

SUPREME COURT OF NIGERIA
5TH AUGUST, 1994. SC.282/1991.
CORAM:- M. L. UWAI, I. L. KUTIGI,
E. O. OGWUEGBU, S. U. ONU, Y. O. ADIO, JJSC.

LAGOS STATE DEVELOPMENT AND
PROPERTY CORPORATION

..... APPELLANT

AND

ADOLD/STAMM INTERNATIONAL
(NIGERIA) LIMITED

..... RESPONDENT

ARBITRATION - Arbitrator chosen by both parties - Whether to be removed on irrelevant allegation of anti government tendencies.

ARBITRATION - Interest - Arbitrator's award - Whether respondent is entitled to interest - Where leave to enforce the award was granted.

ARBITRATION - Misconduct - Alleged against the arbitrator - Where appellant prayed in the alternative that the award be remitted for the arbitrator's reconsideration - Allegation of misconduct declared an after thought.

ARBITRATION - Misconduct - Arbitrator's ex parte proceedings - Where appellants absence was willful - Whether the arbitrator misconducted himself.

ARBITRATION - Setting aside an award - Charges of anti government tendencies against arbitrator - Held not to affect the matter in principle - And to be founded on hearsay evidence.

CONSTITUTIONAL LAW - Inconsistency - Provision of an Edict - Inconsistent with s.274 of the 1979 Constitution - When declared void for inconsistency.

EVIDENCE - Admission of previous proceedings - S. 34(1) of the Evidence Act - Court's consideration of an arbitrator's proceedings - When compliance with the said section is not needed.

EVIDENCE - Affidavit evidence - Conflict therein - Where narrow flimsy

and irrelevant - Whether calling oral evidence was necessary.

PLEADINGS - *Illegality of contract - Not pleaded - Or raised before the arbitrator - Could not be associated with the arbitrator.*

PRACTICE & PROCEDURE - *Evidence given in previous proceedings Arbitration - Whether the court asked to determine the propriety of the arbitrator's proceedings - Can be stopped from relying on the past proceedings before the arbitrator.*

FACTS

The Appellant employed the Respondent to construct a specified number of housing units on a cost plus fee basis. The agreement provided that any dispute be referred to a single arbitrator in accordance with the provisions of the Arbitration Law of Lagos State. Differences arose and the contract was terminated. The Respondent applied to the High Court which appointed Dr. G.B. A. Coker (a retired Supreme Court Justice) to act as arbitrator without any objection by the Appellant's counsel. Two dates were fixed for the arbitrator to commence hearing after a preliminary meeting during which terms of reference were formulated and settled by both parties. The Respondent filed its papers and claimed a total of N5,666,122.91, claiming interest at the rate of 10% per annum. The Appellant filed no papers. On the first day of hearing, Appellant's counsel submitted that they were exploring possibility of effecting a change of the arbitrator, for not being satisfied with his nomination. The arbitrator adjourned to the next day for Appellant to call witnesses in applying for his removal. The arbitrator warned that the hearing would proceed in the absence of such application.

The Appellant and its counsel did not appear nor was any application made. The arbitrator proceeded with the hearing. Consequential damages were awarded in favour of the Respondent. The Appellant moved the Lagos High Court to set aside the award on ground of misconduct, or in the alternative to remit the award for reconsideration by the same arbitrator. Respondent sought for enforcement of the award. Both applications were consolidated. The court remitted the matter for hearing de novo by the same arbitrator. Both parties being dissatisfied appealed to the Court of Appeal. The court below remitted the case back to the High Court for determination before another judge. The case came before Ilori J. who granted leave to enforce the arbitrator's award. The Appellant appealed to the Court of Appeal which upheld Ilori J's decision but refused to order Appellant to pay interest on the award. The

Appellant has now appealed to the Supreme Court against the entire decision of the court below and the Respondent appealed against refusal to award interest. The apex court had to determine inter alia, whether the court of retrial was entitled to admit and use in evidence record of previous proceedings (Exhibit “A”) in determining the new trial.

HELD (Unanimously dismissing the Appellant’s appeal)

Charges of and government tendencies against arbitrator

1. In this case the appellant made charges of anti-Lagos State Government tendencies and hostility against the said government on the part of the Arbitrator as the basis for setting aside the award. These charges do not affect the matter in principle and are founded on hearsay evidence and they offend against sections 88 and 89 of the Evidence Act. (P.332 L.I9)

Irrelevant allegation - Conflict in evidence

2. In the present appeal, there is no ground for supposing that the Arbitrator was anti - Lagos State Government or at war with it. Assuming that the Lagos State Government was the appellant in this case, the materials before the court were not such that could debar the Arbitrator from acting as such in this case. To hold otherwise would open a wide door for all sorts of attempts to get rid of arbitrators deliberately chosen by parties to contracts. The conflicts in the said affidavits seem to me narrow flimsy and irrelevant. They were alien to the matter before the Arbitrator. There was therefore no necessity to call oral evidence in this particular case. (P. 333 L. 3)

Court’s reliance on proceedings before the arbitrator

3. In an order such as that made by the Court of Appeal remitting the case to the court below to be determined by another judge, there is no way that the arbitration proceedings would not be placed before the judge re-hearing the case whether the parties desired it or not. The propriety of the proceedings before the Arbitrator was what Ilori, J. was called upon to determine. It found properly conducted, to consider the enforcement of the award. The proceedings was part of Exhibit “A”. It had to be tendered. There could be no objection to its admissibility in evidence by counsel. (P.335 L.I 1)

When compliance with s. 34(1) of the Evidence Act is not needed

4. The only affidavit evidence referred to by the learned trial judge in his judgment was the two affidavits deposed to by the very counsel arguing the

motion. This case did not need compliance with section 34(1) of the Evidence Act because apart from the arbitration proceedings which in any case must be before the court, other issues referred to in Exhibit “A” were in the main legal submissions of counsel. Exhibit “A” was rightly admitted in evidence. (P.335 L.35)

Arbitrator’s ex parte proceedings

5. An arbitrator may proceed with a reference in the absence of one of the parties if he does not choose to attend. The party ought to have notice that the arbitrator will proceed ex-parte in the case if he does not attend. In this case, the appellant’s counsel was present on 25:8:82 and the Arbitrator’s ruling was sufficient notice. The absence of the appellant and its counsel to my mind was wilful. The Arbitrator by proceeding ex-parte acted fairly towards both parties and his conduct in so doing cannot be impugned. The objection has no basis and it is rejected. It cannot also be said that by proceeding ex-parte, the Arbitrator committed any misconduct. (P.337 L.26)

Unpleaded illegality of contract

6. The Arbitrator could not have been associated with the alleged illegality of the contract because that issue was not pleaded and it did not in any way arise throughout the proceedings before him. (P.339 L.3)

Void Edict for inconsistency with the Constitution

7. Section 2(2) of Edict No. 7 of 1976 of Lagos State not having been modified by the Governor of Lagos State pursuant to section 274 of the Constitution, is void for inconsistency. Section 2(2) of Edict No. 7 of 1976 is therefore inconsistent with the 1979 Constitution and to that extent, must be regarded as a provision which has lapsed or repealed by necessary implication. (P.340 L.24)

Allegation of misconduct against the arbitrator - An after thought

8. Of the various grounds of misconduct alleged by the appellant viz: the arbitrator being “at war” with the Lagos State Government and proceeding with the arbitration ex-parte, none was substantiated. There was no prayer for the appointment of another Arbitrator. If the appellant could pray the court in this alternative, the only conclusion one can draw is that it had confidence in the Arbitrator. In the circumstance, the allegation of misconduct was an after thought. (P. 340 L.32)

Interest on the arbitrators award

9. The respondent is entitled to interest. If the court below dismissed the appeal of the appellant and granted leave to the respondent to enforce the award made by the Arbitrator, the order made as to interest was part of the
5 award. The cross appeal succeeds and it is hereby allowed. (P.341 L.38
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NOTABLE POINTS OF INTEREST

OGWUEGBUJSC

10 ***Admission of evidence given in previous proceedings***

1. Cases of admission of evidence given in previous proceedings at subsequent trials have received judicial pronouncements in this Court. It is settled law that evidence of a witness in one case cannot be accepted as evidence of the truth in another case, except for the purpose of cross-examination. (P.333
15 L.24)

Whether there was improper use of Exh “A”

2. It would have been otherwise if the retrial was before an Arbitrator. The facts of this case are therefore distinguishable from those of the cases earlier
20 discussed in this judgment. It is clear to me that both learned counsel and the learned trial judge Ilori, J. did not make any improper use of Exhibit “A”. The missing counter-affidavit of the Arbitrator which was alleged to be in conflict with those of the appellant had been held by me to be of no consequence and of no probative force. It is therefore unnecessary to speculate on the effect it
25 would have had on the mind of the learned trial judge. (P.335 L.26)

Steps appellant’s counsel should have taken

3. From the above ruling, one or two step should have been taken by the learned counsel for the appellant. She should have applied to the court to
30 have the submission revoked or appeared before the Arbitrator on 26:8:82 to ask for an adjournment to enable her make the necessary applications to the High Court. She did neither. She ignored the proceedings of the Arbitrators until the award was made. The action of the learned counsel for the appellant was to say the least discourteous to the Arbitrator. (P.337 L.19)

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REPRESENTATION

Appellant unrepresented.

Chief F.R.A. Williams SAN, with Ladi Williams for the Respondent.

CASES REFERRED TO

Falobi v. Falobi (1976) 9-10 SC.1	
Akinsete v. Akindutire (1966)1 All N.L.R. 147 at 148	
Olu Ibukun & Or. v. Olu Ibukun (1974)2 S.C. 41 at 48	
Uku & Ors. Okumagba & Ors. (1974)3 S.C. 35 at 64-65	5
Belcher v. Roedean School Site & Buildings Ltd. 85L - T 468	
Osian v. Flour Mills of Nigeria Ltd (1968)2 All NLR 13	
Okupe v. F.I.B.R. (1974)AII N.L.R. 284	
Garba v. University of Maiduguri (1986)1 N.W.L.R. (Pt 18)550	
Okunlade v. Alade (1976)1 All NLR 67	10
Mogaji v. Odofoin (1978)3 SC 91	
Ikenyi v. Ofune (1985)2 NWLR (Pt 5)1 at pages 6-8	
Sanyaolu v. Coker (1983)3 SC 124 at 155	
Nahman v. Odutola (1953)14 WACA 381 at 384	
Alade v. Aborishade (1960) 5F SC. 169 at 171 - 173	15
Drew v. Drew (1885)2 Macq 1 especially at p. 3	
Harvey v. Shelton (1844)7 Beav. 455 at 462	
Bache v. Billington (1894)1 Q.B. 107	
Solanke v. Ajibola (1968)1 All NLR 46	
Myron v. Tradax S.A (1969)2 All E.R. 1267	20
re Smith & Service & Nelson & Sons (1890)25 Q.B.D 545 at 500	
re Baring Brothers & Co and Doulton & Co (1892)61 L.J.Q.B. 704;	
T.L.R.701	
Gladwin v. Chilcote (1841)9 Dowl 550	
Featherstone v. Cooper (1803)\$ VEs 67, 32 E.R, 526	25
Young v. Mayor of Leamington (1882)3 Q.B. 57£	
Mellis v. Shirley Local Board 16 Q.B.D. 446	
Salati v. Shehu (1986)1 NWLR 198	
Heynian v. Darwins Ltd (1942)A.C. 356	
Governor of Kaduna State v. Lawal Kagoma (1982)3 NCLR 1032 1032 at p. 1043	30
Elias v. Disu & Ors. (1962)1 All NLR 214	

STATUTES & RULES REFERRED TO

Arbitration Law Cap. 10 Laws of Lagos State 1973 ss.6(1) & (2), 3	35
High Court of Lagos State (Civil Procedure) Rules 0.42	
Evidence Act ss.87, 88, 89, 34(1), 135, 136(1)	
Public Contracts (Restriction On Award) (Amendment) Edict 1979 s.2 (2)	
Constitution of the Federal Republic of Nigeria, 1979 ss, 171, 173 (1), 174,	

Local Government Law of Kaduna State s.98(1)

Rules of the Supreme Court England, O. 59 r.13(2)

LEAD.JUDGMENT BY OGWUEGBU JSC

This is an appeal against the decision of the Court of Appeal, Lagos Division delivered on 24/9/90. The appeal arose from an arbitration proceedings between the parties.

By a deed of agreement dated 22/2/80, the Lagos State Development and Property Corporation employed Adold Stamm International (Nigeria) Ltd. to construct a specific number of housing units for the former on a cost plus fee basis. The plans and specifications were made part of the agreement.

The agreement provided in its Clause 17 that any dispute or difference in relation to the contract which might arise between the parties and which could not be amicably settled should be referred to a single arbitrator in accordance with the provisions of the Arbitration Law of Lagos State or any statutory modification thereof for the time being in force.

Differences arose and the contract was terminated. Adold/Stamm International Nigeria Ltd. applied to the High Court of Lagos State, Ikeja Judicial Division for an order that Dr. G.B.A. Coker, a retired Justice of the Supreme Court of Nigeria or some other fit and proper person be appointed to act as arbitrator under Clause 17 of the said agreement. The Lagos State Development and Property Corporation was the respondent in the said application.

On 22/2/82, Balogun, J. pursuant to Section 6(1) and (2) of the Arbitration Law Cap. 10, Laws of Lagos State 1973 and Order 42 of the High Court of Lagos State (Civil Procedure) Rules Cap. 52 appointed Dr. G.B.A. Coker to act as an Arbitrator.

The learned counsel Mr. Shade who appeared for the respondent - Lagos State Development and Property Corporation had no objection to Dr. G.B.A. Coker being appointed Arbitrator.

Both parties and their counsel held a preliminary meeting with the Arbitrator in his Chambers on 23/7/82. Mr. Ogundipe from the Chambers of Chief F.R.A. Williams S.A.N. appeared for the appellant (Adold/Stamm) and, a Legal Adviser to Lagos State Development and Property Corporation appeared for the respondent (L.S.D.P.C.) Each counsel outlined his case at this meeting and the terms of reference were formulated and settled by both counsel.

Hearing was fixed for 25th and 26th of August, 1982 with the agree

ment of both parties. The Arbitrator made an order respecting the filing of the respective papers and the deposit of N10,000.00 by each party towards the fees of the Arbitrator and the costs of the arbitration.

The applicant (Adold/Stamm) filed its own paper (Points of Claim) within time and claimed a total of N5,666,122.91. It also claimed interest on the above amount at the rate of 10% per annum from 10/3/81 until the date of payment. The applicant also paid its own deposit. The respondent (L.S.D.P.C.) neither filed its papers nor paid the deposit.

A day before the date fixed for hearing, the respondent's counsel (L.S.D.P.C.) wrote a letter to the applicant's counsel intimating him that they were not satisfied with the nomination of Dr. G.B.A. Coker as Arbitrator and that they were exploring the possibility of effecting a change. A copy of this letter was sent to the Arbitrator on the morning of 25:8:82 the day Arbitrator was to sit.

Counsel for both parties arrived at the venue of the arbitration and addressed the Arbitrator on the contents of the letter. This time, it was Mrs. A. A. Olagbende who appeared for the respondent. She also wrote the letter. She did not come with her witnesses.

After hearing arguments from both learned counsel, the Arbitrator ruled that since he had no materials of substance at the material time disintitling him from holding the arbitration and unless as could be otherwise advised or directed, the arbitration should go on. He adjourned the hearing to the next day 26/8/82 to enable Mrs. Olagbende bring her witnesses or make any further application or applications. He warned that in the absence of such application on explanation, the hearing would proceed.

The hearing proceeded on 26/8/82 as the respondent and its counsel did not put up appearance or make any application. The Arbitrator concluded hearing and adjourned sine die to make his award. On 18/10/82, he awarded consequential damages in favour of the applicant (Adold/Stamm) and fixed the cost of the arbitration at N2,500.00 payable by L.S.D.P.C.- the respondent. In addition, he fixed his fees at N25,000.00 to be paid by both parties in the proportion of N12,500 by each side. The notice of the award was sent to the parties on the same day.

The Lagos State Development Property Corporation (respondent) brought an application in the High Court pursuant to Order 40 of the High Court of Lagos State Civil Procedure) Rules for an order to set aside the award made by the Arbitrator on the ground of misconduct or, in the alternative, for an order remitting the award for re-consideration by the same Arbitrator.

The applicant in the arbitration proceedings (Adold/Stamm) filed an

originating summons before the court asking the court to enforce the award of the Arbitrator as a judgment or order to the same effect. Both applications were consolidated with the consent of both learned counsel. Balogun, J. after hearing arguments on both applications remitted the matter back to the same Arbitrator for hearing and determination de novo. Both parties were dissatisfied with the decision of Balogun, J. and appealed to the Court of Appeal, Lagos Division.

The court below allowed the appeal and remitted the case back to the lower court (High Court) for determination before another Judge.

The case came before Ilori J. who refused to set aside the award made by the Arbitrator. He granted the prayer for leave to enforce the award.

The Lagos State Development Property Corporation was dissatisfied with the decision of Ilori J. and appealed to the Court of Appeal. The court below dismissed the appeal and affirmed the leave granted by Ilori, J. to enforce the award made by the Arbitrator. The court below refused to order L.S.D.P.C. to pay interest on the award.

Dissatisfied with the decision of the court below, the Lagos State Development and Property Corporation appealed to this court against the whole decision. Adold/Stamm International Nigeria Ltd. also appealed to this court against the decision of the court below refusing to order the L.S.D.P.C. to pay interest on the award.

Briefs of argument were filed by the parties in accordance with the rules of this court. I will from now in this judgment refer to the Lagos State Development and Property Corporation as the appellant and Adold/Stamm International Nigeria Ltd. as the respondent.

From the grounds of appeal filed, the appellant identified the following issues for determination:

“(i) Is it proper for a court of retrial to admit and use in evidence record of appeal containing partial evidence, counsel’s submissions (and in particular submissions of counsel no more conducting the case) judgment of the court of 1st trial and to rely on all these to conduct and determine the new trial?”

(ii) What will be the effect of conflicting affidavit evidence in proceeding?

(iii) What is the effect of non-compliance with the enabling law on a contract and in this instance the Public Contracts (Restriction on Award) Law Cap.110 Laws of Lagos State, 1973 as amended by Edict No.7 of 1976 Lagos State. Can statutory obligation be waived?

(iv) What is the effect of illegality on an Arbitration clause?

(v) When is an adjudicator/arbitrator to proceed ex-parte against an absent or defaulting party and when will such proceedings amount to

misconduct on the part of the arbitrator?

(vi) *Can personal hostility by the arbitrator against any of the parties before him affect his award?*

(vii) *Will personal hostility of the Arbitrator against Lagos State Government affect the award?*

(viii) *When does personal hostility amount to reasonable possibility of bias on the part of an arbitrator to amount to misconduct to warrant an order to set aside his award?"*

The respondent formulated the following issues in its brief of argument:

(1) *Whether on the facts and materials established in the courts below it was open to the appellant to complain of-* 10

(a) *the appointment of the Honourable Mr. Justice G.B.A. Coker as arbitrator; or*

(b) *the alleged disqualification of the said arbitrator because there are grounds to entertain reasonable suspicion that he was biased.*

(ii) *Whether the affidavit evidence before the court below is capable of supporting the appellant's allegation that there was a reasonable probability of or a reasonable suspicion that the arbitrator was biased against the L.S.D.P.C.* 15

(iii) *Whether the appellant can be permitted to claim that the contract is illegal after he voluntarily consented to appointment of an arbitrator under clause of the very same contract.* 20

(iv) *Whether the contract upon which the respondent relied, was illegal or unenforceable.*

(v) *Whether the pleading and evidence put forward by the appellant are adequate to support his plea of illegality.* 25

(vi) *Whether the arbitrator acted rightly on the facts of this case in deciding to proceed with the arbitration in the absence of the L.S.D.P.C. or its representative.*

(viii) *Whether the court below was correct in refusing to order payment of interest."* 30

A total of fifteen issues were identified as arising for determination. While some of the issues formulated by the appellant were general in terms and in some respects hypothetical, those identified by the respondent were specific and to the point. All the fifteen issues can be considered under six broad compartments. 35

The appellant's issues (i) and (ii) will each be considered separately and so with the respondent's issues (vii).

The appellant's issues (iii) and (iv) will be dealt with the respondent's issues (iii), (iv) and (v). These deals with the effect of Public Contracts (Re-

striction on Award) Law, Cap. 110 Laws of Lagos State as amended by Edict No.7 of 1976 the transaction between the parties.

The court will consider the appellant's issue (v) with the respondent's issue (vi) which complained of the ex-parte nature of the proceedings before the Arbitrator and whether it amounted to misconduct.

- 5 The appellant's issues (vi), (vii) and (viii) and the respondent's issues (i) and (ii) will be taken together. They raise questions of bias and misconduct on the part of the Arbitrator.

At the hearing of the appeal, the respondent cross-appellant was represented by counsel. The appellant was absent and unrepresented. They 10 had notice of the hearing, Chief F.R.A. Williams S.A.N. who appeared for the respondent adopted the respondent's brief of argument and urged the court to treat the appeal as having been argued on the briefs.

Mrs. Ogunyemi had submitted in the appellant's brief that the court below ought to have held that there being irreconcilable conflicts in the affida- 15 vits sworn to by Oladele, Ogundipe and Dr. G.B.A. Coker, oral evidence ought to have been called to resolve the difference. She referred to the case of Falobi v. Falobi (1976) 9-10 S.C. 1; (1976) 1 NMLR 169 and that failure to do so ought to have called for an order of retrial by the court below. The court was referred to particular paragraphs of the various affidavits and counter-affidavits where 20 the conflicts occurred. The cases of Akinsele v. Akindutire (1966) 1 All N.L.R. 147 at 148, Olu-Ibukun & ors v. Olu-Ibukun (1974) 2 S.C. 41 at 48 and Uku & ors. Okumagba & ors (1974) 3 S.C. 35 at 64-65; (1974) 1 All NLR (Pt.1) 475 were cited and relied upon as instances where this court held that when a court is 25 first hear oral evidence from the deponents or other witnesses in order to resolve the conflict. It was submitted that the Court of Appeal dealt with the appeal without resolving the conflict and that this was wrong.

Chief Williams S.A.N. submitted that the rule in Falobi v. Falobi supra referred to in the appellant's brief comes into play only when the court is faced 30 with two contradictory but legally admissible versions of an event or occurrence in affidavit evidence, that the application of the rule does not arise where there is no conflict or where one of the versions of the event or occurrence is inadmissible in law and therefore worthless. He urged the court to take judicial notice that Chief (Dr) G.B.A. Coker has had a long, honourable 35 and distinguished career as a legal practitioner, a Judge of the High Court and a justice of the Supreme Court. He referred the court to the case of Belcher v. Roedean School Site & Buildings Ltd. 85 L.T. 468 as an excellent illustration of the quality or standard of evidence required. He further submitted that there was no probative force in the two affidavits relied upon by the appellant to

prove the existence of the alleged “bitter dispute” between the Arbitrator and the appellant and/or the Lagos State Government. He also argued that the two affidavits of Oladele offended against sections 87 and 88 of the Evidence Act. He referred to the case of *Osian v. Flour Mills of Nigeria Ltd.* (1968)2 All NLR 13.

Chief Williams, argument on this issue of conflicting affidavit evidence also covered the question of bias on the part of the Arbitrator. I will therefore limit myself to whether oral evidence was in fact necessary assuming there was any conflict. A fuller consideration of the affidavits will be given when dealing with the issues of bias and misconduct.

The paragraphs of the affidavits and counter-affidavit alleged to be irreconcilable are paragraph 4 of the affidavit of Oladele - Senior Executive Officer in the employment of the appellant paragraph 3 of the affidavit of Mr. Ogundipe, paragraphs 7, 8 and 9 of the counter-affidavit of the Arbitrator and paragraphs 2, 3, 7, 8 and 9 of another affidavit of Mr. Oladele

Mr. Oladele in his affidavit in support of the application to set aside the award deposed in paragraphs 3 and 4 of the said affidavit that it was brought to his attention by the Governor’s Office that the Arbitrator had anti-Lagos Government tendencies in that the Arbitrator and the Lagos State Government had conflicting claims over the premium land along Obafemi Awolowo way, Ikeja; that the Arbitrator is contesting the assessment of outstanding tax liabilities in relation to claims made by one Logemo Company and that on receipt of this information, the respondent decided to explore the possibility of changing the Arbitrator as he was very hostile to the Lagos State Government.

In reply to the above averments, Mr. Ogundipe, counsel in Chief Rotimi Williams’ Chambers deposed in paragraph 3 of his affidavit in opposition to the motion to set aside the award that to the best of his knowledge, information and belief, it was not true that the Arbitrator had anti-Lagos State Government tendencies or that he was hostile to the State Government.

The Arbitrator in paragraphs 7, 8 and 9 of his counter-affidavit deposed that he was surprised to read that he had anti-Lagos State Government tendencies. He denied the said allegations.

In paragraphs 2, 3, 7, 8 and 9 of the further affidavit of Mr. Oladele, he deposed that the Arbitrator was in arrears of tax payments for three years 1975/76 to 1982 and recently (1/7/82 and 1/11/82) paid his tax to date after series of correspondence with the Lagos State Internal Revenue Division; that the Arbitrator’s land at Obafemi Awolowo Way had been subject of dispute and had not been settled and that the Arbitrator by a letter dated 13/8/82

demanded a sum of N59,000.00 from the Lagos State Ministry of Economic Planning and Land Matters for an alleged trespass.

The above is the summary of the alleged conflicting or irreconcilable paragraphs of the affidavits. The questions that arise are whether the said paragraphs are material or crucial to the case in addition to being admissible in evidence. Where the conflicts are not material to the case or where the facts are inadmissible in evidence, the court should not be saddled with the responsibility of calling oral evidence to resolve the conflict.

In *Falobi v. Falobi* (supra), this court stated as follows:

“We have pointed out on numerous occasions that when a court is faced with affidavits which are irreconcilably in conflict, the Judge hearing the case, in order to resolve the conflict properly, should first hear oral evidence from the deponents or such other witnesses as the parties may be advised to call.....”

The need to call oral evidence would however not arise if the areas of conflict are so narrow and are not significant: See *Okupe v. F.B.I.R.* (1974) 1 All NLR 314 (Reprint) and *Garba v. University of Maiduguri* (1986) 1 N.W.L.R. (Pt. 18) 550.

In this case the appellant made charges of anti-Lagos State Government tendencies and hostility against the said government on the pan of the Arbitrator as the basis for setting aside the award. These charges do not affect the matter in principle and are founded on hearsay evidence and they offend against section 88 and 89 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 which provide:

“88 When a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge he shall set forth explicitly the facts and circumstances forming the grounds of his belief.

89. When such belief is derived from another person, the name of his informant shall be stated and reasonable particulars shall be given respecting the informant, and the time, place and circumstances of the information.”

In *Belcher v. Roedean School Site & Buildings Ltd.* (supra) referred to by Chief Williams S.A.N., by the terms of a building contract, all questions were to be submitted to the arbitration of an architect appointed by the building owners. A dispute arose which was referred to the architect for arbitration. The builders later brought an application to revoke the submission.

In their affidavit in support of the application, allegations of fraud and misrepresentation were made against the arbitrator (architect). The arbitrator

in his affidavit categorically denied each of the allegations made against him.

The conflict in the affidavit notwithstanding, the court refused to revoke the submission holding that an application to remove an arbitrator should be granted with great caution. In the present appeal, there is no ground for supposing that the Arbitrator was anti-Lagos State Government or at war with it. Assuming that the Lagos State Government was the appellant in this case, the materials before the court were not such that could debar the Arbitra- 5 tor from acting as such in this case.

To hold otherwise would open a wide door for all sorts of attempts to get rid of arbitrators deliberately chosen by parties to contracts. The conflicts in the said affidavit seem to me narrow, flimsy and irrelevant. They were alien 10 to the matter before the Arbitrator. There was therefore no necessity to call oral evidence in this particular case.

It was submitted in the brief of the appellant that the admission of the proceedings before Balogun, J. (Exhibit A) before Ilori, J. ought not to have been accepted by Ilori, J. in coming to the conclusion which he reached; that 15 it contained submissions of counsel who was no more handling the matter and as such the court ought not have countenanced it let alone admitting it in evidence. We were referred to the case of Okulade v. Alade (1976)1 All NLR (Pt.1) 67.

It was also submitted that the counter-affidavit of the Arbitrator was 20 not before Ilori, J. and the anomalies placed the retrial Judge in a situation where he could not have adjudicated the issues with fair mind and a proper assessment. The case of Mogaji v. Odoin (1978) 4 S.C. 91 was cited.

Cases of admissions of evidence given in previous proceedings at subsequent trials have received judicial pronouncement in this court. It is 25 settled law that evidence of a witness in one case cannot be accepted as evidence of the truth in another case, except for the purpose of cross-examination: See Ikenye v. Ofune (1985) 2 NWLR (Pt.5) 1 at pages 6-8.

In Ikenye's case, a copy of the proceedings in a Native Court suit was tendered by one of the plaintiffs' witnesses and was admitted in evidence 30 without objection and marked Exhibit "2". The defendants contended that the exhibit had already resolved the issue of title over the land in dispute in their favour. The plaintiffs held a different view and maintained that it was over a different parcel of land.

The learned trial Judge examined Exhibit "2" critically and concluded 35 that the land in dispute in "2" fell outside the land in dispute in the case before him as contended by the plaintiffs. He accordingly gave judgment for the plaintiffs, basing his decision principally on the contents of Exhibit "2".

On appeal by the defendants to the Court of Appeal, the decision of

the trial Judge was reversed on the ground that the said Exhibit “2” did not support the plaintiffs’ case but rather supported that of the defendants.

On a further appeal to this court, it was held that the courts below based their respective decisions on the evidence adduced in Exhibit “2” which the two courts held as evidence before them without adverting their minds to section 34 of the Evidence Act which laid down in its sub-section (1) the conditions to be complied with before evidence given in a previous case could be received as a substantive evidence to the truth of what it stated. See also Sanyaolu v. Coker (1983) 3 S.C. 124 at 155; (1983) 1 SCNLR 168; Nahman v. Odotola (1953) 14 WACA 381 at 384 and Alade v. Aborishade (1960) 5 S.C. 167 at 171-173; (1960) SCNLR 398. In Alade v. Aborishade (supra) this court held as follows:-

“True it is that, in the last instance in particular, the learned Judge, in accepting as evidence before him that evidence given in 1951 case used that evidence in a manner adverse to the respondent, in whose favour he ultimately gave judgment, but that does not alter the legal position which this court has stated on numerous occasions which is that evidence given in a previous case can never be accepted as evidence by the court trying a case except where section 34(i) of the Evidence Ordinance applies.

The evidence given in an earlier case by persons who also testify in a later case may be used for cross-examination as to credit but it is of no higher value than that. The pleadings in an earlier case may, however, be referred to show what was, in that earlier case, the claim or defence sought to be set up and to point to inconsistency on the part of one party or the other to the later case. The judgment in an earlier case frequently is used perfectly properly in a later case, the classic instance being, of course, on a plea of res judicata, but it can only be used there provided the incidents necessary to support such a plea are fully observed.”

(the italicizing of the word “evidence” is for emphasis only)

In the present appeal, the court below after allowing the respondent’s appeal, remitted the case to the lower court for determination before another Judge. The consolidated motions i.e to set aside the award of the Arbitrator by the appellant and the prayer for the enforcement of the award by the court where the matters remitted to the High Court to be determined by another Judge.

When the learned counsel representing both parties appeared before Illori, J. on 12/12/85. Chief Williams S.A.N. suggested to the court that they put in records of previous proceedings by consent; that it would help both parties and the court since they would in their addresses refer to the proceedings.

Mrs. Olagbende appearing for the appellant had no objection and the record of proceedings before Balogun, J. was admitted by consent of both

counsel and marked Exhibit “A”.

On 14/2/86 the consolidated motions were moved. Mrs. Olagbende for the appellant adopted the record of appeal and addressed the court extensively. She referred to the motion she was moving as being at page 214 of the Exhibit “A”. She made references to the appellant’s earlier submissions, the affidavit and supplementary affidavit deposed to by her and to some aspects of the award. Chief Williams S.A.N. replied to the submissions. He made references to the arbitration proceedings and portions of his submission in the earlier proceedings. The learned trial Judge adjourned for judgment. 5

In a well considered judgment, the respondent’s application was granted. The application of the appellant to set aside the award was dismissed. 10

In an order such as that made by the Court of Appeal remitting the case to the court below to be determined by another Judge, there is no way that the arbitration proceedings would not be placed before the Judge rehearing the case whether the parties desired it or not. The propriety of the proceedings before the Arbitrator was what Ilori, J. was called upon to determine. If found properly conducted, to consider the enforcement of the award. 15 The proceedings were part of Exhibit “A”. It had to be tendered. There could be no objection to its admissibility in evidence by counsel.

Both learned counsel presented fresh legal arguments: The appellant’s counsel in addition adopted the legal submissions made on behalf of the appellant in the earlier proceedings. She referred to the affidavits which she deposed to in the earlier proceedings which formed part of Exhibit “A”. (Italics are mine for emphasis only). 20

Chief Williams S.A.N. made references to the proceedings before the Arbitrator contained in Exhibit “A” which he was entitled to do. 25

It would have been otherwise if the retrial was before an Arbitrator. The facts of this case are therefore distinguishable from those of the cases earlier discussed in this judgment. It is clear to me that both learned counsel and the learned trial Judge Ilori, J. did not make any improper use of Exhibit “A”. The missing counter-affidavit of the Arbitrator which was alleged to be in conflict with those of the appellant had been held by me to be of no consequence and of no probative force. It is therefore unnecessary to speculate on the effect it would have had on the mind of the learned trial Judge. 30

The only affidavit evidence referred to by the learned trial Judge in his judgment was the two affidavits deposed to by the very counsel arguing the motion. This case did not need compliance with section 34(1) of the Evidence Act because apart from the arbitration proceedings which in any case must be before the court, other issues referred to in Exhibit “A” were in the 35

main legal submissions of counsel. I therefore hold that Exhibit “A” was rightly admitted in evidence.

It was submitted on behalf of the appellant that it was obvious to the Arbitrator that the appellant was opposed to his handling the reference and that this opposition was clear from the submission of Mrs. Olagbende -learned
5 appellant’s counsel on 29/7/82.

It was also contended that the Arbitrator only adjourned for a day to allow the appellant come forward with their points of defence; the fact that the Arbitrator had limited time to dispose of the arbitration was not enough reason to hear it ex parte and the cases of *Drew v. Drew* (1885) 2 Macq 1 especially
10 at P.3, *Harvey F. Shelton* (1844) 7 Beav.455 at 462 and *Bache v. Billingham* (1894) 1 Q.B. 107 were cited.

On the issue of fair hearing, it was contended that the Arbitrator should have granted a further adjournment. The case of *Solanke v. Ajibola* (1968) 1 All NLR 46 and *Myron v. Tradax SA* (1969)2 All E.R. 1263 were cited
15 and relied upon.

The learned appellant’s counsel further submitted that the court below was in error in holding that the appellant did not take steps to remove the Arbitrator after the appointment. He submitted that the steps taken to remove him for bias were contained in the affidavits of Mrs. Olagbende.

20 Chief Williams S.A.N. in his reply to the alleged bias, submitted that on the authority of *Belcher v. Roodcan School Site and Buildings Ltd.* (supra), even if there had been litigation between the Lagos State Government on the matters which the appellant relied on in raising this issue, it would not have been sufficient to sustain it.

25 Learned Senior Counsel further submitted that where, as in this case, the existence of antecedent bias was known to a party to an arbitration proceedings, his remedy was either to apply for the revocation of the authority of the Arbitrator or to apply for his removal and should not wait for the result of the arbitration before taking action.

30 He referred to section 3 of the Arbitration Law Cap. 10 Laws of Lagos State, 1973 and submitted that the effect of the said section is that the Arbitrator, when once appointed is entitled to carry on his duties unless both parties consent to terminate his appointment or the court grants leave to terminate such appointment. Learned Senior Counsel referred us to the cases of *Re Smith & Service & Nelson & sons* (1890)25 Q.B.D. 545 at 550 and *Re Baring Brothers & Co. and Doulton & Co.* (1892) 61 LJ. Q.B. 704: 8 T.L.R.701. In the
35 latter case the court held that the arbitrator could not, by reason of some controversy pending between him (arbitrator) and one of the parties unconnected with the arbitration, bring an impartial and unbiased mind to the con

sideration of the matter referred and granted leave to revoke the submission.

On the issue of the Arbitrator proceeding ex parte with the arbitration, the appellant could not be heard to say that it was not given a fair hearing. The Arbitrator and counsel for both parties held a preliminary meeting on 23/7/82. The matter was adjourned to 25th and 26th August, 1982 for 5 hearing.

On 25/8/82 both counsels addressed the court on the letter dated 24/8/82 - Exhibit 4. The Arbitrator minuted as follows in his record of proceedings:-

“However as learned counsel for L.S.D.P.C. has appeared this morning only by herself and without her witnesses, if any, and as the hearing was originally fixed for today and tomorrow. I hereby adjourned further hearing in the matter until tomorrow Thursday 26/8/82 at 10.30 a.m. Learned counsel for the L.S.D.P.C. stated that she would still be receiving instructions and I expect to know for sure from her tomorrow morning any further application or applications of her employers. I must warn however that in the absence of any such application, or explanation, the hearing of the arbitration would proceed tomorrow morning.” 10 15

(the italics are for emphasis only).

From the above ruling one or two steps should have been taken by the learned counsel for the appellant. She should have applied to the court to have the submission revoked or appeared before the Arbitrator on 26/8/82 to ask for an adjournment to enable her make the necessary applications to the High Court. She did neither. She ignored the proceedings of the Arbitrator until the award was made. The action of the learned counsel for the appellant was to say the least discourteous to the Arbitrator. 25

An arbitrator may proceed with a reference in the absence of one of the parties if he does not choose to attend. The party ought to have notice that the arbitrator will proceed ex-parte in the case if he does not attend. See Gladwin v. Chilcote (1841) 9 Dowl 550 and Feather stone v. Copper (1803) 9 Ves.67, 32 E.R 526. 30

In this case, the appellant’s counsel was present on 25/8/82 and the Arbitrator’s ruling was sufficient notice. The absence of the appellant and its counsel to my mind was wilful. The Arbitrator by proceeding ex-parte acted fairly towards both parties and his conduct in so doing cannot be impugned. The objection has no basis and it is rejected by me. It cannot also be said that by proceeding ex-parte, the Arbitrator committed any misconduct. 35

On the question of illegality of the contract, it was submitted in the appellant’s brief that whether illegality was pleaded or not, judicial notice of it should have been taken by the court and since the contract was bad in law, it

could not be enforced. The cases *Young v. Mayor of Leamington* (1882) 3 Q.B. 575 and *Mellis v. Shirley Local Board* 16 Q.B.D. 446 were referred to.

It was further submitted on behalf of the appointment that the contract never came into force and consequently the arbitration clause could not
5 operate; that compliance with the Public Contracts (Restriction On Award) Law Cap. 110, Laws of Lagos State, 1973 as amended by the Public Contracts (Restriction On Award) (Amendment) Edict, 1976 could not be waived.

It was finally submitted that the Arbitrator lacked jurisdiction ab initio by virtue of the contract being illegal on the authority of *Salati v. Sheha*
10 (1986) 1 NWLR 198 and *Heyman v. Darwings Ltd.* (1942) A.C. 356.

In reply, the learned senior counsel for the respondent in his brief referred to section 2(2) of the Public Contracts (Restriction On Award) (Amendment) Edict, 1976 and Section 171(5) of the Constitution of the Federal Republic of Nigeria, 1979. He submitted that the said section of the Lagos State Law on Public
15 Contracts is void for inconsistency with the 1979 Constitution.

In his view, the effect of the legislation is that it would be inconsistent to vest governmental powers on the State Executive Council beyond those which Constitution conferred on it. He referred the court to the case of *Governor of Kaduna State v. Lawal Kagoma* (1982) 3 NCLR 1032.

20 In the alternative, he argued that even if the Law relied upon by the appellant were valid, it did not have the effect claimed by the learned counsel for the appellant; that it could only refer to cases of competitive tendering where there is an invitation to the public to submit tenders or selective tendering where there is an invitation to a limited number of contractors to submit tenders and that there is nothing to
25 show that this is a case of competitive or selective tendering.

On the issue of enforceability, it was further submitted that it was for the appellant to raise the issue and to bring before the Arbitrator evidence to establish the allegation that the requirement of the Law had not been complied with. He referred to sections 135 and 136(1) of the Evidence Act which pro-
30 vide:

"135. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

*136(1) In civil cases the burden of first proving the existence of non existence of a fact lies on the party whom the judgment of the court would be
35 given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleading."*

It was contended on behalf of the respondent that the issue of the alleged want of governmental approval was not put in issue on the pleadings nor was it proved at the trial. We were referred to the case of *Elias v. Disu &*

Ors. (1962) 1 All NLR 214; (1962) 1 SCNLR 361.

It was finally submitted on this issue that it was too late in the day for the appellant to raise the issue of illegality or unenforceability of the contract.

The Arbitrator could not have been associated with the alleged illegality of the contract because that issue was not pleaded and it did not in any way arise throughout the proceedings before him. Section 2(2) of the Public Contracts (Restriction On Award) (Amendment) Edict No.7 of 1976 relied upon by the appellant provides:-

“Any contract relating to projects of a value of five hundred thousand naira and above shall be referred to the Lagos State Executive Council for approval before any award of such contract is made by the Lagos State Tenders Board.”

Section 173(1) of the 1979 Constitution created the offices of the Commissioners of the Government of a State. By section 174, the Governor of the state in his discretion assigns any commissioner of the state responsibility for any business of the Government of that state including the administration of any department of Government.

Section 171(1)(a) of the Constitution assigns a specific function to a body called “executive council” where it provides:-

*“171 (1) The Governor or Deputy Governor shall cease to hold office if-
(a) by a resolution passed by two-thirds majority of the executive council of the state it is declared that the Governor or Deputy Governor is incapable of discharging the functions of his office;”*

Subsection 5 of section 171 of the Constitution is relevant in coming to a decision whether the Public Contracts Restriction On Award) Cap. 110 of the Laws of the Lagos State applied. It provides:-

“(5) In this section, the reference to “executive council of the state” is a reference to the body of Commissioners of the Government of the State, howsoever called, established by the Governor and charged with such responsibilities for the functions of government as the Governor may direct.”

On examination of the provision of section 171(5) of the 1979 Constitution, the State Executive Council is a special body constituted in accordance with this sub-section. I agree with Chief Williams SAN that section 2(2) of the Public Contracts (Restriction On Award) (Amendment) Law No.7 of 1976 would be inconsistent with the Constitution to vest governmental powers on the State Executive Council beyond those which the Constitution conferred on it or which it conferred on the Governor.

In Governor of State v. Lawai Kagoma (supra), section 98(1) of the Local Government Law of Kaduna State conferred certain powers on the “Ex

ecutive Council of the State". In that case as in the present the State law was enacted during the military regime at a time when Decree No. 32 of 1975 had established "Executive Council" of which the State Governor was a member.

Delivering the judgment of the court in that case Fatayi- Williams

5 C.J.N. said:-

".....As I indicated earlier, the words of a statute will generally be understood in the sense which they bore when the statute was passed into law. With this rule in mind, I fail to see how the "Executive Council" established by Decree No. 32 of 1975 could be found to be the
10 same "body of commissioners" conveniently referred to as the "Executive Council of the State" in section 171(5) of the 1979 Constitution. Furthermore, the only constitutional function which that "Executive Council of the State", after it had been established by the Governor of the State in accordance with section 171(5) of the 1979 Constitution is empowered to dis-
15 charge is to declare, by resolution passed by a two-thirds majority that the State Governor is no longer capable of discharging the functions of his office.

20 To that extent, the provisions of S.98(1) if indeed, it confers any other power on that "Executive Council" (although it is my view that it does not) that other power would be inconsistent with that conferred by section 171 of the 1979 Constitution."

Following from the above, sections 2(2) of Edict No.7 of 1976 of
25 Lagos State not having been modified by the Governor of Lagos State pursuant to section 274 of the Constitution, is void for inconsistency. Section 2(2) of Edict No.7 of 1976 is therefore inconsistent with the 1979 Constitution and to that extent, must be regarded as a provision which has lapsed or repealed by necessary implication.

30 As to the allegation of misconduct on the part of the Arbitrator, it is unfortunate and it is my view that the appellant was not properly advised on this. Of the various grounds of misconduct alleged by the appellant viz: the arbitrator being "at war" with the Lagos State Government and proceeding with the arbitration ex-parte, none was substantiated.

35 If the allegations were true, the appellant would not have prayed the High Court in the way it did in its alternative prayer for setting aside the award.

The appellant in its alternative prayer said:-

"the award made between the parties to the above mentioned arbitration by the Honourable Dr. G.B.A. Coker the Arbitrator therein dated the

18th October, 1982 be remitted for consideration by the said Arbitrator of all matters referred to him on the ground listed above under the prayer to set aside the said award."

There was no prayer for the appointment of another Arbitrator. If the appellant could pray the court in this alternative, the only conclusion one can draw is that it had confidence in the Arbitrator. In the circumstance, the allegation of misconduct to my mind was an afterthought.

Again if in fact the grounds were real, I find it difficult to understand why the appellant did not apply to the court to revoke the submission or have the arbitration stayed.

For all the reasons given in this judgment, I resolve all the issues identified for determination by the appellant against it. The only issue left to be considered is the issue submitted by the respondent in its cross-appeal—the refusal of the court below to make an order for payment of interest.

In his judgment dated 9/5/86, Ilori, J. granted the respondent leave to enforce the award of the Honourable Dr. G.B.A. Coker, the Arbitrator duly appointed in the matter pursuant to the order of the High Court.

The Arbitrator in his award made an order for payment of interest on the amount found due at 5% per annum with effect from date of the termination of the contract i.e. 11th March, 1981 until the date of the award.

After the judgment of Ilori, J., the appellant moved the High Court for a stay of execution of the award pending appeal. The court ordered as follows:

"The judgment-debtor shall within 7 days, provide a bond guaranteed by Union Bank of Nigeria Ltd., to pay the judgment-debt with interest immediately the result of the appeal lodged is known if that result is against the debtor."

Chief Williams submitted that after the judgment, the appellant appealed to the Court of Appeal; applied for a stay of execution pending appeal and a stay was granted subject to the above condition.

He further submitted that the above order did not specify the rate of interest and that it was in accord with Order 59 rule 13(2) of the Rules of the Supreme Court in England which applies in Lagos State. It was his contention that this should mean the interest at the rate payable on judgment-debts pursuant to the Judgment Act, 1938 and that the current rate of interest according to the notes in paragraph 42/1/12 of the 1993 edition of the White Book is 15% per annum.

I am satisfied that the respondent is entitled to interest. If the court below dismissed the appeal of the appellant and granted leave to the respon-

dent to enforce the award made by the Arbitrator, the order made as to interest was pan of the award. The cross appeal succeeds and it is hereby allowed. The main appeal is hereby dismissed. It is ordered that the case be remitted for the interest payable to be determined by the High Court (Ilori, J.). The respondent is entitled to costs which I assess at N1,000.00 to be paid by the appellant.

UWAIS JSC

I have had the advantage of reading in draft the judgment read by my learned brother, Ogwuegbu, J.S.C. I agree with the judgment and only wish to add the following.

The Public Contracts (Restriction on Award) Law, Cap 110 of the Laws of Lagos State, 1973 came into force on 2nd January, 1973 under a military regime. It was amended still by a military regime in 1976 by the Public Contracts (Restriction on Award) (Amendment) Edict, No.7 of 1976 which came into operation retrospectively on 13th November, 1975. So that the powers vested in Lagos State Executive council by both laws were consistent with the 1963 Constitution as suspended and modified by Decrees in 1966, 1967 and 1975 respectively. However, with the coming into force of the 1979 Constitution, Cap. 110 as amended by Edict No.7 of 1976 needed to be modified to bring it into conformity with the provisions of sections 174 of the 1979 Constitution and the decision of this court in Governor of Kaduna State v. Lawal Kagama, (1982)3 NCLR 1032 at Pp. 1043. This had not been done by the end day of February, 1980 when the parties in this case entered into a written agreement for the respondent to construct for the appellant 1,000 houses at the sum of N46,573,999.00.

The contract seems at first to have been caught by the provisions of section 2 of the Public Contracts (Restriction on Award) Law, Cap. 110, as amended by Edict No.7 of 1976, which reads:-

“2(1) Any contract relating to projects of a value of more than two hundred thousand naira but below five hundred thousand naira may be awarded by the Lagos State Tenders Board on behalf of any Ministry, Department, Corporation Board, Company or Local Government Council of the Lagos State Government without reference to the Lagos State Executive Council.

(2) Any contract relating to project of a value of five hundred thousand naira and above shall be referred to the Lagos State Executive Council for approval before any award of such contract is made by the Lagos State Tenders Board.”

It is the contention of the appellant that in the light of the non-compliance with the above provisions by it, the contract between it and the respondents did not come into force because the effect of the Law (section 2 thereof) cannot be waived by the parties.

Therefore, the arbitrator appointed by the parties ab initio lacked the jurisdiction to arbitrate. In my opinion, the force in this argument is vitiated by the fact that the power of Lagos State Executive Council under section 2 of Cap. 110, as at the 22nd day of February, 1980, when the contract between the parties as executed, was inconsistent with section 174 of the 1979 Constitution. Consequently, the provisions of section 2 must be considered as null and void and could not, for that reason, have affected the jurisdiction of the arbitrator over the dispute between the parties.

For these and the fuller reasons contained in the judgment read by my learned brother Ogwuegbu, J.S.C. I too will dismiss the appeal by the appellant, and allow the appeal by the respondent by remitting the case to the High Court of Lagos State, for Ilori, J. to determine the interest payable to the respondent on the judgment debt. The appellant shall pay to the respondent costs assessed at N1,000.00.

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KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Ogwuegbu J.S.c. I will also dismiss the appeal and allow the cross-appeal. I endorse the orders in the said judgment.

25

ONU JSC

I had the advantage of reading before now the judgment of my learned brother Ogwuegbu, J.S.C. just delivered. I so entirely agree with his reasoning and conclusion that I have nothing further to add thereto. I endorse the consequential orders including those as to costs awarded therein.

ADIO JSC

I have had the privilege of reading in draft, the judgment just delivered by my learned brother, Ogwuegbu, J.S.C., and I agree that the cross appeal succeeds and that the main appeal fails. I allow the cross-appeal and dismiss the main appeal accordingly. I abide by the consequential orders, including the order for costs.

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