IN THE SUPREME COURT OF NIGERIA

Suit No: SC168/2002

Petitioner: Construction Company Ltd
And
Respondent: Santos M. Batalha

Date Delivered: 2006-03-07

Judge(s): Idris Legbo Kutigi , Aloysius Iyorgyer Katsina-Alu , Ignatius Chukwudi Pats-Acholonu , Sunday Akinola Akintan , Alo

Judgment Delivered

The present respondent, Santos M. Batalha, a Portuguese national, instituted this action as plaintiff at Benin High Court in Edo State as Suit No. B/643/94 against the present appellant, West Construction Company limited, as defendant. The dispute that led to the institution of the case arose over failure of the defendant, now appellant, to pay the plaintiff, now respondent outstanding balance of salary /allowance for services rendered to the appellant company. The plaintiffs' claims, as set out in paragraph 13 of the amended statement of claim, are as follows:

\"1. The sum of N4, 000 being arrears of local salary/allowance and interest at the rate of 21% per annum from the 30th of April, 1994 till judgment and thereafter at the rate of 6% per annum until final payment.

2. The sum of $17,500 being arrears of his off-shore salary/allowance or its Naira equivalent at the rate of 21% per annum from 30th of April, 1994 till judgment and thereafter at the rate of 6% per annum till final payment.\"

The appellant, a construction company, had by a letter dated 14th July 1992 (Exhibit A) employed the respondent as a project engineer. The terms and conditions of the respondent\'s appointment were set out in the said letter, Exhibit A. The letter reads, inter alia, as follows:

\"Mr. Manual DCS Santos Datalha,
C/o West Construction Company Limited,
47 Siluko Road,
Benin City.

Dear Sir,

Offer of Appointment (Junior Position)

With reference to your application and a subsequent interview, we are pleased to offer you appointment as Project Engineer with effect from 1st July 1992 on a salary of N4, 000.00 (Four thousand naira) per month. You will also be entitled to $2,500 (Two thousand five hundred dollars) per month.

You will be on probation for a period of twelve (12) months after which your appointment will, subject to successful completion of probationary service, be confirmed.

In the event of termination of appointment during and after your probationary period, cither party shall give one months notice to other or pay one month\'s salary in lieu of notice.

While you are employed by West Construction Company, you arc not to be involved directly or indirectly in any other employment or activities likely to come into real or apparent conflict with your employment with West Construction Company.

If you accept this offer, you should please signify acceptance by appending your signature to the copy of this letter enclosed herein in the space provided and returning it to the undersigned together with four (4) copies of recent passport photograph of yourself.

Yours faithfully,

For. West Construction Company Limited

(SGD)' ' '
Chairman/Managing Director\"

The respondent accepted the offer of employment conveyed to him in the letter and he was in the appellant\'s employment until he decided to withdraw his services from the company. His decision to withdraw his services was communicated to the appellant in a letter dated 30th April 1993 (Exhibit B). The main reason given in the letter is that he was owed arrears of wages. The letter (Exhibit. B), reads, inter alia, as follows:

\" M. Santos,
West Construction,
47, Siluko Road
Benin City.

Throu: Barrister A. O. Eghobamien, Esq.,

To: The Chairman/Managing Director
Chief (Dr) Sir, G.O Igbinedion, J.P.
Glass House,
Airport Road,
Benin City.

Dear Sir,

Withdrawal of Services

I hereby wish to inform you Sir, of my decision regarding the above-mentioned matter. In view of my salary arrears, which stand at 7 months, I can no longer afford such a situation.
As I consider the present situation, being a brake (sic) of contract by the Company, by failing to honour their responsibilities, for not paying my salary, as stated in my employment letter, I reserve the right to give no notice of quitting my employment with the Company''

After withdrawing his services from the appellant company, the respondent commenced the present action at Benin High Court in which he sought to claim the arrears of his wages from the company. Pleadings were filed and exchanged. The respondent, as plaintiff, gave evidence in support of his claim. Two witnesses testified for the defence. One of the two witnesses was Frederick Odiawa, a Superintendent in the Immigration Department.

The plaintiffs' case as presented at the trial was that he accepted the employment offered to him in the letter, Exhibit A. He served the company for 10 months. Both the offshore salary, which was to be paid in US Dollars and the local salary payable in Naira, were to be paid monthly. He was paid off shore salary for only three months. Lie was owed one-month local salary amounting to N4, 000 and seven months offshore amounting to $17,500. His claim was therefore for the recovery of the outstanding local and offshore salary/off-shore allowance.

The case for the defence was that the contract was illegal and unenforceable. Reliance was placed on paragraphs 4, 5 and 6 of the Joint Reply to the Amended Statement of Claim where the appellant pleaded as follows:

\"4. The defendants aver in the further reply to paragraphs 9,10,11,12 and 13 of the amended statement of claim that the contract of employment, if at all, is illegal, null and void in that it offends against Central Bank of Nigeria Regulations which prohibits paying salary of expatriates in foreign currency by cash in Nigeria.

5. The defendants shall raise a preliminary point of law at the hearing that the Plaintiff was given resident permit to work as Instrumentation Engineer in the business known as Jagal Nigeria Limited on 21st March 1988. The Photostat copy of Form A, Immigration Regulations 1963, Resident permit shall be relied upon at the hearing. The Plaintiff is put on notice to produce the original of the said permit at the hearing. It shall be contended that the Plaintiff entered into an illegal contract with the defendants, which is not enforceable in law.

6. The Defendants shall contend at the trial that the Plaintiff was fraudulently using the resident permit No. 060672 issued to him to work for Jagal Nigeria, Limited for the 1st Defendant which is against the Immigration Act.\"

At the completion of the hearing, the learned trial Judge, Elaiho, J., in his reserved judgment delivered on 10th July 1997, upheld the defence of the defendant that the contract was illegal. He accordingly dismissed the plaintiffs' claim with N1000 costs in favour of the defence.

The plaintiff was dissatisfied with the decision and a notice of appeal containing four grounds of appeal was filed against the judgment. The relief sought from the Court of Appeal in the notice of appeal is:

\"An order setting aside the judgment of the lower court and granting the plaintiffs claim in its entirety\".

The parties filed their respective brief of argument in the Court of Appeal and at the conclusion of the hearing in that court, the plaintiffs appeal was allowed. In the lead judgment delivered by Niki Tobi, JCA, as he then was, (Rowland and Ibiyeye, JJ.CA concurring); the learned Justice came to the following conclusion:

'In sum, this appeal is allowed. The judgment of the learned trial Judge is hereby set aside. I award N4, 000 cost in favour of the appellant\".

The present appeal is from the said judgment. Five grounds of appeal were filed against the decision. The parties filed their briefs of argument in this court. The appellant formulated the following four issues in the appellant\'s brief and they were adopted by the respondent. The four issues are:

\"1. Whether there was any evidence to support illegality or the violation of sections 8 & 34 of the Immigration Act 1990 Cap 17.

2. Whether facts pleaded were sufficient to sustain illegality of the contract pursuant to S. 8 & S. 34 of the Immigration Act 1990.

3. Whether a court of law is permitted to take cognisance of illegality where the evidence, which emerges at trial, shows conclusively that there is illegality, though not pleaded.

4. Whether a breach of Sections 8 & 34 of the Immigration Act 1990 Cap 171 renders the contract between the Appellant and the Respondent void and therefore unenforceable\".

The contention of the appellant, as canvassed in Issue 1 in the appellants\' brief, is that the Learned Justices of the Court below were in error in coming to the conclusion that there was insufficient evidence to support violations of sections 8 and 34 of the Immigration Act. References are made to three portions of the evidence extracted from the respondent while he was being cross-examined. The three instances are where he said in answers to question under cross-examination that:

\"I am not a Nigerian. I am a Portuguese. I arrived for the first time in Nigeria on 5/10/83. I was previously employed by

Albion Construction Co. Nig Lid. I was employed in Nigeria by the said Albion Company. I do not hold a Nigerian passport\".

The second instance is where he said;

\"When I got the letter of appointment, Exhibit A, I started work on 1/7/92. had no resident permit from the Immigration Authority in Nigeria to work for West Construction Company\".

And the third instance is where he said:

\"Within the period 1/7/92 to 30/4/93, I did not have a work permit to work for the 1: defendant and the 1st defendant did not provide for me a work permit\".

It is submitted that it was the above revelations extracted from the respondent under cross-examination that formed the basis of the conclusion reached by the learned trial Judge that the contract of employment was illegal and therefore the action could not be entertained by the court. The learned Justices of the court below arc said to be in grave error in reversing this decision of the trial court.

The question whether sufficient facts were pleaded to support violation of sections 8 and 34 of the Immigration Acts the one canvassed in the appellant\'s Issue 2. It is submitted that illegality was duly pleaded and that both the learned trial Judge and the Justices of the court below conceded that illegality was pleaded. References are made to portions of the pleadings filed by the appellant. It is then submitted that although work permit was not specially mentioned, the position of the law is said to be that for illegality to be raised it must be pleaded with sufficient particularity. The decision in George v. Dominion Flower Mills Ltd. (1963) ALL NLR 72 is cited in support of this submission. It is therefore argued that the requirement of the law was met by the appellant in its pleadings. It is finally submitted that the parties clearly joined issues on illegality at the close of pleadings.

The point discussed in Issue 3 is as an alternative to the point canvassed in Issue 2. It is that there may even be no need to plead illegality in some cases, such as in the instant case. This is said to be because although the general rule is that where a contract is not ex.-facie illegal, the defence of illegality must be pleaded. But there arc said to be exceptions to this general rule. Two of such exceptions are said to be (1) where the illegality appears on the face of the contract, and (2) where the evidence, which proves the contract, discloses the contract to be illegal. It is submitted that the evidence relied on in the instant case clearly established illegality and the court below is said to be wrong in holding a contrary view. The question whether any breach of the provisions of sections 8 and 34 of the Immigration Act could render a contract illegal and unenforceable is the one discussed in Issue 4. It is submitted that as far as statutory prohibition is concerned, the policy of the courts is that it will not enforce a contract that is expressly or impliedly prohibited by statute. The facts in the instant case are said to clearly establish that the contract was apparently illegal and unenforceable. It is finally submitted that upon a proper construction of sections 8 and 34 of the Immigration Act, both parties in this case are prohibited from suing on the contract since they are both guilty of breaches of the provisions of the said Act.

The trial court is therefore said to have acted rightly in declining jurisdiction.

In reply on Issue 1, it is submitted in the respondent\'s brief that the court below was right in its conclusion that there was no admissible evidence on the record to support illegality of the contract of employment under sections 8(1) and 34(1) of the Immigration Act. The decision of the court below is said to be based on the evidence of illegality of the contract under sections 8 (1) and 34(1) which was not pleaded. Consequently, any evidence given in respect of the unpleaded facts would be inadmissible. The evidence indicating that there was illegality arising out of failure to obtain work permit came out during the trial and it was in answers to questions put to the respondent while he was being cross-examined. That evidence is therefore said to be inadmissible, as it was not pleaded. The decision in N. I. P.C. Ltd. v. Thompson Organization Ltd. (1969) All NLR 134 at 138 is cited in support of this submission.

In reply to the submissions made in Issue 2, reference is made to the paragraph statement of defence filed by the

appellant. It is submitted that no mention was made of the absence of a work permit. All that the appellant concentrated and restricted its defence of illegality to is said to be the issue of failure to obtain a residence permit and breach of the Central Bank Regulations. It is submitted that under the rules governing pleadings, a reply can only respond to the issues raised in the defence. It cannot go beyond the defence or set up new facts and claims different or inconsistent with the statement of claim or statement of defence.

It is finally submitted that since the parties did not join issues in their pleadings on failure to obtain work permit, it was wrong of the trial High Court to hold or admit evidence on that issue.

On Issue 3, it is submitted in reply in the respondent\'s brief that the issue is incompetent in that (1) it does not arise from any of the grounds of appeal; and (2) it is hypothetical and academic in nature. Reference is made to the five grounds of appeal filed against the judgment.   It is then submitted that the issue does not flow from any of the five grounds.

Secondly, as the issue of illegality based on sections 8 and 34 of Immigration Act was not raised before the court below, it is submitted that it would be improper for the appellant to now pose the question as Issue 3 in this court. As the question posed does not arise from the case, it is contended that this court should ignore such question and treat same as academic in nature, which this court should not entertain.

In the alternative, it is submitted that where a contract is not ex-facie illegal and the question of illegality depends on the surrounding circumstances, then as a general rule, the court will not entertain the question of its illegality unless it is raised in the pleadings. In the instant case, it is submitted that the plaintiffs' claim was not ex-facie illegal. And since the issue of illegality was not pleaded, any evidence adduced on the unpleaded illegality would go to no issue.

On Issue 4, it is also submitted that since the question of illegality arising from sections 8 and 34 of the Immigration Act was not pleaded, then any argument put up on this Issue 4 would become academic.

In the alternative, it is submitted that even if the provisions of sections 8 and 34 of the Immigration Act are applicable, they could not render the contract illegal and unenforceable for two reasons: the point of judicial authority and on principle of public policy.

On the point of judicial authority, it is submitted that where a statute is silent as to the civil rights of the parties but penalises the making of the contract, the plaintiff is not necessarily deprived of his civil remedies under the contract. A number of legal authorities were cited in support of this submission. It is further contended that the Immigration Act is silent as to the civil rights of the parties that enter into a contract of employment without the requisite permit. The penalty imposed under the combined effect of sections 34(1), 34(2) and 48(1) of the Act is said to be only on the employer and not the foreigner. It is therefore submitted that the respondent is under no criminal sanction whatsoever under the Act apart from deportation. The decision in Oilfield Supply Centre v. Johnson (1987) 2 NWLR (Pt. 58) 625 is cited in support of this submission.

On the principle of public policy, it is submitted that the overriding consideration in the matter is founded on the law of equity with particular reference to estoppel. It is that the appellant whose burden it is to obtain the permit under sections 8 and 34 of the Immigration Act, cannot, after taking the benefit of the contract of employment, be allowed to rely on its illegality to refrain from performing his obligation. It is therefore submitted that a decision not to enforce this contract is a decision to allow the appellant to unjustly enrich itself.

The facts of this case are not in dispute. The appellant, a construction company, employed the respondent, a foreigner, as an engineer and his salary and allowances were set out in the letter of appointment, Exhibit A, already reproduced above. The respondent was paid for his services up to a point. The action by the respondent was for the recovery of his outstanding salary and allowances. The appellant did not deny that it ever employed the respondent. But its defence is that the contract of employment was illegal in that it contravened some provisions of the Immigration Act and Central Bank Regulations and as such the court should not entertain the claim.

The position in law is that a contract that is cx-facie not illegal or offend public policy will be enforced by the courts:

See UBN v. Odusote Bookstores Ltd. (1995) 9 NWLR (Pt 421) 551; Ogwulu v. Coop. Bank of E.N. Ltd. (1994) 8 NWLR (Pt. 365) 685; Sodipo v. Lemminkainen OY (1986) 1 NWLR (Pt. 15) 220; and Ekwunife v. Wayne (W. A) Ltd. (1989) 5 NWLR (Pt. 122) 422. The term \"ex-facie\" is defined in Black\'s Law Dictionary, 6th Edition 1990, page 572 as follows:

\"Ex-facie: From the face; apparently; evidently. A term applied to what appears on the face of a writing.\"

The plaintiff claim in the instant case, as already set out above, is briefly for the recovery of his outstanding salary and allowances due to him from the appellant, his former employer. There is definitely nothing apparent or evidently from the face of the claim to show or from which any act of illegality could be inferred. The claim is therefore ex-facie legal and enforceable.

The law is settled that before a claim can be said to be ex-facie tainted with illegality it must be clearly apparent and unequivocal from the claim that what the court is being called upon to entertain is illegal and in breach of specific statute or law. Thus, for example, a contract for the supply of poison has been held not to be ex-facie illegal and that the onus to prove illegality lay on the person claiming such defence: See Agbakoba v. Meka (1962) N. N. L. R. I.

The law is also settled that whoever intends to claim illegality as a defence must not only plead the illegality, he is also required to set out the particulars of the illegality in his pleadings. This requirement is mandatory in all cases where the contract is not ex-facie illegal and the question of illegality depends on the circumstances of the case. As a general rule therefore, the court will not entertain the defence unless it is raised in the pleadings unless where illegality is apparent on the face of the claim: See Nassar v. Moses (1960) L.L.R 170; George v. Dominion Flour Mills Ltd (1963) I All N.L.R 71, and Ogwuru v. Coop. Bank of E.N. Ltd., supra.

Applying the law as declared above to the instant case, I have no doubt in holding that the plaintiffs claim is a simple claim for outstanding salary and allowances due for services rendered under a contract of employment. The claim was therefore ex-facie not illegal. It follows then that the onus was on the appellant, who wanted to rely on illegality as a defence, to duly plead that defence and set out the particulars of the illegality.

In its attempt to comply with the above legal requirement, the appellant claimed to have raised the defence in paragraphs 4, 5 and 6 of the Joint Reply to Amended Statement of Claim. The three paragraphs have been reproduced earlier above. The defence put up in paragraph 4 is to the effect that the contract of employment was \"null and void in that it offends against Central Bank of Nigeria Regulations, which prohibits paying salary of expatriates in foreign currency by cash in Nigeria\". The details of the Central Bank Regulations were not given and no evidence was led at the trial in support of that pleading. The presumption therefore is that the appellant abandoned that pleading: See Awojugbagbe Light Industries Ltd. v. Chinukwu (1995) 4 NWLR (PL 390)379; Ojikutu v. Fella (1954) 14 WACA 628; Emegokwue v. Okadigbo (1973) 4 SC 113; and Olarewaju v. Bamigboye (1987) 3 NWLR (PL 60) 353.

The defence pleaded in paragraphs 5 by the appellant is, inter alia, that \"the plaintiff was given resident permit to work as an Instrumentation Engineer in the business known as Jagal Nig. Ltd' It shall be contended that the plaintiff entered into an illegal contract with the defendant which is not enforceable in law\". The requirement for residence permit is provided for in section 10 of the Immigration Act. The appellant failed to lead evidence to show that the respondent entered the country illegally and that by entering the country illegally would vitiate the contract of employment it had with the respondent. This is because what section 10(5) of the Immigration Act provides for is that:

\"The failure by any person to comply with the requirement of this section or any condition imposed shall be an offence under this Act, and such person may, if the Minister thinks fit, be required to leave Nigeria''

The sanction prescribed is deportation from the country. It does not prescribe for the nullification of contracts such as in the instant case.

The defence pleaded in paragraph 6 of the appellant\'s defence is to the effect that:

\"The defendants shall contend at the trial that the plaintiff was fraudulently using the resident permit No. 060672 issued to him to work for Jagal Nig. Ltd for the 1st defendant which is against the Immigration Act.\"

The averment again is in respect of resident permit, which is expected to have been issued under section 10 of the Immigration Act. In other words, no breach of the provisions of section 8(1) of the Immigration Act was pleaded by the appellant. Section 8(1) of the Immigration Act provides as follows:

\"8(1)1 No person other than a citizen of Nigeria shall -

(a) Accept employment (not being employment with the Federal Government or a State Government) without the consent in writing of the Director of Immigration....\"

Since the appellant failed to plead a breach of the above provisions of section 8(1) of the Immigration Act, it follows that any evidence led in respect of the unpleaded fact, whether directly from a witness or extracted under cross-examination of the respondent, would be inadmissible: See Ohamade v. A.C.B Lt. (1997) I NWLR (Ft. 480) 123; Iheanacho v. Chigere (2004) 17 NWLR (Ft. 901) 130; and Akaniwon v. Nsirim (1997) NWLR (Ft. 520) 255.

As it has been clearly shown that the appellant failed to plead the illegality of the contract on the ground that a breach of the provisions of either section 8 or section 34 of the Immigration Act was committed, it follows that the question of considering any effect of such a breach would have on the contract does not arise.

In the result, the appeal fails and I accordingly dismiss it. The judgment of the Court of Appeal by which the judgment of the trial Court was set aside and the plaintiffs claim was affirmed is hereby upheld. I therefore hereby enter judgment for the plaintiff/respondent as per his claim as already reproduced earlier above in this judgment. The respondent is also entitled to his costs in the High Court, and in this court, which I assess respectively at N5, 000 and N10, 000. The Court of Appeal awarded him N4, 000.

Judgment delivered by
Idris Legbo Kutigi,J.S.C.

I have had the privilege of reading before now the judgment just delivered by my learned brother Akintan J.S.C. I agree with him that the appeal lacks merit and ought to be dismissed. The Plaintiff is certainly entitled to his arrears of salary and or wages as claimed. The Defendant who has taken advantage under the contract of employment cannot be allowed at this stage to say that the contract was illegal, which it was not. The appeal is therefore dismissed. I endorse the consequential orders made in the lead judgment.

Judgment delivered by
Aloysius Iyorgyer Katsina-Alu,J.S.C.

I have had the advantage of reading in draft the judgment of my learned brother Akintan JSC. I entirely agree with it. I also dismiss the appeal with costs as assessed.

Judgment delivered by
Ignatius Chukwudi Pats-Acholonu, J.S.C.

The Plaintiff Respondent a citizen of Portugal was a project engineer of the appellant. It is his story that in July 1992 he was hired and engaged by the Appellant in its construction company, at a salary and allowances agreed by both parties.

On the 30th of April 1993 the Respondent withdrew his services due to the Appellant\'s refusal or failure to pay his salary and allowances in spite of repeated demands for the payment. The Appellant as a Respondent while not denying employing the Respondent stated that the Respondent was not entitled to the sum of money he was claiming because the contract of employment was illegal as it is enforceable in law. The Appellant contended that the work permit was issued to him by the department of Immigration to work for Jagal Nig. Ltd. and not for its company for which no work permit was obtained - a state of affair, which is against the spirit of the Immigration Act. The Appellant maintained that it is an offence for the Respondent to work for it without resident permit. In the course of the proceedings in the High Court, the provisions of Sections 8 and 34 of the Immigration Act were contested and the claim of the Respondent was dismissed on a preliminary objection. On appeal by the Respondent to the Court of Appeal his appeal was allowed. Dissatisfied with the judgment of the Court of Appeal the Appellant Appealed to this Court and framed four issues for consideration which are

(a) Whether there was any evidence to support Illegality or the violation of sections 8 and 34 of the Immigration Act 1990 Cap 171.

(b) Whether facts pleaded were sufficient to sustain illegality of the contract pursuant to Section 8 and Section 34 of the Immigration Act 1990.
(c) Whether a Court of law is permitted to take cognisance of illegality where the evidence, which emerges at trial, shows conclusively that there is illegality, though not pleaded.

(d) Whether a breach of Section 8 and 34 of the Immigration Act 1990 Cap 171 renders the contract between the Appellant and the Respondent void and therefore unenforceable.

On his part the Respondent adopted the same issues as made out by the Appellant. To my mind the real issue to be determined by this Court is as to the tenor and intendment of Sections 8 and 34 of the Immigration Act of 1990 and how they impact on the denial of payment of salary and allowance the Respondent claimed. In a contract freely agreed by both sides the Appellant refused to pay the remuneration on the premise that the contract was null and void because the Respondent had no work permit. I intend to approach the resolution of this case from 2 points of view; (a) Is it conscionable for the Appellant knowing fully well that the Respondent had no work permit entered into contract of employment with him by which it enjoyed his services and now falling back on a skewed or contrived and hackneyed argument that the contract of service was ab initio tainted with illegality' (b) What if any is the impact of Sections 8 and 34 of the Immigration Act 1990 on this contract of service. It is not in contention that the Respondent did not have work permit for the Appellant. The question then is why did the Appellant refuse to secure or procure the necessary work permit for the Respondent' Section 34 of the Immigration Act Cap 171 states as follows: -

\"(2) Where any person in Nigeria is desirous of employing a person who is a national of any other country he shall, unless exempted under this section, make application to the Director of Immigration in such manner as may be prescribed and shall give such information as to the provision to be made for repatriation of that national and his dependants as the Director of Immigrations may reasonably require; and no such person shall be employed without the permission of the Director of Immigration given on such terms as he thinks fit; the provisions of this section shall extend and apply to persons in employment immediately before, as well as to those employed or to be employed at any time after, the commencement of this Act.\"

It beats my imagination how the Appellant could in all seriousness and conscience after benefiting from the services of the Respondent for about nine months and refusing to pay him the salaries and allowances freely agreed upon could now fall back on the hollow defence or claim of illegality. The presumption or rather the necessary inference deducible there from is that the Appellant never really intended or contemplated to pay the Respondent the amount as agreed in the contract of service. A defence to an action which is ignoble on its face and tainted or besmirched with an oddity that is inherently dubious, dishonest and reprehensible does violence to a principle of equity and good conscience ought not in my view win the support of this Court. This Court should not lend itself to a defence for breach of contract, which is embarrassing to any conscientious being and is an affront to civilized behaviour, and decency

The learned authors of 2004 Edition of Vol. 1 of Chitty on Contracts stated as follows at paragraph 16 - 003

\"The seriousness and turpitude of the illegality which renders contract unenforceable varies considerably. Illegality can arise either from statute or the common law and, particularly where the latter is involved, the courts are faced squarely with the issue of whether public policy requires that a contract (otherwise valid and enforceable) should not be enforced because it is tainted with illegality. Obviously a doctrine of public policy is somewhat open textured and flexible, and this flexibility has been the cause of judicial censure of the doctrine. On occasions it has been seen by the courts as being vague and unsatisfactory, \" a treacherous ground for legal decision, \" a very unstable and dangerous foundation on which to build until made safe by decision\". In the case of Printing and Numerical Registering Co v Sampaon. (1875) L.R. 19 Eq. 462, 165 Jessel M.R. said \"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justices therefore, you have this paramount public policy to consider - that you are not likely to interfere with freedom of contract\"

Let me consider various situations that could make some contracts incapable of enforcement;

(a) Both knew that the performance of the contract necessarily involves the commission of an act which was to their knowledge criminal see Apthrop v Neville (1907) 23 T.L.R. 575; or Stoneleigh Finance Ltd v Philips (1965) 2 Q. B 537, 572, 580. It does not apply here.

(b) Both parties knew that the contract is intended to be performed in a manner, which, to their knowledge is legally objectionable in that sense. This is certainly not the case here.

(c) The purpose of the contract entered by the parties should be seen to be legally objectionable and that notwithstanding such knowledge of that they still went with the contract. Once again this postulation does not apply in this case. See Alexander v Rayson (1936) 1 K.B.169, 182; Elder v Auerbach (1950) 1 K.B. 359;

(d) Both parties participate in performing the contract in a manner, which they know to be legally unacceptable. See Ashmore, Benson, Pease & Co Ltd v A. v Dawson Ltd (1973) 1 W.L.R. 828. This situation does not equally apply here.

After carefully evaluating and systematically appraising and synthesizing the above conditions it is difficult for me to pigeonhole any of the above to apply even inferentially to this contract. If there is any act of illegality about the nature of the relationship between the parties in respect of the alleged infraction of the prescription of Immigration Act, such knowledge shall be imputed to the Appellant who closed its eyes in order to reap where it did not sow, to hoodwink and bamboozle the ignorant foreigner to work for it and fall back on a questionable defence of illegality. Nothing could be more ungallantly than this posture.

In Great Britain for example applications for work permits are normally made by the employers and the same are dispatched to the employer and not the employee. See the 4m Edition of Halsbury\'s Laws of England Para 86. I do not see how the practice in Nigeria in respect of issuance of work permit eligibility will be different from the practice in the United Kingdom as to who should apply for the work permit in this case. Equally too in Great Britain where the employee intends to move to another employer it is essential that a new application be made to the appropriate authority. It can therefore be seen that the Appellant has no leg to stand on in respect of the rather disgusting and revolting offensive attitude it adopted to shirk its responsibility, when its acts traduced all known decent procedures in the circumstances. It is this type of sickening and condemnable behaviour that gives Nigeria a bad name. I agree with the judgment of my noble and learned Lord, Akintan JSC which I had the opportunity of reading in draft.

In the circumstances, I dismiss the appeal and affirm the judgment of the Court below and I abide by the orders in the leading judgment.

Judgment delivered by

Aloma Mariam Mukhtar,J.S.C.

I have read in advance the lead judgment delivered by my learned brother Akintan, JSC. I fully agree with the reasoning and conclusion reached therein, but I would like to add a few points by way of emphasis. The claim before the Edo State High Court is predicated on breach of a contract entered by both parties to this appeal. The plaintiffs case, in a nutshell is that he was employed by the defendants as its project engineer on a local salary of N4, 000.00, and an offshore salary/allowance of $2,500.00 every month. The defendants somewhere along the line reneged on its agreement of the payment of the offshore salary allowances, which amounted to $7,500, which he claimed in the trial court. In their joint defence, the defendants made the following salient averments, which read thus: -

\"4. The defendants aver in further reply to paragraphs 9, 10, 11, 12 and 13 of the statement of claim that the contract of employment if at all is illegal and null and void in that it offends against Central Bank of Nigeria Regulations which prohibits paying salary of expatriates in foreign currency by cash in Nigeria.

5. The defendants shall raise a preliminary point of law at the hearing that the plaintiff was given resident permit to work as an instrumentation Engineer in the business known as Jagal Nigeria Limited on 21st, March, 1988 ....

It shall be contended that the plaintiff entered into an illegal contract with the defendants which is not enforceable in law.\"

In its judgment the learned trial judge found the contract of employment, Exhibit A made between the plaintiff and 1st defendant dated 14/7/92 null and void, and thus dismissed the plaintiffs claim. The learned trial judge in addition struck out the name of the 2nd defendant. The plaintiff appealed to the Court of Appeal, and the decision of the trial court was set aside. This appeal is as a result of that setting aside. The briefs of argument learned counsel for the parties exchanged were adopted at the hearing of the appeal, and both briefs raised issues for determination, (though similar to one another), for the issues raised in the appellant\'s brief of argument were adopted by the respondent in his own brief of argument. The issues formulated are: -

\"A. Whether there was any evidence to support illegality or the violation of sections 8 and 34 of the immigration Act 1990 Cap.171

B. Whether facts pleaded were sufficient to sustain illegality of the contract pursuant to Section 8 and Section 34 of the Immigration Act 1990.

C. Whether a court of law is permitted to take cognisance of illegality where the evidence, which emerges at trial, shows conclusively that there is illegality, though not pleaded.

D. Whether a breach of Section 8 and 34 of the Immigration Act 1990, Cap 171 renders the contract between the appellant and the respondent void and therefore unenforceable.\"

The pivot of the arguments on issues (1) and (2) centers on the finding of the lower court, which reads thus: -

\"The above apart, there is no evidence before the court to substantiate the illegality of the contract of employment under Sections 8(1) and 34(1) of the Immigration Act.\"

Now, what do Sections 8(1) and 34(1) supra stipulate. They stipulate the following: -

\"8.(1) No person other than a citizen of Nigeria shall -

(a) accept employment (not being employment with the Federal Government or a State Government) without the consent in writing of the Director of Immigration; or

34.(1) Where any person in Nigeria is desirous of employing a person who is a national of any other country he shall,

unless exempted under this section, make application to the Director of Immigration in such manner as may be prescribed and shall give such information as to the provision to be made for repatriation of that national and his dependants as the Director of Immigrations may reasonably require, and no such person shall he employed without the permission of the Director of Immigrations given on such terms as he thinks fit; the provisions of this Section shall extend and apply to persons in employment immediately before, as well as to those employed or to be employed at any time after, the commencement of this Act.\"

I have studied the above provisions closely and I have considered the evidence adduced by the parties to the case, and my opinion is that the lower court was right in its above-reproduced finding in the lead judgment. Indeed, it is very clear from the provisions of Section 34(1) that the responsibility is placed on the defendant/appellant. It is instructive also to note that the defendant/appellant was very much aware of the status of the plaintiff/respondent when it employed him i.e. it knew that he had valid permit to work for a company different from it when it employed him. I don\'t think equity and fair play will now permit it to turn around and accuse the respondent of illegality, when in fact it was a party to it. That is if at all there was illegality, (which I have already opined there is not). This fact is buttressed by the evidence of the appellant\'s Executive Director, which reads: -

\"I identify Exhibit B. The plaintiff brought a work permit from another company in Lagos. Exhibit F is the work permit the plaintiff showed me which is for another company.\"

The pertinent question to ask is, if there was illegality involved in the contract between the appellant and the respondent, or the appellant perceived it to be so, then why did it employ him, and in fact allowed him to work with it for months without raising this illegality with him' The appellant enjoyed the services of the respondent, and even paid him his salaries and allowances to a certain point, but stopped. It was when the appellant sought to assert his right to claim his remuneration (which the appellant had stopped paying him) in court that the appellant suddenly remembered that the contract was unenforceable due to illegality. This court cannot and will not condone such unfair act, as to do so will be tantamount to injustice and will occasion grave miscarriage of justice. Whichever way one looks at it, it is clear that the appellant was intent on depriving the respondent of the fruit of his labour, and this court definitely frowns on such injustice. The words of Uwaifo, JSC in the case of Oyekanmi v. NEPA 2000 15 NWLR part 690 pages 414 readily comes to my mind. It reads: -

\"Indeed adjudication will only be beneficial if it is in pursuit of justice of a case and this ought to be the abiding ethos of a court of justice and equity whenever a lawful remedy is available for a wrong. It is sometimes put in short form in the Latin maxim: ubi jus ibi remedium\".

In the light of the above, I also dismiss the appeal. I abide by the consequential orders made in the lead judgment.