THE PURPOSEFUL INTERPRETATION OF THE PROVISIONS OF SECTION 60 OF CAMA IN AID OF INTERNATIONAL TRADE

YUSUF O. ALI
SENIOR ADVOCATE OF NIGERIA

INTRODUCTION

This article was provoked by the recent decision of the Court of Appeal in the case of Ritz & WKG v Techno Ltd, wherein the Court in the view of this writer, correctly interpreted the provision of Section 60 of the Companies and Allied Matters Act (CAMA).2.

The decision of the Court of Appeal in the above case is very important and has a bearing on the promotion of international trade in Nigeria. It has laid to rest for now, the legal point that a Company incorporated outside of Nigeria need not be incorporated in Nigeria simply because it wants to maintain an action in our Court. Conversely, a Nigerian need not bother to know whether or not a foreign company is incorporated in this country or the purpose of maintaining an action against the foreign company in its name.

It should be pointed out however that the provisions of Section 54 of CAMA still hold good notwithstanding the decision in the Techno Ltd case.

Section 54 prohibits a foreign Company not incorporated in Nigeria from carrying on business in the Country.

For its importance the section provides thus:

"54. (1) Subject to sections 56 of this Act, every foreign company which, before or after the commencement of the Act, was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria shall take all steps necessary to obtain incorporated as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Act.

(2) Any act of the company in contravention of subsection

(1) of this section shall be void.

(1) Nothing in this section shall affect the status of -

(a) any foreign company which before the commencement of this Act was granted exemption from compliance with part X of the Companies Act 1968;

(b) Any foreign companies exempted under any treaty to which Nigeria is a party."

In order to underscore the importance of the decision of the Court of Appeal in the Techno Ltd case supra, we shall endeavour to have a look at the position of our law on the point before the coming into force of CAMA.

THE 1968 COMPANIES ACT3

The Companies Act of 1968 like CAMA; prohibited a foreign Company that was not incorporated in Nigeria from carrying on business in the Country. The Act in section 370 provided thus:

"(1) Every foreign company within paragraph (b) of section 368 of this Decree shall give notice in writing of its intention to the registrar; and as soon thereafter as may be, the foreign company shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for the purpose aforesaid, but until so incorporated the foreign company shall have a place of business in Nigeria for any purpose other than the receipt of notices and other documents, as matter preliminary to incorporated under this Decree.

(2) Steps to be taken under this Decree to become incorporated in Nigeria shall not include any invitation to subscribe for shares or otherwise. However, on the basis of a prospectus without the prior approval of the Commissioner; but save to that extent, all other provisions of this Decree as to formation shall apply with any necessary modifications".

The Courts have the opportunity to interpret the above provision in decided cases. One of such case is the decision in Wema Bank v. N.N.S.L.4

The brief fact of the case is as follows: the applicant in this case was a West German firm but represented in Nigeria by a Company incorporated in Nigeria. It applied to be joined as a party to an action instituted against the

respondent, the National Shipping Line Limited. The plaintiff has sued the defendant for an order to compel the defendants to deliver certain goods to the plaintiff and for an order to restrain the defendants from re-shipping the said goods to the foreign company. The defendants who were carriers for the foreign company were acting on its instruction to re-ship of the goods to Germany at the expenses of the foreign company.

The contention of the plaintiff in the case was that having regard to the provisions of section 370 (1) of the Companies Act No 51 of 1968, the German company is not a juristic person having not complied with the said section 370 (1). Therefore the German Company has no right of action and could not be joined as a party to the case.

It was held that although foreign companies not incorporated in Nigeria are juristic persons under the laws under which they are incorporated; nevertheless, such companies lacked the power to issue and be sued in their own names and therefore the Germany] company could not be joined into the action.

The trial court encapsulated its reasoning in this way at page 135 of the report:

> "The real issue in this matter is whether the applicant company is a juristic person according to Nigerian Law of the Companies Act. The first question is, I think what is a juristic person? There are two cases in our case law of what is a juristic person. The first is Shitta & ors vs Ligali & ors (1941) 16 N.L.R. 23 and the other is Agbonmagbe Bank Ltd vs General Manager, G.B.O. Ltd and Another (1961) All NLR 116.
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> From both cases, a juristic person may be defined as a person or entity known by the law. Such a person can sue or be sued. Can it therefore be said that in Nigeria all foreign companies not incorporated in Nigeria are by our laws not legal persons. There is no doubt that they are, but before they can be vested with powers of a company incorporated in Nigeria one of which is the power to sue and be sued in its own name, such companies must be incorporated in Nigeria. This opinion is based on the ground that a company is a creature of the statue and until the provision of the statute have been fully complied with the company cannot be said to have come into existence. The

companies Act No 51 of 1968 laid down certain provisions to be complied with by a foreign company before it is recognized as registered in Nigeria and after registration, the company can then sue or be sued in its own name since it then recognize by the law of Nigeria as a legal person"

The above exposition represented the state of our law on this point until the promulgation of CAMA in January 1990.

We shall therefore take a look at the provisions of CAMA on the point and examine the decision of the court of Appeal in the Techno Ltd case supra.

SECTION 60 OF CAMA

For case of reference, the provision of Section 60 of CAMA is quoted in extenso hereunder:

"For the avoidance of doubt, it is hereby declared that –

(a) Save as provided in sections 55, 56, 57, and 58 of this Act, nothing in this Act shall be construed as authorising the disregard by any exempted foreign company or any enactment of rule of law; and .

(b) Nothing in this chapter shall be constructed as affecting the rights or liability of a foreign company to sue or be sued in its name or in the name of its agent".

Attention must be drawn to the fact that there is no analogue provision similar to the above quoted of CAMA in the Companies Act of 1968. Therefore the decision in N.N.S.L. earlier alluded to can be explained in that context.

It is in the right of the above explanation that one has to look at the case of Techno Ltd the fact of which are as follows: The appellant company is a foreign company incorporated in Germany and at all times materials not registered under Nigerian laws. The respondent Company borrowed some machinery from the Appellant Company which is used at some trade fairs at Minna and Kaduna. It did not pay for the Respondent Company before the High Court of justice Niger State sitting in Minna, The Appellant claimed for the return of all the equipment collected by the Respondent and also claimed various sums of money with interest. The Appellant led evidence in support of its case but when it was the turn of the Respondent to enter its defence, it filed a notice of preliminary ground that the Appellant being a foreign company that was not registered in Nigeria, lacked the legal capacity to sue and be sued in Nigerian courts. The trial court sustained this objection and dismissed the Appellant's case. This ruling engendered the present Appeal.

The Court of Appeal after a thorough review of the fact of the case and previous authorities on the point unanimously held that the ruling of the High Court dismissing the Appellant's case *in limine* was not right in law.

The Court of Appeal therefore allowed the appeal and held rightly in our view, that having regard to the provision of Section 60 (b) CAMA; the appellant even though not registered in Nigeria, could sue and be sued in our courts. In arriving at this decision, the Court of Appeal among other things relied on the dictum of the same court in the case of Nigerian Bank for Commerce and Industry Ltd v Europa Traders (UK) Ltd5.

At page 41 of that report, Ademola JCA (as he then was) held as follows:

> "In as much as a Nigerian who goes to Harrods to buy goods on credit can be sued by Harrods in Nigerian Courts, so also can a British company from whom a British Nigerian has bought goods and has not paid be sued in Nigerian court. There is basis for reciprocity in international relations and no nationalistic feelings rule in international relations".

In other to bring out more clearly the reasoning in the case under consideration, one cannot do better than to quote the relevant dicta of their Lordships in the said case.

Honourable Justice Muntaka Coomasie JCA6 who wrote the leading judgment held (among other) as follows:

> "In the result, I hold that it cannot be right as held by the trial court that a foreign company cannot carry on business in Nigeria and therefore cannot sue and be sued in view of the provisions of Section 54 of the Company and Allied Matters Act, 1990 until it is properly incorporated.
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> I think there is a fundamental misapprehension of the particular section relied upon but both the trial court and the learned counsel for the respondents. The relevant law to my understanding, is that a foreign company which ahs not been registered in Nigeria under the Act supra, cannot carry on business in Nigeria unless and until it has taken steps to incorporate same. Failure to do so some punishments have been stipulated in the same chapter i.e. chapter 3. I must state clearly that same as capacity

to sue and be sued. Section 54 is concerned with "carry on business"

Further down in the judgment, his lordship finally held as follows:

> "I hold on the various authorities that the appellant company can even sue in its name, without necessarily suing company cannot sue to claim its legitimate right in Nigeria because it has not yet been registered. By suing or being sued in Nigeria does not mean "carrying on business' in Nigeria. I answer both issues in affirmative.

Honourable Justice Oduyemi JCA8 in his own contribution to the judgment made the following significant remark:

> "It is therefore apparent to me that the learned trial judge erred in his ruling when he held that the decision of the court of Appeal will not operate to dislodge section54 of the Companies and Allied Matters Act, 1990: this in the face of section 60 which expressly protects the right of liability of a foreign company to sue or be sued in its name or in the name of it's agent.
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> It would appear also that the learned trial judge failed to make a distinction between the right of a company to sue or be sued which was the subject matter of the application before him when he digressed to make pronouncements on the validity or otherwise of the transaction (if any) entered into in Nigeria by the foreign company. That is the subject matter of section 54 and the stage for a finding on that would not have been reached before evidence on the matter had been completely heard and he had the benefit of addresses by learned counsel on both side."

Section 55 of CAMA provides for the sanction against any company and its officers if they fail to comply with the provisions of section 54 supra. This section provides thus:

> "55. If any foreign company fails to comply with the requirements of section 54 of this Act in so far as they may apply to the company, the company shall be guilty of an offence and liable on conviction to a fine of not less than N2,500; and every officer

> or agent of the company who knowingly and wilfully authorises or permits the default or failure to comply with those requirements shall, whether or not the company is also convicted of any offence, be liable on conviction to a fine of not less than N250 and where the offence is a continuing one to a further fine of N25 for every day during which the default continues."

It is our view that the decision of the Court of Appeal in the Techno Ltd. Case supra is a correct position of our law. The decision could be supported (among others) on the following grounds:

1. It is a correct interpretation of section 60 (b) of CAMA;
2. It has fulfilled the mischief aimed at by the law maker in introducing the said section into CAMA unlike the position under the 1968 Companies Act.
3. It will promote international trade and international relations.
4. It supports the public policy of liberalization of free trade between Nigeria and other countries.
5. It removes the legal absurdity that existed in the 1968 Companies Act under which a foreign company cannot sue nor be sued in Nigerian courts until is incorporated under the said Act.

It is our submission that our courts should adopt this of purposeful and dynamic interpretation of our laws that deal with commerce and international trade. If this view is accepted, it would aid the in flow of foreign capital once there is certainty in the law.

CONCLUSION

In this paper, we have tried to examine the legal status of foreign companies vis-à-vis their legal competence to sue and be sued in Nigerian courts without the necessity of fresh re-incorporation in Nigeria. In 1990, a foreign company that wished to sue in Nigeria under the provisions of the Companies Act 1968 would have to be incorporated in Nigeria before doing so.

But under the provisions of Section 60(b) of CAMA, this awkward situation has been ameliorated. However, it is clear that under the 1968 Act and CAMA the position is still that a foreign company that wishes to carry on business in Nigeria swills till have to be registered here subject to the exceptions created by law.