GAR Global Arbitration Review

The Middle Eastern and African Arbitration Review

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Nigeria

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Nigeria

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Summary

In summary

This article examines two recent decisions of Nigeria's Supreme Court in which important principles impacting the law and practice of arbitration in Nigeria were laid down. In the two decisions, the Supreme Court held that filing a defence to proceedings commenced under the summary judgment or undefended list procedures did not amount to taking steps in the proceedings, such as would disentitle the defendant from applying for a stay of further proceedings pending arbitration.

Discussion points

- An admitted but unpaid debt is not a dispute that can be referred to arbitration
- Filing a defence under the summary judgment or undefended list procedure does not amount to taking steps in the proceedings that would disentitle a party from applying for a stay of proceedings and referral of the dispute to arbitration
- The courts will consider the potential impact of the limitation period in determining whether to grant a stay of proceedings pending arbitration

Referenced in this article

- *Sakamori Construction (Nigeria) Limited v Lagos State Water Corporation*
- *Kwara State Government of Nigeria v Guthrie (Nig) Limited*
- Section 5 of Nigeria's Arbitration and Conciliation Act 1988
- Sections 8(1)(d) and 62 of the Limitation Law of Lagos State of Nigeria
- Order 11 of the High Court of Lagos State (Civil Procedure) Rules 2004
- Order 23 of the High Court of Kwara State (Civil Procedure) Rules 2005

Sakamori Construction (Nigeria) Limited v Lagos State Water Corporation[1]

Facts of the case

The appellant, Sakamori Construction (Nigeria) Limited, and the respondent, Lagos State Water Corporation, entered into a contract for the supply and laying of secondary and tertiary network systems under the respondent's Water Supply Expansion Programme between 1994 and 1999. In February 1999, the appellant fulfilled its obligation under the contract

by completing the execution of the project and maintaining it for 12 months following the said completion. In compliance with the contract's terms and the construction industry's custom, the appellant presented invoices with demands for payment at the different stages of completion of the contract. At the completion of the project, the appellant presented its final invoice to the respondent for payment. The respondent did not dispute the invoices. In fact, the respondent admitted the debt in letters dated 8 January 2002, 16 May 2005, and 24 December 2007 but failed to pay the debt despite several demands from the appellant for payment.

Aggrieved by the failure or refusal of the respondent to pay the debt, the appellant filed a lawsuit in the High Court of Lagos State (the High Court) to collect the debt. In accordance with the High Court of Lagos State (Civil Procedure) Rules 2004, which permitted a claimant to apply for summary judgment against a defendant where such a claimant believes that the defendant has no defence to the suit, the appellant also applied for summary judgment against the respondent. The High Court was satisfied that the respondent had no defence to the suit and entered judgment against the respondent in favour of the appellant, granting all the appellant's claims, including the appellant's claim for interest.

The respondent had initially failed to participate in the proceedings. However, after the court had heard the appellant's motion for summary judgment but before it delivered its judgment, the respondents filed an application seeking to arrest the delivery of the judgment and stay further proceedings in the matter pending reference of the matter to arbitration. However, the respondent refused to argue the application and indicated its intention to file a preliminary objection to challenge the suit. Consequently, the trial court deemed the respondent's application abandoned. The respondent appealed against the trial court's decision, deeming its application as abandoned, and filed an application in the Court of Appeal for a stay of further proceedings in the trial court pending the hearing and determination of its appeal. The motion for a stay of proceedings was brought to the attention of the trial judge, who, in deference to the Court of Appeal, suspended the delivery of its judgment to await the outcome of the respondent's appeal. Subsequently, the Court of Appeal struck out the respondent's motion for a stay of proceedings, and this development was duly brought to the attention of the trial judge, who then scheduled the matter for the delivery of their judgment.

On the date the trial court was to deliver its judgment, the respondent's counsel informed the court that the respondent had filed in the Court of Appeal yet another application for a stay of further proceedings. Curiously, however, the application that the respondent claimed to have filed in the Court of Appeal was neither served on the appellant nor was a copy placed in the court's file. The court was infuriated by the respondent's apparently dilatory antics and proceeded to deliver its judgment in the matter and granted all the reliefs sought by the appellant on the ground that the respondent had no defence to the claim.

Aggrieved by the judgment of the High Court, the respondent appealed to the Court of Appeal. The Court of Appeal allowed the respondent's appeal, set aside the decision of the High Court, and referred the parties to arbitration in accordance with the terms of the contract. The appellant was aggrieved by the decision of the Court of Appeal and appealed against it to the Supreme Court.

An admitted debt does not qualify as a dispute that is capable of being referred to arbitration

One of the issues the parties raised for the Supreme Court's determination was whether there was any dispute between parties to be referred to arbitration, considering that the debt was admitted. In its judgment, the Supreme Court held that since the debt had been admitted by the respondent several times, there was no dispute within the contemplation of the arbitration agreement that ought to be referred to arbitration. The Supreme Court, comprising five justices, was unanimous in its decision that since the debt was already admitted, there was no dispute between the parties to justify the grant of the respondent's application for a stay of proceedings under section 5 of the Arbitration and Conciliation Act[2] (ACA). Both the leading judgment of Saulawa, JSC and the supporting judgment of Peter-Odili, JSC cited paragraph 503 Volume 2 of the 4th Edition of ***Halsbury's Laws of England***, where the learned authors stated that 'there is no dispute within the meaning of an agreement to refer disputes where there is no controversy in being, as when a party admits liability but simply fails to pay.'

The Supreme Court also held that the Court of Appeal was wrong to have referred the matter to arbitration because the relief sought by the respondent in the Court of Appeal was an order setting aside the judgment of the trial court and the reassignment of the suit to another judge of the Lagos High Court for hearing. The Court of Appeal was also wrong to have referred the matter to arbitration because doing so would be futile as the appellant would not be able to enforce any award that might be entered in its favour because the limitation period for the enforcement of such award, which is calculated from the date of the underlying breach as opposed to the date of the award, would have kicked in.

Comments

We agree with the decision of the Supreme Court that since the respondent had admitted the debt, there was no dispute between the parties capable of being referred to arbitration, so the decision of the Court of Appeal, referring a non-existent dispute to arbitration, was rightly set aside.

The Court was also right as the order that the respondent sought in the Court of Appeal was an order setting aside the judgment of the trial court and the transfer of the matter to another judge of the Lagos State High Court for hearing. There was no basis for the Court of Appeal to have granted the respondent a relief that it did not seek. It is hornbook Nigerian law that a court has no jurisdiction to grant a relief that a party has not sought. Having requested that the matter be transferred to another judge of the Lagos State High Court, a relief that was inconsistent with the desire to have the matter referred to and settled by arbitration, the Court of Appeal erred in law when it referred the matter to arbitration.

Filing a defence does not amount to a waiver of the right to apply for a stay of proceedings and referral of a dispute to arbitration

One of the issues that fell for determination in the Supreme Court was whether the respondent, as the defendant in the trial court, ought to have filed its defence and raised therein any objections that it wished to raise. The Court of Appeal had held that the respondent would have waived its right to apply for the matter to be referred to arbitration had it filed its defence on the merits of the claim. The Supreme Court disagreed and held that, by virtue of the provisions of Order 22 Rule 2(1) of the High Court of Lagos (Civil Procedure

Rules) 2004, any party could raise any point of law objection in the pleadings, which the trial court may dispose before or during the trial. According to the Supreme Court, this rule does not contradict the provisions of section 5 of the ACA.

Comments

Without prejudice to our position that the Court ought not to have referred the matter to arbitration since the respondent did not seek that relief, we are of the view that the Court of Appeal was right that a defendant who intends to apply for referral of a dispute before the court to arbitration is not required to file a statement of defence or counter affidavit in response to a summary judgment application, otherwise that party would be deemed to have taken steps in the matter and waived the right to insist on the matter being referred to arbitration. This position accords with the provisions of section 5 of the ACA, which requires that any such application for stay of proceedings be filed 'at any time after appearance and before delivering any pleadings or taking any steps in the proceedings'. The position of the Court of Appeal is also consistent with a long line of judicial authorities on the point.[3]

While Order 11 of the Lagos State Civil Procedure Rules 2004 requires a defendant who desires to defend a claim brought under the summary judgment procedure to file their defence in order to enable the court to determine whether they should be granted leave to defend the action, section 5 of the ACA forbids a party that wishes to apply for a stay of proceedings and referral of the matter to arbitration from filing their defence. It is noteworthy that section 5 of the ACA applies to any action in court with respect to any matter that is the subject of an arbitration agreement, and that, in our view, includes proceedings brought under the summary judgment procedure. It is our view that the provisions of the ACA, being statutory provisions, are superior to and must prevail over the provisions of the rules of the court where both are in conflict.[4]

The courts will not refer a matter to arbitration where the resultant award will be caught up by statute of limitation

One of the reasons why the Supreme Court set aside the decision of the Court of Appeal referring the parties to arbitration was that the Court of Appeal failed to consider the principle that an action to enforce an arbitration award cannot be brought after the expiration of six years from the date on which the cause of action accrued (or arose).[5] This point was elaborated on in the concurring judgment of Peter-Odili, JSC, who noted that the appellant's cause of action under the agreement with the respondent arose before 27 March 2000. The Supreme Court noted that, in view of the provisions of the Limitation Law of Lagos State, as well as decided cases to the effect that the limitation period for the enforcement of arbitral award begins to run from the date of the underlying contractual breach rather than from the date of the award, the order of referral to arbitration was futile as the appellant would not be able to enforce any award that might be entered in its favour because the limitation period for the enforcement of the award is calculated from the date of the underlying breach as opposed to the date of the award. Considering that the cause of action occurred sometime in the year 2000, the limitation period of six years for any action based on breach of contract was set in 2006. What this means is that, as of 7 June 2011, when the Court of Appeal referred the parties to arbitration, the appellant was already five years too late to enforce any award that would result from the arbitration.[6]

Comments

It is commendable that the Supreme Court considered the potential injustice and unfairness that the appellant would have faced if the matter was referred to arbitration in view of the provisions of the Limitation Law of Lagos State. The ACA does not provide a limitation period for enforcing an arbitral award in Nigeria. However, the Limitation Laws of the various states apply to arbitration in the same manner and to the same effect as court actions. For instance, the Limitation Law of Lagos State that was considered in this case by the Supreme Court provides in section 62 that 'this Law and any other Limitation enactment shall apply to arbitration as they apply to actions in the court'. Furthermore, section 8 (1)(d) of the Limitation Law of Lagos State provides that actions to enforce an arbitration award, where the arbitration agreement is not under seal or where the arbitration is under any enactment other than the ACA, will not be brought after the expiration of six years from the date on which the cause of action arose. While there is no question that arbitral proceedings must be commenced within the time limit provided in each applicable Limitation Law, namely five or six years, depending on the applicable Limitation Law, the crucial question has always been when does time begin to run for the purposes of an application to enforce an arbitral award? Is it from the date of the initial breach of the underlying contract or the date of publication of the award? The Supreme Court settled this issue in ***Murmansk State Steamship Line v Kano State Oil Millers Ltd***.[7] In its decision, the Court held that the limitation period for the enforcement of an arbitral award begins to run from the date the cause of action accrued and not the date when the award was issued, and that the statutory limitation period[8] for the enforcement of the award began to run in 1964 when the underlying agreement between the parties was breached and not from the making of the award in 1966. The Supreme Court restated its position on this point in the case of ***City Engineering (Nig) Ltd v Federal Housing Authority***.[9]

It is noteworthy that the Lagos State Arbitration Law[10] has addressed this problem by introducing significant changes to ameliorate the effect of section 8(1)(d) of the Lagos Limitation Law and its interpretation by the Supreme Court. The Lagos Arbitration Law contains two very important provisions relating to the application of limitation laws to arbitral proceedings. First, it provides that, in calculating the time prescribed by the applicable limitation laws for the commencement of actions in courts, arbitral and other proceedings in respect of a dispute that is the subject of either an award that the court orders to be set aside or declares to be of no effect, or the affected part of an award that the court orders to be set aside or declares to be of no effect, the period between the commencement of the arbitration and the date of the order of the court shall be excluded. Second, the Lagos Arbitration Law provides that, in calculating the time limit for the commencement of proceedings to enforce an award, the period between the commencement of the arbitration and the date of the award shall be excluded. For arbitrations conducted under the Lagos State Arbitration Law, these provisions have addressed the concerns of arbitration practitioners and the business community regarding the effect of the decisions of the Supreme Court in the ***Murmansk*** and ***City Engineering*** cases.[11]

On 10 May 2022, the Senate of the National Assembly of the Federal Republic of Nigeria passed the Arbitration and Mediation Bill, which is a bill to repeal the ACA and enact the Arbitration and Mediation Act to provide for a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation. The Arbitration and

Mediation Bill also makes the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) applicable to any award made in Nigeria or in any contracting state arising out of international commercial arbitration and the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) and related matters enforceable in Nigeria. The Bill provides that, in computing the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded.

The implication of the decision of the Court of Appeal referring the parties to arbitration on 7 June 2011 over a cause of action that arose before 27 March 2000 vis-à-vis the provisions of the Limitation Law of Lagos State, and the Supreme Court decisions in ***Murmansk State Steamship Line v Kano State Oil Millers Ltd*** and***City Engineering (Nig) Ltd v Federal Housing Authority*** is that the appellant, in this case, would have been unable to enforce any award that might be made in its favour as the limitation period for enforcing the award would have kicked in.

Kwara State Government of Nigeria v Guthrie (Nig) Limited[12]

Facts of the case

The respondent, Guthrie (Nigeria) Limited, commenced an action in the High Court of Kwara State (the High Court) by way of a writ of summons under the undefended list procedure for the recovery of the sum of 586,206,883.33 naira from the appellants, the Kwara State Government of Nigeria, Kwara State Ministry of Social Development, Environment and Tourism and the Honourable Attorney-General and Commissioner for Justice, Kwara State. Upon being served with the writ of summons and accompanying affidavit, the appellants joined issues with the respondent by filing a notice of intention to defend the action with a supporting affidavit. The appellants simultaneously filed a preliminary objection seeking to strike out the suit for want of jurisdiction or a stay of further proceedings and referral of the matter to arbitration. They drew the High Court's attention to the existence of an arbitration clause in the agreement between the parties. In response, the respondent filed a counter-affidavit in opposition to this application.

The High Court upheld the appellants' preliminary objection, declined jurisdiction and referred the parties to arbitration. Aggrieved by the judgment of the High Court, the respondent appealed to the Court of Appeal. The Court of Appeal allowed the respondent's appeal, set aside the decision of the High Court and ordered the suit to be remitted to the High Court for rehearing by another judge. The appellants were aggrieved by the decision of the Court of Appeal and appealed against it to the Supreme Court.

The key issue submitted for determination in the Supreme Court was whether the Court of Appeal was right when it held that the filing of a notice of intention to defend contemporaneously with the preliminary objection by the appellants amounted to taking steps in light of the provisions of section 5(2) of the ACA.

The appellants argued that the undefended list procedure was governed by strict rules of procedure and that failure to comply with the rules would expose it to the risk of default judgment. On the other hand, the respondent argued that by filing the notice of intention to

defend contemporaneously with the preliminary objection, the appellants had taken steps in the proceedings contrary to section 5 of the ACA and had therefore waived their right to have recourse to arbitration.

The Court's decision

The Supreme Court held that the appellants' filing of a notice of intention to defend the action did not amount to taking a step in the proceedings and that the appellants did not act contrary to the provisions of section 5 of the ACA. The Supreme Court restored the decision of the High Court, which ordered a stay of proceedings and referred the parties to arbitration.

Comments

What amounts to taking steps in proceedings, thereby waiving a right to insist on arbitration

As with the summary judgment procedure, which permits a claimant or a plaintiff to apply for summary judgment against a defendant when the claimant believes that the defendant has no defence to the suit, the undefended list procedure, a procedure used only for recovery of debts and liquidated money demand, is used when a claimant believes that a defendant has no defence to the suit. While the rules of some high courts provide for the use of the summary judgment procedure to recover debts or liquidated money demands, others provide for the use of the undefended list procedure. There are also rules of courts that permit either of the two procedures. The undefended list procedure is designed to prevent delay in cases where the plaintiff has a clear case and the defendant has no defence. Where the plaintiff satisfies the court based on the affidavit evidence that the defendant does not have a good defence, the court would enter judgment for the plaintiff, thereby avoiding a full-blown trial with the usual expense, frustrations and delay. On the other hand, if the defendant files an affidavit that discloses a defence on the merit, they would be granted leave to defend by the court. This prevents worthless and sham defences.[13]

Under the High Court of Kwara State (Civil Procedure) Rules 2005, which fell for interpretation in this case, where a party served with the writ of summons and affidavit delivers to the registrar (not less than five days before the date fixed for hearing) a notice in writing together with an affidavit disclosing a defence on the merit, the court may grant them leave to defend the action upon such terms as the court may think just.[14] Where leave to defend is given under this rule, the action shall be removed from the undefended list and placed on the ordinary or general cause list and the court may order pleadings or proceed to hearing without further pleadings.[15] Where any defendant neglects to deliver the prescribed notice of intention to defend and affidavit or is not given leave to defend by the court, the suit shall be heard as an undefended suit and judgment given thereon, without calling on the claimant to summon witnesses before the court to prove their case formally.[16]

It is difficult to agree with the decision of the Supreme Court that filing a notice of intention to defend an action commenced under the undefended list procedure, together with an affidavit disclosing a defence on the merits, does not amount to taking steps in the proceedings that would disentitle the party that has filed the defence from requesting that the matter be referred to arbitration. As indicated above, in relation to the ***Sakamori*** case, there is a plethora

of cases to the effect that filing a defence amounts to taking steps in the proceedings for purposes of an application for a stay of proceedings under section 5 of the ACA.

However, in this instance, the Supreme Court distinguished some of its earlier decisions from the facts of the case. For example, the Supreme Court noted that the case of ***Obembe v Wemabod Estates***[17] was different because it was commenced by the general form of a writ of summons, whereas this case was commenced under the undefended list procedure, and that none of the parties applied for a stay of proceedings and reference of the matter to arbitration. The Supreme Court also distinguished the case of ***SCOA (Nig) Plc v Sterling Bank Plc***[18] from this case on the grounds that in ***SCOA***, the suit was commenced by way of a writ of summons and that the parties in that case voluntarily submitted themselves to the court's jurisdiction, even though their contract contained an arbitration clause.

It would therefore appear that the principle to be deduced from the ***Sakamori*** and the ***Kwara State Government*** cases is that the provisions of section 5 of the ACA pertaining to taking steps in proceedings by filing a defence on the merits of a claim would not apply where the action was commenced under the summary judgment or the undefended list procedures under the rules of the various high courts in Nigeria, but would apply where the action is commenced by way of a writ of summons and statement of claim.

The limitation period for enforcement of arbitral awards

Finally, we note that, unlike in the case of ***Sakamori Construction (Nigeria) Limited v Lagos State Water Corporation,*** discussed above, and which was decided just five months before this case, the Supreme Court did not consider the cause of action in this case, which accrued some time in 2016 when the case was filed, or thereabouts, and that any award that the respondents may obtain might turn out to be pyrrhic victory because of the risk that such award might not be enforceable for the same reasons discussed in the ***Sakamori*** case. We concede that this was not a point taken by any of the parties, but it would appear that none of the parties raised that point in the ***Sakamori*** case and that it was raised suo motu by the Supreme Court.

Referring the parties to arbitration on 13 May 2022 over a cause of action that arose in or around 2016 would raise the exact same issue of unenforceability of any resulting award that the Supreme Court raised in the ***Sakamori Construction (Nigeria) Limited v Lagos State Water Corporation.***

Footnotes

[1] (2022) 5 NWLR (Part 1823) p. 339 SC.

[2] Chapter 18, Laws of the Federation of Nigeria (LFN) 2004.

[3] ***Obembe v Wemabod Estates Limited*** (1977) LPELR (2161) (SC).

[4] See ***BBN (Nig) Ltd v Alhaji S Olayiwola & Sons Ltd & Anor*** (2005) LPELR-806 (SC) p. 8, paragraphs A–C where Nigeria's Supreme Court held that the rules of court are statutory instruments not elevated to the pedestal of statutes. See also ***Elabanjo & Anor v Dawodu***

(2006) LPELR-1106 (SC) p. 34, paragraph F where Nigeria's Supreme Court also held that rules of court cannot override statutory provisions of the law.

[5] See section 8(1)(d) of the Limitation Law of Lagos State.

[6] While the Court was concerned with the issue of enforceability of any arbitral award that would result from the referral to arbitration, it would appear that the Court did not advert its mind to the threshold issue of whether the appellant would have been able to commence arbitration since the limitation period of six years for commencing an action in contract took effect in 2011.

[7] 1974-75 NSCC 590.

[8] In this case, it was the English Statute of Limitation 1623, which requires that a civil action be commenced within six years of the cause of action.

[9] (1997) 9 NWLR (Part 520) at 224. See also ***Tulip (Nig) Ltd v NTM SAS*** (2011) 4 NWLR (Part 1237) 254.

[10] Chapter A11 of the Laws of Lagos State 2015.

[11] For a detailed discussion of this issue, see the Nigerian chapter of ***The Middle Eastern and African Arbitration Review*** (2016), pp. 76–79, which was contributed by the authors' law firm.

[12] (2022) 12 NWLR (Part 1846) 189 SC.

[13] ***NPA v Aminu Ibrahim & Co & Anor*** (2018) LPELR-44464 (SC) pp. 44–45, paragraphs C-A.

[14] Order 23 Rule 3 (1) of the High Court of Kwara State (Civil Procedure) Rules 2005.

[15] Order 23 Rule 3 (2) of the High Court of Kwara State (Civil Procedure) Rules 2005.

[16] Order 23 Rule 3 (3) of the High Court of Kwara State (Civil Procedure) Rules 2005.

[17] (1977) LPELR (2161) (SC).

[18] (2016) LPELR-40566(CA).

IN SUMMARY

This article examines two recent decisions of Nigeria's Supreme Court in which important principles impacting the law and practice of arbitration in Nigeria were laid down. In the two decisions, the Supreme Court held that filing a defence to proceedings commenced under the summary judgment or undefended list procedures did not amount to taking steps in the proceedings, such as would disentitle the defendant from applying for a stay of further proceedings pending arbitration.

DISCUSSION POINTS

- An admitted but unpaid debt is not a dispute that can be referred to arbitration
- Filing a defence under the summary judgment or undefended list procedure does not amount to taking steps in the proceedings that would disentitle a party from applying for a stay of proceedings and referral of the dispute to arbitration
- The courts will consider the potential impact of the limitation period in determining whether to grant a stay of proceedings pending arbitration

REFERENCED IN THIS ARTICLE

- *Sakamori Construction (Nigeria) Limited v Lagos State Water Corporation*
- *Kwara State Government of Nigeria v Guthrie (Nig) Limited*
- Section 5 of Nigeria's Arbitration and Conciliation Act 1988
- Sections 8(1)(d) and 62 of the Limitation Law of Lagos State of Nigeria
- Order 11 of the High Court of Lagos State (Civil Procedure) Rules 2004
- Order 23 of the High Court of Kwara State (Civil Procedure) Rules 2005

SAKAMORI CONSTRUCTION (NIGERIA) LIMITED V LAGOS STATE WATER CORPORATION[1]

Facts Of The Case

The appellant, Sakamori Construction (Nigeria) Limited, and the respondent, Lagos State Water Corporation, entered into a contract for the supply and laying of secondary and tertiary network systems under the respondent's Water Supply Expansion Programme between 1994 and 1999. In February 1999, the appellant fulfilled its obligation under the contract by completing the execution of the project and maintaining it for 12 months following the said completion. In compliance with the contract's terms and the construction industry's custom, the appellant presented invoices with demands for payment at the different stages of completion of the contract. At the completion of the project, the appellant presented its final invoice to the respondent for payment. The respondent did not dispute the invoices. In fact, the respondent admitted the debt in letters dated 8 January 2002, 16 May 2005, and 24 December 2007 but failed to pay the debt despite several demands from the appellant for payment.

Aggrieved by the failure or refusal of the respondent to pay the debt, the appellant filed a lawsuit in the High Court of Lagos State (the High Court) to collect the debt. In accordance with the High Court of Lagos State (Civil Procedure) Rules 2004, which permitted a claimant to apply for summary judgment against a defendant where such a claimant believes that the defendant has no defence to the suit, the appellant also applied for summary judgment against the respondent. The High Court was satisfied that the respondent had no defence to the suit and entered judgment against the respondent in favour of the appellant, granting all the appellant's claims, including the appellant's claim for interest.

The respondent had initially failed to participate in the proceedings. However, after the court had heard the appellant's motion for summary judgment but before it delivered its judgment, the respondents filed an application seeking to arrest the delivery of the judgment and stay further proceedings in the matter pending reference of the matter to arbitration. However, the respondent refused to argue the application and indicated its intention to file a preliminary objection to challenge the suit. Consequently, the trial court deemed the respondent's application abandoned. The respondent appealed against the trial court's decision, deeming its application as abandoned, and filed an application in the Court of Appeal for a stay of further proceedings in the trial court pending the hearing and determination of its appeal. The motion for a stay of proceedings was brought to the attention of the trial judge, who, in deference to the Court of Appeal, suspended the delivery of its judgment to await the

outcome of the respondent's appeal. Subsequently, the Court of Appeal struck out the respondent's motion for a stay of proceedings, and this development was duly brought to the attention of the trial judge, who then scheduled the matter for the delivery of their judgment.

On the date the trial court was to deliver its judgment, the respondent's counsel informed the court that the respondent had filed in the Court of Appeal yet another application for a stay of further proceedings. Curiously, however, the application that the respondent claimed to have filed in the Court of Appeal was neither served on the appellant nor was a copy placed in the court's file. The court was infuriated by the respondent's apparently dilatory antics and proceeded to deliver its judgment in the matter and granted all the reliefs sought by the appellant on the ground that the respondent had no defence to the claim.

Aggrieved by the judgment of the High Court, the respondent appealed to the Court of Appeal. The Court of Appeal allowed the respondent's appeal, set aside the decision of the High Court, and referred the parties to arbitration in accordance with the terms of the contract. The appellant was aggrieved by the decision of the Court of Appeal and appealed against it to the Supreme Court.

An Admitted Debt Does Not Qualify As A Dispute That Is Capable Of Being Referred To Arbitration

One of the issues the parties raised for the Supreme Court's determination was whether there was any dispute between parties to be referred to arbitration, considering that the debt was admitted. In its judgment, the Supreme Court held that since the debt had been admitted by the respondent several times, there was no dispute within the contemplation of the arbitration agreement that ought to be referred to arbitration. The Supreme Court, comprising five justices, was unanimous in its decision that since the debt was already admitted, there was no dispute between the parties to justify the grant of the respondent's application for a stay of proceedings under section 5 of the Arbitration and Conciliation Act[2] (ACA). Both the leading judgment of Saulawa, JSC and the supporting judgment of Peter-Odili, JSC cited paragraph 503 Volume 2 of the 4th Edition of ***Halsbury's Laws of England***, where the learned authors stated that 'there is no dispute within the meaning of an agreement to refer disputes where there is no controversy in being, as when a party admits liability but simply fails to pay.'

The Supreme Court also held that the Court of Appeal was wrong to have referred the matter to arbitration because the relief sought by the respondent in the Court of Appeal was an order setting aside the judgment of the trial court and the reassignment of the suit to another judge of the Lagos High Court for hearing. The Court of Appeal was also wrong to have referred the matter to arbitration because doing so would be futile as the appellant would not be able to enforce any award that might be entered in its favour because the limitation period for the enforcement of such award, which is calculated from the date of the underlying breach as opposed to the date of the award, would have kicked in.

Comments

We agree with the decision of the Supreme Court that since the respondent had admitted the debt, there was no dispute between the parties capable of being referred to arbitration, so the decision of the Court of Appeal, referring a non-existent dispute to arbitration, was rightly set aside.

The Court was also right as the order that the respondent sought in the Court of Appeal was an order setting aside the judgment of the trial court and the transfer of the matter to another judge of the Lagos State High Court for hearing. There was no basis for the Court of Appeal to have granted the respondent a relief that it did not seek. It is hornbook Nigerian law that a court has no jurisdiction to grant a relief that a party has not sought. Having requested that the matter be transferred to another judge of the Lagos State High Court, a relief that was inconsistent with the desire to have the matter referred to and settled by arbitration, the Court of Appeal erred in law when it referred the matter to arbitration.

Filing A Defence Does Not Amount To A Waiver Of The Right To Apply For A Stay Of Proceedings And Referral Of A Dispute To Arbitration

One of the issues that fell for determination in the Supreme Court was whether the respondent, as the defendant in the trial court, ought to have filed its defence and raised therein any objections that it wished to raise. The Court of Appeal had held that the respondent would have waived its right to apply for the matter to be referred to arbitration had it filed its defence on the merits of the claim. The Supreme Court disagreed and held that, by virtue of the provisions of Order 22 Rule 2(1) of the High Court of Lagos (Civil Procedure Rules) 2004, any party could raise any point of law objection in the pleadings, which the trial court may dispose before or during the trial. According to the Supreme Court, this rule does not contradict the provisions of section 5 of the ACA.

Comments

Without prejudice to our position that the Court ought not to have referred the matter to arbitration since the respondent did not seek that relief, we are of the view that the Court of Appeal was right that a defendant who intends to apply for referral of a dispute before the court to arbitration is not required to file a statement of defence or counter affidavit in response to a summary judgment application, otherwise that party would be deemed to have taken steps in the matter and waived the right to insist on the matter being referred to arbitration. This position accords with the provisions of section 5 of the ACA, which requires that any such application for stay of proceedings be filed 'at any time after appearance and before delivering any pleadings or taking any steps in the proceedings'. The position of the Court of Appeal is also consistent with a long line of judicial authorities on the point.[3]

While Order 11 of the Lagos State Civil Procedure Rules 2004 requires a defendant who desires to defend a claim brought under the summary judgment procedure to file their defence in order to enable the court to determine whether they should be granted leave to defend the action, section 5 of the ACA forbids a party that wishes to apply for a stay of proceedings and referral of the matter to arbitration from filing their defence. It is noteworthy that section 5 of the ACA applies to any action in court with respect to any matter that is the subject of an arbitration agreement, and that, in our view, includes proceedings brought under the summary judgment procedure. It is our view that the provisions of the ACA, being statutory provisions, are superior to and must prevail over the provisions of the rules of the court where both are in conflict.[4]

The Courts Will Not Refer A Matter To Arbitration Where The Resultant Award Will Be Caught Up By Statute Of Limitation

One of the reasons why the Supreme Court set aside the decision of the Court of Appeal referring the parties to arbitration was that the Court of Appeal failed to consider the principle that an action to enforce an arbitration award cannot be brought after the expiration of

six years from the date on which the cause of action accrued (or arose).[5] This point was elaborated on in the concurring judgment of Peter-Odili, JSC, who noted that the appellant's cause of action under the agreement with the respondent arose before 27 March 2000. The Supreme Court noted that, in view of the provisions of the Limitation Law of Lagos State, as well as decided cases to the effect that the limitation period for the enforcement of arbitral award begins to run from the date of the underlying contractual breach rather than from the date of the award, the order of referral to arbitration was futile as the appellant would not be able to enforce any award that might be entered in its favour because the limitation period for the enforcement of the award is calculated from the date of the underlying breach as opposed to the date of the award. Considering that the cause of action occurred sometime in the year 2000, the limitation period of six years for any action based on breach of contract was set in 2006. What this means is that, as of 7 June 2011, when the Court of Appeal referred the parties to arbitration, the appellant was already five years too late to enforce any award that would result from the arbitration.[6]

Comments

It is commendable that the Supreme Court considered the potential injustice and unfairness that the appellant would have faced if the matter was referred to arbitration in view of the provisions of the Limitation Law of Lagos State. The ACA does not provide a limitation period for enforcing an arbitral award in Nigeria. However, the Limitation Laws of the various states apply to arbitration in the same manner and to the same effect as court actions. For instance, the Limitation Law of Lagos State that was considered in this case by the Supreme Court provides in section 62 that 'this Law and any other Limitation enactment shall apply to arbitration as they apply to actions in the court'. Furthermore, section 8 (1)(d) of the Limitation Law of Lagos State provides that actions to enforce an arbitration award, where the arbitration agreement is not under seal or where the arbitration is under any enactment other than the ACA, will not be brought after the expiration of six years from the date on which the cause of action arose. While there is no question that arbitral proceedings must be commenced within the time limit provided in each applicable Limitation Law, namely five or six years, depending on the applicable Limitation Law, the crucial question has always been when does time begin to run for the purposes of an application to enforce an arbitral award? Is it from the date of the initial breach of the underlying contract or the date of publication of the award? The Supreme Court settled this issue in ***Murmansk State Steamship Line v Kano State Oil Millers Ltd***.[7] In its decision, the Court held that the limitation period for the enforcement of an arbitral award begins to run from the date the cause of action accrued and not the date when the award was issued, and that the statutory limitation period[8] for the enforcement of the award began to run in 1964 when the underlying agreement between the parties was breached and not from the making of the award in 1966. The Supreme Court restated its position on this point in the case of ***City Engineering (Nig) Ltd v Federal Housing Authority***.[9]

It is noteworthy that the Lagos State Arbitration Law[10] has addressed this problem by introducing significant changes to ameliorate the effect of section 8(1)(d) of the Lagos Limitation Law and its interpretation by the Supreme Court. The Lagos Arbitration Law contains two very important provisions relating to the application of limitation laws to arbitral proceedings. First, it provides that, in calculating the time prescribed by the applicable limitation laws for the commencement of actions in courts, arbitral and other proceedings in respect of a dispute that is the subject of either an award that the court orders to be set aside or declares to be of no effect, or the affected part of an award that the court orders to be set

aside or declares to be of no effect, the period between the commencement of the arbitration and the date of the order of the court shall be excluded. Second, the Lagos Arbitration Law provides that, in calculating the time limit for the commencement of proceedings to enforce an award, the period between the commencement of the arbitration and the date of the award shall be excluded. For arbitrations conducted under the Lagos State Arbitration Law, these provisions have addressed the concerns of arbitration practitioners and the business community regarding the effect of the decisions of the Supreme Court in the ***Murmansk*** and ***City Engineering*** cases.[11]

On 10 May 2022, the Senate of the National Assembly of the Federal Republic of Nigeria passed the Arbitration and Mediation Bill, which is a bill to repeal the ACA and enact the Arbitration and Mediation Act to provide for a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and mediation. The Arbitration and Mediation Bill also makes the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) applicable to any award made in Nigeria or in any contracting state arising out of international commercial arbitration and the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) and related matters enforceable in Nigeria. The Bill provides that, in computing the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded.

The implication of the decision of the Court of Appeal referring the parties to arbitration on 7 June 2011 over a cause of action that arose before 27 March 2000 vis-à-vis the provisions of the Limitation Law of Lagos State, and the Supreme Court decisions in ***Murmansk State Steamship Line v Kano State Oil Millers Ltd*** and***City Engineering (Nig) Ltd v Federal Housing Authority*** is that the appellant, in this case, would have been unable to enforce any award that might be made in its favour as the limitation period for enforcing the award would have kicked in.

KWARA STATE GOVERNMENT OF NIGERIA V GUTHRIE (NIG) LIMITED[12]

Facts Of The Case

The respondent, Guthrie (Nigeria) Limited, commenced an action in the High Court of Kwara State (the High Court) by way of a writ of summons under the undefended list procedure for the recovery of the sum of 586,206,883.33 naira from the appellants, the Kwara State Government of Nigeria, Kwara State Ministry of Social Development, Environment and Tourism and the Honourable Attorney-General and Commissioner for Justice, Kwara State. Upon being served with the writ of summons and accompanying affidavit, the appellants joined issues with the respondent by filing a notice of intention to defend the action with a supporting affidavit. The appellants simultaneously filed a preliminary objection seeking to strike out the suit for want of jurisdiction or a stay of further proceedings and referral of the matter to arbitration. They drew the High Court's attention to the existence of an arbitration clause in the agreement between the parties. In response, the respondent filed a counter-affidavit in opposition to this application.

The High Court upheld the appellants' preliminary objection, declined jurisdiction and referred the parties to arbitration. Aggrieved by the judgment of the High Court, the respondent appealed to the Court of Appeal. The Court of Appeal allowed the respondent's appeal, set aside the decision of the High Court and ordered the suit to be remitted to the

High Court for rehearing by another judge. The appellants were aggrieved by the decision of the Court of Appeal and appealed against it to the Supreme Court.

The key issue submitted for determination in the Supreme Court was whether the Court of Appeal was right when it held that the filing of a notice of intention to defend contemporaneously with the preliminary objection by the appellants amounted to taking steps in light of the provisions of section 5(2) of the ACA.

The appellants argued that the undefended list procedure was governed by strict rules of procedure and that failure to comply with the rules would expose it to the risk of default judgment. On the other hand, the respondent argued that by filing the notice of intention to defend contemporaneously with the preliminary objection, the appellants had taken steps in the proceedings contrary to section 5 of the ACA and had therefore waived their right to have recourse to arbitration.

The Court's Decision

The Supreme Court held that the appellants' filing of a notice of intention to defend the action did not amount to taking a step in the proceedings and that the appellants did not act contrary to the provisions of section 5 of the ACA. The Supreme Court restored the decision of the High Court, which ordered a stay of proceedings and referred the parties to arbitration.

Comments

What Amounts To Taking Steps In Proceedings, Thereby Waiving A Right To Insist On Arbitration

As with the summary judgment procedure, which permits a claimant or a plaintiff to apply for summary judgment against a defendant when the claimant believes that the defendant has no defence to the suit, the undefended list procedure, a procedure used only for recovery of debts and liquidated money demand, is used when a claimant believes that a defendant has no defence to the suit. While the rules of some high courts provide for the use of the summary judgment procedure to recover debts or liquidated money demands, others provide for the use of the undefended list procedure. There are also rules of courts that permit either of the two procedures. The undefended list procedure is designed to prevent delay in cases where the plaintiff has a clear case and the defendant has no defence. Where the plaintiff satisfies the court based on the affidavit evidence that the defendant does not have a good defence, the court would enter judgment for the plaintiff, thereby avoiding a full-blown trial with the usual expense, frustrations and delay. On the other hand, if the defendant files an affidavit that discloses a defence on the merit, they would be granted leave to defend by the court. This prevents worthless and sham defences.[13]

Under the High Court of Kwara State (Civil Procedure) Rules 2005, which fell for interpretation in this case, where a party served with the writ of summons and affidavit delivers to the registrar (not less than five days before the date fixed for hearing) a notice in writing together with an affidavit disclosing a defence on the merit, the court may grant them leave to defend the action upon such terms as the court may think just.[14] Where leave to defend is given under this rule, the action shall be removed from the undefended list and placed on the ordinary or general cause list and the court may order pleadings or proceed to hearing without further pleadings.[15] Where any defendant neglects to deliver the prescribed notice of intention to defend and affidavit or is not given leave to defend by the court, the suit shall be heard as an undefended suit and judgment given thereon, without calling on the claimant to summon witnesses before the court to prove their case formally.[16]

It is difficult to agree with the decision of the Supreme Court that filing a notice of intention to defend an action commenced under the undefended list procedure, together with an affidavit disclosing a defence on the merits, does not amount to taking steps in the proceedings that would disentitle the party that has filed the defence from requesting that the matter be referred to arbitration. As indicated above, in relation to the ***Sakamori*** case, there is a plethora of cases to the effect that filing a defence amounts to taking steps in the proceedings for purposes of an application for a stay of proceedings under section 5 of the ACA.

However, in this instance, the Supreme Court distinguished some of its earlier decisions from the facts of the case. For example, the Supreme Court noted that the case of ***Obembe v Wemabod Estates***[17] was different because it was commenced by the general form of a writ of summons, whereas this case was commenced under the undefended list procedure, and that none of the parties applied for a stay of proceedings and reference of the matter to arbitration. The Supreme Court also distinguished the case of ***SCOA (Nig) Plc v Sterling Bank Plc***[18] from this case on the grounds that in ***SCOA***, the suit was commenced by way of a writ of summons and that the parties in that case voluntarily submitted themselves to the court's jurisdiction, even though their contract contained an arbitration clause.

It would therefore appear that the principle to be deduced from the ***Sakamori*** and the ***Kwara State Government*** cases is that the provisions of section 5 of the ACA pertaining to taking steps in proceedings by filing a defence on the merits of a claim would not apply where the action was commenced under the summary judgment or the undefended list procedures under the rules of the various high courts in Nigeria, but would apply where the action is commenced by way of a writ of summons and statement of claim.

The Limitation Period For Enforcement Of Arbitral Awards

Finally, we note that, unlike in the case of ***Sakamori Construction (Nigeria) Limited v Lagos State Water Corporation,*** discussed above, and which was decided just five months before this case, the Supreme Court did not consider the cause of action in this case, which accrued some time in 2016 when the case was filed, or thereabouts, and that any award that the respondents may obtain might turn out to be pyrrhic victory because of the risk that such award might not be enforceable for the same reasons discussed in the ***Sakamori*** case. We concede that this was not a point taken by any of the parties, but it would appear that none of the parties raised that point in the ***Sakamori*** case and that it was raised suo motu by the Supreme Court.

Referring the parties to arbitration on 13 May 2022 over a cause of action that arose in or around 2016 would raise the exact same issue of unenforceability of any resulting award that the Supreme Court raised in the ***Sakamori Construction (Nigeria) Limited v Lagos State Water Corporation.***

Endnotes

1 (2022) 5 NWLR (Part 1823) p. 339 SC. ^ Back to section

2 Chapter 18, Laws of the Federation of Nigeria (LFN) 2004. ^ Back to section

3 ***Obembe v Wemabod Estates Limited*** (1977) LPELR (2161) (SC). ^ Back to section

4 See***BBN (Nig) Ltd v Alhaji S Olayiwola & Sons Ltd & Anor*** (2005) LPELR-806 (SC) p. 8, paragraphs A–C where Nigeria's Supreme Court held that the rules of court are statutory instruments not elevated to the pedestal of statutes. See also ***Elabanjo & Anor v Dawodu*** (2006) LPELR-1106 (SC) p. 34, paragraph F where Nigeria's Supreme Court also held that rules of court cannot override statutory provisions of the law. ^ Back to section

5 See section 8(1)(d) of the Limitation Law of Lagos State. ^ Back to section

6 While the Court was concerned with the issue of enforceability of any arbitral award that would result from the referral to arbitration, it would appear that the Court did not advert its mind to the threshold issue of whether the appellant would have been able to commence arbitration since the limitation period of six years for commencing an action in contract took effect in 2011. ^ Back to section

7 1974-75 NSCC 590. ^ Back to section

8 In this case, it was the English Statute of Limitation 1623, which requires that a civil action be commenced within six years of the cause of action. ^ Back to section

9 (1997) 9 NWLR (Part 520) at 224. See also***Tulip (Nig) Ltd v NTM SAS*** (2011) 4 NWLR (Part 1237) 254. ^ Back to section

10 Chapter A11 of the Laws of Lagos State 2015. ^ Back to section

11 For a detailed discussion of this issue, see the Nigerian chapter of***The Middle Eastern and African Arbitration Review*** (2016), pp. 76–79, which was contributed by the authors' law firm. ^ Back to section

12 (2022) 12 NWLR (Part 1846) 189 SC. ^ Back to section

13 ***NPA v Aminu Ibrahim & Co & Anor*** (2018) LPELR-44464 (SC) pp. 44–45, paragraphs C-A. ^ Back to section

14 Order 23 Rule 3 (1) of the High Court of Kwara State (Civil Procedure) Rules 2005. ^ Back to section

15 Order 23 Rule 3 (2) of the High Court of Kwara State (Civil Procedure) Rules 2005. ^ Back to section

16 Order 23 Rule 3 (3) of the High Court of Kwara State (Civil Procedure) Rules 2005. ^ Back to section

17 (1977) LPELR (2161) (SC). ^ Back to section

18 (2016) LPELR-40566(CA). ^ Back to section

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