

SUPREME COURT OF NIGERIA
FRIDAY 14TH FEBRUARY, 2014. SC. 138/2004
CORAM:- J. A. FABIYI, B. RHODES-VIVOUR,
M. U. PETER-ODILI, M. D. MUHAMMAD,
J. I. OKORO, JJSC

CORPORATE IDEAL INSURANCE LTD APPELLANT
AND
1. AJAOKUTA STEEL COMPANY LTD
2. MINISTER OF POWER & STEEL RESPONDENTS
3. CENTRAL BANK OF NIGERIA

PLEADINGS - Illegality - Where raised by defendant - He should specifically plead facts of the illegality - Otherwise he cannot raise or canvass same at the trial (H1)

SUPREME COURT - Fresh issue - Leave - A party will not be allowed on appeal - To raise question which was not raised or tried at trial court - Without leave (H2)

SUPREME COURT - Fresh issue - Ground of law - A party will be granted leave to raise new issue not canvassed at trial court - Where the same involves substantial points of law - Which need to be allowed to prevent miscarriage of justice (H3)

COURTS - Contracts - Illegal contract - Where contract is ex facie illegal - Court will refuse to enforce such transaction - Even where illegality has not been pleaded (H4)

CONTRACTS - Illegal contract - Meaning of - Any transaction which is expressly or impliedly prohibited by statute is illegal and unenforceable - And no party can take benefit from it (H5)

CONTRACTS - Insurance - Validity - By Insurance Act s. 50(1) - There shall not be any valid contract of insurance - Unless premium is paid in advance (H6)

STATUTES - Interpretation - Principle - Where words of statute are

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clear and unambiguous - Courts are to give them their plain and ordinary meaning (H7)

STATUTES - Interpretation - Shall - Meaning - When used in a provision - The word connotes that it is imperative for the provision to be obeyed (H8)

STATUTES - Performance of duty - Adherence - Where statute provides for act to be done in a particular way - Failure to adhere as provided - Will be interpreted as not complying with statutory provision (H9)

CONTRACTS - Insurance - Government properties - Responsibility of insuring the properties is vested on NICON - But such property may with approval in writing of Head of State - Be insured with any insurer (H10)

INSURANCE - Government properties - Consent of Head of State - Proof - Burden of proving existence of the consent - Lies on party against whom judgment would be given - If no evidence were adduced (H11)

FACTS

Before the Federal High Court Abuja, plaintiff/appellant commenced this action against defendants/respondents claiming among others the sum of N226 million being arrears of insurance premium on a contract of insurance. 1st respondent requested appellant to provide Insurance Cover for their equipment for the insurance period of year 1996 to 2000. The parties agreed that the premium would not be paid immediately since the Government would have to budget for the money. There was also an agreement that the contract would be binding on the parties as if the premium had been fully paid. The amount was appropriated in the year 2000 budget. When the money was released, 1st respondent did not pay the said sum in spite of several demands and reminders from appellant.

Appellant had no other option but to institute this action. During the course of the proceedings, appellant filed motion for judgment against 1st respondent upon a purported admission of its claims

by 1st respondent in its (1st respondent's) Statement of Defence. Judgment was entered against 1st respondent. Dissatisfied, 1st respondent appealed to the Court of Appeal Abuja. 1st respondent also sought and obtained leave to argue fresh issues relating to illegality of the insurance contract which were not raised at the trial court. Appellant did not oppose the application, but in its brief, it opposed the raising of the fresh issues on the ground that leave was not granted to raise and argue the issues. The court overruled the objection as baseless and eventually held the contract between the parties as illegal. The appeal was allowed and judgment entered in favour of respondent. Aggrieved, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

1. Was the Court of Appeal right in granting the Respondent leave to raise and argue for the first time on appeal alleged breach of Sections 50 and 93 of the Insurance Act and in considering that defence?

2. Did the purported violation of Section 50 and 93 of the Insurance Act No. 2 of 1997 by the Insurance Contract between the parties render the said Insurance Contract unlawful, illegal null and void?

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

PLEADINGS - Illegality

1. By Order 13 Rule 6 (1) of the Federal High Court (Civil Procedure) Rules 2009, (which is in pari materia with Order 26 Rule 6 of the 2000 version) “a party shall plead specifically any matter (for example, performance, release, any relevant statute of limitation” fraud or any fact showing illegality) which if not specifically pleaded might take the opposite party by surprise.” In our adjudicatory process, the law, rules of court and even the court itself abhor elements of surprise on any party. That is why issues to be contested by parties before a court must be settled by pleadings so as to put all parties on notice of the case they are to meet in court so as to enable them prepare adequately for it. Thus by the above Rule of the

Federal High Court (supra) and in a long line of decisions by this court, where the defendant relies upon the defence of illegality, he should specifically and succinctly raise that defence by his pleadings and should state the facts or refer to facts already stated in the Statement of Claim so as to show clearly

B what constitutes the illegality.

It has to be noted that the consequence of not pleading it in the Statement of Defence would prevent the defendant from raising or canvassing it at the trial. (p. 531 H)

C SUPREME COURT - Fresh issue - Leave

2. It is now well settled that this court will not allow a party on appeal to raise a question or an issue which was not raised or tried at the court below without the leave of court.

D In other words, a Respondent is however entitled to raise new issues not raised at the trial court or at the lower court only with the requisite leave of court. In the instant appeal, leave was duly sought and obtained at the court below to raise the issues which are being ventilated on appeal before this court.

E Thus, a party who seeks to file and argue fresh issue not canvassed in the lower court, whether the issue pertains to law or procedure, must seek and obtain the leave of court first, else, such issue must be struck out. (p. 532 E/H)

F SUPREME COURT - Fresh issue - Ground of law

3. I need to emphasize that this court would readily grant leave to a party to raise and argue new grounds or issues not canvassed at the court of trial or at the lower court where the

G new grounds involve substantial points of law substantive or procedural which need to be allowed to prevent an obvious miscarriage of justice. It will also be granted if further evidence is not required. (p. 532 G)

H Contracts - Illegal contract

4. From what I have said above, as a general rule, a defendant seeking to rely on illegality as a defence, must plead same, else he will not be allowed to rely on it. However, there is an exception to this general rule. Where a contract is ex-facie

illegal, whether illegality has been pleaded or not, the court would not close its eyes against that illegality. The rational is that the court has a duty to refuse to enforce such a transaction even where illegality has not been pleaded. It was held by this court in SODIPO V. LEMNINKAMEN OY (supra) that illegality, once brought to the attention of the court, over-rides all questions of pleadings and that it is the duty of the court when asked to give judgment which is contrary to a statute to take the point, although the litigants may not have raised it. (p. 533 A)

CONTRACTS - Illegal contract - Meaning of

5. It is crystal clear that any contract or transaction entered into by parties, which contract or transaction is either expressly or impliedly prohibited by statute, is illegal and unenforceable. It is my view therefore that any contract or transaction which seeks to circumvent the provisions of a statute is ex-facie illegal and no party can take benefit from it. For me, the contract of insurance between the parties herein which was made in clear contravention of Section 50(1) of the Insurance Act 1997, is ex-facie illegal and unenforceable. Accordingly, it is my well considered opinion that the court below was right to have granted leave for the issue to be placed on the front burner. Issue one, as I see it, does not avail the Appellant at all. It is resolved in favour of the Respondents. A contract which violently violates the provisions of a statute as in this case, with the sole aim of circumventing the intentment of the law maker is, to all intents and purpose, illegal, null and void and unenforceable. Such a contract or agreement is against public policy and makes nonsense of legislative efforts to streamline the ways and means of business relations. This court and any other court for that matter would not be allowed to be used to enforce any obligations arising therefrom. The summary of all I have endeavoured to say above is that parties cannot be allowed to enter into a contract or transaction to circumvent the clear and unambiguous provisions of a statute. It has been the view of this court and I reiterate it here that a transaction or contract, the making or performance

of which is expressly impliedly prohibited by statute is illegal and unenforceable or impliedly prohibited by statute is illegal and unenforceable.

Although it is the duty of a trial court to enforce agreements between parties and not to speculate or question the reasons for their entering into any such agreement, where such agreement is illegal or contrary to public policy, such agreement or contract should not be enforced by the court.
(pp. 533 H/538 D)

C *CONTRACTS - Insurance - Validity*

6. Clearly, the above provision means no other thing than what it says. There shall not be any valid contract of insurance until and unless the premium is paid in advance. In other words, payment of premium is a condition precedent to a valid contract of insurance.

There is therefore no doubt that section 50(1) of the Insurance Act 1997, specifically forbids entering into any insurance contract without the premium having first been paid “in advance.” Any non-compliance with the express provision of that section as in this case renders the contract of Insurance between the parties illegal and unenforceable.
(p. 537 C/H)

F *STATUTES - Interpretation - Principle*

7. It is trite that a cardinal rule of interpretation of statute is that where the words of a statute are clear and unambiguous, the courts are to give them their plain and ordinary meaning. It does not require any special or cannon of interpretation.
(p. 537 D)

STATUTES - Interpretation - Shall - Meaning

8. The use of the word “shall” in section 50(1) (supra) is instructive here. It is now well settled that where the provisions of a statute is garbed with the word “shall” as in the instant provision, it connotes that it is imperative for the provision to be obeyed. The word “shall” makes the provision mandatory, imposes a duty and is a word of command.

What this means is that both the Appellant and Respondents were bound to obey the clear provisions of S.50 (1) of the Insurance Act 1997 without any discretion from any party. In other words, that section is concluded in mandatory terms and must be applied strictly. (p. 537 F)

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STATUTES - Performance of duty - Adherence

9. It is the view of this court that where a statute clearly provides for a particular act to be done or performed in a particular way, failure to perform the act as provided will not only be interpreted as a delinquent conduct but will be interpreted as not complying with the statutory provision. (p. 538 A)

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CONTRACTS - Insurance - Government properties

10. By virtue of the above provision the responsibility for insuring all properties of Government as defined in the National Insurance Corporation Act is vested in the National Insurance Corporation of Nigeria. However, notwithstanding this provision any such property of Government may, with the approval in writing of the Head of State be insured with any insurer. The lower court held on this issue that contrary to the provisions of Section 93 of the Act, the approval of the Head of State was not obtained before the Appellant was contracted for insurance of Government property since the Appellant was not NICON the approved insurer under the Act. I agree with this view of the court below. (p. 541 A)

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INSURANCE - Government properties - Consent of Head of State

11. The argument of Counsel for the Appellant that it was the duty of the 1st Respondent only to obtain the consent of the Head of State is unimpressive. As was rightly pointed out by the learned counsel for the 3rd Respondent, the provisions of the Insurance Act are meant for the regulation of the Insurance business, and all parties involved in insurance contracts are expected to abide by those provisions. It does not therefore lie in the mouth of the Appellant in this case to say that it is the prerogative of the 1st Respondent to ensure the observance of any particular requirement of that Act except where

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it is so expressly stated. Due diligence in business requires that all parties must ensure the existence of the necessary prerequisites for the contract they intend to enter into.

Again since the section states that approval of the Head of State must be in writing it is not something to be presumed.

B As to who had the burden of proof as to existence of consent, it is my view that it lies on the party against whom judgment would be given if no more evidence were adduced successfully until all the facts in the pleadings have been dealt with.

C The 1st Respondent in this matter had pleaded that there was no consent which fact would stand proved if no consent was produced or evidence led in rebuttal. The burden of proof thereafter shifted to the Appellant to rebut the same failing which judgment on that issue would be given against it. That is the

D truth and position of the law. (p. 541 C)

REPRESENTATION

A. M. Kayode Esq., with N. C. Abueh (Miss) and Phoebe Egbele, (Miss), for the Appellant

E Chief E. K. Ashiekan Esq. with Victor Lorshenge Esq., Yinusa Umaru Esq., for the 1st Respondent

R. C. Chris Garba (Mrs.) with Ndidi Akobundu Esq. and Abraham Omah, Esq., for the 2nd Respondent

F Fred Onuobia Esq., with Obinna Ogwuagwu for the 3rd Respondent

CASES REFERRED TO

George v. Dominion Flour Mills (1963) 3 NSCC 54

Ibrahim v. Ozim (1988) 1 NSCC 1184

G Alao v. ACB (1998) 3 NWLR (pt. 542) 339

Sodipo v. Lemninkainen OY (1986) 1 NWLR (pt. 15) 220

Scott v. Brown (1992) 2 KB 384

Djukpan v. Orovuyorbe (1967) 1 All NLR 14

Apene v. Barclays Bank of Nigeria (1977) 1 SC 47

H Din v. Attorney-General of the Federation (1988) 4 NWLR (pt. 87) 147

Oforlete v. State (2002) 12 NWLR (pt. 681) 415

Enan v. Adu (1981) 11 - 12 SC 25

Onwuchekwa v. NDIC (2002) 5 NWLR (pt. 760) 371

George v. Dominion Flour Mills (1963) 3 NSCC 54

Ariori v. Elemo (1983) ALL NLR 1

Ngilari v. NICON (1998) 8 NWLR (pt. 560) 1

WAEC v. Akinwunmi (2002) 7 NWLR (pt. 766) 327

STATUTES & RULES REFERRED TO

Insurance Act No. 2 of 1997, ss. 50, 93

Evidence Act Cap. 112 LFN 1990, ss. 135, 151

Federal High Court (Civil Procedure) Rules 2000, O. 26 r. 6

Federal High Court (Civil Procedure) Rules 2009, O. 13 r. 6(1)

LEAD JUDGMENT BY OKORO JSC

The Appellant herein, as Plaintiff at the Federal High Court, sitting at Abuja, by a writ of summons and statement of claim dated 18th December, 2000, claimed against the Respondents as follows: D

“i. A Declaration that the Plaintiff is legally entitled to the sum of N226,000,000.00 specifically appropriated, set aside and earmarked for payment to the Plaintiff as arrears of insurance premium in accordance with the provisions of the Appropriation Act, 2000.

ii. An Order of perpetual injunction restraining the Defendants whether by themselves, their agents, servants, and or privies howsoever from transferring, spending for any other purpose, virement of, misapplying, misusing, diverting, wasting, diminishing, lapsing, retiring or causing to lapse the sum of N226,000,000.00 as the said sum has been specifically appropriated in the APPROPRIATION ACT 2000 for payment of arrears of insurance premium owed the Plaintiff by the Defendants. E

iii. The sum of N226,000,000.00 to the Plaintiff with interest at the approved prevailing prime bank lending rate being the arrears of insurance premium owed the Plaintiff by the 4th Defendant from the 1st day of December, 2000 until final compliance. G

iv. AN order awarding the sum of N50,000,000.00 as special and General Damages against the Defendants jointly and severally in favour of the Plaintiff...” H

At the trial court, the Respondents were the 4th, 2nd and 56 Defendants respectively. The 1st and 2nd Respondents filed their respective statements of Defence, while the 3rd Respondent entered a conditional appearance/filed a Notice of Preliminary Objection and

Motion for Extension of Time within which to file its defence. While the said motions were still pending, the Appellant filed a motion for Judgment against the 1st Respondent upon an admission of its claims by the 1st Respondent in its Statement of Defence.

Judgment was entered against the 1st Respondent accordingly by the Learned Trial judge who thereafter adjourned the other motions for “whatever it is worth”.

Dissatisfied with the said judgment, the 1st Respondent as 4th Defendant, filed Notice of Appeal against it to the lower court upon obtaining the requisite leave to do so. Having filed the appeal, the 1st Respondent (as Appellant at the court below) sought for and was granted leave to argue fresh issues relating to the illegality of the insurance contract which were not raised at the trial court.

In its judgment, the Court of Appeal held as follows:-

“In the event, I find that the contracts of insurance between the parties the subject of the Respondent’s Claim before the Lower Court were in breach of Section 50 and 93 of the Insurance Decree No. 2 of 1997 and accordingly illegal. I therefore resolve issue I in favour of the Appellants. This court is duty bound now to refuse to enforce it. Accordingly, I refuse to enforce it... Having found the agreement between the parties illegal and void, I hereby set aside the judgment of the Federal High Court, Abuja in Suit No.FHC/ABJ/CS/425/2000 delivered on 14th February, 2001. In its stead dismiss the claim of the plaintiff.”

Aggrieved by the decision of the lower court, the Appellant has now appealed to this court. That is a brief history of the case.

A synopsis of the facts will suffice. On 17th January, 1996, the 1st Respondent requested the Appellant to provide insurance cover for their equipment for the insurance period of 1996 to 2000. It was understood between the parties that the insurance premium would not be paid immediately by the 1st Respondent to the Appellant. In other words, parties agreed that the “no premium, no cover” provision in the Insurance Act would not apply to the contract. It was their agreement that the Insurance Contract would be binding on the parties as if the insurance premium had been fully paid. That the total indebtedness by the 1st Respondent to the Appellant was N226 Million being arrears of Insurance Premium for the provision of Insurance cover from 1996 to the year 2000 to cover a total risk borne

by the Appellant for the 1st Respondent in the total sum of N39.85 Billion. That the 1st Respondent was able to cause to be appropriated the sum of N226 Million in the year 2000 Budget of the Government of Nigeria which was enacted into law as Appropriation Act 2000 for the payment of the insurance premium owed by the 1st Respondent to the Appellant. B

The Statement of Claim of the Appellant further reveals that when the said sum was released pursuant to the Appropriation Act, the 1st Respondent refused, neglected or failed to pay the said sum despite several demands and reminders. The Appellant took out a Writ of Summons against the Respondents making claims as earlier set out in this judgment. C

The 1st Respondent's Statement of Defence was essentially an admission of all the claims of the plaintiff but denied that the said sum of N226m was released to it. The Appellant whereupon the admission, moved the court for judgment on the pleadings. The Learned Trial Judge thereupon entered judgment for the Appellant against the 1st Respondent based on the admissions in its statement of defence. This is the judgment which was set aside by the Court of Appeal. D E

Notice of appeal against the judgment of the lower court was filed on 29th June, 2004 against the judgment which was delivered on 29th April, 2004. Four grounds of appeal are contained in the said Notice of Appeal out of which the Appellant has distilled two issues for the determination of this appeal. I shall reproduce the two issues which are contained in the Appellant's brief of argument filed on 28th April, 2006 and adopted by Learned Counsel for the Appellant on 19th November, 2013 when the appeal was heard. The two issues are: F G

1. Was the Court of Appeal right in granting the Respondent leave to raise and argue for the first time on appeal alleged breach of Sections 50 and 93 of the Insurance Act and in considering that defence?

2. Did the purported violation of Section 50 and 93 of the Insurance Act No. 2 of 1997 by the Insurance Contract between the parties render the said Insurance Contract unlawful, illegal null and void? H

In their respective briefs also adopted at the hearing of this

appeal, the 1st, 2nd and 3rd Respondents adopted the two issues formulated by the Appellant verbatim. I shall therefore determine this appeal based on the said two issues.

I now commence the treatment of this appeal with issue one in the Appellant's brief of argument. In proffering argument under this issue, the learned counsel for the Appellant submitted that by Order 26 Rule 6 of the Federal High Court (Civil Procedure) Rules 2000, a party shall plead specifically any fact showing illegality which if not specifically pleaded might take the opposite party by surprise. That a Defendant, in case where illegality is a defence, must raise the illegality in his Statement of Defence alleging facts which made up the illegality itself and citing the relevant statutory provisions. He relies on the case of *George V. Dominion Flour Mills* (1963) 3 NSCC, 54 at 59 and also the case of *Ibrahim V. Ozim* (1988) 1 NSCC 1184. He opined that the Respondents failed to plead the fact of illegality in their statement of defence and that it was fatal to their case, relying on the case of *Alao V. ACB* (1998) 3 NWLR (Pt.542) p.339.

Learned counsel further submitted that the lower court proceeded with the assumption that the insurance contract in this case was on "*the face of it illegal or void*." He contended that the contract was not *ex facie* illegal. That it was purely a contract of insurance or at worst, an agreement for a contract of insurance. It was his contention that the lower court should not have granted the Respondents leave to raise the defence of illegality at this point without the relevant or necessary pleading to back it up. That in view of Order 6 Rule 1 of the Federal High Court (Civil Procedure) Rules 2000, the Court of Appeal erred and thereby came to a wrong decision. Learned Counsel however conceded that where a contract is *ex facie* illegal, the illegality need not be pleaded in view of the decision of this Court in *Sodipo V. Lemninkainen OY* (1986) 1 NWLR (Pt.15) 220 at 232 paragraphs F - G. He faulted Lower Court's decision that Insurance contract was *ex facie* illegal and its reliance on the case of *Scott v. Brown & Ors* (1992) 2 KB 384.

Finally on this issue, the Learned Counsel for the Appellant submitted that any payment of premium without cover would have been illegal as it would have amounted to an offence under the ICPC Act. He also urged this Court to take judicial notice of the general practice in respect of business of government in Nigeria that govern-

ment does not pay in advance due to the official procedures of budget appropriation, award of contract, completion, certification and payments in that order. He also urged this court to resolve this issue in favour of the Appellant.

In response, the Learned Counsel for the 1st Respondent submitted that the Respondent was entitled to raise new issues not raised at the trial court on appeal having obtained the requisite leave of court. He submitted further that fresh issue may be raised on appeal even without leave if it is on the question of jurisdiction and that an appellate court can also raise suo motu issue involving a point of law which the court considers to be fundamental to the entire proceedings. He places reliance on these cases: Djukpan V. Orovuyorbe (1967) 1 ALL NLR 14; Apene V. Barclays Bank of Nigeria (1977) 1 SC 47; Din V. Attorney-General of the Federation (1988) 4 NWLR (Pt.87) 147; Oforlete V. State (2002) 12 NWLR (Pt.681) 415.

It was a further contention of Counsel that it is too late in the day for the Appellant who did not oppose the application for leave to now do so, referring to the case of Etowa Enan & Ors. V. Fidelis Ikor Adu (1981) 11 - 12 SC 25. Also, that whether leave was sought and obtained or not, it is the duty of this Court to give effect to the provisions of a statute. He cited the case of Attorney General of Adamawa State V. Ware (2006) 4 NWLR (pt.970) 399 at 411 para. F -H & 412 paras A - B.

Also relying on the case of Alao V. ACB Ltd (supra), he submitted that a contract forbidden by statute, is ex facie illegal and that a party seeking to rely on it as a defence need not plead same. Also cited by him is the English case of Snell V. Unity Finance Co. Ltd. (1963) QB 203. It was his final submission that it is contradictory for the Appellant to contend that the parties opted to act in breach of the provisions of the Insurance Act just to comply with the ICPC Act. He urged this court to resolve this issue in favour of the Respondents.

The 2nd and 3rd Respondents through their counsel also made submissions on the 1st Issue which submissions are in tandem with those espoused by the 1st Respondent. I do not intend to summarize them as doing so would amount to repetition of the exercise.

By Order 13 Rule 6 (1) of the Federal High Court (Civil Procedure) Rules 2009, (which is in pari materia with Order 26 Rule 6 of the 2000 version) "a party shall plead specifi-

cally any matter (for example, performance, release, any relevant statute of limitation” fraud or any fact showing illegality) which if not specifically pleaded might take the opposite party by surprise.” In our adjudicatory process, the law, rules of court and even the court itself abhor elements of surprise on any party. That is why issues to be contested by parties before a court must be settled by pleadings so as to put all parties on notice of the case they are to meet in court so as to enable them prepare adequately for it. Thus by the above Rule of the Federal High Court (supra) and in a long line of decisions by this court, where the defendant relies upon the defence of illegality, he should specifically and succinctly raise that defence by his pleadings and should state the facts or refer to facts already stated in the Statement of Claim so as to show clearly what constitutes the illegality. See *Onwuchekwa V. NDIC* (2002) 5 NWLR (pt.760) 371; *George V. Dominion Flour Mills* (1963) 3 NSCC 54 at 59. **It has to be noted that the consequence of not pleading it in the Statement of Defence would prevent the defendant from raising or canvassing it at the trial.**

It is now well settled that this court will not allow a party on appeal to raise a question or an issue which was not raised or tried at the court below without the leave of court. This was clearly set out by this court in the case of *SALATI V. SHEHU* (1985) 1 NWLR (Pt.15) 198. **In other words, a Respondent is however entitled to raise new issues not raised at the trial court or at the lower court only with the requisite leave of court. In the instant appeal, leave was duly sought and obtained at the court below to raise the issues which are being ventilated on appeal before this court.**

I need to emphasize that this court would readily grant leave to a party to raise and argue new grounds or issues not canvassed at the court of trial or at the lower court where the new grounds involve substantial points of law substantive or procedural which need to be allowed to prevent an obvious miscarriage of justice. It will also be granted if further evidence is not required.

Thus, a party who seeks to file and argue fresh issue not canvassed in the lower court, whether the issue pertains

to law or procedure, must seek and obtain the leave of court first, else, such issue must be struck out. See OBIAKOR & ANOR. V. THE STATE (2002) 10 NWLR (Pt.776) 10; APENE v. BARCLAYS BANK OF NIGERIA LTD. (supra).

From what I have said above, as a general rule, a defendant seeking to rely on illegality as a defence, must plead same, else he will not be allowed to rely on it. However, there is an exception to this general rule. Where a contract is ex-facie illegal, whether illegality has been pleaded or not, the court would not close its eyes against that illegality. The rational is that the court has a duty to refuse to enforce such a transaction even where illegality has not been pleaded. It was held by this court in SODIPO V. LEMNINKAMEN OY (supra) that illegality, once brought to the attention of the court, over-rides all questions of pleadings and that it is the duty of the court when asked to give judgment which is contrary to a statute to take the point, although the litigants may not have raised it. See: ATTORNEY-GENERAL OF ADAMAWA STATE V. WARE (Supra); ROYAL EXCHANGE ASSURANCE CORPORATION v. S. A. VEGA (1902) 2 KB 384.

In the instant case both the Appellant and Respondents' counsel are in agreement that where a contract is ex-facie illegal, that the illegality need not be pleaded. Whereas the Appellant contends that the contract of Insurance between it and the 1st Respondent was not illegal, the Respondents hold otherwise. The question may thus be asked. How does one identify or recognize an illegal contract or transaction? This question has since been answered by this court in a plethora of authorities. In ALAO v. ACB LTD (1998) 3 NWLR (Pt.542) 339 at 370 paragraphs C - F, per Igu, JSC, this Court held as follows:-

"It is trite that a transaction or contract the making or performance of which is expressly or impliedly prohibited by statute is illegal and unenforceable. Where a contract made by the parties is expressly forbidden by statute, its illegality is undoubted and no court ought to enforce it or allow itself to be used for the enforcement of alleged obligations arising thereunder if the illegality is duly brought to the notice of the court..."

It is crystal clear that any contract or transaction en-

tered into by parties, which contract or transaction is either expressly or impliedly prohibited by statute, is illegal and unenforceable. It is my view therefore that any contract or transaction which seeks to circumvent the provisions of a statute is ex-facie illegal and no party can take benefit from it. For
B me, the contract of insurance between the parties herein which was made in clear contravention of Section 50(1) of the Insurance Act 1997, is ex-facie illegal and unenforceable. Accordingly, it is my well considered opinion that the court below
C was right to have granted leave for the issue to be placed on the front burner. Issue one, as I see it, does not avail the Appellant at all. It is resolved in favour of the Respondents.

The second issue which both parties have adopted is whether the “purported” violation of Section 50 and 93 of the Insurance Act
 D No. 2 of 1997 by the Insurance contract between the parties render the said insurance contract unlawful, illegal, null and void. Section 50 (1) of the Insurance Act states:

“The receipt of an Insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover
 E *in respect of an insurance risk unless the premium is paid in advance.”*

According to the Appellant the above provision is intended to protect the insurer and relates to the contractual validity of the insurance cover. He submitted that the section is not concerned with
 F illegality of insurance contract but the issue of its validity, so that where the condition precedent to “a valid contract of insurance” is not met, then the insurance contract will be invalid and not illegal. Learned Counsel for the Appellant contended that although the parties agreed on non-applicability of the “no premium no cover” principle, there is
 G nothing illegal about the insurance contract.

The Appellant, having submitted that the said provision i.e. Section 50(1) of the Insurance Act inures in favour of the Insurer, contended that this statutory protection may be waived by the insurance company in whose favour it is made. He relies on the case of
 H *Ariori V. Elemo* (1983) ALL NLR 1 at 12. It is his view that the Appellant validly waived its right under section 50(1) thereof and that the lower court cannot be right to invalidate that waiver.

Submitting further, Learned Counsel opined that the contract of Insurance is only invalid and merely voidable and not illegal

or void. On the meaning of voidable contracts, he referred to Chitty on Contract 27th Edition page 20 paragraph 2024 and on what amounts to an illegal contract, he cited the case of Panbisbilder Nigeria Ltd V. FBN (2001) 1 NWLR (Pt.642) 684 at 693 paragraph D.

Relying on the case of Ngilari v. NICON (1998) 8 NWLR (Pt.560) 1 at 15 paragraphs A - C, he submitted that there is no rule of insurance law that there can be no binding contract of insurance until the premium has been actually paid or the policy has been issued. According to him, Section 50(1) (supra) does not exclude an agreement to enter into an Insurance contract and does not invalidate it. B
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As regards Section 93(1) of the Act, Learned Counsel submitted that if the Respondents sought to avoid the contract on the ground of lack of consent of the Head of State, they have the onus to plead and prove this contention referring to Section 135 of the Evidence Act. That the 1st Respondent has the duty to comply with Section 93(2) by obtaining the necessary waiver and not the Appellant. Learned Counsel then referred to Section 151 of the Evidence Act Cap. 112 LFN 1990 and also the case of WAEC V. Akinwunmi (2002) 7 NWLR (Pt.766) 327 at 343 -344 on estoppel. He then urged this court to resolve this issue in favour of the Appellant. D
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In his response on this issue, the Learned Counsel for the 1st Respondent submitted that the Appellant wrongly stated the legal consequences that flow from an invalid contract and has narrowly defined what constitutes an illegal contract. According to him, an illegal contract is where its formation or performance is expressly forbidden by a civil or criminal statute or where penalty is imposed for doing the act agreed upon, referring to Black's Law Dictionary. He opined that a contract can still be illegal even where there is no sanction imposed. He relies on the case of Adesanoye V. Adewole (2006) 14 NWLR (Pt.1000) 242, Alao v. ACB Ltd (supra). F
G

Learned Counsel submitted further that Section 50(1) of the Insurance Act has specifically forbidden entering into any insurance contract without the premium having first been paid and the non-compliance renders the contract between the parties illegal and unenforceable. He also relies on the case of Eimskip v. Exquisite (2003) 4 NWLR (Pt.809) 88 at 118 - 119 paragraphs H - A. That although trial courts are enjoined to enforce contracts voluntarily entered into H

by parties, such should not be the case if the agreement is illegal or contrary to public policy, calling in support the case of Onyeneyin V. Akinkugbe (2001) 1 NWLR (Pt.693) 40.

As regards the cases of Ngilari V. NICON (supra) and Irukwu V. Trinity Mills Insurance Brokers and Ors (supra) which were relied upon by the Appellant, the Learned Counsel for the 1st Respondent submitted that they do not apply in this case. Also submitted was that, had the legislature intended the insurer to waive any of its rights under the Act, it would have said so but that there is none in this case. That the use of the word “shall” in Section 50(1) of the Act shows that the provision is mandatory and cannot be waived, citing the case of Odua Invest. Ltd v. Talabi (1994) 10 NWLR (pt.523) 1.

On Section 93(1) & (2) of the Insurance Act, Learned Counsel contended that all the 1st Respondent needed to do in the circumstance was to make the allegation of lack of consent, which fact would stand automatically proved if no consent was produced or evidence led in rebuttal. That the burden of proof then shifted to the Appellant to rebut the same failing which judgment on that issue would be given against it. The case of Odukwe V. Ogunbiyi (1998) 8 NWLR (Pt.561) 339 was cited in support. That contrary to the position taken by the Appellant, all parties to the contract are duty bound to ensure that Section 93 (1) is complied with before entering into the contract. Also that the Appellant was under a duty to diligently ensure compliance with the Section as ignorance or mistake of the law or fault does not give a party the right to enforce an illegal contract. He relies on the case of Nash V. Stevenson Transport Ltd (1936) 2 KB 128. He then urged this court to resolve the issue in favour of the Respondents.

In his contribution to the position of the 1st Respondent on this issue, the Learned Counsel for the 2nd Respondent submitted that the lower court rightly distinguished the present appeal from what happened in the case of Ngilari (supra) and Irukwu (supra). That there was no reference in the two cases to Section 50(1) of the Insurance Act, 1997 which is clearly opposed to the quoted dictum in Ngilari’s case. Also that a statutory provision cannot be waived where the interest of the public is at stake. His other submissions are in tune with that of the 1st Respondent. The 3rd Respondent’s Counsel has also made submission which accord with that of the other

Respondents already summarized. I shall now proceed to resolve the issue.

A proper resolution of this issue turns on the construction or interpretation of Sections 50(1) and 93(1) and (2) of the Insurance Act, 1997. The Appellant had contended that non-compliance with Section 50(1) of the Act renders the contract of insurance invalid and not illegal whereas the Respondents think otherwise. B

For ease of reference, let me bring to the fore, the said provision. Section 50(1) of the Insurance Act provides:

“The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk, unless the premium is paid in advance.” C

Clearly, the above provision means no other thing than what it says. There shall not be any valid contract of insurance until and unless the premium is paid in advance. In other words, payment of premium is a condition precedent to a valid contract of insurance. It is trite that a cardinal rule of interpretation of statute is that where the words of a statute are clear and unambiguous, the courts are to give them their plain and ordinary meaning. It does not require any special or cannon of interpretation. This has been the position of this court in several decided cases. See *Egbe v. Yusuf* (1992) NWLR (Pt.245) 1, *Olarenwaju V. Governor of Oyo State* (1992) 11/12 SCNJ 92. D E

The use of the word “shall” in section 50(1) (supra) is instructive here. It is now well settled that where the provisions of a statute is garbed with the word “shall” as in the instant provision, it connotes that it is imperative for the provision to be obeyed. The word “shall” makes the provision mandatory, imposes a duty and is a word of command. See ONOCHIE v. ODOGWU (2006) 6 NWLR (Pt.975) 65; OMOKEODO V. IGP (1999) 5 SCNJ 71 at 81. What this means is that both the Appellant and Respondents were bound to obey the clear provisions of S.50 (1) of the Insurance Act 1997 without any discretion from any party. In other words, that section is concluded in mandatory terms and must be applied strictly. F G H

There is therefore no doubt that section 50(1) of the Insurance Act 1997, specifically forbids entering into any in-

insurance contract without the premium having first been paid “in advance.” Any non-compliance with the express provision of that section as in this case renders the contract of Insurance between the parties illegal and unenforceable. It is the view of this court that where a statute clearly provides for a particular act to be done or performed in a particular way, failure to perform the act as provided will not only be interpreted as a delinquent conduct but will be interpreted as not complying with the statutory provision. It was held by this court in *ADESANJOYE v. ADEWOLA* (2006) 14 NWLR (Pt.1000) 242 that in such a situation, the consequences of non-compliance follow, notwithstanding that the statute does not specifically provide for sanction. This knocks the bottom off the submission of the Learned Counsel for Appellant in this case that because Sec. 50(1) of the Act does not provide for sanction, the contract cannot be said to be illegal.

A contract which violently violates the provisions of a statute as in this case, with the sole aim of circumventing the intendment of the law maker is, to all intents and purpose, illegal, null and void and unenforceable. Such a contract or agreement is against public policy and makes nonsense of legislative efforts to streamline the ways and means of business relations. This court and any other court for that matter would not be allowed to be used to enforce any obligations arising therefrom. The summary of all I have endeavoured to say above is that parties cannot be allowed to enter into a contract or transaction to circumvent the clear and unambiguous provisions of a statute. It has been the view of this court and I reiterate it here that a transaction or contract, the making or performance of which is expressly impliedly prohibited by statute is illegal and unenforceable or impliedly prohibited by statute is illegal and unenforceable. See *ALAO V. ACB Ltd* (supra); *EIMSKIP LTD v. EXQUISITE INDUSTRIES NIGERIA LTD* (2003) 4 NWLR (Pt.809) 88 at 118 - 199 paras H - A.

Although it is the duty of a trial court to enforce agreements between parties and not to speculate or question the reasons for their entering into any such agreement, where such agreement is illegal or contrary to public policy, such agreement or contract should not be enforced by the court. See

OYENEYIN V. AKINKUGBE (supra).

One more thing before I move to another aspect of this issue. The Learned Counsel for the Appellant had relied heavily on the case of Ngilari v. NICON (1998) 8 NWLR (pt 550) page 1, a case decided by this court on 5th June, 1998. Learned Counsel quoted from page 21 of the law report where Onu JSC, in his concurring judgment quoted from a book titled Mc Gillivray and Parkingston on Insurance Law 6th Edition page 86 as follows:-

“There is no rule of insurance law that there can be no binding contract of insurance until the premium has been actually paid or the policy has been issued. Once the terms of the insurance have been agreed upon by the parties, there is prima facie binding contract of insurance and the assured is obliged to pay a premium as agreed while the insurer for their part must deliver a policy containing the agreed terms.”

Relying on the above quotation, the Learned Counsel for the Appellant submitted on page 12 of his brief as follows:-

“This is, with all respect, the clearest statement on this point. To this extent therefore, Section 50 of the Insurance Act cannot avail the 1st Respondent. It is also my submission that a contract of Insurance is still a contract, the Insurance Act notwithstanding. The legislature did not intend to change the law of contract so fundamentally from the position so eloquently stated by the Supreme Court in the case of Ngilari V. NICON (supra).”

I must quickly point out here that the facts of the case of Ngilari are quite different from the one in the instant appeal. In Ngilari’s case, the Plaintiff therein, as administrator of the Estate of Jesse James Ngilari issued his personal cheque on the instruction of the deceased to the agent of the Insurance Company as premium for the insurance cover. In other words, premium was actually paid but in the instant case, no premium was paid. In fact there was agreement between the parties herein that the “no premium no cover” principle should not apply to their contract. In Ngilari’s Case, this Court held that since premium was paid though through an agent of the insurance company, there was a valid insurance contract. The Learned Counsel for the Appellant failed to read the concurring judgment of Onu, JSC to the end, else he would have seen where His Lordship held on pp.21G - H and 22 para A as follows:-

“On the principle laid down in National Insurance Corporation of Nigeria V. Power and Industrial Engineering Co. Ltd (supra) this Court quoting with approval from the decision of the trial judge said:

B *“At the High Court, the learned trial judge Belgore, J, dealing with this question in his judgment said “from the moment the proposal was made, accepted and the demanded premium paid, a valid contract was subsisting between Plaintiff and the Defendant.”*

C *The principle laid down above albeit coming as it does from the High Court, is in my view, as solid as a rock which I uphold as applicable to the instant case.”*

In the circumstance, I hold that although the quotation by this court from Mc Gillivray & Parkington in Ngilari’s case tends to suggest that an insurance contract can be legally made without payment of premium, their Lordships in that case held that payment of premium cemented the contract of Insurance. As at the time the case of Ngilari was decided in 1998, Section 50(1) of the Insurance Act 1997 was already operational. The case of Ngilari (supra) was decided on its peculiar facts and the facts therein are not the same here. Therefore, it is highly distinguishable. I so hold.

The argument of the Appellant that Section 50(1) of the Act inures to the Appellant and as such it can waive it does not appeal to me at all. Had the Legislature intended to confer a special right of waiver on the insurer, it would have said so. Moreso, and as already stated, the word “*shall*” used in the provisions of S.50 (1) of the Insurance Act clearly imposed a mandatory condition precedent to the making of a valid insurance contract on all the parties thereto, and does not seek by any stretch of interpretation to confer any right of waiver of same on the insurer or any other party at all.

The other and final aspect of this issue has to do with Section 93 (1) & (2) of the Insurance Act. The section states:

H *“S.93(1) - The responsibility for insuring all properties of government as defined in the National Insurance Corporation Act is vested in the National Insurance Corporation of Nigeria.”*

“S.93(2) - Notwithstanding the provisions of subsection (1) of this Section and Sub-Section (2) of Section 4 of the National Insurance Corporation Act, any such properties of Government may, with the approval in writing of the Head of State, Commander-in-

Chief of the Armed Forces be insured with any insurer."

By virtue of the above provision the responsibility for insuring all properties of Government as defined in the National Insurance Corporation Act is vested in the National Insurance Corporation of Nigeria. However, notwithstanding this provision any such property of Government may, with the approval in writing of the Head of State be insured with any insurer. The lower court held on this issue that contrary to the provisions of Section 93 of the Act, the approval of the Head of State was not obtained before the Appellant was contracted for insurance of Government property since the Appellant was not NICON the approved insurer under the Act. I agree with this view of the court below. The argument of Counsel for the Appellant that it was the duty of the 1st Respondent only to obtain the consent of the Head of State is unimpressive. As was rightly pointed out by the learned counsel for the 3rd Respondent, the provisions of the Insurance Act are meant for the regulation of the Insurance business, and all parties involved in insurance contracts are expected to abide by those provisions. It does not therefore lie in the mouth of the Appellant in this case to say that it is the prerogative of the 1st Respondent to ensure the observance of any particular requirement of that Act except where it is so expressly stated. Due diligence in business requires that all parties must ensure the existence of the necessary prerequisites for the contract they intend to enter into.

Again since the section states that approval of the Head of State must be in writing it is not something to be presumed. As to who had the burden of proof as to existence of consent, it is my view that it lies on the party against whom judgment would be given if no more evidence were adduced successfully until all the facts in the pleadings have been dealt with. See FELIX OSAWORA v. SIMON EZEIRUKA (1978) 5 & 7 SC 135 at 145; ODUKWU v. OGUNBIYI (1998) 8 NWLR (Pt.551) 339 at 353. The 1st Respondent in this matter had pleaded that there was no consent which fact would stand proved if no consent was produced or evidence led in rebuttal. The burden of proof thereafter shifted to the Appellant to rebut the same failing

which judgment on that issue would be given against it. That is the truth and position of the law.

The tragedy of this issue is that the Appellant has failed to put up a strong argument for it to be resolved in its favour. It is accordingly resolved against the Appellant.

B On the whole, the non compliance of the parties herein with the provisions of Sections 50(1) and 93 (2) of the Insurance Act 1997 rendered their contract of Insurance illegal and unenforceable by either party. The Court cannot close its eyes to illegality as it is the
C duty of every court to refuse to enforce such a transaction or contract.

The sum total of all I have said in this judgment is that this appeal lacks merit in its totality and is hereby dismissed. The judgment of the Court of Appeal is accordingly upheld. Parties are to
D bear their respective costs.

FABIYI JSC

E I have had a preview of the judgment just delivered by my learned brother - John Inyang Okoro, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed.

I wish to chip in a few words of my own in support of the said
F judgment. The appellant's claim at the trial Federal High Court relates to contract of Insurance over the property of the 1st respondent (Government property). The claim was for the sum of N226 Million against the 1st respondent as premium. The learned trial judge entered judgment in favour of the appellant against the 1st respondent
G upon admission of the claim in the Statement of Defence.

The 1st respondent thereafter appealed to the Court of Appeal. Thereat, it applied for, and obtained leave to argue for the first time a fresh issue of illegality of the contract of the Insurance for alleged violation of sections 50 (1) and 93 of Insurance Act No. 2 of
H 1997.

The court below heard the appeal and in its judgment, it found that by the provision of section 50 (1) of the Act, non-payment of the Insurance premium in advance renders same illegal and invalid. It equally found that approval of the Head of State and Com-

mander-In-Chief of the Armed Forces in writing was not obtained contrary to section 93(2) of the Insurance Act No. 2 of 1997. The court below then set aside the judgment of the trial Federal High Court and subsequently dismissed the plaintiff's claim.

The above stance of the court below precipitated the appeal to this court. Briefs of argument were filed and exchanged by the parties whose counsel, respectively, adopted same at the hearing of this appeal on 19th November, 2013.

The appellant decoded two (2) issues for determination; as follows:-

1. Was the Court of Appeal right in granting the respondent(s) leave to raise and argue for the first time on appeal alleged breach of sections 50 and 93 of the Insurance Act and in considering that defence?

2. Did the purported violation of sections 50 and 93 of the Insurance Act No. 2 of 1997 by the Insurance contract between the parties render the Insurance contract unlawful illegal, null and void?

It is extant in the records of appeal that the 1st respondent's application to argue fresh points or questions not originally argued at the trial court which involves substantial questions of law and procedure was granted on 8th July, 2002 by the court below. A similar application by the 2nd, 1st and 3rd respondents was also considered and granted by the court below on 10th April, 2003.

It is now well settled by this court that an appellant will not be allowed to raise on appeal a question which was not raised, tried and considered in the court below unless the question involves substantial points of law, whether substantial or procedural and it is clear that no further evidence can be adduced which will affect the decision. See: *Bankole v. Pelu* (1991) 8 NWLR (Pt.211) 523; *Koya v. UBA Ltd.* (1997) 1 NWLR (Pt.481) 251.

There is no doubt about it that breach of a statutory provision is a substantial point of law which cannot just be given a wave of the back hand. In *Alao v. African Continental Bank Ltd.* (1998) 1-2 SC 208, this court, per Iguh, JSC maintained that where a statute makes a particular contract or class of contracts illegal or invalid, the court will refuse to allow an action to be maintained thereon, even though the illegality is not pleaded by the defendant and the parties do not desire to rely on it. See: *Royal Exchange Assurance Corpora-*

tion v. Vega (1992) 2 K.B. 384; Sodipo v. Lemminkainen Oy (No.2) (1986) 1 NWLR (Pt.15) 220; (1956) 1 SC 197; Onyeuke III v. Okeke (1976) 10 NSCC 146 at 150.

Once illegality is brought to the attention of the court, it overrides all questions of pleadings including any admissions made therein.

^B See: Belvoir Finance C. Ltd. v. Harold G. Cole & Co. Ltd. (1969) 1 WLR 1877.

^C The court below was right in granting the respondents leave to raise and argue for the first time on appeal alleged breach of sections 50 and 93 of the Insurance Act No. 2 of 1997 and, in considering that defence.

Once the substantial point of law was brought to the attention of the court below, it had the duty to consider same. The court below was on a firm stand in the step taken by it.

^D In considering issue 2, it is pertinent to quote the provision of section 50(1) of the Insurance Act No. 2 of 1997 for ease of reference. It provides as follows:-

^E *“The receipt of an Insurance premium shall be a condition precedent to a valid contract of Insurance and there shall be no cover in respect of an Insurance risk, unless the premium is paid in advance.”*

^F The word ‘shall’ as employed in the above quoted section 50(1) of the Act, denotes a command. It gives no room for discretion. By its nature, it is mandatory and one cannot wriggle out of same. It imposes a duty. Where a provision stipulates that a thing shall be done, it goes without equivocation that a peremptory mandate is enjoined. Refer to Bamaiyi v. Attorney-General of the Federation & Ors. (2001) 12 NWLR (Pt.722) 468 at 497.

^G It goes without saying, therefore, that payment of premium must be fulfilled to give birth to a legal and enforceable contract. The purported insurance contract between the appellant and the 1st respondent without a premium paid in advance, is contrary to the dictates of section 50(1) of the Act. It is therefore illegal and no court of ^H record can enforce it. See: Alao v. ACB Ltd. (supra) a page 207.

For the above reasons and the fuller ones contained in the lead judgment, I too feel that the appeal is devoid of merit and should be dismissed. I order accordingly and abide by the consequential orders made in the lead judgment inclusive of that relating to costs.

RHODES-VIVOUR JSC

I agree. The issue raised by this appeal is whether the contract entered by the appellant and 1st respondent is valid. Not to be repetitive I adopt the statement of facts set out in the leading judgment of my learned brother Okoro, JSC, which I have read in draft. B

Section 50(i) of the Insurance Act States that:

“The receipt of an Insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk unless the premium is paid in advance.” C

By the above provision there is a condition precedent to be met before there can be a valid contract of insurance, and that is that the premium agreed by the parties must be paid by the insured before there is cover in respect of an insurance risk. Put in another way premium is paid in advance before there is a valid contract of insurance. That is to say no premium no cover is made mandatory by the provisions of section 50(1) supra. D

On 17/1/96 the 1st respondent requested the appellant to provide insurance cover for their equipment. Insurance cover or premium amounted to N226M (two hundred and twenty-six Million Naira). The parties agreed that the premium would not be paid immediately by the 1st respondent to the appellant. They agreed that no premium no cover, a condition precedent by the provisions of section 50(1) supra would not apply to the contract. In effect their agreement was that their contract of insurance would be binding as if the premium had been fully paid. E

Furthermore section 93 of the Insurance Act 1997 states that:

93(1) The responsibility for insuring all properties of government is defined in the National Insurance Corporation Act is vested in the National Insurance Corporation of Nigeria.” F

(2) Notwithstanding the provisions of subsection (1) of this section and sub-section (2) of section 4 of the National Insurance Corporation Act, any such properties of Government may, with the approval in writing of the Head of State, Commander-in-Chief of the Armed Forces be insured with the insurer.” H

The long held position of the law is that where the words used in a statute are clear and free from ambiguity they should be given their ordinary meaning. A judge is not expected to read into

them meanings which were never intended by the Legislature, thereby creating confusion in the process. See *Mobil v. F.B.I.R.* 1977 3 SC p. 53, *Toriola v. Williams* 1982 7 SC P.27.

B Section 93 of the Insurance Act 1997 is two pronged. It saddles the National Insurance Corporation with the responsibility to insure Government property in Nigeria but where this is not done Government property can still be insured by the appellant or any other insurance company if and only if there is approval of the Head of State and such approval must be in writing.

C A contract is invalid either by clear statutory enactment or by rules of common law. Where a contract is expressly prohibited by statute and there is a sanction pronounced by the enactment such a contract is illegal. The test for illegality is prohibition and sanction.

D On the other hand a void contract is not expressly prohibited and its formation is never followed by a sanction. The parties have no rights whatsoever. See *Sodipo v. Lemminkainen* (1986) 1 NWLR (Pt.15) p.220.

E It is the duty of the adverse party to plead and give particulars of illegality. That is when illegality can be said to have been made an issue. But there would be no need to plead illegality where the contract is ex-facie illegal. A judge is expected in such a case to refuse to enforce any illegal transaction and decline to enforce the illegal contract and proceed to declare the contract illegal.

F The facts appear clear, that the parties entered into contract disregarding the mandatory provisions of the law which stipulates that premium must be paid before there is cover. That clearly contravenes section 50 (1) of the Insurance Act.

G Furthermore the property was not insured by the National Insurance Corporation and there was no permission from the Head of State allowing the appellant to insure Government property of the 1st respondent. This contravenes section 93(1) and (2) of the Insurance Act. The end result is that both acts are illegal and void, being in complete contravention of sections 50(1) and 93(1) and (2) of the H Insurance Act 1997.

For these brief reasons as well as those comprehensively given by my learned brother, Okoro JSC, I would dismiss this appeal.

PETER-ODILI JSC

I agree with the judgment just delivered by my learned brother, John Inyang Okoro JSC. In support of the reasoning from which the decision came about I shall make some comments.

This is an appeal from the decision of the Court of Appeal, Abuja Division, Coram: Oguntade, Bulkachuwa, Oduyemi JJCA. The appellant was plaintiff while the respondents were defendants at the Federal High Court, Abuja which court found for the plaintiff/appellant. The Court of Appeal set aside that award thus this appeal to the Supreme Court.

FACTS:

The 1st respondent requested the appellant to provide Insurance Cover for their equipment for the insurance period of 1996 to 2000. It was understood between the parties that the insurance premium would not be paid immediately by the 1st respondent because the Government would have to budget for money, appropriate it and a money Bill signed into law before the Insurance Premium can be paid. It was agreed that the insurance contract would be binding on the parties as if the insurance premium had been fully paid. That is the parties agreed that the “*no premium no cover*” principle would not apply to the insurance contract.

The 1st respondent’s total indebtedness to the appellant was N226 million being arrears of Insurance premium for the provision of insurance cover from 1996 to the year 2000 to cover a total risk cover borne by the appellant for the 1st respondent in the total sum of N39.85 Billion.

The 1st respondent was able to earmark and set aside and cause to be appropriated cumulatively the sum of N226 million in the year 2000 Budget which was enacted into Law as Appropriate Act 2000 for the payment of the Insurance premium owned by the 1st respondent to the appellant. When the said sum was released pursuant to the Appropriate Act the respondent did not pay the said sum in spite of several demands and reminders. The appellant took out a Writ of Summons against the respondents claimed among others the sum of N226,000.00 being arrears of Insurance premium on the Insurance Contract.

The 1st and 2nd respondents filed their respective statements of Defence while the 3rd respondent entered a conditional appear-

ance filed a Notice of Preliminary Objection and motion for Extension of time within which to file its defence. While the said motions were still pending, the appellant filed a motion for judgment against the 1st respondent upon a purported admission of its claims by the 1st respondent in its Statement of Defence.

B Judgment was entered against the 1st respondent accordingly by the learned trial Judge when he adjourned the other motions for “whatever it is worth”. The 1st respondent was aggrieved by that Judgment and appealed against it to the Court of Appeal upon C obtaining the requisite leave to do so. The 1st respondent also sought for and was granted leave to argue fresh issues relating to the illegality of the insurance contract which were not raised at the trial court. The application to raise the fresh issue of illegality was not opposed by the appellant.

D However in the Appellant’s Brief in the Lower Court, appellant opposed the raising of the fresh issues on the ground that leave was not granted to raise and argue the fresh issues.

The learned Justices of the Court of Appeal overruled the said objection as baseless and on the consideration of the said fresh E issues held that the contract of Insurance entered into by the appellant and 1st respondent was illegal and the appeal was allowed and judgment entered in favour of the respondent.

On the 18th November, 2013 date of hearing learned counsel F for the appellant, Mr. A. M. Kayode adopted the brief of the appellant by J.O. Adesina (Mrs.) and filed on 28/4/06. In it were formulated two issues for determination which are as follows:

1. Was the Court of appeal right in granting the respondent leave to raise and argue for the first time on appeal alleged breach of G sections 50 and 93 of the Insurance Act and in considering that defence.

2. Did the purported violation of Section 50 and 93 of the Insurance Act No. 2 of 1997 by the Insurance Contract between the parties render the said Insurance Contract unlawful, illegal null and H void.

Chief E. A. Asieka, learned counsel for the 1st respondent adopted the Brief of argument settled by D. D. Dodo, filed on 14/12/06 and deemed filed on 20/5/09. He utilized the issues as distilled by the appellant for his arguments.

Chief (Mrs.) Rita Chris-Garuba, learned counsel for the 2nd respondent adopted the Brief of Argument she settled and filed on 14/11/13 and deemed properly filed on 18/11/13. In the brief she raised two issues for determination, viz:

1. Was the Court of Appeal right in granting the respondent leave to raise and argue for the first time on appeal, alleged breach of Sections 50 and 93 of the Insurance Act and in considering that defence? B

2. Did the purported violation of sections 50 and 93 of the Insurance Act No. 2 of 1999 by the Insurance Contract between the parties render the said Insurance contract unlawful, illegal, null and void? C

Learned counsel for the 3rd respondent, Mr. Fred Onuobia adopted their Brief of Argument settled by Obinna D. Ogbuagu and filed on 12/4/13 and deemed properly filed on the 18th November, 2013. The issues as distilled by the appellant were adopted by learned counsel for the 3rd respondent. D

The issues as crafted by the appellant are adequate for the determination of the appeal and I shall use them.

ISSUE NO 1. E

Was the Court of Appeal right in granting the respondent leave to raise and argue for the first time on appeal alleged breach of Sections 50 and 93 of the Insurance Act and in considering that defence. F

Canvassing for the appellant, learned counsel said that where illegality is a defence, it must be pleaded which respondent failed to do. He cited Order 26 Rule 6 of the Federal High Court (Civil Procedure) Rules, 2000; *Onwuchekwa v NDIC* (2002) 5 NWLR (Pt. 760) 371 at 388; *George v Dominion Flour Mills* (1993) 3 NSCC 54 at 59; *Ibrahim v Ozim* (1983) 1 NSCC 1184. G

That it is only where a contract is ex-facie illegal that the illegality need not be pleaded and that is not the case in this instance. He referred to *Alao v. ACB* (1998) 3 NWLR (Pt. 542) 339 at 367; *Sodipo v Lenminkainen OY* (1986) 1 NWLR (Pt.1) 220 at 232; *Diab Nasr v Benin* (1968) 1 ALL NLR 269 at 287; *In Royal Exchange Assurance Corporation* (1902) 2 KB 384; *Scott v Brown & Ors* (1892) 2 QB 724. H

For the appellant was further submitted that in respect of

insurance of government property in Nigeria the general practice is the non-application of the “*no premium no cover*” principle.

For the 1st respondent, it was contended that the appellant did not oppose the application for leave to raise and argue the fresh issues and so appellant cannot now turn around in this appeal to challenge the granting of the said leave by Court of Appeal. He cited *Ulor v. Loko* (1988) 2 NWLR (Pt. 77) 430 etc.

That it is contradictory for the appellant to contend that the 1st respondent opted to act in breach of the provisions of the Insurance Act just to comply with the ICPC ACT.

Chief (Mrs.) Chris-Garuba for the 2nd respondent submitted that the lower court was right to have granted the application to raise for the first time on appeal, the breach of Sections 50 and 93 of the Insurance Act 1997 as it is a breach of a substantial point of law and touches on a condition precedent to the validity of the purported contract between the appellant and the 1st respondent. He cited *Bankole v Pelu* (1991) 8 NWLR (Pt. 211) 523, *Onwugbufor v Okoye* (1996) 1 NWLR (Pt. 424) 252; *Yusuf v U.B.N. Ltd* (1996) 6 NWLR (Pt.457) 632; *Koya v UBA Ltd* (1997).

Learned counsel for the 3rd respondent said where as in this case a party seeking leave to raise and argue fresh issues on appeal and satisfies the conditions then the leave granted is in order.

In reply on points of law, learned counsel for the appellant said the question they are posing is whether the discretion to grant the leave was properly exercised by the Court of Appeal notwithstanding that the appellant did not oppose the said application for leave. That the Ruling being interlocutory, the appellant has the right to appeal in the course of this final appeal. He cited *Iweka v SCOA (Nig) Ltd* (2007) 7 NWLR (Pt. 664) 325 at 348; *Okobia v Ajanya & Anor* (1998) 6 NWLR (Pt. 554) 348 etc.

The poser here raised is as to the rightness or not of the court below granting leave to the respondent herein as appellant in that court to raise fresh issues not brought up at the Court of trial. This coming on the heels of the appellant in that court not opposing the application for leave from the appellate court which leave was granted.

The appellant herein vehemently attacks that leave granted by the Court of Appeal. This position the respondents reject in that a fresh issue can be raised at the appellate stage even though not spe-

cifically pleaded at the court of trial and not raised at the Court of Appeal where it is an issue of a substantial nature and no new evidence would be required for its resolution. Indeed, learned counsel for the 1st respondent and the other two respondents are in good stead in saying that a fresh issue may be raised on appeal even without leave, if it is on the question of jurisdiction which even an appellate court can raise suo motu in the fresh issue involving a point of law considered fundamental to the entire proceedings. In fact going along with this line of thought or thinking of the respondents counsel is all the more persuasive in this instance where the appellant did not raise an opposition to that leave. In this wise I shall refer to Din v. A - G Federation (1983) 4 NWLR (Pt.87) 147; Oforlete v State (2002) 12 NWLR (Pt. 681) 415; Etowa Enan & Ors v Fidelis Ikor Adu (1981) 11 - 12 SC 25. B C

To illuminate the dark clouds that might be existing in the mind of whoever is in doubt as to what the Court of Appeal should have done and now in this Apex Court in the matter of the leave to raise a fresh issue albeit the issue of the illegality of the contract embarked upon by the parties I would refer to the stand of this court in similar circumstances. D E

In Salati v. Shehu (1986) 1 NWLR (Pt. 15) 10-11 Nnamani JSC stating the views of this court said, *"the attitude of this court has been that it will not allow a party on appeal to raise a question not raised in the court of trial or grant leave to a party to argue new grounds not canvassed in the lower court except where the new grounds involving substantial points of law substantive or procedural which need to be allowed to prevent an obvious miscarriage of justice."* K. Akpere v Barclays Bank of Nig. Ltd (1997) 47; Agnes Deborah Ejiofodomi v H. C. Okonkwo (1982) 11 SC 74 at 96 - 98. F G

Musdapher JSC (as he then was) in the case of A-G of Adamawa State v Ware (2006) 4 NWLR (Pt.970) 399 at 412, stated: *"It is the duty of every court to give effect to an existing statute whether cited by counsel or not"* Ajayi v Military Administrator Ondo State (1997) 5 NWLR (Pt. 504) 237. H

This court in a judgment in which its views were stated by Iguh JSC in Alao v ACB Ltd (1993) 3 NWLR 339 at 370 thus:

"It is trite that a transaction or contract the making or performance of which is expressly or impliedly prohibited by statute is ille-

gal and unenforceable where a contract made by the parties is expressly forbidden by statute, its illegality is undoubted and no court ought to enforce it or allow itself to be used for the enforcement of alleged obligations arising thereunder if the illegality is duly brought to the notice of the court and if the person invoking the aid of the court as in the present case, is himself implicated in the illegality.”

In the settled stance of the matter by no less than this apex court it is clear beyond peradventure that when the parties entered into the contract of Insurance with the spelt out exclusion clause removing the contract from the stated prescriptions of Section 50(1) of the Insurance Act, the contract was a clear illegality which no court would dignify by attempting to give effect to it.

The situation is such that the position taken by the appellant that the fact ought to have been pleaded failing which was fatal to the illegality submission is akin to the pouring of water on a stone with the attendant effect of a washing off no more no less. Therefore the case of *George v Dominion Flour Mills* (1963) 3 NSCC 54 at 59 advanced by the appellant’s counsel do not enhance their hope beyond a wishful thinking.

In the light of the foregoing, I find the issue herein resolved against the appellant and in favour of the respondent.

ISSUE NO 2. Did the purported violation of sections 50 and 93 of the Insurance Act No. 2 of 1997 by the Insurance Contract between the parties render the said Insurance contract unlawful, illegal, null and void?

For the appellant was canvassed that from a simple understanding of the provisions of section 50(1) of the Insurance Act, the legislature intended that before there could be a valid contract of insurance, the premium shall be paid to the insurance company. Also that the legislation stipulated that the insurer shall not provide cover in respect of any risk unless the premium is paid in advance. That the critical issue is the validity of the contract of insurance. He said that section 50 of the Insurance Act that the section was not concerned with illegality of the insurance contract but the issue of its validity.

Learned counsel for the appellant went on to contend that there is nothing illegal about the insurance contract entered into by the parties. That the provision of section 50 was intended to protect the insurance company so as not to undertake the risk without re-

ceiving the premium. He said that this statutory protection may be waived by the insurance company in whose favour it is made. That it is well established that a statutory right may be waived by the party in whose favour it inures. He referred to *Ariori v Elemo* (1993) ANLR 1 at 12; *Gwonto v State* (1983) ALL NLR 109; *Mohammed v Olawumi* (1993) 4 NWLR (Pt. 287) 254. B

It was further submitted that being invalid the contract of insurance is merely voidable not illegal or void. He cited *Chitty on Contract* 27th Edition page 20; *Panbisbilder (Nig.) Ltd v FBN* (2001) 1 NWLR (Pt. 642) 684 at 693; *NUR v NRC* (1996) 9 NWLR (Pt. 773) C 490 at 503.

It was stated for the appellant that the agreement between the appellant and 1st respondent is at the most an agreement to enter into an Insurance Contract which is enforceable with the facts of the issuance of various policy covers as well as the acknowledgment of the debt by the promise by the said 1st respondent to pay, there exists a contract between the two parties. He cited *Oyeneyin v Akinkugbe* (2001) 1 NWLR (Pt. 693) 40 at 57; *Ngilari v N.I.C.O.N* (1993) 8 NWLR (Pt. 560) 1 at 15. D

That it is the 1st respondent that has the duty to comply with section 93(2) by obtaining the necessary waiver and not the appellant. He cited section 151 Evidence Act Cap 112 LFN 1990; *WAEC v. Akinkumi* (2002) 7 NWLR (Pt. 766) 327 at 343 - 344. E

Learned counsel for the 1st respondent said the courts will not enforce any contract which has been held to be invalid. He referred to the definition of the term, "illegal contract in *Black's Law Dictionary*; *Adesanoye v Adewole* (2006) 14 NWLR (Pt. 1000) 242; *Eimskip v Exquisite* (2003) 4 NWLR (Pt. 809) 88 at 118 - 119. F

Learned counsel for the 2nd respondent stated that where a statute expressly or impliedly prohibits a contract that contract is illegal or void and that is the position of Section 50 of the Insurance Act of 1997. That in the provision the framers of the Act used the word "shall" a couple of times. The implication being that for a contract of insurance to be enforceable, payment of premium must be fulfilled. He cited *Alao v ACB Ltd* (1998) supra page 177 at 207. That from the words of Section 50 of the said Act, payment of premium is made a condition precedent to an entry of a valid and enforceable contract of insurance. The law on non satisfaction of a condition precedent is G H

very clear and where that condition precedent for the performance of an action unless the prior action is performed subsequent actions remains void. He referred to *FBN Plc. v Victor Ndoma-Egba* (2006) ALL FWLR (Pt.307) 1012.

B For the 3rd respondent was contended that the provisions of the Insurance Act are meant for the regulation of the insurance business, and all parties involved in insurance contracts are expected to abide by those provisions. Section 151 of the Evidence Act does not apply in this instance.

C Section 50(1) of the Insurance Act 1997 provides as follows:
“The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk, unless the premium is paid in advance.”

D This provision above is explicit, glaring and leaves nothing to conjecture as to what is intended or meant and so tallies with the views of this court in *Adesanoye v. Adewole* (2006) 4 NWLR (Pt. 1000) 242 wherein is stated:

E *“Where a statute clearly provides for a particular act to be performed, failure to perform the act will not only be interpreted as a delinquent conduct but will be interpreted as not complying with the statutory provision. In such a situation, the consequences of non-compliance follow, notwithstanding that the statute does not specifically provide for a sanction.”*

F For emphasis I shall recast the provisions of Section 50(1) of the Insurance Act and it is hereunder:

Section 50(1) of the Insurance Act provides thus”

G *“The receipt of an Insurance premium shall be a condition precedent to a valid contract of Insurance and there shall be no cover in respect of an Insurance risk, unless the premium is paid in advance.”*

I shall now quote relevant provision in the Insurance Decree 1997 and that is as stated hereunder.

H Section 93(1) of the Insurance Decree 1997 provides thus:

“The responsibility for insuring all properties of government as defined in the National Insurance Corporation Act is vested in the National Insurance Corporation of Nigeria.”

Section 93 (2) stipulates as follows:

“Notwithstanding the provisions of subsection (1) of this Section and subsection (2) of Section 4 of the National Insurance Act, any such properties of Government may, with the approval in writing of the Head of State, Commander-in-Chief of the Armed Forces be, insured with any insurer.”

With these provisions of the Act and Decree in view and relating them to the fact that the premium was not paid before the contract and approval of the Head of State not obtained before the purported Insurance, the fall out or implication is that the insurance contract lacks viability or validity.

Therefore there has been non-compliance with the prescription of conditions precedent and so a valid insurance contract does not exist. The case of Ngilari v NICON (1998) 8 NWLR (Pt. 560) 1 which the appellant is hanging on, a judgment of this court in which was held at page 21 paras C - D thus:

“There is no rule of Insurance Law that there can be no binding contract of insurance until the premium has been actually paid or the policy has been issued.”

I would with humility state that Ngilari v NICON (supra) would not avail the appellant since the facts here are different, the contract herein purporting to exclude the operation of Section 50 of the Insurance Act relating to the payment of premium.

From the foregoing, the premium not having been paid in compliance with the definite mandatory provisions of the relevant Act, specifically Sections 50 and 93, it is certain that the issue herein is resolved against the appellant. The Court below was right in its decision that there was illegality and no valid contract.

In conclusion with the above reasons and the better articulated reasoning in the lead judgment, I too dismiss the appeal which is lacking in merit.

I abide by the consequential orders therein made.

MUHAMMAD JSC

My learned brother John Inyang Okoro, JSC, obliged me a preview of his lead judgment just delivered. I imbibe the reasons articulated therein and his lordship's conclusion that the unmeritorious appeal be dismissed.

H

An insurance contract in respect of the 1st respondent's property was asserted by the appellant to have been entered into. Appellant sued the respondents at the Federal High Court for the premium put at N226 million. Upon admission of the claim by the 1st respondent the trial court entered judgment in favour of the appellant.

B Dissatisfied, the respondents appealed to the Court of Appeal where they sought and obtained leave to raise and argue the issue of the illegality of the contract between them for the first time. Learned counsel to the 1st respondent contended that the contract which had violated Sections 50(1) and 93 of the Insurance Act No 2 of 1997 was unenforceable. The trial court's decision entering judgment for the appellant in respect of the illegal contract being perverse, it was argued, should be set-aside. The lower court sustained learned counsel's submission and allowed the appeal.

D Aggrieved, the appellant has appealed to this Court. He urges that the lower court's erroneous judgment be interfered with. Appellant contends that the leave granted the respondents to raise the fresh issue of illegality of the contract having been wrongly sought and obtained, any decision on the very issue by the lower court cannot endure. The court's eventual decision, it is further argued, is wrong in law.

F Responding, learned respondents' counsel submits that the grant of leave to them to raise the new issue had proceeded on correct principles in the same way the decision of the court below setting aside the illegal contract cannot be faulted. He insists that the appeal be dismissed.

G Now, an appeal is only allowed if the decision appealed against turns out, for the reasons the appellant contends it should, to be perverse. A decision of a court that enforces an illegal transaction is perverse and stands to be set-aside. See:- Ibrahim v. Osim (1988) 3 NWLR (Pt 82) 257 and Sodipo v. Lemminkain OY (1986) 1 NWLR (Pt 15) 220.

H Section 50 (1) of the Insurance Act No 2 of 1997 relevant in the determination of one of the two issues the appeal raises provides:-

"The receipt of on Insurance premium shall be a condition precedent to a valid contract of Insurance and there shall be no cover in respect of an Insurance risk unless the premium is paid in ad-

vance.”

Given the clear and unambiguous words which make the foregoing Section, learned respondents’ counsel is right to insist that the lower court cannot be faulted in setting aside the trial court’s judgment which sought to enforce an Insurance contract between the two in respect of which premium was to be paid in advance but had not been so paid. By Section 50(1) of the Insurance Act No 2 of 1997, for a valid contract to exist between the parties, the premium must be paid for in advance. In the instant case where payment had not been effected in the manner the law provides it must, the trial court is clearly in error to have found for the appellant who in law had no contract in place to lawfully enforce. And that is not all.

By Section 93(2) of the same legislation, the approval of the Head of State and Commander-in-Chief of the Armed Forces must be obtained by the parties before entering into the contract. Having found that the trial court had ignored these facts which are *ex facie* visible, it will be unlawful for the lower court to affirm the trial court’s perverse decision. In *Sodipo v. Lemminkauren OY & Anor* (No 2) *supra*. Eso, JSC (of blessed memory) restated the principle more adroitly in his concurring judgment thus:-

“It is that when a contract is ex facie illegal, whether illegality has been pleaded or not the court would not close its eyes against that illegality, as it is the duty of every court to refuse to enforce such a transaction even when illegality has not been pleaded.”

For the foregoing and the detailed reasons contained in the lead judgment, I too find the appeal unmeritorious and dismiss it. I abide by the consequential orders contained in the lead judgment including the one on costs.

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