

**SUPREME COURT OF NIGERIA**

11<sup>TH</sup> MAY, 2007 SC. 259\2002

**CORAM:- U. A. KALGO, S. A. AKINTAN, A. M. MUKHTAR,  
W. S. N. ONNOGHEN, F. F. TABAI, JJSC**

AFRICAN REINSURANCE CORPORATION ..... APPELLANT  
AND  
J. D. P. CONSTRUCTION NIG. LTD. .... RESPONDENT

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ACTIONS - Diplomatic immunity - How it was developed - State can sue in foreign courts - But cannot be sued there - Save they voluntarily submit to jurisdiction (H1)

ACTIONS - Diplomatic immunity - Exclusion of - Fantaye case - Immunity granted appellant excludes its commercial activities - Appellant successfully raised its immunity in Fantaye case - Because waiver was not proved (H2)

ACTIONS - Contracts - Diplomatic immunity - Where the contract provided that any dispute - Could be litigated upon - Appellant cannot claim that it has not waived its immunity (H3)

**FACTS**

Before the Lagos High Court, plaintiff/respondent filed an action against defendant/appellant. It claimed inter alia, the sum of over US \$2.7 million being the sum due and payable to the plaintiff on a building contract between the parties. When appellant was served with the Writ of Summons filed along with the Statement of Claim, it entered an appearance under protest. Appellant vide its preliminary objection claimed that the High Court lacked jurisdiction on the ground that it by virtue of the Diplomatic Immunities Privileges (African Reinsurance Corporation) Order 1985 has diplomatic immunity.

After hearing the parties the trial Judge overruled the objection. Appellant's appeal to the Court of Appeal was dismissed. Still dissatis-

fied, appellant has further appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

Whether the appellant was covered by the diplomatic immunity raised in its objection to the court's jurisdiction in this case.

**HELD** (Unanimously dismissing the appeal per **AKINTAN JSC**)

***Diplomatic immunity - How it was developed***

1. It may be mentioned that the idea of diplomatic immunity was developed from one of the consequences of State equality rule which is expressed in the *Latin maxim: par in parem non habet imperium* - meaning: no State can claim jurisdiction over another. In practice, therefore, although States can sue in foreign courts, they cannot as a rule be sued there unless they voluntarily, submit to the jurisdiction of the court concerned: See *Oppenheim, International Law, a Treatise*, Vol 1 - Peace, 8<sup>th</sup> edition, page 264. (p. 2096 B)

***Diplomatic immunity - Exclusion of - Fantaye case***

2. The practice of granting diplomatic immunity to States has, in practice, been extended to government naval-ships, properties and government servants acting in their official capacities. But such immunity is no longer granted to a foreign State in respect of acts which are not governmental, which means in most cases, the acts of a foreign State as a trader: See *Oppenheim, supra*, page 265.

In the instant case, the appellant is an international corporation jointly set up by some African States. It was to carry on the reinsurance business in many African States. The host States confer on it certain immunities usually enjoyed by States. But the immunity granted to it by the Nigerian government specifically excludes its commercial activities. In the *African Re-insurance Corporation v. Fantaye* (1986) 2 NSCC 884, the appellant was able to successfully raise the immunity granted to it in Nigeria. The action was instituted against the company by one of its employees. It was a claim for wrongful termination of the employee's appointment and damages. One of the reasons for the appellant's success in that case is that there was no proper proof of waiver of the

immunity. (p. 2096 D)

***Contracts - Diplomatic immunity***

3. In the instant case, the facts are that the transaction was commercial in nature. It was a contract given out by the appellant to the respondent to build its headquarters in Lagos, Nigeria. It was specifically provided in the written contract that any dispute arising from the contract could be litigated upon in a Lagos High Court. I believe that the appellant's Board of Directors approved the agreement and had implemented its provisions by releasing funds to the respondent for the execution of the building. Also on the completion of the job, the Board took possession of the completed building from the respondent. It is, in my view, very ridiculous and unethical for the appellant to now claim that it had not waived its diplomatic immunity in the instant case by agreeing that it could be sued in the written contract.

Again, I believe that, having regard to the fact that the activities covered in this case are commercial in nature, the appellant in fact was not covered by the provisions of the Diplomatic Immunity arrangement it now relied on as a defence. (p. 2096 H)

**REPRESENTATION**

Chief G. O. K Ajayi, SAN (with A. O. Okeaya-Inneh) for Appellant.  
Mr. C. I. Joseph, SAN (with Emeka Okpala) for Respondent.

**CASES REFERRED TO**

African Re-insurance Corporation v. Fantaye (1986) 2 NSCC 884  
Adeyemi v. The State (1991) 1 NWLR 679  
Lawal v. Dawodu (1972) ANLR 707

**STATUTE & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1979 s. 12(1)  
High Court of Lagos State (Civil Procedure) Rules 1994 O. 17 r. 11

**LEAD JUDGMENT BY AKINTAN.JSC**

The present respondent, as plaintiff, instituted this action at Lagos High Court as Suit No. LD/2342/2000 against the present appellant as the defendant. The plaintiffs claim is as follows:

B “(1) *The sum of US \$2, 755,618.85 being the sum due and payable to the plaintiff on a building contract between the parties.*

(2) *Interest on the said sum of US \$2,755,618.85 at the rate of 12% per annum from the 22<sup>nd</sup> June, 2000 until judgment and thereafter at the same rate until total liquidation.*

C (3) *The cost of this action.”*

The writ of summons was filed along with the statement of claim. When the appellant was served, it entered appearance under protest and then filed a notice of preliminary objection in which it claimed that the trial High Court lacked jurisdiction to entertain the claim. The reason for the objection is given as follows: -

“*The appellant by virtue of the Diplomatic Immunities Privileges (African Reinsurance Corporation) Order 1985 has diplomatic immunity.*”

The matter then went for hearing before Shitta-Bey, J. After hearing the parties on the objection, he delivered the court’s ruling on 26/10/2000 in which the objection was overruled. The appellant was dissatisfied with the ruling and an appeal filed against the ruling at the court below was dismissed. In the lead judgment of the court below written by Outage, JCA (as he then was) to which Caladium and Chukwuma-Eneh, JJCA agreed, the learned Justice said thus in the concluding portion of the judgment:

G “*The answer I return to appellant’s questions for determination is that I agree with the decision of the Supreme Court in the Fantaye case that a waiver by a corporate body, Hike the appellant, of its diplomatic immunity must be supported by a resolution of its board of directors; and*

H *the waiver can only be effectively raised before the court at the time when the body is brought before the court. I however, do not think that such claim to diplomatic immunity was available to the appellant in the circumstances of this case. In the final conclusion, this appeal fails and*

*is dismissed with =N=7,500 costs in “favour of the respondent.”*

The appellant was again not satisfied with the judgment and has therefore appealed against it to this court. The respondent was also not satisfied with some portions of the judgment. A cross -appeal was also filed. The parties filed their respective briefs of argument in this court. B The appellant formulated the following two issues as arising for determination in the appeal:

*“1. Having:*

*(i) ruled after formal objection and argument that the two issues C formulated by the plaintiff/respondent did not arise for determination in the appeal*

*(ii) ruled further that it was only the three issues formulated by the defendant/appellant which arose for determination and*

*(iii) resolved the said three issues in favour of the defendant/ap- D pellant was the Court of Appeal entitled to turn round thereafter to consider the plaintiff/respondent’s rejected two issues and resolve them in the plaintiff/respondent’s favour and then dismiss the appellant’s appeal?*

*2. Having resolved all of the three issues arising before it for E determination, in favour of the appellant, was he a Court of Appeal entitled to dismiss the appellant’s appeal on the ground that it would be immoral and unjust to allow it.”*

The respondent, on the other hand, formulated two issues as arising F for determination in the appeal and three issues as arising for determination in the cross-appeal. The two issues formulated by the respondent in respect of the appeal are as follows:

*“1. Whether or not the additional grounds of appeal filed and G argued herein, without the leave of Court specifically prayed for and granted to appeal on a consent judgment, are competent in the circumstances herein.*

*(2) Whether or not the Court of Appeal was not enjoined in the H circumstances herein to have considered and determined all the issues appropriately arising for determination before it.”*

The three issues formulated in respect of the cross-appeal are as follows:

B “What is the legal consequence of the *Diplomatic Immunities and Privileges (African Reinsurance Corporation) Order 1985* which was issued, based on the *Headquarters Agreement* in total disregard to and without compliance with section 12(1) of the 1979 Constitution which was then extant.

2. Whether or not by producing the 1985 Order, albeit as an appendix to the appellant’s brief in the Court of Appeal, the appellant had not removed the list from the appeal on the issue of judicial notice of the 1985 Order before the Court of Appeal.

C 3. Did the defendant/appellant properly raise a special defence before the High Court of Lagos State in the circumstance therein.”

D The brief facts of the case are that the appellant is a corporation carrying on re-insurance business in Nigeria while the respondent is a civil engineering company incorporated in Nigeria. By a written contract between the parties, the respondent agreed with the appellant to construct the appellant’s head office building at Victoria Island, Lagos for a tentative sum of US \$6,234,989.66.

E One of the clauses in the agreement provides that the parties agreed to subject themselves to the jurisdiction of the High Court of Lagos in the resolution of any dispute arising from the contract.

F The respondent pleaded that it completed the construction work and delivered possession of it to the appellant. The amount now claimed by the respondent is what was outstanding to it from the appellant out of the cost incurred in constructing the building. When the appellant failed to pay the said sum, the respondent filed the action at Lagos High Court.

G Upon service of the writ on the appellant, it entered an appearance under protest and then filed a notice of preliminary objection. The ground of objection filed is as follows:

H “*The applicant by virtue of the Diplomatic Immunities and Privileges (African Reinsurance Corporation) Order 1985 has diplomatic immunity.*”

The matter thereafter came up for hearing before Shitta-Bey, J. sitting at Lagos High Court. After hearing submissions from Counsel for the parties, the learned trial judge delivered a considered ruling in which

he over-ruled the objection.

The appellant was dissatisfied with the ruling of the trial High Court and an appeal was filed against it to the court below. The appeal was dismissed by the Court below and the present appeal is from the judgment of the court below delivered on 2005/2002. B

The contention of the appellant, as canvassed in the appellant's brief and in the oral presentation at the hearing, is that the court below, in its judgment now on appeal, although resolved all the issues canvassed before it in favour of the appellant, yet the court did not enter judgment in favour of the appellant. This is said to be wrong. The court below is said to have based its reason for dismissing the appeal before it by re-opening the issue as to whether the appellant was in fact entitled to claim diplomatic immunity in the circumstances of this case. C

Reference is made to a portion of the lead judgment written by Oguntade, JCA (as he then was) where he said as follows: D

*"The correct position is that the diplomatic Immunities and privileges which a foreign sovereign enjoys in Nigeria is largely determined by the common law. In other words, a foreign sovereign cannot claim immunity when he is engaged in trade, commerce or ordinary business activities."* E

It is submitted that the learned Justice was wrong in that that contention had earlier been rejected by this court in the case of *African Reinsurance Corporation v. Fantaye* (1986) 2 NSCC 884 which is binding on the court below. F

It is submitted in reply in the respondent's brief that the status of Diplomatic Immunity is a special defence to an otherwise right of the citizens to seek for redress in a court of law. Reference is made to Order 17 Rule 11 of the *High Court of Lagos State Civil Procedure Rules* (1994) which provides, *inter alia*, that the- defendant or plaintiff must raise by his pleading all matters which show the action or counter- claim not to be maintainable or that the transaction is either void or voidable in point of law. The appellant is said to have breached that Order by not raising the objection in its statement of defence. The reliance by the appellant on the provisions of the Diplomatic Immunity in respect of purely commercial G H

transaction is also said to be immoral having regards to the facts of this case.

The main question raised in this appeal is whether the appellant was covered by the diplomatic immunity raised in its objection to the court's jurisdiction in this case. **It may be mentioned that the idea of diplomatic immunity was developed from one of the consequences of State equality rule which is expressed in the *Latin maxim: par in parem non habet imperium* - meaning: no State can claim jurisdiction over another. In practice, therefore, although States can sue in foreign courts, they cannot as a rule be sued there unless they voluntarily, submit to the jurisdiction of the court concerned: See *Oppenheim, International Law, a Treatise*, Vol 1 - Peace, 8<sup>th</sup> edition, page 264.**

**The practice of granting diplomatic immunity to States has, in practice, been extended to government naval-ships, properties and government servants acting in their official capacities. But such immunity is no longer granted to a foreign State in respect of acts which are not governmental, which means in most cases, the acts of a foreign State as a trader: See *Oppenheim, supra*, page 265.**

In the instant case, the appellant is an international corporation jointly set up by some African States. It was to carry on the reinsurance business in many African States. The host States confer on it certain immunities usually enjoyed by States. But the immunity granted to it by the Nigerian government specifically excludes its commercial activities. *In fact African Re-insurance Corporation v. Fantaye* (1986) 2 NSCC 884, the appellant was able to successfully raise the immunity granted to it in Nigeria. The action was instituted against the company by one of its employees. It was a claim for wrongful termination of the employee's appointment and damages. One of the reasons for the appellant's success in that case is that there was no proper proof of waiver of the immunity.

**In the instant, case, the facts are that the transaction was commercial in nature. It was a contract given out by the appellant to the respondent to build its headquarters in Lagos, Nigeria. It was**



specifically provided in the written contract that any dispute arising from the contract could be litigated upon in a Lagos High Court. I believe that the appellant's Board of Directors approved the agreement and had implemented its provisions by releasing funds to the respondent for the execution of the building. Also on the completion of the job, the Board took possession of the completed building from the respondent. It is, in my view, very ridiculous and unethical for the appellant to now claim that it had not waived its diplomatic immunity in the instant case by agreeing that it could be sued in the written contract. C

Again, I believe that, having regard to the fact that the activities covered in this case are commercial in nature, the appellant in fact was not covered by the provisions of the Diplomatic Immunity arrangement it now relied on as a defence. D

In the result, I hold that there is totally no merit in the appeal. I accordingly dismiss the appeal with ₦= 10,000 costs in favour of the respondent.

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### KALGO JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother Akintan JSC in this appeal. I agree with his reasoning and the conclusion reached therein which I adopt as mine. I accordingly find no merit in the appeal and the cross appeal which are hereby dismissed. I abide by the consequential order made in the said judgment including the order of costs. F

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### MUKHTAR JSC

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Akintan JSC. I am in complete agreement with the reasoning and conclusion reached in the judgment. The appeal definitely has no merit whatsoever, and I am also dismissing it in its entirety. I agree with the order as to costs. H

**ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal  
B holden in Lagos in appeal No. CA/L/449/2000 delivered on the 20<sup>th</sup> day of  
May, 2002 in which it dismissed the appeal of the appellant against the  
ruling of the High Court of Lagos State, in suit No. LD/2342/2000 deliv-  
ered on the 26th day of October, 2000.

C The appellant and the respondent entered into a contract in which  
the respondent agreed with the appellant to construct the appellant's head  
office building situate at Victoria Island, Lagos for a tentative sum of  
United States Dollars 6,243,989.66. The parties also agreed to submit  
D themselves to the jurisdiction of the Lagos State High Court in the reso-  
lution of any dispute arising from the said contract. It is the case of the  
respondent, as pleaded in the Statement of Claim, that it completed the  
contract and delivered possession thereof to the appellant which delivery  
was acknowledged by the appellant in writing but the appellant refused to  
E pay 50% of the retention money of US\$386,243.92 despite repeated de-  
mands; that the total entitlement of the respondent from the appellant is  
\$37,755,618.85 which the respondent claimed in addition to interest  
thereon.

F When the processes were served on the appellant, it caused a  
conditional appearance to be entered on its behalf together with a prelimi-  
nary objection challenging the jurisdiction of the trial court to entertain  
the matter on the ground that it enjoys diplomatic immunity by virtue of  
the provisions of the Diplomatic Immunities and Privileges (African Re-  
G insurance Corporation) Order 1985. The objection was overruled by the  
trial court resulting in an appeal to the Court of Appeal, which, as stated  
earlier in the judgment, dismissed same.

On further appeal to this Court, the issues for determination, as  
H identified by learned Senior Counsel for the appellant CHIEF G. O. K.  
AJAYI, SAN are as follows: -

*"402 1. Having:*

*(i) ruled after formal objection and argument that the two issues*

*formulated by the Plaintiff/Respondent did not arise for determination in the Appeal.*

*(ii) ruled further that it was the THREE ISSUES formulated by the Defendant/Appellant which arose for determination and*

*(iii) resolved the said THREE ISSUES in favour of the Defendant/Appellant,*

*Was the Court of Appeal entitled to turn round thereafter to consider the Plaintiff/ Respondent's rejected two issues resolve them in the Plaintiff/Respondents favour and then dismiss the Appellant's Appeal?* C

*2. Having resolved the THREE ISSUES arising before it for determination, in favour of the Appellant, was the Court of Appeal entitled to dismiss the Appellant's Appeal on the ground that it would be immoral and unjust to allow it?"*

I should, at this, stage, mention the fact that the respondent has cross appealed against the judgment of the lower court and in the Respondent/Cross Appellant's Brief of Argument filed on 23/4/04, the following issues have been identified for determination: - D

*"2.03 WHETHER OR NOT the additional grounds of appeal filed E and argued herein, without the leave of court specifically prayed for and granted to appeal on a consent judgment, are competent in the circumstances herein. Issue No. 1.*

*2.04 WHETHER OR NOT the Court of Appeal was not enjoined F in the circumstances herein to have considered and determined all the issues appropriately arising for determination before it. Issue No. 2. ON THE CROSS APPEAL.*

*2.05 WHAT is the legal consequence of the Diplomatic Immunities and Privileges (African Reinsurance Corporation) Order 1985 ("the 1985") which was issued, based on the Headquarters Agreement in total disregard to and without compliance with section 12(1) of the 1 979 Constitution which was then extant. Issue No. 3* G

*2.06 WHETHER OR NOT by producing the 1985 Order, albeit as H an appendix to the Appellant's brief in the Court of Appeal, the Appellant had not removed the LIS from its appeal on the issue of judicial notice of the 1985 Order before the Court of Appeal. Issue No. 4.*

*2.07 Did the Defendant/Appellant properly raise a special defence before the High Court of Lagos State in the circumstance herein. Issue No. 5.”*

From the above issues, it is very clear that learned counsel for the  
B respondent/cross appellant did not file a separate brief of argument in  
respect of the two appeals but a joint brief in which arguments on the  
two appeals are identified only by the issues formulated in relation thereto.  
For instance issues 1 & 2 relate to the main appeal while issues 3-5 relate  
C to the cross appeal, all of which are argued in the same brief and without  
separate headings to demarcate them, This approach is not only novel  
but strange in deed. I do not wish to comment any further on that.

In arguing the appeal, learned Senior Counsel for the appellant has  
urged the court to allow the appeal on the grounds that the lower court  
D having after formal objection rejected the issues formulated by the plain  
tiff/respondent, the Court of Appeal was bound by that decision; that the  
Court of Appeal was wrong to have resolved in favour of the plaintiff/  
respondent those very issues it had rejected as arising for determination  
E in the appeal; that having resolved in favour of the appellant all the issues  
raised by it for determination the Court of Appeal ought to have allowed  
the appeal; that the Court of Appeal is bound by the decision of the Su-  
preme Court in Fantaye’s case wherein it was declared that the  
F appellant enjoys diplomatic immunity; and that the Court of Appeal was  
in error in supposing that it would be unjust or immoral for it to hold that  
the appellant was, entitled to rely on its diplomatic immunity.

On the other hand, Learned Senior Counsel for the respondent/cross  
G appellant C. O. I. JOSEPH Esq. SAN, submitted that the additional grounds  
of appeal of the appellant are incompetent and so are the two issues  
formulated and argued thereon because the appellant did not seek nor  
obtain the leave of court before filing and arguing them particularly as the  
grounds and issues thereon touch on what learned senior counsel termed  
H consent judgment; that the Court of Appeal was eminently competent to  
have and validly raised and determined the issue as to whether or not the  
appellant enjoys diplomatic immunity in the *circumstances* herein; that the  
1985 order is a void piece of legislation the same being in direct infraction

and violation of section 12(1) of the 1979 Constitution as amended; that by producing the 1985 order, albeit as an appendix to the appellant's brief before the Court of Appeal but in deference to the decision of the High Court of Lagos State, the appellant removed the LIS on the issue of judicial notice before the Court of Appeal; and, that a claim of diplomatic immunity is a special defence under the High Court of Lagos State Civil Procedure Rules 1994 and the proper place for a plea of special defence as provided for by the said rules is in the Statement of Defence. B

To begin with I find it difficult to really understand respondent/cross appellant's issue No. 1 particularly the term "*consent judgment*" in the context, in which it appears therein. My inability to so understand the term arises from the fact that there is nothing on record to show that any consent judgment was entered by the trial court or the lower court in the matter, making it necessary for the contention that leave of the court is thereby required for the appellant to appeal against the said consent judgment. In the practice of the law words and phrases are employed as works of art which have, by practice, acquired specific meaning or usage associated therewith and one is likely to create confusion when such words or terms of art are used out of context as in the instant case with regard to the term, "*consent judgment*." D E

The primary issue for determination in this appeal, as I see it, is; simply whether the lower, court was right in dismissing the appeal having regards to the holding by that court that "*I agree with the decision of the Supreme Court in the Fantaye case that a waiver by a corporate, body like the appellant of its diplomatic immunity must be supported by a resolution of its board of directors; and that the waiver can only be effectively raised before the, court at the time when the body is brought before the court.*" F G

See page 194 of the record.

It is the case of the appellant that the lower court having agreed with the decision of the Supreme Court which is relevant to the facts of the instant case, it ought to have allowed the appeal, not to have dismissed it; that the lower court went on to dismiss the appeal on an issue not properly before it particularly as it is alleged to have, earlier in its

judgment, expressly rejected the issues on the basis of which such a decision or conclusion could have been reached. The question is whether the appellant is correct, having regard to the record.

In an attempt at justifying the contention of the appellant that the lower court rejected the two issues raised by the respondent, yet went ahead to determine the appeal on those very issues, learned senior counsel referred the court to pages 189 where the lower court alluded to the objection of learned counsel for the appellant to the two issues and pages 181 -182 of the record where the lower court is alleged to have reacted to the said objection. It should be noted that pages 181 - 182 precede page 189 and not the other way round as presented by learned senior counsel, and when one looks at the record it does not support the contention of learned counsel for the appellant.

At pages 9 - 10 of the Appellant's, brief, learned senior counsel for the appellant made the following submissions: -

*"5.04 The Defendant/Appellant submits that, since the two Issues formulated by the Respondent were not based on any Grounds of Appeal, they fell flat to the ground, and the Court of Appeal could not consider them (the authorities in support of that proposition are cited in the Appellant's REPLY BRIEF at page -139 of the Record). See also: Adeyemi v. The State (1991) 1 NWLR 679. So, when in the course of the arguments in respect of the Appeal, Learned Counsel for the Respondent attempted to argue those two Grounds of Appeal, Counsel for the Appellant objected on the ground that they could not be considered.*

*5.05 The Court of Appeal, in the course of its Judgment (Oguntade JCA) alluded to this objection at Page 189 of the Record where Oguntade JCA said:*

*"The Respondent's issues sought to discuss whether in fact, such Diplomatic Immunity existed in the circumstances of this case. Chief G. O. K. Ajayi S.A.N had objected at the time we heard this Appeal to this issues raised by the Respondent. He argued that since the Respondent had not filed a Cross-Appeal, it could not raise issues not arising from the Appeal by the Appellant."*

*5.06 The reaction of the Court of Appeal to this objection is re-*

*flected at Pages 181 - 182 of the Record. The relevant passage has already been reproduced earlier on in this BRIEF paragraph 3.07 above but it can bear repetition. This is what Oguntade J.C.A. said:*

*“ In the appellant’s brief filed, the issues for determination in the appeal were identified as the following:*

*”1. Was the court below right in refusing to hear the defendants challenge to the court’s jurisdiction upon the ground specified in the Notice of preliminary objection filed by it?*

*2. At what time can a body enjoying Diplomatic Immunity be held to have effectively elected to waive its immunity from suit and give jurisdiction to the ordinary courts; is it when it agrees in the body of a contract that disputes arising therefrom be referred to the courts for determination or is it when a court is about or is being asked to exercise jurisdiction over it?*

*3. Can a corporate body enjoying Diplomatic Immunity be held to have waived its immunity on account of a CONTRACT IF there is no averment or evidence that such waiver is supported by a Resolution, of the Board of Directors of the body?”*

The respondent’s issues were these:

*“(i) Whether or not the defendant would otherwise have been entitled to a claim of jurisdictional immunity under the Common Law (by virtue of section 1 (i) of the Act which was the applicable law prior to the enactment of the 1962 law.*

*(ii) Whether or not the defendant, which assumes the characters of a trader/merchant, can claim the benefit (of diplomatic immunity) provided by section 1 (i) of the Act in view of section (3)(b) often same Act.”*

*I shall be guided in this judgment by the issues formulated, by the appellant. I intend to consider issue No. 1 separately and issues 2 and 3 together.”*

5.07 As submitted earlier in paragraph 3.08 of this Brief, the Court of Appeal had by the above quoted passage, ruled that the Issues sought to be raised, arid which was objected to both in our Reply Brief and orally during arguments, did not arise for hearing in the Appeal.

5.08 The appellant respectfully submits that the Court of Appeal was bound by its Ruling that the issues sought by to be argued by the Respondent did not arise for determination in the Appeal and would not be considered in the Appeal. The Court of Appeal was therefore incompetent to reverse that determination. See *Lawal v. Dawodu* (1972) ANLR 707 where the Supreme Court (per Coker JSC) said inter alia, at page 719:

*“We are clearly of the view that the Learned Trial Judge was not entitled, as he thought he was, to alter the effect of his own ruling on the issue previously decided by him in the course of the same proceeding in favour of the Plaintiff.”*

5.09 The Defendant/Appellant therefore respectfully submits that the Supreme Court ought to set aside the determination of the Court of Appeal on the two Issues, made at Page 193 of the Record where it held, in lead Judgment of Oguntade JCA as follows:

*“The correct position is that the diplomatic immunities and privileges which a foreign sovereign enjoys in Nigeria is largely as determined by the Common Law: In other words, a foreign sovereign cannot claim immunity when he is engaged in trade, commerce or other business activities. “*

At pages 181 - 182 of the record, the lower court held as follows: -

*“In the appellant’s brief filed, the issues for determination in the appeal were identified as the following:*

*“1. Was the court below right in refusing to hear the defendant’s challenge to the court’s jurisdiction upon the ground specified in the Notice of preliminary objection filed by it?*

*2. At what time can a body enjoying. Diplomatic Immunity be held to have effectively elected to waive its immunity from suit and give jurisdiction to the ordinary courts; is it when it agrees in the body of a contract that disputes arising therefrom be referred to the courts for determination or is it when a court is about or is being asked to exercise jurisdiction over it?*

*3. Can a corporate body enjoying Diplomatic Immunity be held to have waived its immunity on account of a contract if there is no aver-*



*ment of evidence that such waiver is supported by a Resolution of the Board of Directors of the body?”*

The respondent's issues were these:

*“(1) Whether or not the defendant would otherwise have been entitled to a claim of jurisdictional immunity under the Common Law by virtue of section 1 (i) of the Act which was the applicable law prior to the enactment of the 1962 law.*

*{ii) Whether or not the defendant, which assumes the characters of a trader/merchant, can claim the benefit (of diplomatic immunity) provided by section 1(i) of the Act in view of section 1(3) (b) of the same Act.”*

*I shall be guided in this judgment by the issues formulated by the appellant. I intend to consider issue No. 1 separately and issues 2 and 3 together.”*

It is very clear from the above that the lower court did not state the reason /or its preference of the issues as formulated by learned counsel for the appellant to those of the respondent neither did the court state expressly that it had rejected the said Issues of the respondent.

The reaction of the lower court to the objection of learned senior counsel for the appellant to the two issues raised by learned senior counsel for the respondent is at pages 189 -190 of the record as follows: -

*“The respondent's issues had sought to discuss whether in fact such diplomatic immunity existed in the circumstances of this case. Chief G. O. K Ajayi S.A.N. had objected at the time we heard this appeal to the issues raised by the respondent. He argued that since the respondent had not filed a cross-appeal, it could not raise issues not arising from the appeal by the appellant.*

*My view is that it would be a worthless exercise to consider this appeal without first determining whether indeed there was diplomatic immunity in favour of the appellant in respect of the suit brought against it. This is the more so in this case having regard to the circumstances in which the matter giving cause to this appeal arose. The trial judge had reasoned in a manner I consider ambivalent. It had first said that the appellant who had not filed a statement of defence could not raise the*

issue of diplomatic immunity. Later, it went on to hold that the immunity claimed did not cover the type of contract, which was the subject-matter of the dispute before the court. It does not seem wise in my humble view to start discussing the manner by which diplomatic immunity should be raised without ascertaining whether or not the said diplomatic immunity exists.”

From the above passage it is very clear that the lower court did not expressly or by necessary implication sustain the objection of learned Senior Counsel for the appellant as regards the two issues raised by learned senior counsel for the respondent. Rather it appears to me that the court agreed with the issues as falling for determination of the appeal and proceeded to do so.

I am of the considered view that the lower court, is correct in the position it took on the matter having regard to the grounds of appeal before it, particularly ground IV, which complained thus: -

“IV. The learned Trial Judge erred in law when she concluded that the Appellant does not enjoy immunity since subject matter of the transaction is a contract.

**PARTICULARS.**

In accordance with section 2(3) of the Diplomatic Immunities and Privileges (African Reinsurance Corporation) Order 1985 the only transaction where the Appellant does not have immunity is in REINSURANCE business.”

From the above ground of appeal, it is clear that the trial court did hold that appellant did not enjoy immunity in the transaction leading to the action thereby necessitating the particular ground of complaint before the Court of Appeal. I hold the view that with that ground of appeal the issue or question as to whether the appellant enjoyed diplomatic immunity in relation to the transaction in issue is prominently brought into focus before the lower court for determination. It follows therefore in my view, that if the lower court took up the issue and determines same, it is perfectly in order in so doing, the same having been supported by the ground of appeal before the court.

In resolving the issue, it is the view of the lower court, as repro-

duced earlier in this judgment, that though the applicable law on the issue of appellant's diplomatic immunity is as stated by this Court in Fantasy's case, the said decision does not apply to the facts of this case because diplomatic immunity does not avail the appellant in the circumstances of this case thereby affirming the decision of the trial court complained of in B ground IV of the grounds of appeal before the Court of Appeal. I therefore find nothing wrong with that decision of the Court of Appeal, which is hereby affirmed by me.

In conclusion, I agree with the lead judgment of my Learned brother C AKINTAN, JSC; the draft of which I had earlier read; that the appeal and cross appeal are without merit and should be dismissed. I accordingly dismiss them and abide by all other consequential orders contained in the said lead judgment including the order as to costs.

Appeal and cross appeal dismissed. D

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### **TABAI JSC**

I had a preview of the leading judgment of my learned brother E Akintan JSC. I agree entirely with the conclusion that the appeal lacks merit and is liable to be dismissed. The Diplomatic Immunity under which the Appellant sought protection is definitely not available to it.

Having voluntarily entered into the contractual commercial venture F and derived benefits thereunder and having further undertaken to submit to the jurisdiction of the Lagos State High Court in the event of a dispute arising under the contract, the Appellant cannot turn round to claim diplomatic immunity to evade its liability under the contract.

I also dismiss the appeal with costs which I assess at N10,000.00 G in favour of the Respondent.

H