

SUPREME COURT OF NIGERIA
5TH MARCH, 2010. SC. 283/2003
CORAM:- D. MUSDAPHER, G. A. OGUNTADE, F. F. TABAI,
I. T. MUHAMMAD, O. O. ADEKEYE, JJSC

1. PAN AFRICAN INT. INCORPORATION
2. PAN AFRICAN INT. NIGERIA LTD. APPELLANTS
3. IYKE EJIZU
AND
1. SHORELINE LIFTBOATS LTD
2. INTERNATIONAL OFFSHORE RESPONDENTS
CONSTRUCTION LIMITED

FAIR HEARING - Violation - Evidence led before joinder - As basis for liability - Propriety - As the evidence was taken behind their back - To hold appellants liable based on it - Amounts to breach of their right to fair hearing (H1)

FAIR HEARING - Breach - Effect on proceedings - It renders the entire proceedings null and void - Necessitating a consequential order of retrial (H2)

FACTS

The plaintiff/1st respondent sued the 2nd respondent and the appellants, as defendants, before the Federal High Court in Lagos. Appellants were the 2nd, 3rd and 4th defendants respectively at trial court while 2nd respondent was the 1st defendant. Plaintiff's claim was for a certain sum allegedly due to plaintiff for defendants use of plaintiff's liftboats. Plaintiff also claimed interest on the sum as well as solicitors' fees it incurred in its effort to compel defendants to pay the sum due. Though plaintiff's claim was jointly and severally against all the defendants, the suit was initially commenced against the 2nd respondent only as sole defendant. And as from the date of commencement - 9th February 1999 - till 2nd March 2000, when the sole witness in the matter testified and concluded his testimony, 2nd respondent remained the sole defendant.

It was thereafter that, upon an application by plaintiff, appellants were joined as co-defendants on the order of the court. The

court then heard the address of counsel for plaintiff and adjourned the matter for judgment. Before the date for judgment, 1st appellant brought an application praying for an order to arrest the judgment on the ground that the process in the matter were yet to be served on it. The court however, refused the application on the ground that such was unknown to our law. Eventually it gave judgment to plaintiff as per its claim. Aggrieved, appellants appealed to Court of Appeal but their appeal was dismissed. Still dissatisfied, appellants have come on a further and final appeal to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the Court below was right to have upheld the award of interest at 21% per annum against the Appellants when it was not a term in the contract.

2. Whether the Court below was right to have sustained the award of the sum of N1,000,000.00 (one million naira) solicitor's fees against the Appellants when same was not a term of the contract.

3. Whether corporate veil could be lifted in the absence of any allegation or evidence of fraud to expose the Appellants particularly 1st and 2nd Appellants who were artificial persons on ground of being sister companies to the 1st Defendant/Respondent and the 3rd Defendant/Appellant for being a director in the three companies.

4. Whether there was overwhelming evidence before the trial court as reasoned by the court below in its judgment in the light of the record that the only evidence available was that given by the PW1 against the Defendant/Respondent on the 2nd of March 2000 before the joinder of the Appellants on the 11th April 2000 and amendment of the 6th June 2000 for which no further evidence was given to establish any liability against the Appellants.

HELD (Unanimously allowing the appeal per **TABAI JSC**)

Evidence led before joinder - As basis for liability - Propriety

1. Defendants/Appellants thus became parties to the action only on the 6th of June 2000, four months after the evidence had been recorded. In other words, the evidence which purportedly established their liability was not only taken behind their back, but taken when they were not parties.

The complaint of the Defendants/Appellants is that their fun-

damental right of fair hearing guaranteed under Section 36 of the 1999 Constitution and the rules of natural justice were violated. In my view, there is a lot of force in this argument and I am therefore persuaded by it. The liability of the 2nd, 3rd and 4th Defendants/Appellants cannot be determined by the evidence of the 2nd of March 2000. The result is that the use of that evidence against them constituted a clear breach of the Appellants' right of fair hearing under s. 36 of the Constitution and the rules of natural justice. (p. 1162 G/ 1163 A)

FAIR HEARING - Breach - Effect on proceedings

2. It is settled principle of law that where, in any proceedings, the rules of natural justice or the principles of fair hearing are breached, such a breach renders the entire proceedings null and void and the appropriate consequential order is one of retrial before another judge of the Court.

In view of the foregoing, there can be no question of evidence let alone overwhelming evidence against the Appellants. As against the Appellants therefore there is no legal evidence, the proceedings having been rendered null and void. The result is that the fourth issue is resolved in favour of the Appellants. (p. 1163 C/ E)

NOTABLE POINT OF INTEREST

TABAI JSC

1. It is immaterial that the decision is correct if there is breach of fair hearing

Fair hearing lies, not in the correctness or propriety of the decision but rather in the procedure followed in the trial and determination of the case. In *STATE v ONAGORUWA* (supra) at 56, the Supreme Court per KARIBI- WHITE, JSC re-emphasised this principle when he said:-

"It is only when the opponent has been heard that the judge would be seen to be discharging the duty of an unbiased umpire. Learned counsel for the Respondent appears to consider the absence of miscarriage of justice as a consideration to ameliorate an infringement of a provision of fundamental human right. This is not the correct legal position. The violation of the rule of audi alteram partem per se lies in the breach of the fundamental human right.

Once right is violated, it is irrelevant whether the decision made subsequent thereto is correct (underlining mine) See ALHAJI UMARU ABBA TUKUR v GOVERNMENT OF GONGOLA STATE; (1989) 9 SCNJ 1 (1989) 4 N. W. L. R. (Part 117) 517” (p. 1161 G)

B REPRESENTATION

A. M. Makinde Esq. for the appellants

S. E. Elema Esq. for the respondents.

C CASES REFERRED TO

- IJEOMA v. STATE (1990) 6 NWLR (Part 158) 567
AREMO v ADEKUNLE (2001) NWLR (Part 644) 257
Okonkwo v. Okonkwo (1998) 10 NWLR pt. 521 pg. 554
N. G. S. CO. LTD v. N. P. A. (1990) 1 N.W.L.R. (Part 129) 141
D ADIGUN v A. G. OYO STATE (1987) 1 N.W.L.R. (Part 53) 678
NGWUTA MBELE v. THE STATE (1990) 4 NWLR (Part 145) 484
BOB-MANUEL v BRIGGS (1995) 7 NWLR (Part 409) 537 at 592
STATE v OMOGORUWA (1992) 2 NWLR (Part 221) 33 at 56 and 58
E REWANE v OKOTIE- EBOH (1960) N. S. C. C. Vol. 1 page 135 at 139
OKAFOR v. A. G. ANAMBRA STATE (1991) 6 N. W. L. R. (Part 200) 659 at 678
RASAKI A. SALU v. MADAM TOWURO EGEIBON (1994) 6 N.W.L.R. (Part 348) 23 at 44
F National Bank of Nig. Ltd. V. P. B. Olatunde Co Nig. Ltd (1994) 3 NWLR pt. 334 pg. 512
ALHAJI UMARU ABBA TUKUR v GOVERNMENT OF GONGOLA STATE; (1989) 9 SCNJ 1 (1989) 4 N. W. L. R (Part 117) 517
G

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999, s. 36

H LEAD JUDGMENT BY TABAI JSC

This is an appeal against the judgment of the Lagos Judicial Division of the Court of Appeal delivered on the 19th of June 2003. The Appellants who were the 2nd, 3rd and 4th Defendants were also the 2nd, 3rd and 4th Appellants respectively at the Court below. The

Plaintiff, SHORELINE LIFTBOATS NIGERIA LTD, was the sole Respondent at the Court below and the 1st Respondent herein. And the 2nd Respondent herein INTERNATIONAL OFFSHORE CONSTRUCTION LTD was the first Defendant.

The action itself was commenced at the Federal High Court, Lagos about the 9th of February 1999 when the writ of summons was issued. Pleadings were filed, exchanged and amended. In paragraph 15 of the Amended Statement of Claim the Plaintiff/1st Respondent claimed from the Defendants jointly and severally.

(i) The sum of US\$404,000.00 (four hundred and four thousand United States Dollars or the equivalent in Nigeria Naira)being total amount due to the Plaintiffs from the Defendants upon the Defendants' use of the Plaintiff's Liftboats known as "Shoreline VII" and for which use the Defendants have refused, failed and neglected to pay despite several demands from the Plaintiff.

(ii) The sum of N1,000,000.00 being solicitors fees already incurred by the Plaintiffs as a result of the failure of the Defendants to pay for the use of the plaintiff's Liftboat known as "Shoreline VII" as aforesaid.

(iii) Interest at the rate of 21% per annum on the above total sum from 19th May 1997 until date of judgment and thereafter at the rate of 8% per annum until the entire judgment debt and costs are liquidated.

On the 2nd of March 2000 the only witness in the case, Commodore Salaudeen Akani (Rtd) testified and concluded his testimony. It is instructive to note that from the 9th of February 1999 when the Writ of Summons was issued to the 2nd of March 2000 when the sole witness commenced and concluded his testimony INTERNATIONAL OFFSHORE CONSTRUCTION LTD., remained the only defendant.

By a motion dated 21st of March 2000 but filed on the 24th of March 2000 the Plaintiff/1st Respondent sought the joinder of the 2nd, 3rd and 4th Defendants/Appellants and amendment of the statement of claim. This motion was heard and granted on the 6th of June 2000. On the 9th of November 2000 Chief B.A. Ayorinde addressed the Court and the matter was adjourned for judgment.

In a motion dated the 13th of December 2000 the 1st Defendant/Appellant (*sic 1st Appellant*) sought:

1. An order arresting forbearing the reading, rendering, giv-

ing or pronouncement of the ruling or judgment order or decree in respect of this matter in that the Defendant was not or has not been served with any processes in this matter.

2. An order directing the Plaintiff/Respondent or their counsel; if represented by counsel to serve all processes in this suit on counsel to the Defendant/Applicant forthwith.

On the 14th of December this motion was argued. The application was however refused. In refusing the application the trial court relying on BOB-MANUEL v BRIGGS (1995) 7 NWLR (Part 409) 537 at 592 held that the procedure for the arrest of a judgment was alien to our Civil Procedure Rules. In the concluding part of the ruling the trial court said:-

"It is trite that the jurisdiction of a Court can only be exercised in accordance with the Rules and Procedure. On the above premise I hold that the present application seeking to arrest the judgment of this Court fixed for today in the above mentioned suit is incompetent and is accordingly struck out."

The court then proceeded to read the judgment wherein all the reliefs as claimed were granted.

Dissatisfied with the said judgment, the Defendants went on appeal to the Court below. By the unanimous judgment on the 19th of June 2003 the appeal was dismissed and the judgment of the trial Court affirmed.

The Defendants are still aggrieved by the judgment of the lower court and have come on appeal to this Court. The parties, through their counsel settled, filed and exchanged their briefs of argument. The Appellant's Brief of Argument was prepared by A. M. Makinde and it was filed on the 8th of January 2009. The brief of the Respondent was prepared by S. E. Elema of the firm of B. Ayorinde & Co and same was filed on the 26th of March 2009.

In the Appellants' Brief Mr. M.A. Makinde formulated the following four issues for determination:

1. Whether the Court below was right to have upheld the award of interest at 21% per annum against the Appellants when it was not a term in the contract.

2. Whether the Court below was right to have sustained the award of the sum of N1,000,000.00 (one million naira) solicitor's fees against the Appellants when same was not a term of the con-

tract.

3. Whether corporate veil could be lifted in the absence of any allegation or evidence of fraud to expose the Appellants particularly 1st and 2nd Appellants who were artificial persons on ground of being sister companies to the 1st Defendant/Respondent and the 3rd Defendant/Appellant for being a director in the three companies. B

4. Whether there was overwhelming evidence before the trial court as reasoned by the court below in its judgment in the light of the record that the only evidence available was that given by the PW1 against the Defendant/Respondent on the 2nd of March 2000 before the joinder of the Appellants on the 11th April 2000 and amendment of the 6th June 2000 for which no further evidence was given to establish any liability against the Appellants. C

In the Respondent's Brief Mr. Elema did not appear to have proposed issues for determination. He appears to have adopted the issues as proposed by the Appellants. I would therefore adopt the four issues proposed by the Appellants. D

On the 1st issue learned Appellants' counsel referred to the testimony of the Plaintiff's witness and submitted that there was no evidence relating to interest. He urged that although matters relating to interest were pleaded, pleadings can never amount to evidence. It was submitted therefore that the failure to adduce evidence of interest was fatal to any claim for interest. E

With respect to the 2nd issue it is the submission for the Appellants that the payment of solicitor's fees was not a term of the contract of the 30th October 1994. It was counsel's submission that there was no unchallenged evidence capable of being acted upon. Learned counsel distinguished this case from *REWANE v OKOTIE EBOH* (1960) N. S. C. C. Vol. 1 page 135 which, he submitted, does not apply in this case. F G

On the 3rd issue for determination learned counsel submitted that companies have distinct legal personalities from their directors and relied on *SOLOMON v SOLOMON* (1897) AC 22. It was submitted that corporate veil can be lifted to do justice as stated by the Court below. It was further submitted that *CNLFORD MOTOR & CO v. HORNE* (1933) Ch. 935 relied upon by the Court below is inapplicable. It was counsel's further contention that the contract of the 30th October 1994 was between the Plaintiff and 1st Defendant H

and that the 2nd, 3rd and 4th Appellants were clearly not parties to the said contract and lifting the corporate veil would violate the establish legal principle of privity of contract and distinct legal personality.

On the 4th issue of whether there was overwhelming evidence before the trial Court to establish the liability of the 2nd, 3rd and 4th Defendants/Appellants, learned counsel for the Appellants referred to the only evidence in the case on the 2nd of March 2000 and the fact that the 2nd, 3rd and 4th Defendants/Appellants were only joined on the 6th of June 2000 and submitted that the evidence could not by any stretch of imagination amount to overwhelming against the Appellants who were strangers to the contract. The finding, counsel argued, has led to a miscarriage of justice. Learned counsel urged finally that the appeal be allowed and the judgment of the court below set aside.

In the Respondent's Brief of Argument Mr. S. E. Elema advanced the following arguments. With respect to the 1st issue of the propriety or otherwise of the award of 21% interest, learned counsel argued that claims in commercial matters must necessarily attract interest when money falls due for payment but remains unpaid. Reliance was placed on N. G. S. CO. LTD v N. P. A. (1990)1 N.W.L.R. (Part 129) 141.

On the second issue of whether the lower court was right to sustain the award of N1,000,000.00 (one million naira) solicitor's fee against the Appellants, learned counsel argued that counsel's fees firm part of costs recoverable by a successful litigant. He relied on REWANE v OKOTIE- EBOH (1960) N. S. C. C. Vol. 1 page 135 at 139.

As regards the third issue of whether the lower court was right to have lifted the corporate veil in the circumstances of this case, learned counsel argued that although the said contract was expressed to be between the Respondent and the 1st Appellant, it was not executed under the common seal and that it was executed by the 4th Appellant in his personal name. Counsel further referred to the pledge made by the 4th Appellant at page 148 of the record using the letter headed paper of the 2nd Appellant, Pan African International Incorporated and contended that the entire transaction was entered into by the 4th Appellant using the names of the 1st – 3rd Appellants and that in the circumstances lifting the veil of incorporation was the only

way the court could do justice to the parties.

With respect to the 4th issue of whether the evidence was overwhelming or sufficient to support the judgment counsel referred to the principles regarding amendments and joinder of parties and submitted that once the amendment was granted its effect dates back to the date of the original claim and relied on AREMO v ADEKUNLE (2001) NWLR (Part 644) 257. He urged finally that the appeal be dismissed and the judgment of the Court below affirmed. B

Because of what I consider to be the effect of the 4th issue I would like to deliberate on this appeal by starting with that issue. The question is whether the procedure complained of occasioned some miscarriage of justice. Before considering this issue, it is necessary to restate the principle that this court would not interfere with the concurrent findings of fact of the two courts below unless there is a miscarriage of justice. This principle was restated in NGWUTA MBELE v THE STATE (1990) 4 NWLR (Part 145) 484. This Court would therefore only interfere with the concurrent findings of fact of the two courts below if it is established that there was a breach of the principles of fair hearing occasioning some miscarriage of justice or even the likelihood of it. The Appellants alleged that the action was not defended because they were not aware. Section 36 of the 1999 Constitution incorporates the audi alteram partem rule which stipulates and ensures that no verdict can be entered by a court or tribunal against a person in a matter relating to his civil rights and obligations without being given the opportunity of being heard. This is so because both under the Constitution and rules of natural justice no decision of a court or tribunal can be regarded as valid unless it heard both sides involved in the dispute. See STATE v OMOGORUWA (1992) 2 NWLR (Part 221) 33 at 56 and 58; DEDUWA v OKORODUDU (1976) 8-10 SC 329; AMADI v THOMAS ADLIN & CO. LTD (1972) 4 SC 228. Also fair hearing lies, not in the correctness or propriety of the decision but rather in the procedure followed in the trial and determination of the case. In STATE v ONAGORUWA (supra) at 56, the Supreme Court per KARIBI- WHITE, JSC re-emphasised this principle when he said:- C
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“It is only when the opponent has been heard that the judge would be seen to be discharging the duty of an unbiased umpire. Learned counsel for the Respondent appears to consider the ab-

sence of miscarriage of justice as a consideration to ameliorate an infringement of a provision of fundamental human right. This is not the correct legal position. The violation of the rule of audi alteram partem per se lies in the breach of the fundamental human right.

Once right is violated, it is irrelevant whether the decision made subsequent thereto is correct (underlining mine) See ALHAJI UMARU ABBA TUKUR v GOVERNMENT OF GONGOLA STATE; (1989) 9 SCNJ 1 (1989) 4 N. W. L. R. (Part 117) 517"

The question is what is the barometer for measuring when the rule of fair hearing has been breached. It has been settled that the true test of fair hearing is the impression of a reasonable person who was present at the trial whether from his observation justice has been done in the case. See for this IJEOMA v STATE (1990) 6 NWLR (Part 158) 567 MOHAMMED v KANO NATIVE AUTHORITY (1968) 1 ALL NLR 4224; OKAFOR v A.G. ANAMBRA STATE (1991) 6 N. W. L. R. (Part 200) 659 at 678.

Applying this test of a reasonable man to the facts and circumstances of this case, can it be said that, from the inception of the case to the 2nd of March 2000 when the only witness in the case testified and up to the 14th of December 2000 when judgment was delivered, justice was done? Although I had earlier stated the substance of the facts relevant to the question I would nevertheless repeat a narrative of some salient facts.

At the commencement of the action on the 9th of February 1999 the only Defendant was INTERNATIONAL OFFSHORE CONSTRUCTION LTD. And it remained so until the 2nd of March 2000 when the only witness in the case testified and concluded his evidence. The motion for joinder of the 2nd, 3rd and 4th Defendants/Appellants filed on the 24th of March 2000 was not taken until the 6th of June 2000 when it was heard and granted by the trial Court. The 2nd, 3rd and 4th **Defendants/Appellants thus became parties to the action only on the 6th of June 2000, four months after the evidence had been recorded. In other words, the evidence which purportedly established their liability was not only taken behind their back, but taken when they were not parties.** The only witness in the case Commodore Salaudeen Akani (Rtd) was not recalled for purposes of cross-examination by the 2nd, 3rd and 4th Defendants/Appellants. They were thus denied the opportunity of

contesting the case of the Plaintiff/Respondent.

The complaint of the Defendants/Appellants is that their fundamental right of fair hearing guaranteed under Section 36 of the 1999 Constitution and the rules of natural justice were violated. In my view, there is a lot of force in this argument and I am therefore persuaded by it. The liability of the 2nd, 3rd and 4th Defendants/Appellants cannot be determined by the evidence of the 2nd of March 2000. The result is that the use of that evidence against them constituted a clear breach of the Appellants' right of fair hearing under s. 36 of the Constitution and the rules of natural justice.

What then is the effect of this finding that the proceedings constituted a breach of the principles of fair hearing?. **It is settled principle of law that where, in any proceedings, the rules of natural justice or the principles of fair hearing are breached, such a breach renders the entire proceedings null and avoid and the appropriate consequential order is one of retrial before another judge of the Court.** In support of this principle see the case of *RASAKI A. SALU v MADAM TOWURO EGEIBON* (1994) 6 N.W.L.R. (Part 348) 23 at 44; *ADIGUN v A.G. OYO STATE* (1987) 1 N.W.L.R. (Part 53) 678. **In view of the foregoing, there can be no question of evidence let alone overwhelming evidence against the Appellants. As against the Appellants therefore there is no legal evidence, the proceedings having been rendered null and void. The result is that the fourth issue is resolved in favour of the Appellants.**

The resolution of this issue in favour of the appellants determines the appeal. The proceedings before the trial court having been held to be null and void, it would be an exercise in futility to consider the other issues in the appeal.

In conclusion, I hold that this appeal succeeds. The proceedings including the judgment of the trial court and its affirmation by the Court of Appeal be and are hereby set aside. The case be and is hereby remitted back to the trial Federal High Court for retrial by another judge.

The Defendants/Appellants are entitled to cost against the Plaintiff/1st Respondent which I assess at N10,000.00 at the trial Court, N20,000.00 at the Court below and N50,000.00 in this Court.

MUSDAPHER JSC

I have read before now, the judgment of my Lord Tabai, JSC just delivered with which I entirely agree. I too, allow the appeal and set aside the decisions of the lower courts and remit the case back to the trial court for a trial denovo before another judge. I abide by the order for costs proposed in the judgment aforesaid.

OGUNTADE JSC

I have had the advantage of reading in draft the lead judgment by my learned brother Tabai J.S.C. I agree with his reasoning and conclusion. I would also allow this appeal and order a retrial of the suit. I subscribe to the order made on costs.

MUHAMMAD JSC

I read the judgment of my learned brother, Tabai, JSC. I agree with his reasoning and conclusion. I abide by orders made in the leading judgment including the order on costs.

ADEKEYE JSC

I had read before now the judgment just delivered by my learned brother F. F. Tabai, JSC. I agree with his reasoning and conclusion after a careful scrutiny of the issues raised for determination in this appeal. I am at one with him that joining the 1st and 2nd appellants on the 11th of April 2000 at a stage in the court proceedings when no further evidence was led in proof of the amended statement of claim meant to establish their liability amounts to a substantial irregularity. PW1 in his evidence merely informed the court - that the 3rd appellant was President/Chief Executive Officer of the three companies, and he was using their names interchangeably to conduct his business. The only evidence available on printed Record was that given by PW1 against the respondent on 2nd March 2000, at a stage when the action was contested between the plaintiff and the 1st defendant and before the appellants were joined on 11th April 2000.

In effect since no further evidence was given after the amend-

ment of the statement of claim on the 6th of June, 2000 to establish any liability against the 1st - 3rd appellants. Surprisingly the court below referred to this evidence as overwhelming and unchallenged against the background of the claim by the appellants that they were not aware of the proceedings until judgment was to be delivered. The evidence available which was to establish a case of breach of contract between the 4th appellant and respondent at the trial court cannot be used against the 1st - 3rd appellants who were strangers to the contract on the doctrine of privity of contract. Such a conclusion will lead to miscarriage of justice against the appellants.

Where a case has occasioned a miscarriage of justice, such a matter is liable to be set aside by a court no matter however well decided.

Okonkwo v. Okonkwo (1998) 10 NWLR pt. 521 pg. 554

Oyekanmi v. NEPA (2000) 6 NWLR pt. 249 pg. 524

An appellate court will exercise its discretion to order a retrial when particularly there has been a fundamental irregularity in the trial, among other reasons.

National Bank of Nig. Ltd. V. P. B. Olatunde Co Nig. Ltd (1994) 3 NWLR pt. 334 pg. 512.

Madukolu v. Nkemdilim (1962) 2 SCNLR 341

With fuller reasons given in the leading judgment of my learned brother I agree that ordering a retrial is necessary so as to do substantial justice in the case. I adopt the consequential orders made in the Leading judgment as mine.

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