EMIRATES TRADING AGENCY COMPANY, represented by its Counsel, Gbaintor & Associates Law Firm, Appellant, *v.* **GLOBAL AFRICA IMPORT & EXPORT COMPANY**, by and thru its Managing Director, Morris A. Sackor, its Agents And Any Other Authorized Officer, Appellee.

APPEAL FROM THE RULING OF THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: March 18, 2004. Decided: August 16, 2004.

1. A judge of concurrent jurisdiction cannot review the act of his predecessor.
2. A judge acts wrongly in ruling in a matter which runs contrary to that made by his predecessor in the same matter.
3. No circuit judge has the power to review, modify, or rescind any decision by another circuit judge who is of the same official hierarchy on any point already passed by him however erroneous the act of his colleague may be.
4. The authority to review the ruling of a circuit court judge lies only with the Supreme Court.
5. The judgment of a lower court can only be reviewed, reversed or modified by a higher judicial forum, namely, the Honourable Supreme Court of Liberia.
6. The Supreme Court has the authority to render whatever judgment the lower court should have rendered.
7. A written agreement to submit to arbitration any controversy existing at the time of the making of the agreement or any controversy thereafter arising is valid, enforceable without regard to the justiciable character of the controversy, and irrevocable except upon such grounds as exist for the revocation of any contract.
8. Where the parties to a contract agree to submit any dispute arising out of the contract to arbitration as a means of settling their dispute, the courts will enforce such provisions of the contract.
9. The Liberian Constitution, at Article 25, states that the obligations of contract shall be guaranteed by the republic and no laws shall be passed which might impair that right.
10. Settlement is defined as adjustment or liquidation of mutual account; the acts by which the parties who have been dealing together arrange their accounts and strike a balance.
11. An important element of settlement under contract law is that there be full and final payment or discharge of an account.

Emirates Trading Agency Company, appellant, sued out an action of damages for breach of contract against Global Africa Import and Export Company, appellee, claiming amounts of US$609,005.00 and US$42,000.00 as balances due under a contract for the sale of rice and

an MOU for the purchase of gold dust, respectively. In response, the appellee prayed for the dismissal of the suit, contending that under the contract the parties had agreed to submit any disputes growing out of the contract to arbitration and which is in conformity with the Constitution and decisions of the Supreme Court, but which the appellant had failed to honour. The appellant, while acknowledging that the sale of rice contract provided for arbitration in the event of a dispute, contended nevertheless that the arbitration provision was not applicable since it had been superseded by a subsequent Letter of Understanding executed by the appellee, under the terms of which the appellee had made a new commitment to the appellant relative to the payment of amounts which it had defaulted on and which was previously the subject of a dispute.

The trial judge denied the motion to dismiss the action and ruled the case to trial. However, the succeeding trial judge reviewed the motion anew and granted the same, ruling, firstly, that as provided in the sale of rice contract the parties should go to arbitration and, secondly, that the appellee was not liable to the appellant since the goods for which the appellant was claiming the value of had never been delivered to the appellee.

The Supreme Court, in its review of the matter on appeal, held that the succeeding judge had erred in reviewing the ruling of his predecessor and acting contrary to his predecessor's ruling, the two of them being of the same rank. The Court noted that a judge of concurrent jurisdiction is without the authority to review, modify or rescind the ruling of his predecessor in the same matter. That review, the Court opined, was solely within the purview of the Supreme Court, the higher judicial forum.

The Court held, however, that as it had the power of review, it would determine whether the first trial judge was correct in denying the motion to dismiss the action. The Court stated that the trial judge had erred in that the parties having agreed that their dispute would be submitted to arbitration, they were bound by the agreement and the court was obligated to respect, uphold and enforce the provisions of such agreement, a right guaranteed by the Liberian Constitution which prohibits the Legislature from passing any laws impairing contractual obligations. The subsequent Letter of Understanding, referred to by the appellant and signed only by the appellee, the Court averred, did not supersede the sale of rice contract. The Court noted further that there were several other issues which the parties had raised and which were outstanding, but which were not covered by the Letter of understanding, and hence still governed by the arbitration clause of the sale of rice contract. Accordingly the Court denied the appeal, dismissed the case and directed that the parties proceed to arbitration

William A. N. Gbaintor of Gbaintor & Associates Law Firm appeared for the appellant. *Snonsio F. Nigba* of Legal Services, Inc. appeared for the appellee.

MR. JUSTICE KORKPOR, SR., delivered the opinion of the Court

Emirates Trading Agency Company, hereinafter referred to as "ETA", the appellant in these proceedings, and Global Africa Import & Export Trading Company, hereinafter referred to as "Global", the appellee, entered into a contract on December 3, 2001 for the sale of 4,000 metric tons of rice worth US$1,332,000.00. On the same day, the parties also executed a Memorandum of Understanding (MOU), under which Global agreed to procure gold dust from Liberia and after preliminary quality tests to determine purity, to send it to ETA for refining and sale at the best prevailing market price. Each party was required to give proper account for all costs and incidental expenses incurred before the sale of each consignment. Actual profit and loss were to be shared by both parties equally.

Under the terms of the sales contract for the 4,000 metric tons of rice, it was agreed that payment would always be effected before delivery; that ETA would ship the rice to a warehouse in Monrovia and shall remain the sole owner of the cargo in the warehouse; that title to said cargo would be transferred to Global only to the extent of payment made to ETA. It was further agreed, under the sales contract, for the rice, that ETA had the full right to re-sell or transfer the entire cargo or any portion thereof, as the case may be, to any party within or outside Liberia, directly or through a third party, and that Global was not to do or cause any act which will prejudice or harm the right of ETA in the event of re-sale or transfer of the cargo not paid for by Global within any agreed period. The contract required that the buyer deposits US$150,000.00 in guarantee of buyer's performance of its obligations. Specifically, the contract provided that "the amount be used by the seller to compensate against any losses or additional costs incurred by the seller as a result of buyer's non-performance. . ." It was also agreed under the sale contract that "disputes, if any, arising out of this contract to be settled amicably between the seller and buyer failing which arbitration as per English law will be applicable."

The parties, on July 6, 2001, entered into a third contract known as the storage supervision agreement. Under that agreement, the consignment of rice was to be stored in a bonded warehouse at the Freeport of Monrovia and manned by Global and BIVAC International, ETA's representative in Liberia. Each party was required to provide one padlock to be placed on the door of the bonded warehouse to ensure that Global would make prepayment for the rice to ETA through BIVAC for any and all quantities of rice before BIVAC released the consignment. In other words, Global would pay for the rice in advance before the parties would proceed to the warehouse to open their respective padlocks for Global to receive the consignment paid for. ETA alleges that this control system worked well until Global unilaterally took exclusive control of the bonded warehouse.

Dispute then arose concerning Global's alleged failure to make certain payments to ETA in keeping with the contract for the sale of the rice and the MOU for the purchase of gold dust. This led to a letter of undertaking written to ETA by Global on September 25, 2002. In

the letter of undertaking Global promised to settle the outstanding amounts due to ETA and specified in the Letter of Understanding, within one month from the date of the letter, same being September 25, 2002, failing which ETA shall have all rights to recover the money "in any manner deemed fit by ETA without prejudice to their rights under the existing contract." Global failed to settle the outstanding amounts in one month as promised.

Consequently, ETA filed an action of damages for breach of contract against Global, alleging that Global breached the contract for the sale of rice and the MOU for the purchase of gold dust. ETA claimed the amount of US$609,000.00 as balance due it under the contract of sale of rice and the amount of US$42,000.00 as balance due under the (MOU) for the purchase of gold dust. The total claim of ETA amounts to US$651,000.00.

Global filed its answer denying the complaint, contending that the parties having agreed under the terms of the contract to seek arbitration in case of dispute, the action of damages filed by ETA should be dismissed; that the complaint was not certain and definite, both as to the amount claimed and conditions said to have been performed by ETA; that under the terms of the contract for sale of rice, ETA could not recover for goods not paid for by Global and not delivered to Global; that the nature of the contract between the parties required reconciliation of accounts to make certain of any claim before a demand could be made by any party. Simultaneously with the filing of its answer, Global filed a motion to dismiss the complaint. For the benefit of this opinion, we quote counts 3, 4, and 5 of the motion to dismiss, as follows:

"3. Movant submits that said agreement provides for Arbitration. The last paragraph of said agreement provides that: "Disputes, if any, arising out of this contract to be settled amicably between the seller and the buyer failing which arbitration as per the English law will be applicable. All other terms and conditions not in conflict with the above to be as per the English law."

"4. Movant further says that the Constitution of the Republic of Liberia guarantees obligations of private contracts and that no laws shall be passed which might impair this right. Movant submits that respondent, consistent with said contract, should have first submitted the alleged dispute, which may have arisen to arbitration and then seek enforcement of the arbitral's award by a court of law. That the failure of respondent to do so makes respondent complaint a fit subject of dismissal."

"5. And also because, movant says that the Supreme Court of Liberia has held that a motion to dismiss a complaint on grounds that the agreement sought to be enforced or out of which the dispute arose provides for arbitration will be granted without prejudice to the plaintiff; this movant so prays. Moreover, court cannot enforce a contract in a manner other than expressed therein."

ETA filed its resistance to the motion to dismiss. We quote hereunder counts 3, 4, 6, and 12 of said resistance, hereunder:

"3. That as to count 3 of the purported motion, respondent admits that the sale contract executed by and between movant and respondent provides for arbitration, if and only if the parties can not settle disputes arising out of the contract amicably."

4.Further to count 3 of respondent's resistance above, respondent says and avers that by the provision of the subject contract, quoted above, the said sale contract has embellished in it a condition precedent; the occurrence of the said condition precedent, respondent submits, will produce an outcome different and distinct from the non occurrence of the said condition precedent."

"6. That respondent says and avers that in view of the facts and circumstances of this case, the next issue to be considered is whether or not the condition precedent occurred so as to entitle movant to the relief it now seeks by the institution of the motion pending before court? The answer to this question is no. The reason behind this answer is that the condition precedent, the occurrence of which would have compelled arbitration, is if the contracting parties had failed to resolve their dispute amicably. But in the instant case, the parties amicably settled their dispute, out of which amicable settlement grew the Letter of Understanding which was intentional-ly and voluntarily executed by the movant, and which letter of undertaking also authorized respondent to enforce recovery of its money from the movant thru any means including institution of an action. Furthermore, respondent submits that because the condition precedent did not occur, the necessity for arbitration was clearly dispensed with.

"12. That respondent submits that the amicable settlement reached at by the contracting parties on September 25, 2002, as a result of which amicable settlement Global Africa Import & Export Trading Company executed the Letter of Understanding, renders the arbitration clause inserted in the December 3, 2001 sale contract powerless and inapplicable. Therefore, plaintiff/respondent has the right to exercise any of the rights expressly granted it by Global Africa Import & Export Trading Company in the Letter of Undertaking, including resort to the court of law."

The motion to dismiss was heard by His Honour William B. Metzger, Sr., Assigned Circuit Judge, during the March, A. D. 2003 Term of the Civil Law Court, Sixth Judicial Circuit, Montserrado County. Judge Metzger denied the motion, to which ruling Global noted exception.

When His Honor J. Boima Kontoe took over the Civil Law Court, Sixth Judicial Circuit, Montserrado County, he assigned the case for disposition of law issues. In his ruling on the law issues, Judge Kontoe held that the parties should seek arbitration as provided for under the sale contract they signed. The judge also held that Global was not liable for goods not paid for and/or delivered. Further, the judge held that ETA did not plead the special damages prayed for with the required definiteness, particularity, and certainty in keeping with Liberian law. Judge Kontoe therefore dismissed the complaint in its entirety. To this ruling

dismissing ETA's entire complaint on the disposition of law issues, appellant excepted and announced an appeal to this Court.

During argument before us, the appellant contended that Judge Kontoe committed a reversible error when he ruled that the parties should revert to arbitration, the issue of going to arbitration having been passed upon by his predecessor, Judge William B. Metzger, Sr. The appellant maintained that a judge of concurrent jurisdiction may not review, modify, or undo the act of his predecessor. Hence, appellant said, it was wrong for Judge Kontoe to have ruled contrary to the position of his predecessor, Judge Metzger, on the issue of arbitration.

The appellant also contended that the arbitration clause under the contract for the sale of rice created a condition precedent so that arbitration would have been resorted to if, and only if the parties could not settle their dispute arising out of the contract amicably. The appellant maintained that when dispute arose between the parties, said dispute was amicably resolved. Hence, the arbitration clause became inapplicable.

The appellant further maintained that a clause in the Letter of Undertaking gives all rights to appellant to recover the outstanding money in manner deem fit by appellant including court action, without prejudice to the rights of the parties under the existing contract.

The appellee, for its part, contended that Judge Kontoe did not commit any reversible error when, during the disposition of the law issues, he ruled dismissing the action on ground that the parties should have submitted themselves to arbitration. The appellee also argued that in the clear language of the contract for sale of rice, payment for all goods were to be effected always before delivery, and that title will be transferred to the buyer only to the extent of payment made to the seller. The appellee therefore contended that it could not be held liable for goods not paid for and delivered. The appellee also contended that it made a deposit of US$150,000.00 in keeping with the contract for the sale of rice to be used by the seller to compensate against losses or additional costs incurred by the seller as a result of buyer's non-performance. The appellee maintained that the issue of its deposit of US$150,000.00 was never addressed.

Finally, the appellee contended that the complaint filed by the appellant is not definite, certain, and specific as to the amount of US$651,000.00 claimed and the conditions the appellant claimed to have performed under the contract for the sale of rice and the MOU for the purchase of gold dust. For that lack of certainty and definiteness, as required under our statute, the appellee asserted that the complaint was properly dismissed by the trial court.

The pertinent issues for our consideration in this case are:

1. Where an identical issue has been passed upon by a predecessor judge in a motion to dismiss, can a succeeding judge of concurrent jurisdiction rule contrary on the same issue during disposition of the law issues?
2. Is the ruling of Judge Metzger denying the motion to dismiss proper?

Our answer to the first question is no. The law in our jurisdiction is, and has always been, that a judge of concurrent jurisdiction can not review the act of his predecessor. In this connection, this Court has held that a judge acts wrongly in ruling in a matter which runs contrary to that made by his predecessor in the same matter. *Flomo and Kangbe v. Yancy and Baimba*, 31 LLR 464 (1983). In the case *Kpoto v. Kpoto*, 34 LLR 371 (1987), this Court was even more direct and specific on the issue when it held that: "No circuit judge has the power to review, modify, or rescind any decision by another circuit judge who is of the same official hierarchy on any point already passed upon by him, however erroneous the act of his colleague may be." Based on the authorities cited above, it is clear that Judge Kontoe was wrong to have ruled contrary to Judge Metzger's position on the issue of the parties proceeding to arbitration, the two judges being of the same rank and having concurrent jurisdiction.

The authority to review Judge Metzger's ruling lies only with this Court. In the case *Buchanan-Horton v. Belleh et al.*, 39 LLR 169 (1998), syl. 2, the Supreme Court held that "The judgment of the lower court can only be reviewed, reversed or modified by a higher judicial forum, namely, the Honorable Supreme Court of Liberia." And the Supreme Court has the authority to render whatever judgment the lower court should have rendered. *Lamco J. V. Operating Company v. Rogers and Wesseh,* 29 LLR 259 (1981).

So, let us now see whether the judge acted properly when he denied the motion to dismiss which was based on the premise that the parties having agreed under their contract to submit to arbitration, they should be allowed to do so. Our Civil Procedure Law, Rev. Code 1, at section 64.1, provides:

> "A written agreement to submit to arbitration any controversy existing at the time of the making of the agreement or any controversy thereafter arising is valid, enforceable without regard to the justiciable character of the controversy, and irrevocable except upon such grounds as exist for the revocation of any contract."

The most recent and controlling opinion on this position is found in the case *Chicri Brothers, Inc. v. Isuzu Motors* Overseas Distribution Corporation, 40 LLR 128 (2000). In that case, this Court held that where parties to a contract agree to submit any dispute arising out of the contract to arbitration as a means of settling their dispute, our courts will enforce such provisions of the contract. To our mind, section 64.1 of our Civil Procedure Law is validated by the *Chicri Brothers'* case.

Applying Section 64.1 of the Civil Procedure Law and the Supreme Court's ruling in the *Chicri Bothers* case, and considering that the appellant and appellee had agreed to submit to arbitration any dispute or disagreement arising from the contract for the sale of rice, this Court holds that the agreement of the parties should be respected and upheld. Our Constitution provides, at Chapter 3, Article 25, that the "obligation of contract shall be guaranteed by the Republic and no laws shall be passed which might impair this right."

There is no doubt that the parties in this case, under the contract for the sale of rice, agreed that in case of disputes, if any, arising out of the contract, such dispute(s) should be settled amicably between them, failing which they should proceed to arbitration under English law. While we agree with the appellant that arbitration, as provided for under the contract for the sale of rice could only be resorted to when the parties fail to settle their dispute, we do not agree that there was settlement of the dispute which arose between appellant and appellee so as to vitiate and nullify the arbitration clause. Indeed, there was an attempt to settle, but there was never a settlement. This is exactly the reason for the arbitration clause under the contract for sale of rice — that in the event there is no amicable settlement, then the parties will submit themselves to arbitration. It is paradoxical to say that there was amicable settlement between the parties, yet the appellant is seeking remedy against the appellee in court.

Settlement is defined as adjustment or liquidation of mutual account and the acts by which parties who have been dealing together arrange their accounts and strike a balance. BLACK'S LAW DICTIONARY 1231 (5th ed., 1979). An important element of settlement under contract law is that there be full and final payment or discharge of an account. In the instant case, there was no final payment or discharge of an account Rather, there was an acknowledgment of obligation and an undertaking by letter on the part of one party to make settlement of outstanding amount to the other party. But that undertaking was never fulfilled. As such, we do not agree that the parties resolved or settled their dispute.

Moreover, we note that in keeping with the Letter of Undertaking the outstanding amounts which the appellee agreed to settle was US$144,000 on the contract for the sale of rice, and US$42,000.00 on the MOU for the sale gold dust. The sum total of these amounts is far less than the amount of US$651,000.00, for which the appellant has sued. The question is how was the amount sued for, for which the appellee did not give express undertaking to settle, derived? The answer can only be that the Letter of Undertaking did not fully address the entire alleged claim of the appellant in this case. And, if there are amounts included in the appellant's claim that were not addressed in the Letter of Undertaking, then these amounts are not outside of the arbitration clause under the contract for the sale of rice and must therefore be made subject of arbitration between the parties.

The appellee contended that it made a deposit of US$150,000.00 to be used by the seller to compensate against any losses or additional costs incurred by the seller as a result of the buyer's non-performance. This amount was not mentioned in the Letter of Understanding. We hold that this amount too is not outside of the arbitration clause and therefore must be made subject of arbitration.

There were several other issues raised by the parties herein. However, because we have decided that the controlling issue in this case borders on arbitration, and having decided that the parties should proceed to arbitration, we do not deem it necessary to pass on the other issues.

Wherefore and in view of the foregoing, this Court holds that the parties having agreed to settle their disputes by submitting to arbitration under the English law, they must proceed to do so. The action of damages for breach of contract is therefore dismissed. The Clerk of this Court is hereby ordered to send a mandate to the court below to give effect to this ruling. Costs are ruled against the appellant. And it is hereby so ordered.

Appeal denied; case dismissed.