

SUPREME COURT OF NIGERIA
25TH FEBRUARY, 2011. SC. 236/2003
CORAM:- A. M. MUKHTAR, F. F. TABAI, I. T. MUHAMMAD,
M. S. MUNTAKA-COOMASSIE,
B. RHODES-VIVOUR, JJSC

SHIPCARE NIGERIA LIMITED
OWNERS OF THE M/N APPELLANT
AFRICAN HYACINTH
AND
1. THE OWNERS OF THE M/V
FORTUNATO RESPONDENTS
2. GEOGAS SHIPPING S. A.

ADMIRALTY - Limitation of liability - S. 363 of Merchant Shipping Act - Conditions - A ship owner who pleads the section to limit his liability - Where there is damage - Must prove that he was not at fault or privy to what occurred (H1)

ADMIRALTY - Limitation of liability - Competence of crew - Need to prove - Onus is on the appellant seeking to limit liability - To prove competence of the crew - When the damage occurred (H2)

ADMIRALTY - Limitation of liability - Incompetent crew - Proof of fault - Where a ship is shown to be manned by an incompetent crew - At the time of damage - The owners must be taken to be at fault (H3)

APPEALS - Issues - Need to arise from ground - Every issue must be related to a ground of appeal - Any issue outside the grounds of appeal is irrelevant - And will be struck out (H4)

FACTS

The plaintiff/appellant took out a summons for decree of Limitation at the Federal High Court, pursuant to section 363 of the Merchant Shipping Act, 1990, section 9 of the Admiralty Jurisdiction Act, 1991, and Order 13 of the Admiralty Jurisdiction (Procedure) Rules 1993, against the defendants/respondents. Appellant's claim was for sun-

dry reliefs by which it sought to limit its liability for the damage done to the respondents' ship, M/V Fortunato by the appellant's ship, M/T African Hyacinth. The facts of the case are largely undisputed. On the 11th day of April, 1997, at about 7. 40 pm, appellant's ship, while navigating in the Warri Port and proceeding to the loading terminal, had collided with respondents' ship which was at anchor resulting in extensive damage to respondents' ship. The collision occurred in a Pilotage District, an area where by law, appellant's ship is required to be under the pilotage of a Nigeria Ports Authority Pilot or a licensed Pilot of the district, but appellant's ship was not so manned at that time.

Following the incident, appellant admitted liability for the damage but instituted the above action with a view to reducing the damages payable by it in respect of the damage. The action was heard on affidavit evidence with several exhibits filed by parties. The question for determination revolved on whether appellant had made out a case to entitle it to the relief sought. At the end of hearing, the learned trial judge dismissed the action for want of merit, though it held that appellant's ship was seaworthy at the time of the accident. Aggrieved, appellant appealed to the Court of Appeal. Respondents also cross appealed, challenging the finding that appellant's ship was seaworthy at the time of the accident. Court of Appeal dismissed the appeal but allowed the cross appeal. Still dissatisfied appellant has come on a further and final appeal to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether there was evidence before the Court of Appeal regarding improper manning of the vessel, African Hyacinth and if so whether the same was responsible for the collision.

2. Whether the Court of Appeal was entitled to find that the captain and chief mate of the vessel were incompetent because their certificate was not tendered.

3. Whether the actual fault or privy of ships owners may be inferred from alleged default of the crew of the vessel.

4. Whether there was any basis for the denial to the appellant of the right from its liability.

HELD (Unanimously dismissing the appeal per **RHODES-VIVOUR JSC**)

ADMIRALTY - Limitation of liability

1. A ship owner who pleads section 363 of the Merchant Shipping Act, Cap. 224, which limits liability where there is damage, must prove that he was not at fault or privy to what occurred.

The issue of Limitation arises after liability has been established, and the owner of a ship would be entitled to limit his liability where there is absence of fault or privy. (p. 508 D)

Limitation of liability - Competence of crew - Need to prove

2. After examining depositions in the affidavits, the Court of Appeal observed that the issue was whether Newton Funfade found on board African Hyacinth at the time of the collision, was competent and qualified to be the captain of the ship. The court concluded that there was no iota of evidence that a competent and qualified captain was provided by the ship owners. The learned Justices of the Court of Appeal then held that from the printed evidence, there was no qualified and competent captain manning the vessel at the time of the collision.

I agree with this conclusion. The onus is on the appellant to establish that its captain and crew are competent to man a ship. The two affidavits filed by the appellant did not have any depositions or annexures authenticating the qualifications of Newton Funfade. In the absence of certificate indicating that Newton Funfade is qualified, evidence ought to have been produced to show that Newton Funfade was competent to man a ship. In the absence of all of the above, the Court of Appeal was perfectly right to conclude that at the time of the collision the M/T African Hyacinth was manned by incompetent and unqualified crew. (p. 509 D)

Limitation of liability - Incompetent crew - Proof of fault

3. The owners of a ship ought to employ qualified and competent master and crew to man their ship and where there is a collision with another ship the onus is on them to prove that their crew are qualified and competent. Surely, the owners of the ship cannot say they are not at fault if their ship is under the control of unqualified, incompetent crew. Navigating the M/T African Hyacinth in a compulsory

Pilotage District without a company Pilot or a licensed Pilot is contrary to Section 23 (1) and (3) of the Ports Decree 1993. The incompetent crew in control of the appellant's ship were appointed by the said owners and so there is actual fault and privy on their part.

(p. 510 F)

B

APPEALS - Issues - Need to arise from ground

4. On page 18 of the appellant's brief is a fifth issue. An issue was not formulated rather learned counsel commenced argument immediately on the finding by the Court of Appeal that the appellant's ship was unseaworthy. The position of Law is that issues for determination must be related to a ground/s of appeal, since the ground/s of appeal is/are a direct challenge to the decision of the lower court. Any issue outside the appellant's grounds of appeal is irrelevant and will be

D struck out.

After examining the five grounds of appeal reproduced above, it is clear that an issue on the unseaworthiness of the appellant's ship does not arise from any of the five grounds of appeal. It is accordingly struck out. (p. 511 E)

E

REPRESENTATION

Chief F. O. Offa for the appellant, with him V. C. Kanu
Olumide Aju Esq. For the Respondent

F

CASES REFERRED TO

Odeh v. Ameh 2004 4 NWLR pt. 863 p. 309

Balogun v. Adelobi 1995 2 NWLR pt. 376 p. 131

Iroegbu v. Okwordu 1990 6 NWLR pt. 159 p. 643

G Okonkwo v. Okonkwo 1998 10 NWLR pt. 571 p. 554

UTB (Nig) Ltd. v. Ajagbule 2006 2 NWLR pt. 965 p. 459

The Fresh field (Owners) and others 1965 2. A. E. R. p. 283

Oil Company of New York v. Clan Steaners Line Ltd. 1924 AC p. 100

H The Lady Gwendolen: Arthur Guinness, Son and Co. (Dublin) Ltd.
v. The Fresh field (Owners) and others 1965 2. A. E. R. p. 283

STATUTES & RULES REFERRED TO

Merchant Shipping Act, 1990, Cap. 224, L. F. N, 1990, s. 363

Admiralty Jurisdiction Act, 1991, S. 9

Admiralty Jurisdiction (Procedure) Rules, 1993, O. 13

Compulsory Pilotage Districts (Establishment) Order 1993, s. 6

Ports Decree, s. 23

LEAD JUDGMENT BY RHODES-VIVOUR JSC

B

The appellant is the owner of M/T African Hyacinth. On the 11th day of April, 1997, at about 7.40 pm, whilst navigating in the Warri Port, and proceeding to the loading Terminal she collided with the M/V fortunate which was at anchor. There was extensive damage to M/V fortunato. The collision occurred in a Pilotage District and by the provisions of Section 23 (1) and (3) of the Ports Decree 1993, the appellant's ship must be under the Pilotage of a Nigeria Ports Authority Pilot or a Licensed Pilot of the District. Both courts below found that the appellants ship was not manned by a competent Pilot. By summons for Decree of Limitation brought under Section 363, Merchant shipping Act, 1990, Section 9 of the Admiralty Jurisdiction Act, 1991, Order 13 of the Admiralty Jurisdiction (Procedure) Rules 1993, the appellant admitted liability for the damage arising out of the collision with the M/V fortunato but by the action supra sought a Decree limiting their liability. In the action they sought six Declarations, and they are:

C

D

E

1. A DECLARATION that by reason of the provisions of section 363 of the Merchant Shipping Act, Cap. 224, Laws of the Federation of Nigeria, 1990, they are not answerable in damages beyond the aggregate amount of N47.00 for each tone of the tonnage of the M/T African Hyacinth ascertained in accordance with the said provisions, in respect of loss or damage caused to any property or the infringement of any rights through their act or omission the navigation or management or the African Hyacinth when the M/T African Hyacinth collided with the Defendants vessel the fortunato and its Appurtenances on the 11th day of April, 1997 at Warri.

F

G

2. A DECLARATION that the tonnage of the M/T African Hyacinth ascertained in accordance with the provisions of the Merchant Shipping Act, Cap 224, Laws of the Federation of Nigeria, 1990, is 1,320.33 tonnes.

H

3. A DECLARATION that the liability of the Plaintiff aforesaid is limited to N62,055.51 and no more together with simple interest

thereon from the 11th day of April, 1997, to the date of the Limitation Decree herein.

4. That all proper directions be given by this Honourable Court for ascertaining the persons who may have any just claim for loss or damage arising out of the said collision.

B 5. That the aforesaid sum of N65,005.51 together with interest thereon be rateably distributed among several persons who may make out their claim thereto and that proper directions may be given for the exclusion of such claims as shall fail to make out their claim within a time to be fixed for such purpose.

C 6. Alternatively, that all proper directions be given for the further conduct of these proceedings.

Ukeje J (as she then was) of the Federal High Court presided. Trial was premised on affidavit, counter affidavit, further affidavit and D several exhibits.

The central issue for determination was:

Whether there was sufficient materials on the record which will entitle the plaintiff (now appellant) to limit their liability.

E In a considered judgment delivered on the 18th of December, 1997, the learned trial judge found that:

1. The M/T African Hyacinth was seaworthy at the time the collision occurred on the 11th of April, 1997.

F 2. The collision occurred in the Warri Port, a compulsory Pilotage area established by the Compulsory Pilotage Districts (Establishment) Order 1993. Section 6 of 1993.

The provisions of Section 23 (1) and (3) of the Ports Decree 1993 apply to make it compulsory that whenever a ship is navigating a compulsory Pilotage District for the purpose of entering, leaving or G even merely making use of the Port therein, then, such ship must be under the pilotage of a Nigeria ports Authority Pilot or a Licensed Pilot of the District.

The learned trial judge continued:

H “There is no evidence whatsoever before this court that at the time of the collision, the vessel was complying with Section 23 (1) of the Ports Decree, as there is no evidence that Newton funfade or any other master of the vessel is either a company Pilot or a Licensed Pilot of the District.

The action was dismissed after the learned trial judge concluded

that is was not a proper case in which to grant the plaintiff leave to limit their liability in terms of their claim. The plaintiff appealed. The defendants cross appealed. For the main appeal, the Justices of the Court of Appeal considered issues 1,2,3 and 4 in the appellant's brief and issues 1 and 2 in the respondents/cross appellants' brief. The issues are:

1. Whether the learned trial judge was entitled to resolve the conflicting averments in the affidavits on the question, whether or not the vessel was navigating at the time of the collision, without calling oral evidence.

2. Whether the learned trial judge was right to have dismissed the Plaintiff's suit, without having made a finding that the collision occurred as a result of the actual fault or privity of the appellant's shipowner.

3. Whether the plaintiff was given fair hearing on the issue of non compliance with pilotage regulations in respect of which they had no notice.

4. Whether the learned trial judge was justified in finding that the collision occurred partly because the M/T African Hyacinth had not complied with the mandatory requirements regarding pilotage in a compulsory pilotage district.

5. Whether the learned trial judge was bound to call any oral Evidence to resolve the alleged conflict in the affidavit filed by the parties.

6. Whether the learned trial judge was right in holding that the Appellant was not entitled to limit its liability under section 363 of the Merchant Shipping Act.

A sole issue was considered in the cross appeal and it was:

Whether the learned trial judge was justified in finding that the M/T African Hyacinth was sea worthy.

The Court of Appeal in a well considered judgment dismissed the appeal, but allowed the cross appeal. This appeal is against the judgment.

In accordance with rules of this court, briefs were duly filed and exchanged. The appellant's and respondents' briefs were both filed on the 25th of November 2010. Learned counsel for the appellant, Chief F. O. Offia formulated four issues for determination. They are:

1. Whether there was evidence before the Court of Appeal regarding improper manning of the vessel, African Hyacinth and if so whether the same was responsible for the collision.

2. Whether the Court of Appeal was entitled to find that the captain and Chief mate of the vessel were incompetent because their
B certificate was not tendered.

3. Whether the actual fault or privity of ships owners may be inferred from alleged default of the crew of the vessel.

4. Whether there was any basis for the denial to the appellant
C of the right from its liability.

On the other side, learned counsel for the respondents formulated only one issue for determination. It reads:

1. Whether the appellant has established that the collision involving the appellant's vessel and the respondents' vessel occurred
D without its actual fault or privity so as to entitle it to a limitation of its liability.

The arguments and issues, though differently framed are substantially the same as those considered in the Court of Appeal. The central issue being whether on the evidence on record, the appellant
E was entitled to limit its liability. In deciding this appeal, I shall consider all the issues laid before this Court.

At the hearing of the appeal on the 29th day of November, 2010, learned counsel for the appellant, Chief F. O. Offia adopted his
F brief filed on the 25th of November, 2010. He urged us to allow the appeal, contending that the appellant is entitled to limit its liability. MR. O. Aju learned counsel for the respondents adopted his brief also filed on the 25th of November, 2010. He observed that there were concurrent findings of fact that the vessel was not manned by a
G competent Pilot, contending that in the circumstances the appellant cannot limit liability. He urged us to dismiss the appeal. Legislations to be considered in this Appeal are:

1. Merchant Shipping Act, Cap 224, LFN 1990.

2. Admiralty Jurisdiction Act, 1990.

H There are concurrent findings of fact by the two Courts below that the appellant's ship, M/T African Hyacinth was not manned by a competent Pilot on the 11th April, 1997 when it collided with the defendants' ship, M/V fortunate.

Findings of fact made by the trial court and affirmed by the

Court of Appeal are very rarely disturbed, or interfered with, but this court would quickly interfere and state the correct position if satisfied that there has been exceptional circumstances such as:

(a) the findings cannot be supported by evidence or are perverse ; or

(b) that there was miscarriage of justice; or B

(c) the court overlooked some principles of law or procedures.

See

Iroegbu v. Okwordu 1990 6 NWLR pt. 159 p. 643

Balogun v. Adelobi 1995 2 NWLR pt. 376 p. 131

Okonkwo v. Okonkwo 1998 10 NWLR pt. 571 p. 554 C

In the light of the above, I shall now consider the issues but first I shall explain Limitation of Liability and the need for it. The right to limit liability is provided in Section 363 (i) (d) (ii) of the Merchant shipping Act, Cap 224 Laws of the Federation of Nigeria 1990, Vol. D
9. Relevant extracts run as follows:

“(i) The owner of a Commonwealth ship or foreign ship shall, where all or any of the following occurrences take place without his actual fault or privity-

(a) - E

(b) -

(c) -

(d) Where any loss or damage is caused to any property, other than any property mentioned in paragraph (6) of this subsection, or any rights are infringed through the act or omission of any person, whether on board the ship or not, in the navigation or management of the ship, or in the loading, carriage or discharge of her cargo, or in the embarkation, carriage or disembarkation of her passengers, or through any other act or omission of any person on board the ship, G
-

Be liable to damages beyond the following amounts:

(ii) in respect of such loss, damage or infringement as is mentioned in paragraphs (b) and (d) of this subsection, whether there is in addition loss of life or personal injury or not, an aggregate amount - not exceeding an amount equivalent to 1,000 gold francs for each ton of their ships tonnage. H

Before Section 363 supra can apply, the following conditions must be satisfied:

1. The ship that seeks to limit its liability must be a Commonwealth ship or a foreign ship.

2. The loss or damage has been caused to the property of a third party.

3. The loss or damage must have occurred without the actual fault or privity of the ship seeking to limit its liability

Where the above applies to a shipowner, he is perfectly within his rights to invoke Section 9 of the Admiralty Jurisdiction Act, Laws of the Federation of Nigeria, Vol. 1. It reads:

(1) A person who apprehends that a claim for compensation under any law, including the Merchant Shipping Act, that gives effect to a liability convention may be made against him by some other person, may apply to the Court to determine the question whether the liability of the first mentioned person in respect of the claim may be limited under this Law”.

That is precisely what the appellant did by filing summons before the Court at first instance. ***A ship owner who pleads section 363 of the Merchant Shipping Act, Cap. 224, which limits liability where there is damage, must prove that he was not at fault or privity to what occurred.***

The issue of Limitation arises after liability has been established, and the owner of a ship would be entitled to limit his liability where there is absence of fault or privity. See Standard Oil Company of New York v. Clan Line Steaners Ltd. 1924 AC p. 100.

The Lady Gwendolen: Arthur Guinness, Son and Co. (Dublin) Ltd. v. The Fresh field (Owners) and others 1965 2. A. E. R. p. 283

The right of the owner of a ship to limit liability is statutory and the reason for this piece of legislation is to relieve ship owners of the obvious grave consequences of the negligent acts of their servants, agents or privies. I shall now address the issues.

1. Whether there was evidence before the Court of Appeal regarding improper manning of the vessel African Hyacinth and if so, whether the same was responsible for the collision.

2. Whether the Court of Appeal was entitled to find that the captain and chief mate of the vessel were incompetent because their certificate was not tendered.

Issues 1 and 2 shall be taken together.

Learned counsel for the respondent observed that it was wrong for the Court of Appeal to conclude that both the master of the vessel and the Chief mate were incompetent, contending that even if Newton Funfade did not have a certificate, there was no basis for linking that fact with the cause of the collision.

In conclusion, learned counsel insisted that there was no factual basis for the conclusion by the Court of Appeal that the master and Chief mate of the vessel were uncertified or incompetent or that the collision resulted in any way from the alleged incompetence. Learned counsel for the respondent observed that the appellant was not able to establish that its vessel was manned by properly competent and qualified crew at the time of the collision. He observed that no certificate of any crew member was annexed to the affidavit and no deposition made regarding the competence or otherwise of the crew.

After examining depositions in the affidavits, the Court of Appeal observed that the issue was whether Newton Funfade found on board African Hyacinth at the time of the collision, was competent and qualified to be the captain of the ship. The court concluded that there was no iota of evidence that a competent and qualified captain was provided by the ship owners. The learned Justices of the Court of Appeal then held that from the printed evidence, there was no qualified and competent captain manning the vessel at the time of the collision.

I agree with this conclusion. The onus is on the appellant to establish that its captain and crew are competent to man a ship. The two affidavits filed by the appellant did not have any depositions or annexures authenticating the qualifications of Newton Funfade. In the absence of certificate indicating that Newton Funfade is qualified, evidence ought to have been produced to show that Newton Funfade was competent to man a ship. In the absence of all of the above, the Court of Appeal was perfectly right to conclude that at the time of the collision the M/T African Hyacinth was manned by incompetent and unqualified crew.

3. Whether the “actual fault or privy” of ship owners may be inferred from alleged default of the crew of the vessel.

4. Whether there was any basis for the denial to the appellant

of the right from its liability.

Taking issues 3 and 4 together learned counsel for the appellant argued that as no default of the- crew has been shown to be attributable to the owners of the vessel no actual fault or privity on their part had been shown. He submitted that there was no basis for the denial to the ship owners of the right to limit their liability. Learned counsel for the respondent observed that the appellant failed to lead evidence to show that it had a Pilot on board the vessel in a Compulsory Pilotage District, contending that the failure amounted to actual fault or privity on the part of the owners. Reliance was placed on Asiatic Petroleum Co. Ltd. v. Lennard's Carrying Co. Ltd. 1914 1 KB P. 419

This is what the Court of Appeal had to say:

".....I bear in mind that in the case at hand, the owners of M/T African Hyacinth is a corporate body (SHIPCARE LIMITED). Since a corporation has no mind of its own, its active and directing will most necessarily be sought in the person of him which was in fact directing its mind and will - the category of such people must be found within the senior officers of the Company who can hire and fire pilots and/or captains. If they appoint incompetent Captain or fail to lead evidence as to the competence and qualification of the person they appoint as Captain and if damage resulted from the negligent performance of the duties of the Captain the Company will be liable, their liability cannot be limited Under the statute....."

This reasoning appears sound to me. ***The owners of a ship ought to employ qualified and competent Master and Crew to man their ship and where there is a collision with another ship the onus is on them to prove that their crew are qualified and competent. Surely, the owners of the ship cannot say they are not at fault if their ship is under the control of unqualified, incompetent crew, navigating the M/T African Hyacinth in a Compulsory Pilotage District without a Company Pilot or a Licensed Pilot contrary to Section 23 (1) and (3) of the Ports Decree 1993. The incompetent crews in control of the appellant's ship were appointed by the said owners and so there is actual fault and privity on their part.***

Asiatic Petroleum Co. Ltd. v. Lennards Carrying Co. Ltd. 1914 1 KB p. 419

The appellant's brief and an Amended Notice of Appeal were filed on the 25th of November, 2010. The 1st - 4th grounds of appeal in the brief are identical with the 1st - 4th grounds of appeal in the Amended Notice of Appeal. In the Amended Notice of Appeal, is a fifth ground of appeal. I shall reproduce the grounds of appeal in the Amended Notice of Appeal. The grounds are:

1. The Court of Appeal erred in Law in attributing the collision between the Appellant's vessel African Hyacinth and the Respondents' vessel Fortunato, to lack of proper manning of the Appellant's vessel and rejecting the Appellant's plea for a limitation.

2. The Court of Appeal misdirected itself in finding that the master and Chief Mate of the Appellant's vessel were not competent, when no evidence to that effect was before the Court.

3. The Court of Appeal erred in Law in holding that "actual fault or privity" of the appellant should be inferred from alleged defaults of the crew of the vessel African Hyacinth.

4. The Court of Appeal erred in Law in finding that the onus lay on the Appellant ship owner to prove that its crew was competent.

5. The Court of Appeal erred in Law in failing to determine the substantial point on appeal before it namely, whether the issue of compulsory pilotage which was a question of fact, was properly raised and determined in the Court below.

On page 18 of the appellants brief is a fifth issue. An issue was not formulated rather learned counsel commenced argument immediately on the finding by the Court of Appeal that the appellant's ship was unseaworthy. The position of the Law is that issues for determination must be related to a ground/s of appeal, since the ground/s of appeal is/are a direct challenge to the decision of the lower court. Any issue outside the appellant's grounds of appeal is irrelevant and will be struck out. See UTB (Nig) Ltd. v. Ajagbule 2006 2 NWLR pt. 965 p. 459 Odeh v. Ameh 2004 4 NWLR pt. 863 p. 309.

After examining the five grounds of appeal reproduced above, it is clear that an issue on the unseaworthiness of the appellant's ship does not arise from any of the five grounds of appeal. It is accordingly struck out.

Concurrent findings of fact by the two courts below that the

M/T African Hyacinth was not manned by a competent pilot on the 11th day of April, 1997, when it collided with the defendants' ship. M/V Fortunato, are correct. Accordingly I dismiss this appeal with costs of N50,000.00 to the Respondents.

B

MUKHTAR JSC

C I have read in advance the lead judgment delivered by my learned brother Rhodes-Vivour JSC. I am in complete agreement with the reasonings and conclusion reached that the appeal lacks substance and merit, and deserves to be dismissed. I also dismiss the appeal, and abide by the consequential orders made therein.

D

MUHAMMAD JSC

E My learned brother, Rhodes-Vivour, JSC afforded me an opportunity to read before now the judgment just delivered. I am in complete agreement with his reasoning process and the conclusions arrived at by him. I too dismiss the appeal. I abide by all orders made in the judgment including order as to costs.

MUNTAKA-COOMASSIE JSC

F I was privileged to read in draft the beautiful judgment of my learned brother, Rhodes-Vivour, JSC just delivered. I am in entire agreement with his Lordship's reasons and conclusion, which I adopt, with respect, as mine. I also agree that the appeal has no merit. The learned trial judge has done a good job and the Court of Appeal G displayed tremendous courage in agreeing with the decision of the trial court which was correct and not perverse. That being the case, appeal lacks merit and same is dismissed by me. I endorse the orders as to costs as adumbrated by my learned brother in the lead judgment.

H Appeal dismissed.