1986 Constitution having carefully assessed the two periods mentioned *supra*, realized that the development during the Tolbert era was in the best interest of the nation, Liberia. Accordingly, they provided under Article 7 of the Constitution of Liberia that:

"The Republic shall, consistent with the principles of individual freedom and social justice enshrined in this Constitution, manage the National Economy and the National Resources of Liberia in such manner as shall ensure the maximum feasible participation of Liberian citizens (emphasis mine). LIB. CONST., art. 7 (1986).

Predicated upon this provision, the President, Dr. Samuel K. Doe, in June 1986, directed the Ministry of Commerce to order the modification of the tripartite agreement of 1984, which gave the plaintiff (a non-Liberian) the rights to sole distributorship of all products of the Monrovia Tobacco Company, and to grant to qualified Liberian companies the right to distribute the products of the defendant. I am of the considered opinion that the President has the constitutional right to regulate commerce and to enforce the trade laws of this country, particularly where a contract is found to be in violation of an existing statute as well as against public policy.

The phrase "public policy" is defined further as "the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare." 17 AM JUR. 2d., *Contracts*, § 175. The 1986 Constitution, having empowered the Government to formulate policies whereby Liberians can fully participate in the economic development of this Country, the Government, through the President, ordered the adjustment of the tripartite agreement and the subsequent inclusion of Liberians in the distributorship contract of the Monrovia Tobacco Company's products. The measure was intended to improve the financial position of Liberians and to avoid the absolute control over the Liberian economy by foreign businessmen, most of whom are financially able and stronger than their Liberian counterparts. This trend of development, being in the supreme interest of Liberians, I hold that the contract is against public policy. It has been held that "An agreement may be void and of no legal effect because public policy forbids that a contract be entered into with respect to the subject matter." See *Cohen v. Mayflower Corp.*, 196 Va 1153, 8.6 SE 2d 860.

I further disagree with the majority in denying the motion to intervene on the ground that the granting of the motion will prejudice the interest of plaintiff since punitive damages cannot be assessed against the Republic of Liberia. The majority should have dwelled on determining the nature and constitutionality of the President's directive.

As to issue number two, whether or not considering the facts and circumstances in the instant case, an action of damages can be maintained against the defendant, the answer is "no". This is so because it has been held that:

"Contracts are not enforceable where the subject, operations or tendency thereof violates public policy or the established interest of society." *Parkins v. Hegg*, 212 Minn. 3NW 2d 671 Additionally, it has also been said that "a court will not grant any relief to a plaintiff who rests his claim on an agreement which is against public policy." *Beit v. Beit.*, 135 Conn. 195, 413 A.2nd 161, 65A, 2d 171, 10 ALR 2d, 734.

In the instant case, the records reveal that the agreement upon which the plaintiff rested its claim was against public policy and therefore, the judgment of the court below dismissing the cause of action should be affirmed and confirmed, most especially where the tripartite agreement which is alleged to have been breached by defendant clearly provided that: "It is

mutually agreed and understood that in the event of the happening of any event beyond the control of either of the parties, including any Government Order or Decree, which shall make it impossible for either party to fulfill the terms of this agreement, then in such case the party so prevented from fulfilling the terms of this agreement shall be relieved of the relevant obligation imposed by this agreement. (*See* Tripartite Agreement, Article 6, page 2, FORCE MAJEURE). (Emphasis mine).

I conclude therefore that the motion to intervene filed by the Minister of Justice in defense of the constitutionality of the President's directive to modify the tripartite agreement to include others should have been granted, and the entire cause of action dismissed; especially so, where the records had clearly shown that the said agreement, which alleged breach gave birth to this suit, was entered into upon the orders of the same person, Dr. Samuel K. Doe, who then served as Head of State and Chairman of the People's Redemption Council. It was the same Dr. Samuel K. Doe, who in 1986 instructed the adjustment of the 1984 tripartite agreement in his capacity as President of the Second Republic, in consideration of the constitutional provision quoted *supra*. I believe we will be creating a paradox, wherein at a certain point in time we recognized that the President has the power to control commerce and enforce the trade laws of this country, while at other times we can reject or deny that the President does have power to regulate commerce and the enforce trade laws. Let us remember that with these inconsistencies, we are making a mockery of our judicial system and will further be setting a dangerous precedent.

For the several reasons which I have stated herein, I find myself unable to agree in remanding the case to the court below for a jury trial. Therefore, I voted to affirm the trial court's ruling and have thus prepared and filed my dissent to the decision of the majority of my brethren of the Bench.

Editor's Note: Even though Mr. Justice Azango had intimated that he would be filing a separate dissent, he did not. Instead, he merely did not sign the judgment.