

SUPREME COURT OF NIGERIA
24TH APRIL, 2009 SC. 88/2003
CORAM:- D. MUSDAPHER, G. A. OGUNTADE,
M. MOHAMMED, F. F. TABAI,
M. S. MUNTAKA-COOMASSIE, JJSC

1. FASEL SERVICES LIMITED APPELLANTS
2. CHIEF (SIR) M. O. KANU (KSC)
AND
1. NIGERIAN PORTS AUTHORITY
2. NIGERIAN PORTS AUTHORITY RESPONDENTS
SUPERANNUATION FUND

CONTRACTS - Enforceability - Illegality ex-facie - Attitude of courts
- Whether such illegality is pleaded or not - The court would not
close its eyes against it - It has a duty to refuse to enforce the contract
(H1)

CONTRACTS - Illegality - Purport of - Where a Statute declares a
contract not only void - But also imposes a penalty for violation -
The contract is illegal ab initio (H2)

COMPANY LAW - Investments - Illegality of - Trustee Investments
Act, s. 2 - Purpose of - It is meant to safeguard investments against
abuse of power - Not to make them illegal for ignoring the Provisions
thereof (H3)

FACTS

The plaintiffs/respondents sued the defendants/appellants by
an originating summons before the Federal High Court raising a
number of questions, and claiming a declaration that the 2nd re-
spondent was entitled to the full dividends on the amount of its full
investments in the 1st appellant company.

The appellants contested that the investments of the 2nd re-
spondents beyond the amount permitted under the Trustees Invest-
ments Act was illegal and unenforceable. Accordingly appellants
claimed that the 2nd respondent was only entitled to dividends on
that part of the investment as is permitted under the Act. After hear-

ing, the learned trial judge gave judgment to the respondents. Dissatisfied, the appellants appealed to the Court of Appeal which dismissed the appeal. Still aggrieved, the appellants have brought this further appeal to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether having regard to the provisions of the Trustee Investments Act CAP 449 of the Laws of the Federation 1990, the investments of the 2nd Respondent in the 1st Appellant Company is illegal and therefore unenforceable."

HELD (Unanimously dismissing the appeal per **MOHAMMED JSC**)
CONTRACTS - Enforceability - Illegality ex-facie

1. The attitude of the Courts to the issue of apparent or *ex-facie* illegality is certainly well settled. When a contract is *ex-facie* illegal, whether the alleged illegality has been pleaded or not, the Court would not close its eyes against illegality, as it is the duty of every Court to refuse to enforce such a transaction. In other words once illegality has been brought to the attention of the Court, it must be considered and resolved. (p. 855 B)

CONTRACTS - Illegality - Purport of

2. The position of the law is that where a statute declares a contract or transaction between parties not only void but also imposes a penalty for violation, that contract or transaction is illegal *ab initio*. However where the legal sanction is merely to prevent abuse or fraud and no penalty is imposed for the violation of the provision of the statute, the violation is merely voidable and not illegal. (p. 855 E)

Investments - Illegality of - Trustee Investments Act, s. 2

3. Section 2 of the present statute being relied upon by the Appellants to say that the transaction between them and the Respondents is illegal is merely in the statute to safeguard investments under the Act by guarding against abuse of power and fraud and not to make investments made in disregard of the provisions of the statute illegal in the absence of any sanctions for ignoring the provisions of the statute. (p. 856 E)

NOTABLE POINT OF INTEREST**MOHAMMED JSC**

1. It is not in the public interest to treat the transaction as illegal

It is therefore not in the interest of public policy for the transaction of investment between the parties herein to be treated or regarded as illegal. This is because public policy can adequately be taken care of or safeguarded by the ultimate Government's power through the parent Ministry of the Respondents, now the Ministry of Transport, to direct the withdrawal of the 2nd Respondent's investments from the 1st Appellant without any loss being incurred to the funds invested. (p. 856 G)

REPRESENTATION

S. Larry with F. Ayaegba (Miss) and A. Nwosu (Miss) for the Appellants.

Titilayo Akinlawon (Mrs.) with Soji Toki for the Respondents.

CASES REFERRED TO

Gedge v. Royal Exchange Assurance Corporation (1900) 2 Q.B. 214 at 220

Akagbue and Ors. v. Romaine (1982) 5 S.C, 133

Nasr v. Berini (Betrut-riyad (Nigeria) Bank Ltd. (1968) 1 All N.L.R, 274

Sodipo v. Lemminkainen (1986) 1 N.W.L.R. (Pt. 15) 220

Solanke v. Abed (supra) Oil-field Supply Centre Ltd. v. Johnson (1987) 2 N.W.L.R. (Pt. 58) 265

Ibrahim v. Osim (1988) 3 N.W.L.R. (Pt. 82) 257

Pan Bishbilder (Nigeria) Ltd. v. First Bank of Nigeria Ltd. (2000) 1 N.W.L.R (Pt. 642) 684 at 693

Thirwell v. Oyewunmi (1990) 4 N.W.L.R. (Pt. 144) 384

Kasunmu v. Baba-Egbe 14 WACA 444

Adepoju v. Afonja (1994) 8 N.W.L.R. (Pt. 363) 437 at 524

STATUTE REFERRED TO

Trustee Investments Act, Cap 449, Laws of the Federation of Nigeria, 1990, ss. 2 & 3

BOOKS REFERRED TO

Professor Sagay's Laws of Contract, 2nd Edn

Halbury's Laws of England; 3rd Edn, vol.8., page 126, paragraph21

LEAD JUDGMENT BY MOHAMMED

B Fasel Services Limited, the 1st Appellant in this appeal is a Limited Liability Company which was incorporated on 22nd August, 1978 with the then registered name of Fag Africana Services Limited. The 2nd Appellant Chief M. O. Kanu is the Chairman and Chief Executive of the Board of Directors of the 1st Appellant. Between 1983 and 1986, the 2nd Respondent which is a body or fund established and funded by the 1st Respondent, a body created by the Federal Government of Nigeria by statute, bought and was duly allotted with 1,330,000 Ordinary Shares of the 1st Appellant Company. When D between 1987 and 1989, the 1st Appellant found itself in financial stress resulting in the appointment of a receiver manager by one of its creditors, it approached the 2nd Respondent to further invest in the Company by the purchase of additional shares and provision of loan through acquisition of Debentures secured by Deed of Mortgage. This request resulted in further investment by the 2nd Respondent in the 1st Appellant Company to the tune of N52,000,000.00. Of this amount, the sum of N 20,000,000.00 was invested in the purchase of additional Ordinary Shares while the sum of N32,000,000.00 was invested in form of a loan secured by a Mortgage of Debentures of the 1st Appellant.

It was common ground on the undisputed facts of this case between the parties that the sum of N32,000,000.00 further invested by the 2nd Respondent by way of Debenture Mortgage had since G been redeemed by the 1st Appellant. However in 1995, the 2nd Respondent again acquired additional Ordinary Shares of the 1st Appellant, bringing its total number of shares in the Company to 28,639,687. Although the 2nd Respondent as shareholder of the 1st Appellant had received dividends in the sum of 141,413,445.00, H 141,919,700.00, N42,559,600.00 and 542,557,571.83 for the financial years of 1992, 1993, 1994 and 1995 respectively, and despite the declaration of 13 kobo, 10 kobo and 20 kobo respectively as dividends per share of the Company for the financial years of 1996, 1997 and 1998, only the sum of N763,558.74 representing

dividends payment on only 1,300,000 units of shares out of the number of shares of 28,639,687 held by the 2nd Respondent, was actually paid to the 2nd Respondent. The refusal of the 1st Appellant to pay the correct amount of dividends due to the 2nd Respondent having regard to the number of shares held by it in the 1st Appellant which apparently regarded the entire investment of the 2nd Respondent in it as illegal being in violation of the Trustee Investments Act, gave rise to the dispute between the parties resulting in the Respondents' action as Plaintiffs by Originating Summons against the Appellants as Defendants setting down the following questions and consequent reliefs for determination by the trial Federal High Court; B
C

"1. Whether in the light of the 27,309,687 shares certificates issued by the 1st Defendant Company to the 2nd Plaintiff the Defendants especially the 2nd Defendant's Company can deny the Plaintiff the rights as shareholder of the said 27,309,687 Units of Ordinary Shares. D

2. Whether the provisions of the Trustees Investments Act CAP 449 Laws of the Federation 1990 Edition renders the said 27,309,687 Units of Ordinary Shares held by the 2nd Plaintiff in the 1st Defendant Company illegal. E

3. Whether the provisions of the Trustees Investments Act, CAP 449 Laws of the Federation 1990 Edition wholly and exclusively regulate Plaintiffs Investment Powers.

4. Whether the Defendants who are neither contributors nor beneficiaries of the 2nd Plaintiffs fund, have the locus standi, to challenge the Plaintiff's investment of 27,309,687 Units of Ordinary Shares in the 1st Defendant Company. If the answers to 1, 2, 3 or 4 above are/is in the negative, the Plaintiffs claim: F

(A.) A declaration that the 2nd Plaintiff as the lawful Shareholder of the 27,309,687 Million Units of Ordinary Shares of the 1st Defendant Company is entitled to exercise all the Shareholders rights in respect of the 27,309,687 Million Units of shares especially the right to receive dividends thereof from the 1st Defendant, G

(B.) An order directing/compelling the Defendants especially the 2nd Defendant to do pay forthwith, dividends to the 2nd Plaintiff on the said 27,309,687 Million Units of Ordinary Shares for 1996, 1997 and 1998 financial years." H

This Originating Summons of the Plaintiffs now Respondents

filed on 15th June, 1999 at the trial Federal High Court Abuja, came before Auta J., who in a considered judgment delivered on 31st January, 2000 found in favour of the Plaintiffs/Respondents. Part of this judgment at pages 137 - 138 of the record reads -

"In conclusion the best the Defendants can do now that they are buoyant is to buy out the Plaintiff and pay them the correct market price of their shares, and also pay them their due dividend. In view of the observation made by me above I find that the 1st Defendant and 2nd Defendant, cannot deny the Plaintiff their rights as shareholders of the said 27,309,687, Units of Ordinary Shares. The provisions of Trustees Investments Act CAP 449 LFN does not render the said 27,309,687 Units of Ordinary Shares by the 2nd Plaintiff in the 1st Defendant Company illegal. The Defendants are therefore ordered to pay forthwith, dividends to the 2nd Plaintiff on the said 27,309,687 Units Of Ordinary Shares for 1996, 1997 and 1998 years, till date. The application of the Plaintiff accordingly succeed."

The Appellants were not happy with this decision of trial Court against them and therefore decided to appeal to the Court of Appeal where the Appellants in their Appellants' brief of argument, raised only one issue for the determination of their appeal. That issue states

"Whether the investment of the 2nd Respondent in the 1st Appellant's Company contravenes the provisions of Section 2(1)(d.) and Section 2(2)(b.) & (c.) of the Trustees Investments Act CAP 449 LFN 1990 and therefore rendered the said investment illegal and unenforceable even where the said illegality was not pleaded."

In a unanimous decision of the Court of Appeal Abuja Division with Muhammad JCA (as he then was) delivering the lead judgment on 30th January, 2003, the Appellants' appeal was dismissed and the judgment of the trial Court which found the provisions of the Trustee Investments Act CAP 449 Laws of the Federation 1990, do not render the investment of the 2nd Respondent in the 1st Appellant Company illegal or unenforceable, was accordingly affirmed.

contract in this appeal to the extent that the transaction herein is totally independent of the effect of the Act? (Related to Ground E)"

In the brief of argument filed on behalf of the Respondents by their learned Counsel however, two issues were identified. The are -

"1. Whether the Court of Appeal rightly held that without a

stipulated penalty for infraction the Respondents investment in the 1st Appellant Company was Not illegal.

2. Whether the Court of Appeal rightly held that having regard to all surrounding circumstances especially the benefits conferred on the Appellants under the contracts, the Appellants are estopped from challenging the legality of the Respondents investment in the 1st Appellant Company.”

I may observe at this stage that the contractual relationship between the parties in this case arose from the investments of the 2nd Respondent in the 1st Appellant Company which the Appellants do not dispute. The Appellants were only contending that having regard to the provisions of the Trustee Investments Act CAP 449 Laws of the Federation 1990, the investments were illegal and therefore the transaction between the parties being the product of an illegal contract was unenforceable. That was why the main issue that was considered and resolved by the trial Court on the determination of the questions in the Originating Summons of the Respondents as Plaintiffs, was whether having regard to the provisions of Sections 3 and 4 of the Trustee Investments Act, the investments of the 2nd Respondent in the 1st Appellant was illegal and therefore not recoverable. The trial Court resolved this issue against the Appellants by holding that the transaction between the parties was not illegal under the Act. In the same vein, when the Appellants appealed against the decision of the trial Court, only one issue bordering on the legality or otherwise of the investments was raised by the Appellants which issue was also resolved against them by the Court below. In the present appeal in this Court by the Appellants on the same dispute between the parties that started at the trial Court, the Court of Appeal and finally to this Court, it is difficult to understand why as many as three issues for determination are now placed before this Court by the same Appellants for the determination of this appeal. It is observed that the alleged illegality or otherwise of the investments of the 2nd Respondent in the 1st Appellant, cuts across all the three issues now being raised. No wonder, the learned Counsel to the Appellants had no option than to argue them together. Well, I shall also take the Appellants’ three issues for resolution in this appeal together although still bearing in mind that the main and real issue for determination in this appeal as differently couched in the Appellants’ third issue, is

whether having regard to the provisions of the Trustee Investments Act CAP 449 of the Laws of the Federation 1990, the investments of the 2nd Respondent in the 1st Appellant Company is illegal and therefore unenforceable.

B Learned Counsel to the Appellants in the Appellants brief, reply brief and oral submission, quoted extensively from Professor Sagay's Nigerian Law of Contract 2nd Edition on the definition of illegal or void contracts and came to the conclusion that illegality and voidness of contracts are virtually or practically the same. Reviewing the decision in the cases of Solanke v. Abed (1962) 1 All N.L.R. 230, C Thirwell v. Oyewunmi (1990) 4 N.W.L.R. (Pt. 144) 384 and Kasunmu v. Baba-Egbe 14 WACA 444, relied upon by the Court below in arriving at its decision now on appeal, learned Appellants' Counsel urged this Court not to agree with that Court on the interpretation D and application of the law in contention. Counsel pointed out that the term 'illegal*' when used in relation to contracts expands beyond outright crimes or civil wrongs which attract penalties and includes void or unenforceable contracts notwithstanding whether or not the illegality, voidity or unenforceability arises by issues now being raised. E No wonder, the learned Counsel to the Appellants had no option than to argue them together. Well, I shall also take the Appellants' three issues for resolution in this appeal together although still bearing in mind that the main and real issue for determination in this F appeal as differently couched in the Appellants' third issue, is whether having regard to the provisions of the Trustee Investments Act CAP 449 of the Laws of the Federation 1990, the investments of the 2nd Respondent in the 1st Appellant Company is illegal and therefore unenforceable.

G Learned Counsel to the Appellants in the Appellants brief, reply brief and oral submission, quoted extensively from Professor Sagay's Nigerian Law of Contract 2nd Edition on the definition of illegal or void contracts and came to the conclusion that illegality and voidness of contracts are virtually or practically the same. Reviewing the decision in the cases of Solanke v. Abed (1962) 1 All N.L.R. 230, H Thirwell v. Oyewunmi (1990) 4 N.W.L.R. (Pt. 144) 384 and Kasunmu v. Baba-Egbe 14 WACA 444, relied upon by the; Court below in arriving at its decision now on appeal, learned Appellants' Counsel urged this Court not to agree with that Court on the interpretation

and application of the law in contention. Counsel pointed out that the term 'illegal' when used in relation to contracts expands beyond outright crimes or civil wrongs which attract penalties and includes void or unenforceable contracts notwithstanding whether or not the illegality, voidity or unenforceability arises by operation of statute or common law because according to him a contract that is expressly or implicitly prohibited by statute is illegal, particularly when such contract is expressly forbidden by statute, its illegality is undoubted on the authority of the case of *Sodipo v. Lemminkainen O.Y. (No. 2) (1986) 1 N.W.L.R. (Pt. 15) 220*. Learned Counsel then reviewed the case of the Respondents as contained in their Originating Summons, the defence put up by Appellants in their counter affidavit and their subsequent motion to dismiss the Respondents' case at the trial Court, and in addition quoted the entire provision of the Trustee Investments Act with the exception of Section 5 thereof and argued strongly that the act of the 2nd Respondent in investing its funds in the purchase of shares and debentures in the 1st Appellant's Company, is clearly prohibited by Section 2(1)(d.) and subsections (2)(b.) and (c.) of the Trustee Investments Act thereby making the contract transaction between the parties illegal contrary to the findings of the trial Court and the Court below. Quoting from the cases of *Thirwell v. Oyewunmi (1990) 4 N.W.L.R. (Pt. 144) 384*; *Alao v. African Continental Bank Ltd. 1998 3 N.W.L.R. (Pt. 542) 339*, *Sodipo v. Lemminkainen (supra)*, *Onyuike III v. Okeke (1976) 1 All N.L.R. (Pt. 1) 181* and *Pan Bishbilder (Nigeria) Ltd. v. First Bank of Nigeria Ltd. (2000) 1 N.W.L.R. (Pt. 642) 684 at 693* and submitted that since the contract or transaction between the parties is illegal or void, no purported obligations arising therefrom can be enforced because none of the parties herein can competently approach the Court in order to enforce any obligation arising from the transaction, the same being void ab initio by reason of the statutory provisions.

On the issue of jurisdiction now being raised by the Appellants in their first issue for determination in which they accused the Court below of failing to set aside the judgment of the trial Court or at least refusing to assume jurisdiction itself in the matter, learned Counsel maintained that where a statute makes a particular contract invalid as in the present case, the Court ought to have refused to entertain the action even though neither party had raised the objection by virtue

of Section 16 of the Court of Appeal Act and the case of Adepoju v. Afonja (1994) 8 N.W.L.R. (Pt. 363) 437 at 524. Learned Appellant's Counsel concluded by pointing out that the 1st Appellant only ceased to pay dividends to the 2nd Respondent as from 1996 when the position of the Federal Government through the offices of the Secretary to the Government, the Ministry of Finance, the Ministry of Transport being the parent Ministry of the Respondents and the Office of the Attorney General of the Federation, became quite clear that the transaction between the parties was illegal and for that reason urged this Court to allow the appeal and declare the transaction between the parties illegal and unenforceable in order to allow the losses to rest where they are at the moment.

For the Respondents however, it was their contention that where a statute prohibits an act, the doing of the prohibited act may be voidable but only becomes illegal if there is a penalty for infraction relying on a number of decisions including Thirwell v. Oyewunmi (1990) 4 N.W.L.R. (Pt. 144) 384 at 400, Ibrahim v. Osim (1988) 3 N.W.L.R. (Pt. 85) 257 at 278 and Solanke v. Abed (1962) 1 All N.L.R. 230. Learned Counsel referred to Section 2(l)(a.) and (d.) of the Trustee Investments Act and pointed out that the provisions merely prescribe without imposing a penalty and therefore at best, the shares purchase transaction between the parties was merely voidable but not illegal because contrary to the Appellants' argument, the provision is not prohibitory but facilitatory or permissive provision. Counsel argued that the Act merely facilitates investment in securities by authorising them having regard to the word 'may' used in Section 3(1) of the Act. The case of PI & PC, Co. Ltd. v. Ebhota (2001) 4 N.W.L.R. (Pt. 704) 493 at 534, was called in aid to support this stand. Learned Counsel therefore maintained that since the Act does not impose a penalty for the prohibition, the transaction between the parties is not illegal to warrant the Appellants who counseled, procured and lured the Respondents into the transaction of the purchase of shares and allotting the same, hiding behind as alleged illegality to the detriment of other contracting parties, the Respondents. On the fact that the stand now taken by the Appellants is not allowed by law, Counsel referred and relied on the cases of Ibrahim v. Osim (supra), Buswell v. Godwin 1971 1 All E.R. 418 and Oilfield Supply Centre v. Johnson (1987) 2 N.W.L.R. (Pt. 58) 625 at 639. With re-

gard to the application of the Trustee Investments Act, Counsel observed that by Section 2(1)(d.) the Act does not apply to private Companies within the meaning of the Companies and Allied Matters Act. On whether or not the defence of illegality raised by the Appellants as Defendants at the trial Court was enough to oust the jurisdiction of the trial Court, learned Counsel answered the question in the negative on the authority of the cases of *Garthwaite v. Gartwaite* 1963 - 64 Probate 356, *Elufioye v. Halilu* (1990) 2 N.W.L.R. (Pt. 130) 1 at 24 and *Attorney General of Lagos State v. Dosunmu* (1989) 3 N.W.L.R. (Pt. III) 552 at 567. Counsel therefore urged this Court to dismiss the appeal. B C

The task of resolving the main issue for determination in this appeal which is whether the provisions of the Trustee Investments Act have made it illegal for the 2nd Respondent as Trustee of the Pension Funds of the 1st Respondent to invest the funds in the Securities of the 1st Appellant's shares and debentures, may be embarked upon by first looking into the provisions of the Act itself, particularly in Sections 2(1)(a.) -(d.) subsection (2)(a.) and (b.); 3 and 4 thereof. These relevant Sections state - D

"2(1) This Act shall apply to E

(a.) all securities hereafter created or issued by or on behalf of the Government of the Federation;

(b.) securities hereafter created or issued by or on behalf of the Government of a State which are declared by the President by notice in the Federal Gazette to be securities to which this Act applies; F

(c.) securities which are declared by the President by notice in the Federal Gazette to be Securities to which this Act applies, being securities created or issued by companies or Corporations incorporated directly by an Act enacted by the National Assembly or by a law enacted by the House of Assembly of a State or by an Act or Law having effect as if it was so enacted, which Companies or Corporations are specified in the Schedule hereto or which may be added to such Schedule by the President by notification in the Federal Gazette. G H

(d.) debentures and fully paid-up shares of any Company incorporated by and registered under the Companies and Allied Matters Act (Other private company within the meaning of that Act)

(2) the power conferred by the foregoing subsection shall not

be exercisable unless, at the time when it is proposed to exercise it -

(a.) the nominal value of the fully paid-up shares issued by the Company in question is not less than One Million Naira; and

(b.) the price of the debentures or shares of the class in question is quoted on the Lagos Stock Exchange and

B *(c.) xxxxxxxxxxxxxxxxx*

(3) No investment shall be made in exercise of the power conferred by subsection (1) of this Section if the investment would cause

C *(a.) the value of the part of the trust fund invested in the exercise of that power to exceed one-third of the total value of the fund or*

(b.) the value of the part of the fund so invested in the shares and debentures off a particular company

To exceed one-tenth of the total value of the fund; or

D *(c.) the value of the part of the fund so invested in the shares of a particular company to exceed one twentieth of the total value of the fund.*

(4)xxxxxxxxxxxxxxxxxxxxxx

E *3(1.) Without prejudice to the enable provisions of any other law, a trustee may under the powers of this Act invest in any of the securities specified or referred to in section 2 of the Act.*

F *(2) The power conferred by subsection (1) of this section shall be exercised according to the discretion of the trustee but subject to any consent or direction required by the instrument. if any, creating the trust or by law with respect to the investment of the trust funds.*

4. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has at anytime ceased to be an investment authorized by the provisions of this Act."

G There is no doubt whatsoever that having regard to the undisputed facts of this case regarding the exercise of the powers of the 2nd Respondent in investing the Pensions Funds of the 1st Respondent put under its care and Trust, the directions and guidelines specified in Section 2 subsections (1) and (2) of the Act, especially the
H restriction placed on the investment in Shares and Debentures of a private Company within the meaning of the Companies and Allied Matters Act whose prices of Shares and Debentures are not quoted on the Lagos Stock Exchange would appear to have been violated as complained and asserted by the Appellants in their defence to the

Respondents action to claim their rights as shareholders of the 1st Appellant. The question therefore is whether the investment of the 2nd Respondent in the 1st Appellant in violation of the clear provisions of Section 2(1) (d) and subsection (2) (b) of the Trustee Investments Act, make such investments illegal and therefore unenforceable against the Appellants. ***The attitude of the Courts to the issue of apparent or ex-facie illegality is certainly well settled. When a contract is ex-facie illegal, whether the alleged illegality has been pleaded or not, the Court would not close its eyes against illegality, as it is the duty of every Court to refuse to enforce such a transaction. In other words once illegality has been brought to the attention of the Court, it must be considered and resolved.*** See Gedge v. Royal Exchange Assurance Corporation (1900) 2 Q.B. 214 at 220; Akagbue and Ors. v. Romaine (1982) 5 S.C, 133; Nasr v. Berini (Betrut-riyad (Nigeria) Bank Ltd. (1968) 1 All N.L.R, 274 and Sodipo v. Lemminkainen (1986) 1 N.W.L.R. (Pt. 15) 220.

In the present case, is the contract or transaction between the parties illegal as asserted by the Appellants having regard to the provisions of the Trustee Investments Act earlier quoted in this judgment? The answer of course lies on the face of the Trustee Investments Act itself. ***The position of the law is that where a statute declares a contract or transaction between parties not only void but also imposes a penalty for violation, that contract or transaction is illegal ab initio. However where the legal sanction is merely to prevent abuse or fraud and no penalty is imposed for the violation of the provision of the statute, the violation is merely voidable and not illegal.*** See Solanke v. Abed (supra) Oil-field Supply Centre Ltd. v. Johnson (1987) 2 N.W.L.R. (Pt. 58) 265 and Ibrahim v. Osim (1988) 3 N.W.L.R. (Pt. 82) 257 and Pan Bishbilder (Nigeria) Ltd. v. First Bank of Nigeria Ltd. (2000) 1 N.W.L.R (Pt. 642) 684 at 693 where Achike JSC (of blessed memory) clearly stated the position of the law: -

“Permit me to digress generally on illegality. It is common ground that illegality and voidness of the loan contract between the parties is the main subject matter of controversy in this appeal. Definition of the term illegal contract has been elusive. The production of clarity of the classification of illegality appears to be almost confounded

and rendered intractable primarily because text-writers and the Judges have continued to use the terms 'void' and 'illegal' interchangeably. Halsbury's Laws of England (3rd ed. vol. 8 p. 126 para. 218 states that - 'A contract is illegal where the subject-matter of the promise is illegal or where the consideration or any part of it is illegal. Without
 B getting unduly enmeshed in the controversy regarding the definition or classification of that term, it will be enough to say that contracts which are prohibited by statute or at common law, coupled with provisions for sanction (such as fine or imprisonment) in the event of its
 C contravention are said to be illegal. There is however the need to make a distinction between contracts that are merely declared void and those declared illegal. For instance, if the provisions of the law require certain formalities to be performed as conditions precedent for the validity of the transaction, without however imposing any
 D penalty for non-compliance, the result of failure to comply with the formalities merely renders the transaction void, but if a penalty is imposed, the transaction is not only void but illegal, unless the circumstances are such that the provisions of the statute stipulate otherwise. See *Solanke v. Abed & Anor.* (1962) N.R.N.L.R. 92, (1962) 1
 E S.C.N.L.R. 371 and *P. Kasumu & Ors. v. Baba-Egbe* 14 WACA 444."

Indeed **Section 2 of the present statute being relied upon by the Appellants to say that the transaction between them and the Respondents is illegal is merely in the statute to safe-**
 F **guard investments under the Act by guarding against abuse of power and fraud and not to make investments made in disregard of the provisions of the statute illegal in the absence of any sanctions for ignoring the provisions of the statute.** In other words the restriction placed by Section 2 of the Trustee Invest-
 G ments Act on the 2nd Respondent to avoid investing the funds under its care and management in private Companies and Companies whose prices of Shares and Debentures are not quoted on the Lagos Stock Exchange, is only to ensure the security and safety of the invest-
 H ments. It is therefore not in the interest of public policy for the transaction of investment between the parties herein to be treated or regarded as illegal. This is because public policy can adequately be taken care of or safeguarded by the ultimate Government's power through the parent Ministry of the Respondents, now the Ministry of Transport, to direct the withdrawal of the 2nd Respondent's investments

from the 1st Appellant without any loss being incurred to the funds invested. It is for the foregoing reasons that in the circumstances of this case, I also entirely agree with the two Courts below that the contract of investment between the parties is far from being illegal. Thus, the contract or transaction not being illegal, the question of whether or not it is enforceable between the parties herein is not at all in doubt. B

With the conclusion I have arrived at on the status of the contract or transaction between the parties not being illegal, the issue of whether the trial Court and the Court below have jurisdiction to entertain the case of the Respondents against the Appellants is no longer of any significance since the issue on jurisdiction was entirely tied to the alleged illegality of the investments. C

On the whole, this appeal has no merit at all and the same is accordingly hereby dismissed. The judgment of the trial Court as affirmed by the Court below are hereby further affirmed. D

There shall be N50,000.00 costs to the Respondents against the Appellants.

MUSDAPHER JSC

I have read before now the judgment of my Lord Mohammed, JSC just delivered with which I entirely agree. In the aforesaid judgment his Lordship has comprehensively and meticulously dealt with all the issues submitted for the determination of the appeal. I respectfully adopt his reasonings as mine and I accordingly also find this appeal as unmeritorious and I dismiss it. I affirm the judgment of the courts below. I abide by the order of costs proposed in the aforesaid judgment. E F G

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgement by my brother Mohammed JSC. I agree with his reasoning and conclusion. I would also dismiss the appeal with costs as ordered. H

TABAI JSC

I had a preview of the lead judgment prepared by my learned brother Mohammed, JSC wherein the facts are comprehensibly set out and analysed and the issue of illegality of the contract exhaustively discussed. I agree with the reasoning and conclusion therein that the appeal be dismissed and I therefore also dismiss it.

MUNTAKA-COOMASSIE JSC

I have had a preview of the lead judgment just delivered by my learned brother Mahmud Mohammed, JSC. The reasons and conclusions of my learned brother are quite unassailable. I adopt them as mine. I hold boldly that considering the provisions of the “*Trustee Investments Act Cap, 449 Laws of the Federation 1990*”, the Investment of the 2nd Respondent, Nigerian Ports Authority Superannuation Fund in the 1st Appellant Company as it stands cannot be illegal and therefore enforceable against the appellants. The learned Justices of the Court below are correct and their decision cannot be easily faulted. The provisions supra I think are meant to safeguard the public against fraud or abuse. That’s why no specific penalty was imposed on the violators of such provisions. I refer to the Supreme Court decision in Ibrahim V Osim (1988) 3 NWLR (Pt.82) 257/272 per Obaseki JSC.

The two lower courts therefore had jurisdiction to entertain the case of the parties since I hold that there is no illegality in the transaction and or investments. Appeal is devoid of merit same is accordingly dismissed. I abide by the consequential orders adumbrated in the lead judgment including orders as to costs.

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