

IN THE SUPREME COURT OF NIGERIA

Suit No: SC252/2001

Petitioner: Standard (Nig) Eng Co Ltd & Anor
And
Respondent: Nigerian Bank for Commerce and Industry

Date Delivered: 2006-03-09

Judge(s): Sylvester Umaru Onu , Aloysius Iyorgyer Katsina-Alu , Umaru Atu Kalgo , George Adesola Oguntade , Ikechi Franco

Judgment Delivered

This is an appeal against the decision of the Court of Appeal; Benin Division (hereinafter called \"the court below\") delivered on 29th March, 2001, allowing the appeal by the Defendant/Respondent to it from the decision of the High Court of Ondo State holden at Akure -per Adeloye - Chief Judge, on 25th March, 1996.

Dissatisfied with the said decision, the Appellants who were the plaintiffs in the trial court, and also the Cross Appellants in the court below, have again, appealed to this Court on twelve (12) grounds of appeal.

Both in the Amended Writ of Summons and paragraph 53 of the Statement of Claim, the Appellants, claimed from the defendants/respondents as follows:

i) A Declaration that the refusal of the Defendant to open letter of Credit required by the Plaintiffs constitutes a breach of the investment and Mortgage agreement between the Plaintiffs and the Defendant

ii) An Order of Specific performance, that the Defendant should unconditionally open the letter of Credit with the Plaintiffs' new suppliers at the current price in 1994 of the machinery and equipment needed for the project, the subject of contract.

Alternatively:

iii) An Order directing the defendant to pay the sum of N430, 198,000.00 as damages thus:-

a)
Cost of purchase, Stamp duty, Registration of projects with erection of factory building
N7, 000,000.00

b)
Cost incurred in making four trips to England in Company of other officials of the Supplier and other expenses
N2, 024,000.00

c)
Loss of anticipated profit and earning on the project
N12, 897,000.00

d)
Amount representing the difference between the cost of the machines and equipment in 1982 and the present rate of purchase
N408.277,000.00

Total

N430,198,000.00

iv) An Order directing the defendant to pay to the plaintiffs an amount representing 10% of the judgment debt as interest per annum from the date of judgment until the judgment is finally liquidated".

The trial court in its judgment at page 97 of the Records, stated as follows:-

"in sum I refuse the declaration sought and come to the conclusion that the fraud and distrust of the suppliers by the plaintiffs frustrated the business deal of the plaintiffs and led to a breach of the Mortgage Agreement. I order that the defendant open a letter of credit with the plaintiffs' new suppliers at the current price of the machinery and equipment needed for the project or in the alternative the defendant should refund all the expenses of the plaintiff at the time of application in 1988".

The respondent appealed against the said decision. The appellants, cross-appealed. Briefs were filed and exchanged by the parties. In a unanimous decision, the court below, allowed the main appeal, dismissed the claims of the appellants and dismissed the cross-appeal hence the appeal by the appellants to this Court.

The appellants in their Brief, have formulated six (6) issues for determination, namely,

"Issue One

Whether the Court of Appeal was right in confirming that the doctrine of frustration applied to this case when same was neither pleaded by either of the parties and there was no evidence to have warranted, such a finding' Grounds 6 and 7 of the Notice of Appeal.

Issue Two

Whether the Court of Appeal was right in holding that the refusal by the respondent to accept the new supplier nominated by the appellant did not constitute a breach of the Mortgage and Investment Agreement' Grounds 9 and 10.

Issue Three

Whether the omission of the Court of Appeal to give equal prominence to the case of the appellant in the main appeal and those of the respondent in the cross-appeal has occasioned a miscarriage of justice in this case' Grounds 11 and 12 of the Notice of Appeal.

Issue Four

Whether the application of the Supreme Court's decision in *Mazin Eng. Ltd. V. Power Aluminium Ltd.*(1993) 5 NWLR (Pt 295) 526 and the rejection of the applicability of the Supreme Court decision in *Nasaralai Vs. Arab Bank* 1986 4 NWLR (Pt. 36) 409 by the Court of Appeal has not occasioned a miscarriage of justice in this case' Grounds 4 and 8 of the Notice of Appeal.

Issue Five

Whether the finding by the Court of Appeal to the effect that the suppliers (i.e. Waf Export Ltd.) was an agent to the plaintiff and that the claim of the plaintiff did not correspond with the relief ordered by the trial Judge were not perverse' Grounds 3 and 5 of the Notice of Appeal.

Issue Six

Whether the Court of Appeal was right in confirming the legitimate use of an allegedly altered clean report of finding when same was never pleaded nor given in evidence by either of the parties but only raised speculatively by the

'defendant's Counsel in a written address' See Grounds 1 and 2 of the Notice of Appeal".

The Respondent in its Brief has adopted all the issues formulated by the Appellants.

When this appeal came up for hearing on 13th December, 2005, Bolanle Esq., - learned counsel for the Appellants, adopted their Brief - He referred to their case No. 1 of the List of Authorities - i.e. Mozin Engineering Ltd, v. Tower (not Power as appears in the Brief and list) Aluminium Ltd. (1993) 5 NWLR (Pt 295) 320 (it is also reported in (1993) 6 SCNJ.178 and urged the Court, to follow it. He submitted that to merely plead frustration without evidence in support, goes to no issue. He finally, urged the Court to allow the appeal.

Chief Fesobi, referred to and adopted their Brief of Argument filed on 16th October, 2001, and urged the Court, to dismiss the appeal for, lacking in merits, according to him.

From the pleadings and the evidence of the parties, the facts briefly stated, are that the 1st plaintiff/Appellant, is a limited liability company incorporated in Nigeria, while the 2nd plaintiff/Appellant, is the Managing Director of the 1st plaintiff/Appellant. The 1st plaintiff/Appellant carries among its businesses, the servicing and general repairs of Automobiles and heavy duty trucks. The defendant/Respondent is a financial institution.

On 12th February, 1987, the Appellants and the Respondent, executed an investment and mortgage Agreement wherein, the Respondent agreed to provide the Appellants, a loan of N1,620,000.00 (one million six hundred and twenty thousand naira) or its equivalent in foreign currency to enable the Appellants, finance an Automobile Servicing Workshop Project. It was also agreed that a part of the said loan amounting to '226,000.00 (two hundred and twenty-six thousand pounds sterling), was to be made available in foreign exchange for the purpose of opening a letter of credit in favour of any company nominated by the Appellants to import the machinery required by the Appellants.

With the consent of the Respondent, the Appellants nominated Waf Export Ltd based in London to supply the machinery and Midland Bank also based in London, as the confirming bank to the letter of credit transaction. Shortly after the execution of the said Agreement, the Appellants drew the attention of the Respondent, to the insufficiency of the said sum of '226,000.00 (two hundred and twenty-six thousand pounds sterling) foreign exchange earlier approved for the project. As a result of this information by the Appellants to the Respondent, the sum of \$35,000.00 (thirty-five thousand dollars), was further approved by the Respondents, bringing or making the total amount approved, to '245,860.32 (two hundred and forty-five thousand eight hundred and sixty pounds thirty-two pence). The original proforma invoice was thereupon amended, to reflect this later approval. The amended proforma invoice is dated 4th February, 1988. The Respondent, thereafter, forwarded the said invoice to Cotecna International Ltd. - who is the Inspection Agents, for onward transmission to Midland Bank and the said suppliers.

It is noted by me that the said amendment, was approved by the World Bank that had provided the line of credit and remitted the said amount of '245,860.32 to Midland Bank in order to finance, the purchase based on the amended proforma invoice. It was after this, that the Respondent, (not the plaintiffs as stated in the Appellants' Brief), opened a letter of credit No. 880043/WB in which the said WAF Export Ltd, was named as the beneficiary.

The request for additional loan to the Appellants was confirmed to Cotecna International Liaison Officer in Lagos by a letter - exhibit "F" dated 19th July, 1988. Attached thereto, were Exhibits F1 to F10 - i.e. particulars of the machinery specified for supply by WAF Export Ltd. (hereinafter called "the Suppliers"), in view of the said amended letter of credit, the 1st Appellant, on arrival from London to Nigeria on 30th Nov, 1988, approached the Respondent with a request to extend its said letter of credit for another or further six months - i.e. to 30th June, 1989.

Things started to "fall apart" or "wobble", when the Appellants, learnt that the Suppliers, had deviated/renege from the agreed supply of the machinery contained in or, specified in the said invoice and were looking for some sub-standard ones and were even trying to inflate the prices. The Appellants immediately wrote exhibit "J" dated 7th March, 1989 (not 17th March, 1989, as appears at pages 88 and 418 of the Records). Exhibit J in headed/captioned -"Application to stop the Shipment of sub-standard machines and inflation of prices".

In response to Exhibit J, the Respondent wrote exhibit "K" dated 8th March, 1989, to Cotecna International Ltd. As a

result of the receipt of Exhibit "M" from Cotecna International Ltd. dated 31st May, 1989, to the Appellants informing/intimating them that the Suppliers had printed the Appellants' letter heads/headings and forged the signature in order to obtain documents from Cotecna International Ltd. (hereinafter called simply "Cotecna") giving permission for a deviation from the original contract, the Appellants, wrote Exhibit "O" dated 8th July, 1989, asking or urging on the Respondent, not to make any payment to the Suppliers. The Appellants again, wrote another letter - exhibit "P" dated 10th July, 1989 to the Respondent and followed it up with a Telex or Telegram to the Respondent urging it not to transact any business with any expired document.

Eventually, the Appellants sought to substitute the Suppliers, with another or new supplier - C.J. SERVICES LTD., but the Respondent refused, It is as a result of the refusal, that the plaintiffs/Appellants, instituted the action that has eventually, led to the instant appeal. The Appellants' case, succeeded at the said trial High Court. The Respondent appealed to the court below while the Appellants cross-appealed. In the said unanimous decision, the court below, allowed the appeal of the Respondent and dismissed the said cross-appeal.

In my humble and respectful view, the real and crucial issues for determination are Issues Two, Four and Five of the Appellants. The learned trial Judge at page 91 of the Records, found that there was mutual distrust between the Appellants and the Suppliers or the Agent. At page 93B of the Records, (the side numbering is faulty). His Lordship, stated inter alia, as follows:

"The alteration to the Clean Report of Finding was made by the plaintiff (sic) with the connivance of the supplier".

".....It is not explained to the defendant what fatal effect the alteration by the two parties without the prior consent of the Bank would have.....".

He reproduced the concluding paragraph of Exhibit "M" which read thus:

"We would draw your attention to established procedure, which protect your interests, which state that any amendment to a Form "M" should be completed via the issuing bank and not in the form of a letter from the applicants".

Then at page 94, he stated as follows:

"I have a strong feeling that the agreement by the two parties to alter the Clean Report of Finding without resort to NBCI (i.e. the respondent) or Cotecna was made in ignorance".

He went on thus:

"The only issue on which the supplier and the plaintiff (sic) agreed was the amendment of the proforma invoice Form M dated 19/7/88, whereby the cost of machinery was increased by \$35,000.00. Therefore, it was a catalogue of distrust between the plaintiff and the Supplier....."

His Lordship went on to expatiate and inter alia, stated as follows:

".....Plaintiffs compared the list with the original order and found that the imported machinery was not according to the specification. This he reported to NBCI. - Plaintiff himself advised the Bank not to release money to the Supplier for the machinery shipped to Nigeria. As the Plaintiff's Manager was rejecting the goods of the Suppliers, he was on the other hand entering into an agreement with the suppliers to clear the machinery imported. He again applied for a loan to take delivery of the machinery he had himself originally condemned".

(The underlining mine)

At page 95, the learned trial Chief Judge, had a "swipe" on the 1st Appellant. He had this to say, inter alia -

".....The report of the demand for gratification originated from the plaintiff (sic). Furthermore, the plaintiff (sic) later again admitted that he (sic) (meaning the 2nd plaintiff/Appellant) sought

to over invoice his goods to accommodate what he had spent in travelling to London\".
(The underlining mine)

He went on, inter alia, as follows:

\"in my view, the more serious complaint against the relationship of the Supplier and the plaintiff (sic) is the total lack of trust between the two. The very basis of any commercial or business relationship is trust\".

(The underlining mine)

He expatiated and then stated inter alia, as follows:

\"..... I agree with the submission of learned counsel for the defendants that the Supplier by his fraudulent and unreliable style of business was responsible for the frustration of the contract agreement between the plaintiffs and the defendants. The plaintiff was no less guilty by his false accusation of the staff of the defendants\".

(The underlining mine)

Then said he:

\"I do not believe the plaintiff (meaning the 2nd plaintiff) when he said that he was being forced by the officers of NBCI to sign documents that could be incriminatory or that he was arrested by the staff of the Bank on a chance visit to their premises.....\".

(The underlining mine)

Yet and yet, surprisingly and remarkably, for reasons best known to His Lordship, at pages 96 and 97 of the Records, he made a \"U-turn\" so to speak and made the said orders at page 97 of the Records part of which i had reproduced earlier in this Judgment.

The court below - per Ba'aba, JCA at pages 434 to 435, stated as follows:

\"I am therefore of the firm view that the refusal of the appellant to accept the new supplier nominated by the respondents does not constitute a breach of contract in the circumstances of this case as no self respecting bank would commit its resources without imposing strict conditions. The case of Nasaraisi v. Arab Bank (1986) 4 NWLR (Pt. 36) 409,415 -416 relied upon by the learned counsel for the respondents, is not applicable in this case where the letter of credit has expired. Even in Nasaraisi (supra) the right of the appellant to reject a supplier was recognized.'

(The underlining mine)

I agree. I will in fact, add that with some of the findings or pronouncements of the learned trial Chief Judge hereinabove reproduced, no Bank worth its while, will ever dare to have any further dealings with a customer such as the Appellants or the 2nd Appellant in particular, whose dubious activities, would amount to eating its/their cake and having it. Worse still, where their customer falsely, accused their staff, of grievous wrong doing.

More disturbing, is/was, when the learned trial Chief Judge, proceeded to make an award or awards that were never pleaded nor asked for by the Appellants. He gave his reason for making the said orders at page 96 of the Records that the project still stands.

It need be emphasized, that the various findings of fact by the learned trial Chief Judge some of which I have reproduced in this Judgment, were not appealed against by the Appellants. The consequence in law is that the said findings are deemed to be correct. See Chief Biariko & ors. v. Chief Edeh - Ogwuile & ors, (2001) 4 SCNJ. 335 (5) 353 cited and relied on by the learned counsel for the Respondent; Ejiwhomu v Edet-Eter Mandilas Ltd. (1986) 9 S.C. 41 @ 47: and Alhaji Adeyemi & anor. v. Chief Olakunmi & 10 ors. (1999) 14 NWLR (Pt. 638) 104 (5) 211 - 214; (1999) 12

SCNJ. 224 just to mention but a few.

Again, the court below held that there is no dispute that the 2nd Appellant, admitted that there were irregularities in the transaction caused by the Suppliers. See page 434 of the Record. I note that there is no appeal against this finding by the Appellants.

A reading by me of paragraph 20 of the Amended Statement of Defence, puts me in no doubt, that the Respondent, gave very good reasons for its refusal to continue with the Agreement - Exhibit A - It is averred as follows:

'..... .the Defendant avers that the mere nomination of a Supplier by the plaintiff is not enough. Such a change must be approved by the Defendant. The Defendant categorically rejected the request for change .of Supplier through its letter LEG 649 Vol. 1 of 24th August, 1989.....'

(The underlining mine)

See also paragraph 21 thereof.

I note that the Appellants did not counter this weighty averment either by filing a further Amended Statement of Claim or controvert it in their evidence. See also exhibit NN. - The two page letter dated September 13, 1991. See page 44 of the Records.

I had stated that the reason given by the learned trial Chief Judge is/was, that the Project still stands. For said he:

'It is my view that what has been adversely affected is the transaction between the plaintiffs and their Suppliers. If the Suppliers are rejected as the plaintiffs have done the project still stands. Except the Midland Bank or even NBCI sees something wrong with the project or likely to cripple, the project could the lenders withhold making an investment. Critical factors in the transactions between the plaintiff and the NBCI have been perpetrated by WAF Exports Ltd. If the plaintiffs denounced WAF Export as they have done and seek to substitute him (sic) with another agent I see no reason why such a substitution should be refused. It is in evidence that no payment has been made to WAF Export by Midland Bank or NBCI.....'

With the greatest respect, the above reasoning or conclusion is completely misconceived. It was because of this reasoning, that His Lordship, made the orders herein below reproduced. It need be borne in mind that the learned trial Chief Judge, refused the declaration sought by the Appellants. In other words, he refused the claims in the said paragraph 53 (i) and (ii) of the Amended Statement of Claim. His Lordship, as noted by me earlier in this Judgment, granted the Alternative claims (iii) (a) to (d). By implication, the learned trial Chief Judge refused the claim in No. 4 relating to interest.

I have deliberately gone this far because, it is now settled that an appeal, is by way of a re-hearing. See Sabrue Motors Nig.Ltd, v. Rajab Enterprises Nig. Ltd. (2002) 4 SCNJ 270 @ 282: and Attorney-General, Anambra State & 5 ors. v. Okeke & 4 ors. (2002) 5 SCNJ. 318 (5) 333.

For the avoidance of doubt, the orders read as follows:

'.....it is my order that a new letter of credit be issued by the defendants with the plaintiffs at the current price of the machinery and equipment to be ordered by the plaintiff (sic).

In the alternative the plaintiff (sic) should be entitled to a refund by the bank of the fee of N24,000 paid as front, stamp duty, registration and other legal expenses, cost of obtaining Governor's consent and the equity of '410,000 raised by the plaintiff (sic)\".

I had earlier reproduced the concluding paragraph of the trial court's judgment at page 97 of the Records. From the first order, the learned trial Chief Judge, with respect, was re-writing, the contract Agreement of the parties. Surely, and on

the decided authorities, he was not entitled to do so. See *Fakorede & ors. v. Attorney-General of Western State* (1972) 1 All NLR 178 @ 189; (1972) 3 S.C. 79; *Oduye (Mrs.) v. Nigeria Airways Ltd.* (1987) 2 NWLR (Pt.55) 126; (1987) 4 SCNJ. 40. *Mrs. Layade v. Panalpina World Transport Nig. Ltd.* (1996) 7 SCNJ. 1 (a) 14 -15 - per Adio, JSC, and many others. It is noted by me that in the Appellants' Issue No. 1, the learned counsel for the Appellants forcefully attacked and deprecated the said conclusion of the learned trial Chief Judge that the fraud and distrust of the Suppliers by the plaintiffs frustrated the business deal of the Appellants and that this led to a breach of the Mortgage Agreements. However, what is important in my respectful view in this appeal, is that the said award or order or orders made by the learned trial Chief Judge, is/are at variance with the Alternative claim. Surely, if the learned trial Judge found as a fact and held that the contract had been frustrated for whatever reason, he had no right or business, to make the said order or orders. I so hold.

It is now firmly settled in a plethora of decided authorities/cases by this Court, that a court, does not award what is not sought by a party or what is not claimed by a party. See *Ekpenyong v. Inyang* (1975) 2 S.C. 71 @ 81 - 82; *Kalio v. Daniel - Kalio* (1975) 2 S.C. 15 @ 17 -19; *Makanjuola & anor. V. Chief Balogun* (1989) 3 NWLR (Pt. 108) 192 @ 206; (1989) 5 SCNJ. 42; *Olorotimi v. Ige (Mrs.)* (1993) 8 NWLR (Pt.311) 257 @ 271; (1993) 10 SCNJ. 1 and recently, *Adeye & 8 ore, v. Chief Adesanya & 3 ors.* (2001) 2 SCNJ 79 and *Joe Go/day Co. Ltd. & 5 ore, v. Co-operative Development Bank Plc* (2003) 2 SCNJ 1 (5) 20 just to mention but a few.

The court below at page 406 of the Records, stated inter alia as follows:

"I agree with the submission of the learned counsel for the Appellant that looking at the claims of the Respondents contained in the Amended Statement of Claim at pages 12 - 13 of the record and the award granted to the Respondents by the learned trial Chief Judge at pages 96 - 97 of the record they do not appear to correspond hence the said orders are ultra vires and void. It has been decided in a long list of authorities that the Court should never award what was never claimed or pleaded by either party: See *Ekwunife v. Wayne (W/A) Ltd.* (1989) 4 NWLR (Pt. 122) 454; *Ekpenyong v. Inyang (sic)* (1975) S.C. 71, 80-89".

The above pronouncement cannot be faulted by me as it is settled law.

In view of the fact and I so hold, that the issue in this appeal, is a simple and straightforward one and which is clearly taken care of by Issues Two (2) and Five (5) of the Appellants in their said Brief, my answers to the said two (2) issues, is rendered in the Affirmative/Positive; while my answer to issue Five (5), is in the Negative. In the circumstances, since I am of the respectful view, that the other Issues one, three, four and six, are non-issues, irrelevant and amount to academic issues or chasing the shadow instead of the substance, and this Court is precluded from going into them, the said issues are hereby and accordingly, struck out by me.

In the end result or final analysis, this appeal is devoid of any substance or merit, it fails and it is accordingly dismissed.

I hereby affirm the said decision of the court below. I award N1 0,000.00 (ten thousand naira) costs in favour of the Respondent payable to it by the Appellants.

The Cross Appeal

The court below, rightly in my view, held that the other issues not considered by it, are academic because,

"if it is resolved in favour of the cross-appellant, it will not have any effect on the judgment for that reason, the said issue is discountenanced it will amount to repetition to reproduce the submissions of both Counsel on the remaining two issues, that is, issues No. 1 and 3 which I have already dealt with in the appeal.

I therefore adopt my conclusion in the appeal in respect of the said issues which I hereby resolved (sic) In favour of the cross-respondent against the cross appellant. The cross-appeal therefore fails and is hereby dismissed".

I entirely agree. The cross-appeal fails and it is dismissed with costs as costs follow the events. However, the cross-appellant cannot be punished because of the decision of his learned counsel to file the same. So, no order as to costs.

Judgement delivered by
Sylvester Umaru Onu, J.S.C.

The Appellants who were plaintiffs at the Akure Division of the High Court of Ondo State (before Adeloje, C.J) claimed as per paragraph 53 of their Amended Statement of Claim as follows: -

i) A Declaration that the refusal of the Defendant to open letter of Credit required by the Plaintiffs constitutes a breach of the investment and Mortgage agreement between the Plaintiffs and the Defendant

ii) An Order of Specific performance, that the Defendant should unconditionally open the letter of Credit with the Plaintiffs' new suppliers at the current price in 1994 of the machinery and equipment needed for the project, the subject of contract.

Alternatively:

iii) An Order directing the defendant to pay the sum of N430, 198,000.00 as damages thus:-

a)
Cost of purchase, Stamp duty, Registration of projects with erection of factory building
N7, 000.000.00

b)
Cost incurred in making four trips to England in Company of other officials of the Supplier and other expenses
N2, 024,000.00

c)
Loss of anticipated profit and earning on the project
N12, 897,000.00

d)
Amount representing the difference between the cost of the machines and equipment in 1982 and the present rate of purchase
N408.277,000.00

Total
N430,198,000.00

iv) An Order directing the defendant to pay to the plaintiffs an amount representing 10% of the judgment debt as interest per annum from the date of judgment until the judgment is finally liquidated".

The learned trial Chief Judge at the conclusion of the trial held as follows: -

"In sum I refuse the declaration sought and come to the conclusion that the fraud and distrust of the suppliers by the plaintiffs frustrated the business deal of the plaintiffs and led to a breach of the mortgage Agreement. I order that the defendant open a letter of credit with the plaintiffs' new suppliers at the current price of the machinery and equipment needed for the project or in the alternative the defendant should refund all the expenses of the plaintiff at the time of application in 1988."

By the above extract, the plaintiffs as appears clear, won only a partial success in their claims against the background of the defendant who was wholly dissatisfied and so filed an appeal before the Court of Appeal, Benin Division

challenging the decision of the trial court. The plaintiff's sequel to their reaction brought a cross - appeal. The Court below in a considered unanimous decision allowed the defendant's appeal and proceeded to dismiss the plaintiffs' suit. Equally, the cross - appeal by the defendant was dismissed. Being dissatisfied with this decision the plaintiffs have finally appealed to this Court.

My learned brother Ogbuagu, JSC has so meticulously articulated the facts culminating in the dispute that I do not consider repeating them all over again except to highlight issues where necessary for the sake of emphasis and clarity. Be that as it may, the learned trial Chief Judge rightly recognised as undisputed the following facts at pages 87 - 88 of the record, viz:

1. On 12th February, 1987 the plaintiffs and the defendant executed an Investment and Mortgage Agreement wherein the defendant agreed to provide the plaintiff a loan of N1, 620, 000.00 or its equivalent in foreign currency to enable the plaintiffs finance an Automobile Servicing Workshop projects.

2. The part of the loan to be made in foreign exchange '226, 000.00 for the purpose of opening a letter of credit in favour of any company nominated by the plaintiffs to import the machinery required by the plaintiffs.

3. With the consent of the defendant, the plaintiffs nominated WAF Export Company based in London to supply the machinery and Midland Bank of London as the confirming bank that is, the bank through which the foreign currency payment was to be made for machinery purchased.

4. The machinery available was to cost '245, 860.32 or \$441, 000 instead of '226, 000 earlier proposed Midland Bank was contacted to amend the letter of credit to accommodate an additional \$35, 000.00 to make up for \$441, 000.00 or '245, 860.32 required.

5. Both parties further recognised and agreed on the Cotecna International Company being the Nigerian Federal Government Agency in England with office in Lagos and having the duty to inspect and check goods coming to Nigeria. They issue invoices for goods to be supplied and conduct pre - shipment inspection after which a "Clean Report of Finding for Payment" is issued on goods to be shipped.

6. The irrevocable letter of credit for the import of the machinery was opened by the defendants in favour of WAF EXPORT LTD. The request for additional loan to the plaintiff was confirmed to Cotecna International Liaison Officer in Lagos vide letter dated 19 July 1988 admitted as exhibit "F" to which were attached particulars of machinery specified for supply by WAF Export marked exhibit FI - F10. In view of the amended letter of credit, plaintiff, on arrival from London to Nigeria on 30/11/88 went to the defendants to extend his letter of credit for a further six months to 30/6/89."

Of what led to the ultimate collapse of the project the learned Chief Judge said, inter alia, at page 94 - 95 of the record thus:

"The only issue on which the supplier and the plaintiff agreed was the amendment of the proforma invoice Form M dated 19/7/88, whereby the cost of machinery was increased by \$35, 000. Thereafter, it was a catalogue of distrust between the plaintiff and the supplier. By a letter dated 7/3/89 to which was attached a personal letter of one Admiral Sunday Englo the plaintiff accused the suppliers of inflating prices and procuring substandard machines. The accusation was not only communicated to Cotecna International but notified to Midland Bank London. The plaintiff by letter and by cablegram to Midland Bank urged the Bank to withhold payment to the supplier who was alleged to have shipped substandard machinery in May 1989 according to the plaintiffs WAF Export Limited had presented to them a list of substandard equipment and machinery which plaintiffs alleged had been shipped to Nigeria by the supplier. Plaintiffs compared the list with the original order and found that the imported machinery were not according to the specification. This he reported to NBCI. Plaintiff himself advised the bank not to release money to the supplier for the machinery shipped to Nigeria. As the plaintiff manager was rejecting the goods of the suppliers, he was on the other hand entering into an agreement with the suppliers to clear the machinery imported. He again applied for a loan to take delivery of the machinery he had himself originally condemned.

(Underlining is mine for comments later)

In my view, the more serious complaint against the relationship of the supplier and the plaintiff is the total lack of trust between the two. The very basis of any commercial or business relationship is trust. If a customer and its agent who in this case is the supplier have no confidence or trust in each other, no self respecting bank would lend its money in support of their business. The accusations and counter accusation of one by the other rather than booster business relationship harmed and devastated it. I agree with the defendant that the air between the supplier and the plaintiff had been so foul that it would be a risk on the part of the defendant to continue to honour any investment in the business of the plaintiff. I agree with the submission of learned counsel to the defendants that the supplier by his fraudulent and unreliable style of business was responsible for the frustration of the contract agreement between the plaintiffs and the defendants. The plaintiff was no less guilty by his false accusation of the staff of the defendants.

(Underlining above is also by me for emphasis)

I do not believe the plaintiff when he said that he was being forced by the officers of NBCI to sign documents that could be incriminatory or that he was arrested by the staff of the Bank on a chance visit to their premises."

The doctrine of frustration was given prominence of treatment by the two courts below (see paragraph 27 of the Amended Statement of Defence at page 20 of the Record). The case of Mazin Engineering Ltd v. Tower Aluminium (per Wall, JSC) was given full consideration and founded upon with several Court of Appeal and this Court's decisions to wit: AH v. Alesinloye (2000) 6 NWLR (Pt.660) 177 S.C; Iloabachie v. Philips (2000) 14 NWLR (Part 686) 43 C.A; Araka v. Ejeagu (2000) (Part 692) 684 SC; Oshodi v. Eyifunmi (2000) 13 NWLR (Pt.684) 298 and Duerveburvo v. Nwanedo (2000) 13 NWLR (Pt.690) 287 C.A, also called in aid. See further, page 568 of Sagay Nigerian Law of Contract, 2nd Edition published by Spectrum 2000 cited in support thereof.

Be it noted that as pleaded in the Amended Statement of Defence I earlier referred to, particularly in paragraphs 5, 19, 20 and 22 thereof clause 35(n) of exhibit 'A' - the Mortgage and Investment Agreement executed on 12/2/88 provides as follows:

"35(n) That the lender reserves the right to withhold making investment in (sic) the borrower should any critical factor likely to adversely affect the project transpire on further investigation or on the happening of any event likely to be critical to the future of the Borrower."

Thus, the free hand that was given to the defendant under Clause 35(n) of Exhibit A to refuse to advance money should it find any critical matter, which may in its view affect the future of the investment. The court below having held that the defendant was in its view right when it held that the defendant was not in breach of its obligation under Exhibit 'A' by pulling out of the contract with the plaintiffs, was right and I so hold.

It is for the above reasons and the more convincing reasons given by my learned brother Ogbuagu, JSC that I too dismiss the appeal with N10, 000.00 costs to the respondent.

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

I have had the advantage of reading in advance the judgment delivered by my learned brother Ogbuagu JSC. I entirely agree with it and, for the reasons he has given, I also dismiss the appeal with N10, 000.00 costs in favour of the Respondent. I also dismiss the cross-appeal.

Judgement delivered by
Umaru Atu Kalgo, J.S.C.

I have read in advance the judgment just delivered by my learned brother Ogbuagu JSC in this appeal. I entirely agree with his reasoning and conclusions on the critical and substantive issues for determination which he fully and exhaustively considered in the leading judgment. As a result, I also find no merit in the appeal. I therefore dismiss the main appeal and the cross-appeal and affirm the decision of the Court of Appeal. I abide by the order of costs made in the said leading judgment.

Judgement delivered by
George Adesola Oguntade, J.S.C.

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother, Ogbuagu J.S.C. I agree with his reasoning and conclusion arrived at by him. I only wish to emphasise some aspects of the appeal in relation to the issue of frustration of the contract between parties, which the appellants' counsel raised in his written brief.

The case was heard by Adeloye - Chief Judge who on 25-3-96 gave judgment in the matter. The relief which the plaintiffs, (now appellants) had sought were:

- 'i) A Declaration that the refusal of the Defendant to open letter of Credit required by the Plaintiffs constitutes a breach of the investment and Mortgage agreement between the Plaintiffs and the Defendant
- ii) An Order of Specific performance, that the Defendant should unconditionally open the letter of Credit with the Plaintiffs' new suppliers at the current price in 1994 of the machinery and equipment needed for the project, the subject of contract.

Alternatively:

- iii) An Order directing the defendant to pay the sum of N430, 198,000.00 as damages thus:-

- a)
Cost of purchase, Stamp duty, Registration of projects with erection of factory building
N7, 000,000.00
- b)
Cost incurred in making four trips to England in Company of other officials of the Supplier and other expenses
N2, 024,000.00
- c)
Loss of anticipated profit and earning on the project
N12, 897,000.00
- d)
Amount representing the difference between the cost of the machines and equipment in 1982 and the present rate of purchase
N408.277,000.00

Total
N430,198,000.00

- iv) An Order directing the defendant to pay to the plaintiffs an amount representing 10% of the judgment debt as interest per annum from the date of judgment until the judgment is finally liquidated".

The trial court in its judgment concluded in these words:

"In sum I refuse the declaration sought and come to the conclusion that the fraud and distrust of the suppliers by the plaintiffs frustrated the business deal of the plaintiffs and led to a breach of the Mortgage Agreement. I order that the defendant open a letter of credit with the Plaintiffs' new suppliers at the current price of the machinery and equipment needed for the project or in the alternative the defendant should refund all the expenses of the plaintiff at the time of application in 1988."

The plaintiffs, by the above extract from the judgment would appear to have succeeded partially. The defendant, who was dissatisfied with the judgment, brought an appeal against it before the Benin Division of the Court of Appeal (i.e. the court below). The plaintiffs also brought a cross-appeal. On 29-3-2001, the court below in a unanimous judgment allowed the appeal by the defendant and dismissed plaintiffs' suit. The cross-appeal by the defendant was dismissed. The plaintiffs were dissatisfied with the said judgment and have come before this Court on a final appeal.

The relevant facts leading to the dispute have been set out in the lead judgment. I do not therefore need to repeat them save only to the extent necessary to make the discussion of issues by me easy to follow.

The plaintiffs and the defendants had entered into an Investment and Mortgage agreement. The defendant, under the agreement, was to grant to the plaintiffs a loan of N1, 620,000.00 or their equivalents in foreign currency, to enable the plaintiffs establish an Automobile servicing Workshop. In the course of implementing the agreement, a disagreement arose between the parties in consequence of which the project foundered and parties were unable to bring it to a satisfactory conclusion.

The trial court in its judgment had at pages 87-88 of the record identified the undisputed facts of the case thus:

1. On 12th February 1987 the plaintiffs and the defendant executed an Investment and Mortgage Agreement wherein the defendant agreed to provide the plaintiff a loan of NI, 620,000.00 or its equivalent in foreign currency to enable the plaintiffs finance an Automobile Servicing Workshop projects.
2. The part of the loan to be made in foreign exchange was '226,000.00 for the purpose of opening a letter of credit in favour of any company nominated by the plaintiffs to import the machinery required by the plaintiffs.
3. With the consent of the defendant, the plaintiffs nominated WAF Export Company based in London to supply the machinery and Midland Bank of London as the confirming bank that is, the bank through which the foreign currency payment was to be made for the machinery purchased.
4. The machinery available was to cost '226,000.00 earlier proposed Midland Bank was contacted to amend the letter of credit to accommodate an additional \$35,000.00 to make up for \$441,000.00 or '245,860.32 required.
5. Both parties further recognised and agreed on the Cotecna International Company being the Nigerian Federal Government Agency in England with office in Lagos and having the duty to inspect and check goods coming to Nigeria. They issue invoices for goods to be supplied and conduct pre-shipment inspection after which a 'Clean Report of Finding for Payment' is issued on goods to be shipped.
6. The irrevocable letter of credit for the import of the machinery was opened by the defendants in favour of WAF EXPORT LTD. The request for additional loan to the plaintiff was confirmed to Cotecna Inter'national Liaison Officer in Lagos vide letter dated 19th July 1988 admitted as exhibit 'F' to which were attached particulars of machinery specified for supply by WAF Export marked exhibit F1 -F 10. In view of the amended letter of credit, plaintiff, on arrival from London to Nigeria on 30/11/88 went to the defendants to extend his letter of credit for a further six months to 30/6/89."

And as to what ultimately led to the collapse of the project the trial Chief Judge said at pages 94-95:

"The only issue on which the supplier and the plaintiff agreed was the amendment of the proforma invoice Form M

dated 19/7/88, whereby the cost of machinery was increased by \$35,000.00. Thereafter, it was a catalogue of distrust between the plaintiff and the supplier. By a letter dated 7/3/89 to which was attached a personal letter of one Admiral Sunday Englo the plaintiff accused the suppliers of inflating prices and procuring substandard machines. The accusation was not only communicated to Cotecna International but notified to Midland Bank London, The plaintiff by letter and by cablegram to Midland Bank urged the Bank to withhold payment to the supplier who was alleged to have shipped substandard machinery in May 1989 according to the plaintiffs WAF Export Limited had presented to them a list of substandard equipment and machinery which plaintiffs alleged had been shipped to Nigeria by the supplier. Plaintiffs compared the list with the original order and found that the imported machinery was not according to the specification. This he reported to NBCI. Plaintiff himself advised the Bank not to release money to the supplier for the machinery shipped to Nigeria. As the plaintiff Manager was rejecting the goods of the suppliers, he was on the other hand entering into an agreement with the suppliers to clear the machinery imported. He again applied for a loan to take delivery of the machinery he had himself originally condemned.

It was alleged by Cotecna International that the supplier had forged plaintiffs' letter hading to be able to obtain payment from Midland Bank for the substandard machinery rejected by the plaintiff.

On 10/7/89, plaintiff wrote to NBCI to suspend all transactions with WAF Limited, the same message by the plaintiff was cabled to Midland Bank London on 13/7/89. On 26/7/89 the Managing Director WAF Export wrote to NBCI accusing the staff of the Bank of improper demand for gratification, failing which, the letter of credit would either be cancelled or left to expire. The report of the demand for gratification originated from the plaintiff. Furthermore, the plaintiff later again admitted that he sought to over invoice his goods to accommodate what he had spent in travelling to London.

In my view, the more serious complaint against the relationship of the supplier and the plaintiff is the total lack of trust between the two. The very basis of any commercial or business relationship is trust. If a customer and its agent who in this case is the supplier have no confidence or trust in each other, no self respecting bank would lend its money in support of their business. The accusations and counter accusation of one by the other rather than booster business relationship harmed and devastated it. I agree with the defendant that the air between the supplier and the plaintiff had been so foul that it would be a risk on the part of the defendant to continue to honour any investment in the business of the plaintiff. I agree with the submission of learned counsel for the defendants that the supplier by his fraudulent and unreliable style of business was responsible for the frust'ration of the contract agreement between the plaintiffs and the defendants. The plaintiff was no less guilty by his false accusation of the staff of the defendants."

(Underlining mine)

Notwithstanding the fact that the learned Chief Judge found that a measure of distrust had crept into the relationship between the parties, he still found a basis for further business relationship between them for he said at pages 96-97.

"It is my view that what has been adversely affected is the transaction between the plaintiffs and their suppliers. If the suppliers are rejected as the plaintiffs have done the project still stands. Except the Midland Bank or even NBCI sees something wrong with the project or likely to cripple the project could the lender withhold making an investment. Critical factors in the transactions between the plaintiff and the NBCI have been perpetrated by WAF Exports Ltd. If the plaintiffs denounced WAF Export as they have done and seek to substitute him with another agent I see no reason why such a substitution should be refused. It is in evidence that no payment has been made to WAF Export by Midland Bank or NBCI. It is my order that a new letter of credit be opened by the defendants with the plaintiffs at the current price o the machinery and equipment to be ordered by the plaintiff."

The court below in its judgment discussed at some length the issue of frustration of contract. In the process, it considered the judgment of this Court in *Mazin Eng. Ltd. V. Tower Aluminium* (1993) 5 NWLR (Pt.295) 526 at 534 where this Court per Wali JSC discussed the import of frustration in contract. The court below then concluded at page 430:

"As I earlier stated, the contract in this case has certainly been frustrated due to the disagreement between the respondents and WAF Export London, the suppliers for which the appellant, at least cannot be blamed.

Applying the guiding principles enunciated in *Tower Aluminium* (supra) I hold that the contract having been frustrated, the respondents are not entitled to any damages consequently the learned trial Chief Judge ought to have dismissed the respondents' claim. I therefore allow the appeal set aside the judgment of the learned trial Chief Judge dated 25/3/96.

It is surprising that the learned trial judge having held that the contract had been frustrated by the conduct of WAF Export, London, the suppliers which I believe was the main reason for his refusal to grant the relief for a declaration that there was a breach of contract, suddenly turned round and held the appellant liable for a breach of contract."

Thus it is apparent that both the trial court and the court below had believed that the contract was frustrated by the conduct of the overseas suppliers WAF Export London. Appellants' counsel has argued in his written brief that none of the parties had in their pleadings raised the issue of frustration and that the word frustration was first used in the judgment of the trial court and later by the court below. It was submitted that the two courts below were wrong to have based their judgment on issues not raised by the parties in their pleadings. Counsel relied on *AH v. Alesinloye* [2000] 6 NWLR (Pt.660) 177 SC; *Iloabachie v. Phillips* [2000] 14 NWLR (Pt.686) 43 C.A.; *Araka v. Ejeagwu* [2000] 15 NWLR (Pt.692) 684 SC; *Oshodi v. Eyifunmi* [2000] 13 NWLR (Pt.684) 298 and *Duerveburvo v. Nwanedo* [2000] 13 NWLR (Pt.690) 287 C.A.

Counsel further submitted that on the facts and circumstances of this case, the doctrine of frustration was inapplicable. Counsel defines frustration thus:

"In its enlarged form, the doctrine of frustration simply means that if the performance of a contract depends on the continued existence of a state of affairs, then the destruction or disappearance of the state of affairs without the default of either of the parties will discharge them from the contract. Frustration, it is submitted only 'occurs under conditions that are totally out of the control of the parties' see page 568 of *Nigerian Law Of Contract By Sagay, 2nd Edition Published By Spectrum 2000.*"

Counsel further quoted a passage from *Cricklewood Property & Investment Trust Ltd. v. Leightons Investment Trust Ltd.* [1945] 1 All ER 252 which was referred to in *Mazin Eng. Ltd. V. Tower Aluminium Ltd.* (supra). The passage reads:

"..... if therefore the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstances arising, frustration does not occur. Neither of course does it arise where one of the parties had deliberately brought about the supervening event by his own choice

I am not in this judgment directly concerned with the determination of the question whether or not the facts and circumstances of this case justified the invocation of the doctrine of frustration in contract. This is because the submission of appellants' counsel is that the issue of frustration was never raised on parties' pleading. The question I must answer is 'was frustration an issue before the trial court on parties' pleading' I say this because the relevant issue raised by the appellants in their brief (i.e. issue one) reads:

"Whether the Court of Appeal was right in confirming that the doctrine of frustration applied to this case when the same was neither pleaded by either of the parties and there was no evidence to have warranted such a finding."

A perusal of the Amended Statement of defence shows that the defendant, even if in a muted manner raised the issue of frustration in paragraph 27 thus:

"27. In further answer to paragraph 26 hereof, the plaintiff is put to the strictest proof. The Defendant will contend at the trial that the contract having been frustrated by the act of the plaintiffs, no question arose as to the then Naira equivalent of a non existent contract."

(Underlining mine)

It seems to me that since the facts as found, only indicated that the contract was frustrated by the conduct of WAF

Export London, the suppliers nominated by the plaintiffs, the question of frustration, to be made a live issue in the case, should have been pleaded with greater particularity so as to put the plaintiffs on notice as to what was said they did which led to the frustration of the contract.

The crucial aspect of the matter which the appellants seemed to have underplayed is clause 35(n) of Exhibit 'A', the Mortgage and Investment Agreement executed on 12/2/88. The clause reads:

"35(n) That the lender reserves the right to withhold making investment in (sic) the borrower should any critical factor likely to adversely affect the project transpire on further investigation or on the happening of any event likely to be critical to the future of the Borrower."

The defendant in paragraphs 5, 19, 20, 21 and 22 of the Amended Statement of defence had pleaded thus:

"5. In answer to paragraphs 12, 14, 15, 16, 17, 18, the Defendants aver that there are other conditions besides those therein stated which are conditions precedent to which obligations of the Defendants are subject to. These conditions are clearly set out in Clause 35 of the Loan agreement and in particular sub paragraph (n) of clause 35 under which the Defendant reserves the right to withhold making investment should any critical factor likely to adversely affect the project transpire. Such critical factor did arise.

Particulars

(a) The Plaintiffs and the suppliers W.A. Fagbuyi unilaterally amended the proforma invoice against which the Defendant established a Letter of Credit without the knowledge of Midland Bank of England (the confirming Bank); the Defendant, and Cotecna International Limited (the Inspection Agents).

(b) The Defendant could not ignore the written call made by the plaintiffs that the Defendant should assist installing the arrangement concluded by W.A.F. Export Ltd. To ship sub-standard goods.

(c) There were two conflicting reports of findings submitted by the Inspection Agents, and

(d) The shipping documents were submitted by the Plaintiffs after the Letter of Credit had expired.

19. The Defendant in answer to paragraphs 40 and 41 confirms notification of the change of suppliers by the plaintiffs from W.A.F. Export Limited to C.J. Services Limited.

20. In further answer to paragraphs 40 and 41, the Defendant avers that mere nomination of a supplier by the plaintiff is not enough. Such a change must be approved by the Defendant. The Defendant categorically rejected the request for change of Supplier through its letter LEG 649 Vol. 1 of 24th August 1989. The Defendant pleads this letter and will rely on it at the trial.

21. In still further answer to paragraphs 40 and 41 the Defendant avers that the facts disclosed in the entire transaction and the role played by the plaintiffs eroded Defendant's confidence in the project implementation.

22. The Defendant in answer to paragraph 42 avers that given the circumstances, it was under no obligation to open a Letter of Credit in the name of the new Supplier C.J. Services Limited aforesaid. The plaintiff's complaint to the Public Complaints commission was purely of sentimental value and not governed by strict commercial and banking practices. The Defendant will rely on its letter 08/036/ODS/87/WBL/SUP of 12th November 1990 at the trial of this action."

Given the above averments in the amended Statement of defence, it would appear that it was the defendant's reliance on clause 35(n) of Exhibit 'A' that was later unwarily described by both the trial court and the court below as frustration.

My view is that the loss of trust between the parties arising from various irregularities in the relationship between the plaintiffs and WAF Export London, the allegations that the employees of the defendant had been demanding

gratification, and the concealment of some facts from Cotecna and the defendant that ultimately drove the defendant into seeking refuge under clause 35(n) of Exhibit 'A'.

In *MISR v. ASSAD* (1971) 1 All NLR 172 this Court per Coker JSC observed:

"But the contract of parties still remains their contract and it will be asking too much of any court to sanction an unwarranted departure from the terms of a contract into which two free and able parties entered unless such a contract or any part of it has been lawfully abrogated or discharged. Both Lambo J. and George J. in their rulings already referred to were at considerable pains to determine the actual meaning of the clause dealing with the appointment of arbitrators in the submission of the parties dated the 20th July, 1962. They both thought the clause was ineptly phrased and Lambo J. thought as well that the plaintiffs (or their counsel) were mistaken in their construction of the clause. Despite the observations of the learned judge the clause still remains the contract of the parties and the ordinary rules of law relating to contracts must apply. We cannot therefore accede to the argument of learned counsel for the plaintiffs that even though the clause remains in the contract, yet this Court (or indeed any court) can treat the clause as unenforceable and therefore discountenance it in the enforcement of rights under the contract."

See also *Fakorede v. Attorney-General (West)* (1972) 3 S.C. 79

Clearly, the defendant was given a free hand under clause 35(n) of exhibit 'A' to refuse to advance money should it find any critical matter, which may in its view affect the future of the investment. It seems to me that the loss of confidence in a business proposal between the parties, one of whom was a bank cannot be treated as trivial. The court below in my view was right when it held that the defendant was not in breach of its obligations under Exhibit 'A' by pulling out of the contract with the plaintiffs.

I would also dismiss this appeal as in the lead judgment of my learned brother Ogbuagu JSC. I award N10, 000.00 costs in favour of the respondent against the appellants.