

SUPREME COURT OF NIGERIA
14TH JULY, 2000. SC. 40/1996
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,
U. MOHAMMED, A. I. KATSINA-ALU,
A. O. EJIWUNMI, JJSC

A. SAVOIA LIMITED APPELLANT
AND
A. O. SONUBI RESPONDENT

ARBITRATION - Arbitrator - Misconduct - Conduct that would amount to misconduct - Within the law.

ARBITRATION - Arbitrator - Misconduct - Findings on the evidence - Where the arbitrator based his findings and award on the evidence before him - He has not misconducted himself.

ARBITRATION - Arbitrator - Misconduct - Question of law - That was not specifically referred to the arbitrator - But material in the decision of the matter referred - The arbitrator was not guilty of misconduct for deciding the issue.

ARBITRATION - Award - Interference by the court - Under sections 11 and 12 of the Arbitration Law of Lagos State - The court's jurisdiction to interfere with an award - Is limited to setting aside or remitting a matter to the arbitrator for reconsideration.

CONTRACTS - Termination - Wrongful termination by one party - What the other party may do in the circumstance.

FACTS

In the High Court of Lagos State, the appellant as applicant, filed an application pursuant to section 12, Arbitration Law, Cap. 10 Laws of Lagos State 1973 and Order 73 rule 2 RSC (England), for an order that the arbitration award between the parties dated 8th day of March, 1985 be set aside on the following grounds:- that the arbitrator misconducted

himself; that the award did not deal conclusively with all the issues referred particularly the issues of delay in completion, bad workmanship and materials; that the award is bad on the face of it; that the arbitrator exceeded his authority; and that the arbitrator is biased in his award. The application was supported by affidavits and a number of documents.

The parties had entered into a building contract on 13th April 1983 by which the respondent as contractor, contracted to erect for the appellant, as employer two storey blocks of 6 flats together with out-houses at plot 7 Parkview Estate Ikoyi Lagos. Before the completion of the building, a dispute arose as a result of which the appellant terminated the contract on 24th March, 1984. The dispute was referred by the parties, to an arbitrator, Dr. T. M. Aluko, a renowned civil engineer. The respondent as claimant in the arbitration claimed. (i) a total sum of N83,410.49 payment for work done by him from 21st January to 24th March 1984; (2) payment of retention money of N22,911.00 in respect of all work done by him, and (3) repayment of the sum of N25,000 he allegedly loaned to the appellant. The appellant on the other hand counterclaimed for (i) compensation for expenses incurred by putting right work allegedly done badly by the respondent; (2) damages suffered by it through respondent's failure to complete the work satisfactorily and within the 10 months contract period; and (2) payment of the sum of N5,000 balance on N30,000 it gave to the respondent as an advance at the beginning of the contract.

The arbitrator entered into the arbitration and after taking evidence from witnesses called by the parties, issued a report containing his award. In his award, the arbitrator upheld respondent's claim for work done and retention money but disallowed the claim for N25,000 loan to the appellant. A total sum of N75,754.64 was awarded in favour of the respondent. On the appellant's claims, the arbitrator found that the unilateral circumstances of that determination (of the contract) must absolve the claimant from liability to refund any expenses incurred by the respondent in making good these defects". Consequently, he rejected the appellant's claims. Notwithstanding his rejection of appellant's claims the arbitrator awarded him a total sum of N14,000 for defective works which is in excess of the actual claim of the appellant. The appellant dissatisfied

with the award filed an application as aforesaid for an order setting aside the award.

After hearing arguments from learned counsel for the parties, the learned trial judge found against the appellant on all issues raised by him except on the issue of N5,000 claimed by the appellant and remitted the award to the arbitrator to enable him look further into that claim. The appellant was dissatisfied with the judgment and appealed to the Court of Appeal, Lagos Division, which court dismissed the appeal. It however made a consequential order that the disputed sum of N5,000 should be paid to the appellant by the respondent. The appellant has further appealed to the Supreme Court raising two issues.

ISSUES FOR DETERMINATION

_____1. *Whether the Court of Appeal was right to uphold the judgment of the High Court on the ground that the Arbitrator did not legally misconduct himself by employing his skill, and experience in place of evidence before him?*

2. *Whether the Court of Appeal should not have set aside the judgment of the High Court on the ground that the learned Judge erred in ruling that the Arbitrator did not contravene the rules of natural justice?*

HELD (Unanimously dismissing the appeal per lead judgment of **OGUNDARE JSC**)

Arbitrator - Misconduct

1. This Court has, in Taylor Woodrow (Nig.) Ltd. v. Suddentsche Etna-Werlk GMBH (1993) 4 NWLR 127, spelt out some conduct that would amount to misconduct within the law. Some of these are:

(1) where the arbitrator fails to comply with the terms, express or implied, of the arbitration agreement;

(2) where, even if the arbitrator complies with the terms of the arbitration agreement, the arbitrator makes an award which on grounds of public policy ought not to be enforced;

(3) where the arbitrator has been bribed or corrupted;

(4) technical misconduct, such as where the arbitrator makes a mistake as to the scope of the authority conferred by the agreement

of reference. This, however, does not mean that every irregularity of procedure amounts to misconduct;

(5) where the arbitrator or umpire fails to decide all the matters which were referred to him;

B (6) where the arbitrator or umpire has breached the rules of natural justice.

(7) If the arbitrator or umpire has failed to act fairly towards both parties, as for example:-

C (a) by hearing one party but refusing to hear the other; or

(b) by deciding the case on a point not put by the parties.

(p. 2837 D)

Misconduct - Findings on the evidence

D 2. It is clear that the arbitrator based his findings and award on the evidence before him. The English cases of Owen v. Nicholl (supra) Mediterranean v. Fortress (supra) are just not apposite to the facts of the present case. Ademola JCA was right when he observed:

E *"It is simply not correct that the Arbitrator had been capricious or that he has used his judgment or skill to side-track the evidence before him with regard to the valuation of work done by the respondent between 21/1/84 and 23/4/84."*

I agree with the Courts below that a case of misconduct was not proved F by the Appellant against the arbitrator. (p. 2840 B)

Misconduct - Question of Law

G 3. It is submitted on behalf of the Appellant that the arbitrator in finding that the Appellant wrongfully terminated the contract with the Respondent, acted unfairly in raising the issue suo motu and thereby committed a misconduct. I don't think this submission is right. The question of the termination of the contract was put before the arbitrator by the Appellant when he claimed for damages for Respondent's failure to complete the building work in 10 months as stipulated in the contract. It is not H the Appellant's case that the arbitrator by finding that the contract was wrongfully terminated by the Appellant, committed an error in law. Rather, it is that (1) the arbitrator was wrong in raising the matter suo motu and

(2) the Respondent, having accepted the termination, the Appellant ought not to be deprived of damages for delay and shoddy job.

Either contention cannot be right. I have explained earlier that it was the Appellant by claiming damages for breach of contract, who put the validity of his termination of the contract in issue. I cannot fault the arbitrator for deciding that issue. Although the question of law as to the validity of the termination of the contract was not specifically referred to the arbitrator it is however material in the decision of the matter referred, in this case by the Appellant. (p. 2842 E)

Contracts - Termination

4. Where a contract is wrongfully terminated by one party, the other party has a choice of either accepting the termination and suing for damages for wrongful termination of the contract or ignore the wrongful termination and perform his own part of the contract and claim thereafter against the wrongful party. In this case, the Respondent accepted the termination but did not claim for damages for wrongful termination in the arbitration proceedings. His so choosing is no reason for awarding damages to the Appellant for his own wrongful act. (p. 2843 A)

Arbitration - Award

5. I think the Court of Appeal acted wrongly in making the order it made. Under sections 11 and 12 of the Arbitration Law of Lagos State, the court's jurisdiction to interfere with the award of an arbitrator is limited to setting aside an award or remitting a matter to the arbitrator for reconsideration. The Court has no jurisdiction to determine any matter, the subject of an arbitration proceedings. The trial High Court acted properly in this case in remitting the matter of the Appellant's claim for N5,000 to the arbitrator for consideration and resolution. With respect to their Lordships of the Court of Appeal, they acted wrongly in making the order that the sum be paid to the Appellant by the Respondent. Their lack of jurisdiction to make the order apart, the issue was not placed before them and they did not hear the parties on it. They ought not to have made the order. As the matter does not arise for consideration in this appeal, I say no more on it.

What I have said is for the guidance of the courts in the future. (p. 2843 F)

NOTABLE POINT OF INTEREST

OGUNDARE JSC

B *1. An arbitrator cannot make an award above what was claimed*

Clearly the arbitrator could not be right in making an award over and above what was claimed and after that claim had been refused. But the error is in favour of the Appellant. The Respondent who could have complained did not complain. (p. 2842 A)

C

REPRESENTATION

Dr. O. Ajayi for the Appellant

Respondent absent and unrepresented

D **CASES REFERRED TO**

Owen v. Nicholl (1948) 1 ALL ER 707

Mediterranean v. Fortress (1948) 2 ALL ER 186

Taylor Woodrow (Nig.) Ltd. v. Suddentsche Etna-Werlk GMBH (1993)

E 4 NWLR 127

F.H.A. v. Warner & Warner (1986) 5 NWLR 473

STATUTES & RULES REFERRED TO

F Arbitration Law, cap. 10 Laws of Lagos State, 1973; s. 12

Arbitration and Conciliation Act, cap 19 Laws of the Federation of Nigeria, 1990; s. 30(i)

Rule of the Supreme Court (England) ord. 73 r. 2

LEAD JUDGMENT BY OGUNDARE JSC

G

It has always been thought that proceedings by way of arbitration is a quick way to resolution of disputes between contracting parties, when compared with the tardy proceedings of a law court. This case appears to cast some doubt on the truism of this belief.

H

The parties to this appeal entered into a building contract on 13th April 1983 by which the Respondent as Contractor, contracted

to erect for the Appellant, as Employer 2 two-storey blocks of 6 flats together with out-houses at Plot 7. Parkview Estate Ikoyi Lagos. Before the completion of the building, a dispute arose as a result of which the Appellant terminated the contract on 24th March 1984. The dispute was referred by the parties, to an arbitrator, Dr. T. M. Aluko, an acknowledged civil engineer of no mean repute. Dr. Aluko entered onto the arbitration and after taking evidence from witnesses called by the parties, issued a report containing his award. The report was issued on 8th March, 1985 within a year of the dispute. That is as it should be so far.

The Respondent, as claimant had claimed in the arbitration - a total sum of N83,410.49 payment for work done by the Respondent from 21st January to 24th March 1984;

2. Payment of retention money of N22,911.00 in respect of all work done by the Respondent; and

3. Repayment of the sum of N25,000 allegedly loaned to the Appellant by the Respondent.

The Appellant on the other hand counter-claimed for -

1. Compensation for expenses incurred by him by putting right work allegedly done badly by the Respondent;

2. Damages suffered by him through Respondent's failure to complete the work satisfactorily and in the 10 months contract period; and

3. Payment of the sum of N5,000 balance on a N30,000 he gave to Respondent as an advance at the beginning of the contract.

In his award, the arbitrator upheld Respondent's claim for work done between 21st January and 24th March 1984 and allowed the sum of N53,105.96 in respect of this claim. On the retention money, he allowed the sum of N22,648.68 instead of N22,911.00 claimed by Respondent. The arbitrator disallowed the Respondent's claim for N25,000.00 loan made by it to the Appellant. A total sum of N75,754.64 was made in favour of the Respondent.

On the Appellant's claims, the arbitrator found that the "unilateral circumstances of that determination (of the contract) must absolve the claimant from liability to refund any expenses incurred by the Respondent in making good these defects". Consequently, he rejected the Appellant's

claims (1) and (2). He also rejected his claim (3) for N5,000.00. Notwithstanding his rejection of Appellant's claim (1), the arbitrator awarded him N11,000.00 instead of his claim for N8,095.00 for defective staircase. A further award of N3,000.00 was also made in favour of the
B Appellant for other defective works; making a total of N14,000.00 made in favour of the Appellant. The final award to the Respondent was put at N61,754.64 to be paid to the latter by the Appellant.

But this was not the end of the matter. For on 19th April 1985 the Appellant, as applicant, filed an application pursuant to section 12,
C Arbitration Law, Cap. 10 Laws of State and Order 73 rule 2 RSC (England), for an order, as subsequently amended, that the award made between the parties to the above mentioned arbitration by Dr. Timothy Mofolorunso Aluko, the arbitrator therein dated 8th day of March 1985 be set aside on the following grounds:

D 1. That the arbitrator Dr. Timothy Mofolorunso Aluko misconducted himself by:-

1. receiving and acting upon contradictory, unreasonable, unwarranted and inconsistent evidence which by law is not admissible
E and if at all, to which no weight ought to be attached; and breaching the basic rules of natural justice, equity and good conscience, having applied different yardsticks of justice.

2. That the said award does not deal with, either conclusively,
F including the issues of delay in completion, bad workmanship and materials.

3. That the award is bad on the face of it because:-

1. the principle therein stated as the principle of law according to which the said arbitrator professed to make this award is erroneously
G stated and applied;

2. the award is uncertain, contradictory and ambiguous and

3. the award was improperly procured, the Respondent having;

1. suppressed vital evidence during the hearing of the arbitration
and

2. tendered forged documents.

H 4. That the said arbitrator exceeded his authority by relying on

assumptions in displacement of the contract between the parties, and thereby acting on matters not within the terms of reference of the arbitration agreement.

5. That the arbitrator is biased in his award. The application was supported by affidavits and a number of documents which included the Report of the Arbitrator (Exh 3), the Contract documents (Exhibit S1), Rules of Procedure for the arbitral proceedings (Exhibit S8) submission of counsel (Exhibit S9) and Evidence of Witness (Exhibit S.10).

After hearing arguments from learned counsel for the parties, the learned trial Judge (Oguntade J. as he then was) in a judgment delivered on 14th October 1985, found against the Appellant on all issues raised by him except on the issue of N5,000.00 claimed by the Appellant and remitted the "award to the arbitrator to enable him look further into applicant's claim for N5,000.00 arising from the disputed payment of N25,000.00 and to make such other awards as the justice of the matter deserved."

The Appellant was dissatisfied with this judgment and appealed to the Court of Appeal (Lagos Division) which Court dismissed the appeal and affirmed the judgment of the trial High Court. It, however, made the following consequential order in respect of the disputed sum of N5,000.00:

"In agreement with the learned Judge in the court below, I order that the sum of N5,000.00 being the balance for the loan made to the Respondent by the appellant at the beginning of the contract for the Work to be done at Park View Estate, Ikoyi, should be paid to the appellant by the Respondent."

Being dissatisfied with the judgment of the Court of Appeal, the Appellant has further appealed to this Court upon three grounds of appeal. And in his written brief of argument filed pursuant to the rules of this Court, he formulated two issues as calling for determination in the appeal, that is to say:

1. Whether the Court of Appeal was right to uphold the judgment of the High Court on the ground that the Arbitrator did not legally misconduct himself by employing his skill, and experience in place of evidence before him?

2. Whether the Court of Appeal should not have set aside the

judgment of the High Court on the ground that the learned Judge erred in ruling that the Arbitrator did not contravene the rules of natural justice? And at the oral hearing of the appeal, Dr. O. Ajayi, learned counsel for the Appellant proffered oral submissions in further elucidation of arguments contained in the brief.

B I may observe at this stage that the Respondent neither filed a brief nor took part at the hearing of the appeal.

On Issue (1), it is submitted that an arbitrator must decide on the evidence adduced by the parties and not on his own knowledge and
C experience acquired in a different capacity. Appellant relied on Owen v. Nicholl (1948) 1 ALL ER 707. It is also submitted that an arbitrator with expert knowledge or skill could only employ same in the determination of the dispute where the parties consent and authorize the arbitrator to make use of that special knowledge, skill or judgment or "where the parties agree
D to arbitrate under the rules of a Chamber of Commerce, under which the Arbitrator is appointed for them, and the arbitrator is chosen or appointed because of his knowledge and experience of the trade." Mediterranean v. Fortress (1948) 2 ALL ER 186 is cited in support. It is further submitted
E that as the arbitrator in the instant case was only a civil engineer and not a quantity surveyor, it could not be said that he was appointed or authorized to make use of his expert knowledge, expertise or experience. It is finally submitted that the arbitrator was in error to use his knowledge and experience in the finding on the value of work done by the Respondent
F from 21st January to 24th March, 1984 rather than acting on the evidence of the quantity surveyor called by the Appellant. It is contended that by his so doing the arbitrator acted in excess of jurisdiction and his conduct amounted to legal misconduct and his award should be set aside on that ground.

G On issue (2), the main complaint is that the arbitrator refused Appellant's complaint on the ground that the latter was guilty of wrongful termination of the building contract between the parties. It is submitted that by raising this point suo motu and deciding on it without hearing the parties, the arbitrator acted unfairly against the Appellant by applying
H different yardsticks in his approach to the case of each party. It is contended that the arbitrator thereby breached the rules of natural justice.

I have carefully considered the submissions of learned counsel for the Appellant. With respect to him, however, I see no merit in the appeal.

True enough, section 12(2) of the Arbitration Law Cap. 10, Laws of Lagos State 1973 applicable to this case, empowered the Court to set aside an award where the arbitrator had misconducted himself or the award had been improperly procured. (See now section 30(1) of the Arbitration and Conciliation Act, Cap 19 Laws of the Federation of Nigeria 1990 incorporating the New York Convention). What is misconduct is, of course, not defined in the Law nor in the Act. But **this Court has, in Taylor Woodrow (Nig.) Ltd. v. Suddentsche Etna-Werlk GMBH (1993) 4 NWLR 127, spelt out some conduct that would amount to misconduct within the law. Some of these are:**

(1) where the arbitrator fails to comply with the terms, express or implied, of the arbitration agreement;

(2) where, even if the arbitrator complies with the terms of the arbitration agreement, the arbitrator makes an award which on grounds of public policy ought not to be enforced;

(3) where the arbitrator has been bribed or corrupted;

(4) technical misconduct, such as where the arbitrator makes a mistake as to the scope of the authority conferred by the agreement of reference. This, however, does not mean that every irregularity of procedure amounts to misconduct;

(5) where the arbitrator or umpire fails to decide all the matters which were referred to him;

(6) where the arbitrator or umpire has breached the rules of natural justice.

(7) If the arbitrator or umpire has failed to act fairly towards both parties, as for example:-

(a) by hearing one party but refusing to hear the other; or

(h) by deciding the case on a point not put by the parties.

Was misconduct, actual or legal, proved against Dr. T. M. Aluko, the arbitrator in this case? I rather think not. I think, in his complaint on issue (1), the Appellant got it all wrong. At the arbitration proceedings one Aiyepola a quantity surveyor gave evidence for the Appellant in respect of the valuation of the work done by the Respondent as at 24th March

1984 when the contract was determined. In respect of the evidence of this witness, this is what the arbitrator said:

"Now witness Aiyepola for the Respondent valued the work that had been completed at the time of the determination of the contract as

B *N437,650 c 64.6% of the contract sum. There is thus a gap of N68,691.96. This no doubt will be a source of concern to the Respondent Shonubi. He will however note that his architect has certified and checked all valuations up to the last payment on 21st January, 1984 and those valuations cannot, and are not up for review at this arbitration. What is*
C *properly at issue here is whether or not the Claimant should be paid for work between the last payment and the time the contract was determined and what the payment should be. I have already ruled that they were entitled to be paid and that the sum of N53,105.96 be paid to them."*

Earlier in his report the arbitrator had found:

D *"The Claimant in their Points of Claim asked for payment for work done by them from 21st January 1984 when they were paid the last certificate and 24th, March 1984 when their contract was determined. Their claim is for materials, plant, wages and payment to a sub-contractor.*

E *The Claimant supported their claims with waybills and paysheets.*

The Claimant would normally be due for another payment from the Respondent about the time the contract was determined by the Respondent but in the event they did not have the opportunity of presenting
F *their valuation for that period before they were sacked. I rule that they are entitled to payment for work done on the project during this period."*

Appellant's architect had issued certificates for work done by the Respondent up to 21st January 1984 in the total sum of N430,325. Adding the claim now allowed the Respondent and the retention fee as found by the arbitrator, the total value of work done by the Respondent as at
G 24th March 1984 was put at N506,341.96, a sum in excess of Aiyepola's valuation of N437,650.00. This is the misconduct complained of by the Appellant. He alleged that the arbitrator used his knowledge, expertise and experience in awarding a figure, rather than base his award on the evidence of Aiyepola.

H This complaint cannot be correct. The arbitrator's reasoning

is contained in the first passage above. He did not apply his personal knowledge but based his award on the evidence before him. He reasoned very logically that aiyeola could not be right in his valuation if the Appellant's architect by his certificates for work done had made Appellant pay to Respondent a total sum of N435,325.00 as at 21st January 1984. B Surely, the Respondent could not have done work to the meagre value of N2,325.00 (the difference between Aiyepola's valuation and payments already made to the Respondent) in the two months between 21st January and 24th March 1984. He accepted Respondent's evidence (with percentage cuts), as he was entitled to do; in preference to Aiyepola's C evidence.

Much has been made of the remark of Ademola JCA who delivered the lead judgment of the Court below. The learned Justice of Appeal remarked thus: D

"As to the complaint that the Arbitrator was not appointed because of his previous skill and knowledge in his arbitration, I am of the view that this complaint cannot ground my setting aside the award made by him. The truth of the matter is that the appellant agreed to the appointment proposed by the respondent who nominated a man, highly E qualified, professionally and academically in matters of building which is the subject matter of the suit.

I will be more than surprised if in the course of the arbitration F such a man as Dr. Aluko would not bring to bear his skill and knowledge and experience to evaluate the amount of work done on the building which is in dispute. In fact it would be the height of professional folly or negligence if he were to refrain from doing so."

This remark, in my respectful view, is of no moment when one considers G what the learned Justice said immediately following this remark. He said:

"In fact doing so within the limit of the evidence put before him is the very reason why he was appointed.

There would have been some substance in the appellant's H contention if the arbitrator learned and skillful, were to go outside the evidence before him and make award using his experience and professional knowledge as a basis for such award. That has not been the case here."

It is clear that the arbitrator based his findings and award on the

evidence before him. The English cases of Owen v. Nicholl (supra) Mediterranean v. Fortress (supra) are just not apposite to the facts of the present case. Ademola JCA was right when he observed:

B *"It is simply not correct that the Arbitrator had been capricious or that he has used his judgment or skill to side-track the evidence before him with regard to the valuation of work done by the respondent between 21/1/84 and 23/4/84."*

I agree with the Courts below that a case of misconduct was not proved by the Appellant against the arbitrator. I, therefore, resolve Issue (1) C against the Appellant.

On issue (2), Appellant complained of unfairness by the arbitrator. His complaint is that the arbitrator applied different yardsticks in his consideration of the case of the parties. An example of this was that in the consideration of his case, the arbitrator took up the question of the D wrongful termination by him of the contract and decided on it against him without hearing the parties; whereas the point was not put before the arbitrator for adjudication. The Appellant further complained that the arbitrator came to a wrong decision in law on the said point and relied E on the Court of Appeal decision in F.H.A. v. Warner & Warner (1986) 5 NWLR 473 where it was held that although the employer did not strictly follow the contractual provision for termination of the contract the notice of termination made it clear that the contract was being terminated for the F inability of the Contractor to complete the building within the contractual period, and for that reason the contract had effectively been terminated. Appellant also relied on some English authorities which on going through I find not helpful in the determination of this appeal. Warner v. Warner (1993) 6 NWLR 148 SC does not help the Appellant either.

G In considering the claim of the Appellant for damages for failure of the Respondent to complete the contract within the stipulated time of 10 months and for badly done job, the arbitrator commented:

H *"It is the practice in the construction industry for the owner through his representatives, that is the architect and/or the engineer, to insist on the contractor doing all aspects of a contract in accordance with the specifications both in the quality of materials and in workmanship. Where the contractor does any part of the work not in accordance with*

these specifications the owner's representative would normally insist on that part being done again, even if it means demolishing a substantial part of the work by the contractor before doing it again. After the contract is completed and handed over to the owner he normally calls upon the contractor to make good any defects that may surface within the maintenance period. It is only if the contractor fails to do this that the owner is entitled to do the necessary work and reimburse himself from the retention money which accumulated from the periodical interim certificates. It is important however that the contractor be first given the opportunity to make good himself any defects found during the construction or during the maintenance period before the owner makes good such defects himself at the contractor's expense.

In the present case the Claimant was not called upon to make good the defects in the staircase, the roof tank, the septic tanks and any other components of the work found defective. Presumably the communication line between the Claimant and the Respondent in their contractor-owner relationship ceased to exist after the Respondent determined the contract by his letter of 24th March 1984. The unilateral circumstances of that determination must absolve the Claimant from liability to refund any expenses incurred by the Respondent in making good these defects."

Against this background, he refused Appellant's claims for special and general damages. After considering another claim of the Appellant for N5,000.00 for money owed and refusing same, the arbitrator proceeded to consider his claims for defective staircase and other defective works (claims he had earlier refused) and awarded N11,000.00 damages as against N8,095.00 claimed for defective staircase and N3000 for other defective works. Clearly the arbitrator could not be right in making an award over and above what was claimed and after that claim had been refused. But the error is in favour of the Appellant. The Respondent who could have complained did not complain. I wonder how the Appellant could now complain of unfairness against him. I may mention that the arbitrator had, after a consideration of Respondent's claim for N25,000.00 refund of loan allegedly made to the Appellant, had refused same. Appellant did not complain of unfairness in this regard. I think the Appellant is just looking for any excuse to avoid the award of the arbitrator.

Contrary to the impression given us by learned counsel for the Appellant, the notes of evidence taken at the arbitration proceedings were produced at the High Court and marked Exhibit S. 10. I have gone through Exhibit S. 10 and find no cause to suggest that the arbitrator acted unfairly towards the Appellant in the course of the proceedings before him.

It is submitted on behalf of the Appellant that the arbitrator in finding that the Appellant wrongfully terminated the contract with the Respondent, acted unfairly in raising the issue suo motu and thereby committed a misconduct. I don't think this submission is right. The question of the termination of the contract was put before the arbitrator by the Appellant when he claimed for damages for Respondent's failure to complete the building work in 10 months as stipulated in the contract. It is not the Appellant's case that the arbitrator by finding that the contract was wrongfully terminated by the Appellant, committed an error in law. Rather, it is that (1) the arbitrator was wrong in raising the matter suo motu and (2) the Respondent, having accepted the termination, the Appellant ought not to be deprived of damages for delay and shoddy job.

Either contention cannot be right. I have explained earlier that it was the Appellant by claiming damages for breach of contract, who put the validity of his termination of the contract in issue. I cannot fault the arbitrator for deciding that issue. Although the question of law as to the validity of the termination of the contract was not specifically referred to the arbitrator it is however material in the decision of the matter referred, in this case by the Appellant. Where a contract is wrongfully terminated by one party, the other party has a choice of either accepting the termination and suing for damages for wrongful termination of the contract or ignore the wrongful termination and perform his own part of the contract and claim thereafter against the wrongful party. In this case, the Respondent accepted the termination but did not claim for damages for wrongful termination in the arbitration proceedings. His so choosing is no reason for awarding damages to the Appellant for his own wrongful act.

I, therefore, resolve issue (2) also against the Appellant.

There is only one point I think I should comment upon even though it is not raised in this appeal. The trial High Court found that the claim of the Appellant for N5,000.00 refund was not resolved by the arbitrator and remitted same to the arbitrator to enable him look further into the Appellant's claim. There was no appeal against this part of the judgment of the trial Court. The Respondent who should have complained did not complain. The Court of Appeal, however, made an order directing the Respondent to pay the same sum of N5,000.00 to the Appellant. It thus resolved the issue without further reference to the arbitrator.

I think the Court of Appeal acted wrongly in making the order it made. Under sections 11 and 12 of the Arbitration Law of Lagos State, the court's jurisdiction to interfere with the award of an arbitrator is limited to setting aside an award or remitting a matter to the arbitrator for reconsideration. The Court has no jurisdiction to determine any matter, the subject of an arbitration proceedings. The trial High Court acted properly in this case in remitting the matter of the Appellant's claim for N5,000 to the arbitrator for consideration and resolution. With respect to their Lordships of the Court of Appeal, they acted wrongly in making the order that the sum be paid to the Appellant by the Respondent. Their lack of jurisdiction to make the order apart, the issue was not placed before them and they did not hear the parties on it. They ought not to have made the order. As the matter does not arise for consideration in this appeal, I say no more on it. What I have said is for the guidance of the courts in the future.

This appeal fails and it is hereby dismissed by me. As the Respondent took no part in the appeal, I make no order as to costs.

BELGORE JSC

I do dismiss this appeal for the reasons adumbrated in the judgment of Ogundare JSC which I had the opportunity of discussing with him before hand and of having read it in draft I also make no order as to costs.

MOHAMMED JSC

I have had the preview of the judgment just read by my learned brother Ogundare, JSC., in draft and I agree with him that this appeal has failed. I accordingly dismiss it. I also make no order as to costs.

B _____

KATSINA ALU JSC

C I have had the privilege of reading in advance the judgment of my learned brother Ogundare, JSC in this appeal. I agree entirely with it. I have nothing useful to add.

EJIWUNMI JSC

D I have had the opportunity of reading in draft the judgment just read by my learned brother Ogundare JSC. In that judgment all the facts and the issues raised, having been carefully considered, before the appeal was dismissed. As I agree entirely with the reasons given for dismissing the appeal, I adopt them as my own. The appeal is therefore also dismissed
E by me. I abide by the order made as to costs in the leading judgment of Honourable Justice Ogundare, JSC.

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