

## FEATURES

---

### **Sierra Leone Chamber of Commerce Industry and Agriculture get a lecture on "Legal and Regulatory Barriers to Private Sector Development in Sierra Leone"**

By Dr. Ade Renner Thomas  
Sep 21, 2005, 22:22

The Sierra Leone Chamber of Commerce Industry and Agriculture last Tuesday September 20th 2005 invited His Lordship the Chief Justice of the Republic of Sierra Leone, Dr. Ade Renner-Thomas to speak on the topic of "Legal and Regulatory Barriers to Private Sector Development in Sierra Leone" at the Chamber's Special Business Luncheon of 2005. The Chief Justice delivered an address that was very insightful and educative and touched on a number of important issues affecting the Sierra Leone Business Community. Awareness Times is reproducing the entire speech below:

Mr. Chairman, President of The Sierra Leone Chamber of Commerce Industry and Agriculture, distinguished ladies and gentlemen let me take this opportunity to congratulate the Chamber on this occasion of your First Special Business Luncheon 2005. I must also thank you for inviting me to speak on the topic: "Legal and Regulatory Barriers to Private Sector Development in Sierra Leone".

Before setting out to write this speech I tried to figure out the objective of the Chamber in selecting this topic. It immediately became obvious to me that members of Chamber and, may be their external partners also, must, at some stage, have come to the conclusion that one of the reasons why it has not been easy for the private sector in Sierra Leone to start new businesses or to expand existing ones is the prevalence of laws and regulations which serve as an obstruction or a bar to such launching or development.

However, I am sure members of Chamber will readily agree with me that laws are necessary for the good order of any society and to a certain extent businesses need to be regulated for social economic or other reasons: sometimes for the sole interest of Government as in the case of fiscal regulation; sometimes to ensure the survival of the very business sector itself or its customers as in the case of financial institutions such as banks etc; and, in yet other instances, purely in the interest of the public at large as in the case of price regulation, consumer protection or environmental control. In short not all laws or regulations are obstructive to development per se and indeed sometimes they are a necessary evil.

Whilst it is true that certain existing laws and regulations may be impacting negatively on the development of private sector business it is equally true that in certain areas of business the absence of clear-cut legal guidelines for the conduct of the relevant business may constitute an even greater

impediment to the development of business generally. A glaring example is the lack of a precise legal framework for attracting foreign investments into Sierra Leone and this despite the enactment in August 2004 by Parliament of the Investment Promotion Act, No.10 of 2004 which according to its short title, is:

*"an Act to promote and attract private investment both domestic and foreign for the development of production and value adding activities, to improve exports and provide employment opportunities and generally to create an environment conducive to private investment and to provide for other related matters".*

This is a statute to which I shall return later in this address.

Another preliminary observation I would like to make is that in talking about barriers to private sector development one has got to be clear in ones mind about which perspective one is speaking from. The barriers that a foreign entrepreneur operating within the private sector in Sierra Leone has to contend with are much more formidable than those likely to be faced by a domestic entrepreneur operating within the context of the same private sector.

In the same token, an entrepreneur, whether foreign or domestic, who opts to take advantage of the benefits of incorporation is likely to face many more legal and regulatory barriers than one who opts to operate within the context of an informal partnership or, better still, as a sole proprietor. Indeed, as will be demonstrated later in this paper one of the negative impacts of economically repressive laws and excessive regulation is to drive business from the formal sector into the informal sector.

Another decision I took in approaching my brief is this: rather than merely catalogue the laws and regulations that constitute a barrier to private sector development I decided that it might be more useful to highlight the fundamental aspects of the life cycle of the average private sector business and comment as I go along on how the existing laws and regulations or the absence of laws and regulations governing these aspects impact on the development of private sector business in Sierra Leone.

In selecting the aspects I am going to focus on I have been guided by those indicators utilized by the editors of the Doing Business Project. Doing Business is a World Bank project that investigates world-wide the scope of and manner of regulations that enhance business activity or those that constrain it. The project aims over a three year period that started in 2004 to

advance the World Bank Group's private sector development agenda by;

- i) focusing on the regulatory environment for businesses;
- ii) by highlighting what needs to be changed; and
- iii) by enriching international initiatives on development effectiveness.

The first in the series of three reports entitled "Doing Business 2004- Understanding Regulations" and the second just published entitled "Doing Business 2005- "Removing Obstacles to Growth" are recommended reading for any businessman seeking to do business in Sierra Leone or any where else in the world for that matter. Both could be accessed on the website "[www.doingbusiness.org](http://www.doingbusiness.org)". the third and final report is due out in 2006.

In the 2004 report the project focused on the laws and regulations as well as the cost and length of time spent by the average business on the following:

- i) Starting a new business;
- ii) Hiring and firing workers;
- iii) Getting credit;
- iv) Enforcing agreements; and
- v) Closing businesses.

In the 2005 report the focus is on the following:

- i) Acquiring property;
- ii) Dealing with government licenses and inspections; and
- iii) Protecting investors.

The third and final report will focus on:

- i) Paying taxes;
- ii) Trading across borders; and

### iii) Improving law and order.

I am sure you will forgive me if I deal with only some of these aspects of doing business in Sierra Leone if, for no other reason, at least, because of time constraint and because of the relative importance of some as compared with others. Secondly, I shall only be dealing with businesses operating or seeking to operate within the formal sector under the provisions of the Companies Act, Chapter 249 of the Laws of Sierra Leone, 1960.

## **STARTING A BUSINESS**

When an entrepreneur decides to start business in Sierra Leone by means of a limited liability company the bureaucratic and legal processes he has got to contend with are some of the first obstacles he has to surmount. The first observation is there is no single documentation, whether statutory or otherwise, that he can consult to inform him as to the legal and regulatory requirements he must comply with nor is there a one-stop shop to which he can address his requirements as is the case in many other even developing countries. Needless to say, the provisions of section 6 of the recently enacted Investment Promotion Act, No.10 of 2004, do not sufficiently address this problem as they merely provide that the entrepreneur shall on request be assisted by SLEDIC to obtain the various certificates needed to start such a business.

Even with the enactment of this new statute and the assistance of SLEDIC the bureaucratic and legal processes remain the same. Because of the existing provisions of the Companies Act, Cap 249 of the Laws of Sierra Leone, and those of other statutes such as the Exchange Control Act, Cap 256, the entrepreneur has got to contend with several issues and make so many decisions before he could have the business incorporated.

These include the following some of which I shall only highlight;

- Assembling the names, addresses and description of at least two or in the case of a public company seven, persons described as initial subscribers who must sign the memorandum and articles of association;

- deciding whether or not the business is going to include non-Sierra Leoneans; and

i) If so whether those non-Sierra Leoneans are

resident or not, because if they are not resident in Sierra Leone they have to show that their shares are been paid for in cash or in kind from external sources;

ii) If the non-Sierra Leonean is resident in Sierra Leone and he wants to pay for his shares in Leones then he needs to show evidence that those Leones were earned in Sierra Leone.

- deciding whether the Non-Sierra Leoneans are going to be in the majority, i.e. holding more than 51% of the shares , in which case the company becomes a non-citizen company and one of the incidences flowing from that is that under the provisions of the Non-Citizens (Interest In Land) Act, No 30 of 1966 the company can only own a reserved leasehold of twenty-one years in the Western Area;

- choosing a name for the new company taking into account the restrictions placed by law on the choice of names which therefore necessitates obtaining clearance from the Registrar of Companies for the use of the particular name or in certain cases obtaining the consent of the Minister of Trade and Industry if, for example, the name includes the words "Sierra Leone", "national", or any word suggesting a connection with the local or central government;

- drafting of the memorandum and articles of the company to include the name of the company with "limited" as the last word, the registered location of the company, the objects of the company bearing in mind that according to sections 6 and 7 of the Companies Act the memorandum of a company can only be altered in limited circumstances and even then after obtaining the sanction of the court; the memorandum must also state the amount of the share capital with which the company seeks to be registered and the division thereof into shares of a fixed amount. Though excepted in certain circumstances prescribed by law there is no minimum amount of share capital paid up or otherwise the amount stated will determine the amount of stamp duty payable on registration;

- the content of the sister document, the articles of association is also prescribed by law but the Act provides samples in the schedule thereto any one of which could be adopted or adapted to suit the requirement of the new company; the process for alteration of the articles laid down by the Act happily is much less cumbersome needing only a special resolution;

- the draft memorandum and articles of association together with

evidence of payment for the shares to be taken by any non-resident non-sierra Leonean must be forwarded to the Bank of Sierra Leone for approval for the issue of the shares of the company in accordance with some obscure and obsolete provision of the Exchange Control Act, Cap of the Laws of Sierra Leone; I say obsolete because in my over thirty years of practice in the commercial field I have never known of any case where the Central Bank has refused permission to issue shares;

- Once the letter of approval has been obtained from the Bank of Sierra Leone then the legal practitioner engaged in the formation of the company or the person named in the articles as a director or secretary of the company must in accordance with section 16 of the Companies Act make a statutory declaration, that is, under oath, that all the requirements of the Act in respect of registration have been complied with;

- After depositing the memorandum and articles of association duly signed by all the initial subscribers, the letter of approval from the Bank of Sierra Leone, the statutory declaration and various other relevant statements for filing and the payment of the requisite stamp duty and filing fees the Registrar of companies then issues a Certificate as conclusive evidence that the new company is duly incorporated in accordance with the provisions of the Act;

Despite all this lengthy procedure, and the procedure would have been much more complex if the new company was to be a public one, the entrepreneur is still not able at this stage to start his business. Pursuant to the provisions of the Business Registration Act, No.13 of 1983, he must first register and license the business. The application for the registration and the licence is made to the Registrar who for the purposes of the Act is the Administrator & Registrar-General. It is made in a prescribed form which according to Section 3(3) of the Business Registration Act must contain ten detailed particulars of the business such as the capital employed in the business the contribution of each shareholder and the estimated annual turnover. This latter information is used by the revenue authorities to assess the amount of tax payable even before the start of the business. A quarter of the amount assessed will have to be paid in advance before the Commissioner of Income Tax will issue the requisite statement that the proprietor has discharged his obligations under the Income Tax Act, No.8 of 2000. This statement must be obtained before the Registrar could issue the business registration certificate and the business licence after payment of the prescribed fee. The business licence is valid only till the 31<sup>st</sup> December in any particular year irrespective of the date the license is first issued. A similar statement from the Commissioner of Income Tax is reached when an application for renewal of the license is submitted to the Registrar.

After consultation with the Commissioner of Income Tax and with the concurrence of the Minister the Registrar may reject the application if not satisfied that the business is registrable or licensable for the first time or on a renewal. Prior to the decision the Registrar may require the books and accounts of the business to be produced for inspection. The applicant has a right of appeal to the High Court against the decision of the Registrar.

Section 12 deals with exemptions including those which could be ordered by the Minister and which must be published in the Gazette.

Under Section 11 the Registrar may for good cause cancel any registration or license and strike the name of any business off the Register.

I have taken the trouble to give details of the provisions of the Registration of Business Act, because it create in my opinion, quite a bureaucratic regime and vests tremendous power in the Registrar which could easily be wielded to frustrate the starting of a business or to stifle its continuance and further development.

It is not surprising therefore that the Heritage Foundation in its 2005 Index of Economic Freedom after a survey of 161 countries has categorised Sierra Leone as mostly unfree and even repressive in the field of business regulation ranking it at 135 amongst the worse in the world.

I shall now turn to the other indicators used by the Doing Business Project but without going into any detail, simply highlighting some of the obvious cases of laws and regulations obstructive to the development of private sector business.

The hiring and firing of workers which is the next indicator featured in the 2004 report is mainly governed in Sierra Leone by the common law and modified by the Regulations of Wages and Industrial Relations Act, No.18 of 1971 and the Collective Agreement reached between the representative of employers and the various Trade Groups established under section 7(i) of the Act. Of great concern here is the exact legal status of the collective agreements that have been recently negotiated by the certain trade groups. It is not always clear how representatives of the particular trade group are some of the employers who negotiates these collective agreements and to what extent they can bind other employers. Most times the provisions of certain collective agreements particularly in areas, such as minimum wage, medical and transport allowances, overtime and redundancies have no relevance to the economic conditions prevailing in the labor market. Other matters for concern in this area is the arbitrary increase from time to time of the fees payable for the issue of work permits to expatriate works and the conditions for the issue of residence permits.

I next turn to the acquisition of real property for the purposes of businesses in Sierra Leone. Two statutes are relevant here. As far as the Western Area is concerned mentioned has already been made of the Non-Citizens (Interest-in-land) Act, No.30 of 1966, which restricts non-citizens, and this includes non-citizen companies as defined earlier, from acquiring any interest in land greater than a reserved leasehold of a term not exceeding twenty-one years without first obtaining a licence from a Board consisting of the Ministers responsible for Trade and Industry, Lands, Finance, Development and the Attorney-General.

Though because of the provisions of Section 8(a) of the Act a mortgage of a freehold in the Western Area could be created in favour of a non-citizen lender such as a non-citizen bank under Section 8(b) of the Mortgagee wishes to foreclose it would need a licence from the Board failing which the freehold will vest in the Board and the Board

could cause the Sheriff to sell the same by public auction under section 5(i) of the 1966 Act.

The problems created by the provisions of the Provinces Land Act, Cap 122 is even more complex. Because of the definition of non-natives in the Act, as persons not entitled under customary law to rights - land in the Provinces all companies and other non-natural persons, whether citizens or non-citizens are automatically classified as non-natives. Thus, if two natives come together to incorporate their business they cannot according to section 4 of the Act own a greater interest in land in the Provinces than a term of fifty years with an option for renewal for a second or further terms not exceeding twenty-one years. Before acquiring such interest he must first obtain the consent of the Chiefdom Council and the approval of the District Commissioner failing which he can only hold the land under a tenancy at will which could be determined by either side without notice. There are other formalities relating to the content of the lease, the manner and persons before whom it should be executed and the registration of some non-compliance with which may render the lease voidable as happened in the now well-known case of *Agip v Ed Mask* which went as far as the Supreme Court.

Needless to say that in the context of Sierra Leone where interest in land is the most widely used form of collateral to secure loans and overdrafts these two statutes, the Non-Citizens (Interest-in-Land) Act and the Provinces Land Act, Cap 122, are crying out loud for amendment of the obstacles they constitute to development of private sector business particularly in the banking housing and agricultural sectors are concerned.

I may also add on the issue of obtaining credit for business Act, Cap. 122 is even more complex under Because of the definition of a non-natives in the interpretation section of the Act, i.e. a person not entitled under customary law to rights in land in the Provinces, all companies and other non-natural persons, whether citizens or non-citizens are automatically classified as non-natives. Thus, if two natives come together to incorporate their business they cannot, because of the provisions of section 4 of the Act own an interest in land in the Provinces greater than a term of fifty years with an option for renewal for a second or further terms not exceeding twenty-one years. Before acquiring such interest the non-native must first obtain the consent of the Chiefdom Council and the approval of the District Commissioner failing which he can only hold the land under a tenancy at will which could be determined there.

Having said that, it should be emphasized that there is a need for the, modernization of our laws relating to the creation of charges generally. The method of creating legal mortgages under our laws involving the conveyance of the legal interest of the mortgagor to the mortgagee subject to a proviso for reconveyance prevents the use of the mortgaged property as security for other credit and has no place in a modern financial environment. Perhaps with the improvement in the process of enforcing securities that will flow from the judicial reforms envisaged under the present administration financial institutions will be more disposed to accepting other forms of collateral apart from landed security.

The question of the number of licences that the average business is obliged to obtain and the fees payable therefore are a matter strictly of fiscal policy as determined by the government of the day. For obvious reasons I would not venture an opinion on this issue is that like taxation, if businesses are overburdened this will definitely have a negative impact on the economy generally.

In the 2004 Report of the Doing Business Project I referred to earlier the following statement of its findings is made:

*. "Taxes are essential to provide the public services and infrastructure that helps business and society to be more productive and better off. Still there are good ways and bad ways to collect taxes. Rich countries tend to have lower*

*business taxes and make them less complex. Simple, moderate taxes and fast, cheap administration means less hassle for business as well as higher revenues. In contrast, poor countries tend to use business as a collection point, charging higher taxes."*

Mr. Chairman, I next turn to the existing laws dealing with the issue of incentives to businesses. I had earlier referred to the Investment Promotion Act, No.10 of 2004 and its short title which contain very laudable objectives indeed. Sadly, when one examines the various provisions closely one is left with the impression that they are rather vague and not specific enough to attain the declared objectives of the Act.

A typical example is the treatment of the concept of incentives for investment. In Section 1 which deals with interpretation it is stated that the word "incentives" when used in relation to investment means *"the legal provisions designed to encourage investments and includes the conferment of any advantage in respect of particular investments"*.

After such a helpful definition there follows the substantive provision dealing with incentives in section 3 and this states as follows:

*"In addition to this Act, there are other enactments providing specially for investment in business enterprises concerned with tourism, banks, non-bank financial institutions, and other business activities, including such matters as the incentives for any such investments."*

How much more helpful it would have been if the relevant enactment had been listed in a schedule to Investment Promotion Act. The impression one gets is that there is no fixed and clearly laid-down policy of Government yet on the question of incentives and that for the time being tax exemptions and other incentives will continue to be given on a case by case basis with all the uncertainty that such a method involves.

Mr. Chairman, I have only highlighted some of the laws and regulations which tend to obstruct the development of the private sector in Sierra Leone. I wish to end with the findings and the thoughts of the editors of the 2004 Report of the Doing Business Project on the question of excessive regulation. It is their considered opinion that:

*"The countries that regulate the most-the poor countries - have the least enforcement capacity and the fewest checks and balances to ensure that regulatory discretion is not used to abuse businesses and extract bribes.*

*Regulation has a perverse effect on the people it is meant to protect. Faced with a large regulatory burden and few incentives to become formal, entrepreneurs in most developing countries choose to operate in the unofficial economy.*

[One may cite as a typical example the regulation of Foreign Exchange Bureaux. Because the relevant prescribes that only companies, association and Groups of persons could be licensed to conduct foreign exchange business and goes on further to state that all licensees must maintain a foreign currency account in one of the banks this has resulted in pushing the great majority of the dealers who incidentally are mostly sole proprietors, into the informal sector. I suspect more foreign exchange transactions take place in Sackville Street each day than anywhere else in Freetown.]

*It is hard for businesses to get credit or resolve disputes through formal institutions, such as courts. Growth is*

*inhibited because transactions take place only within a narrow group of established business relationships. The resources for delivering basic infrastructure are reduced because businesses do not pay taxes. There is no quality control of products.*

*The results: poor economic outcomes, a reduced tax base, a large group of entrepreneurs and businesses never entering the formal sector, and a general failure of the state to provide for its citizens. It is in the most heavily regulated counties that investment and productivity are low, and unemployment is high."*

I cannot agree more.

Mr. Chairman, Members of the Sierra Leone Chamber of Commerce, Industry and Agriculture, distinguished ladies and gentlemen I thank you for your attention.