NIGERIAN NATIONAL PETROLEUM CORPORATION V.CLIFCO NIGERIA LIMITED (2011)

NIGERIAN NATIONAL PETROLEUM CORPORATION v. CLIFCO NIGERIA LIMITED

In The Supreme Court of Nigeria

On Friday, the 15th day of April, 2011

SC.233/2003

JUSTICES

ALOMA MARIAM MUKHTAR Justice of The Supreme Court of Nigeria

WALTER SAMUEL NKANU ONNOGHEN Justice of The Supreme Court of Nigeria

FRANCIS FEDODE TABAI Justice of The Supreme Court of Nigeria

JOHN AFOLABI FABIYI Justice of The Supreme Court of Nigeria

BODE RHODES-VIVOUR Justice of The Supreme Court of Nigeria

Between

NIGERIAN NATIONAL PETROLEUM CORPORATION Appellant(s)

AND

CLIFCO NIGERIA LIMITED Respondent(s)

BODE RHODES-VIVOUR, J.S.C (Delivering the Leading Judgment): The Appellant/cross respondent and the respondent/cross appellant executed a contract on the 7th day of October 1994.
In that contract it was agreed that the appellant/cross respondent would sell to the respondent/cross appellant twenty four cargoes of Vacuum Gas oil (VGO) at the rate of one cargo per month. The contract was for two years certain and it commenced on 7th of October 1994. As at 1999 the appellant/cross respondent had only made available to the respondent/cross appellant five cargoes of VGO. Rather than sue for breach of contract the respondent/cross appellant preferred Novation. The parties had a meeting on the 27th of October 1999, and at that meeting a Novation emerged. The old contract had been novated into a new contract. New terms were agreed in substitution for some of the-terms of the term contract. The new terms were that in substitution for VGO, Nineteen cargoes of Low Pour Fuel Oil (LPFO) at the same rate would be supplied to the

respondent/cross appellant commencing from November, 1999.
The parties went to arbitration because the appellant/cross respondent failed to deliver to the respondent/cross appellant the nineteen cargoes of LPFO as agreed in the novation, in place of the same amount of VGO.
On the 12th of December, 2000 the arbitrators published their award, which was in favour of the respondent/cross appellant. The award by the Arbitral Panel runs as follows:

"We award and determine that the respondent (i.e. the appellant in this appeal) jointly and severally shall pay to the claimant sum the of $4,500,000 (four million, five hundred thousand US Dollar) OR in the alternative, we order the delivery by the respondent to the claimant a total of 18 cargoes of LPFO of 25,000 metric tons each month for every consecutive month commencing from the month of January, 2001 for the next eighteen months.
It was further ordered that if the respondents should default in any months delivery, the balance of the cargoes will become due and exigible in cash at the rate of US $250,000.00 (two hundred and fifty thousand US Dollars) each, at the prevailing price in the oil market. It was further ordered that the respondent shall bear and pay the whole costs of the arbitration which includes fees and expenses assessed at N4, 000,000.00 (four million Naira). Finally the respondent were ordered to pay the claimant interest at the rate of 10% per annum from the day after the award was made until the date of payment of the sums awarded, both dates inclusive".

Before the arbitral panel the Pipelines and Products marketing Company was the 2nd respondent. The Court of Appeal struck them out.
The appellant, as applicant in suit No: FHC/ABJ/CS/433/2000 took out an originating summons. The applicant prayed the Federal High Court for the following reliefs:
1. An order setting aside the arbitral award dated, the 12th of December, 2000 by Chief, The Hon. Dr. Nnaemeka-Agu, Alhaji, The Hon. Abdullahi Ibrahim SAN, and Chief, The Hon. Bayo Ojo, SAN in the matter of the arbitration between CLIFCO Nig Limited v. Nigeria National Petroleum Corporation.

2. An order refusing recognition or enforcement of the arbitral award dated the 12th December, 2000 by Chief,The Hon. Abdullahi Ibrahim SAN, and Chief, The Hon. Bayo Ojo SAN in the matter of the arbitration between CLIFCO Nigerian Ltd. v. Nigerian National Petroleum Corporation.

In support of the originating summons was a 30 paragraph affidavit deposed to by Olayinka Bolanta, a Legal Practitioner in Chambers of applicant's Counsel. Several documents were annexed to the affidavit in support.
Arguments commenced on 13/3/01 and were concluded on 10/5/01.

The learned trial Judge Okeke J. delivered judgment on the 31st day of October, 2001. The Judge set aside the award and further held that the award could not be enforced. The respondent/cross appellant filed an appeal before the Lagos Division of the Court of Appeal. The appellant/cross respondent as respondent filed preliminary objection and

cross-appealed.
In a well considered judgment delivered on the 30th day of June 2003, the Court of Appeal concluded as follows:
1. The order by the arbitral panel that the 1st respondent pay US $4,500.000.00 damages as loss of profit is set aside as the order constitutes an error on the face of the record.

2. The alternative award by the arbitration panel that the 1st respondent should supply to appellant 18 Cargoes of LPFO monthly as affirmed.

3. The award is remitted to the arbitrators who shall within 60 days from the date of this judgment set a new time frame for the performance of order (2) made above.

4. The award of 10% interest on the monetary compensation made by the arbitrators is set aside as one without jurisdiction.

5. The name of Pipelines and Products Marketing Company Ltd. in the proceedings before the arbitration Panel is struck out and consequently the award made against it jointly with the 1st respondent is set aside. The award against the 1st respondent however subsists as stated in order 2 above.

6. There is no basis to sustain the judgment of the lower court on the other ground other than those stated in the judgment as canvassed on Respondent's Notice.

7. I award N7,500 costs in favour of the appellant against 1st respondent. I also award N5, 000 damages against the appellant in favour of the 2nd respondent.

This appeal is against that judgment. The Respondent before the Court of Appeal (i.e. the Nigerian National Petroleum Corporation) filed an appeal, while the appellant before the Court of Appeal (KLIFCO Nigeria Limited) filed a cross appeal.
In accordance with Rules of this Court the brief filed on the 21st of June 2005 was deemed duly filed on the 31st of May, 2006.
The respondents brief was filed on the 16th of June, 2006.
As regards the cross appeal, the respondent/cross appellant's brief was filed on the 4th of May, 2005, while the appellant/cross respondent's brief was filed on the 7th November, 2005. Learned counsel for the appellant formulated the following five issues for determination of the appeal. They read:

1. Whether or not the lower court was right to hold that the arbitration panel had jurisdiction to entertain this matter notwithstanding the concurrent finding of fact that the old contract agreement which contained the arbitration clause had been novated into a new contract which had no similar clause.

2. Whether the lower court was not wrong when it failed to hold that the arbitrators misconducted themselves by taking evidence from the respondents without affording the appellant same opportunity.

3. Whether or not the lower court was right in upholding the alternative award, of the arbitrators having regard to the circumstances of this case.

4. Whether or not the cost awarded by the lower court was justified.

5. Whether or not the lower court was not in error in considering issues which were not placed before the court.

On his part, learned counsel for the respondent also formulated five issues for determination. They are:

1. Whether the decision of the lower court that Arbitration Panel had the jurisdiction to entertain the matter placed before them was not correct.

2. Whether the lower court's decision that the appellant was not denied opportunity to defend itself before the Arbitration Panel was not proper.

3. Whether or not the cost awarded by the lower Court against the parties was proper.

4. Whether the lower court considered issues not placed before it by the parties and, if it did, whether such consideration affected the judgment.

5. Whether the lower court was right in upholding the alternative award of the arbitrators.

Learned counsel for the appellant, and respondent formulated five issues respectively. Both sets of issues ask the same questions. In the circumstances, I shall rely on the five issues formulated by the appellant in deciding this appeal. At the hearing of the appeal on the 31st day of January 2011, learned counsel for the appellant adopted the appellant's brief filed on the 21st day of June, 2005, deemed duly filed on the 31st day of May, 2006. Learned Counsel said nothing in amplification of their briefs. Learned Counsel for, the appellant urged us to allow the appeal, while learned counsel for the respondent urged us to dismiss the appeal. I shall now examine the issues seriatim.

Issue No.1
Whether or not the lower court was right to hold that the arbitration panel had jurisdiction to entertain this matter notwithstanding the concurrent findings of fact that the old contract agreement which contained the arbitration clause had been novated into a new contract which had no-similar clause.

Learned counsel for the appellant observed that the arbitration clause (Article 22) in the agreement of 7/10/94 specifically refers to that agreement contending that it cannot extend to the new contract made on 27/10/99. He submitted that the arbitration clause in the old contract cannot confer jurisdiction on the arbitration panel in respect of the new contract, and so the panel had no jurisdiction to entertain the dispute between the parties in the absence of an agreement to extend the arbitration clause to the novated contract.

Continuing his argument learned counsel observed that the settled position of the law is that jurisdiction can be raised at any time or stage in the proceedings or on appeal, observing that the lower court was in error when it failed to consider the issue of jurisdiction of the arbitral panel.
Learned counsel for the respondent observed that the modification of the terms of the obligation in the original contract with new terms on 27/9/99 did not extinguish the arbitration clause in the original contract and so the arbitration panel had jurisdiction to entertain the dispute.
In further submissions learned counsel observed that since the foundation of jurisdiction in arbitration is submission, and the appellant voluntarily submitted to arbitration he cannot be heard to resile at this stage.
Finally, learned counsel observed that the appellant was estopped from raising the issue of jurisdiction. Reliance was placed on Section 12(3) (a) of the Arbitration and Conciliation Act 1990.

In the contract of 7/10/94 it was agreed that the appellant would sell to the respondent twenty four cargoes of Vacuum Gas Oil (VGO) monthly for two years certain. As at 1999 only five cargoes were made available to the respondent. The respondent preferred novation to suing for breach of contract, and so on 27/10/99 both sides met, at the end of their meeting the old contract was novated in a new contract. The new terms agreed were that the appellant should sell to the respondent the outstanding nineteen cargoes but this time around, Low Pour Fuel Oil (LPFO) instead of (VGO). The appellant failed to deliver to the respondent the nineteen cargoes of LPFO as agreed, and so they went arbitration.
Issue such as:
(a) That an arbitration clause is separate from the contract, and whether it survived the agreement of 17/10/94;

(b) Whether there was Novation;

(c) The effect of Novation on arbitration clause, are all no longer live issues, and I must state that delving into them would amount to an academic exercise, and courts ought to spend precious judicial time on live issues. See:
Oyeneye v. Odugbesan 19724 SC p244
Nzom v. Jinadu 1987 1 NWLR Pt 51 p537
Okulate v. Awosanya 2002 2NWLR Pt 645 p530
Nkwocha v. GOV of Anambra State 1984 1 SCNLR p634

The live point for consideration under this issue is jurisdiction in arbitral proceedings. The question asked in issue No. 1 is whether the Arbitration panel had jurisdiction to entertain the dispute between the parties. Jurisdiction is a threshold matter, a question of law. The position of the Law is that the issue of jurisdiction can be raised at any stage of the proceedings, in the court of first instance, on appeal, and even in the Supreme Court for the first time. See
Usman Dan Fodio University v. Kraus Thompson Organisation Ltd. 2001 15 NWLR pt.736 p. 305.

The reason is obvious. Jurisdiction is the heart and soul of a case. No matter how well a case is conducted and decided if the court had no jurisdiction to adjudicate, the whole exercise would amount to a nullity. See Madukolu v. Nkemdilim 1962 1 ANLR p.587 Bronik Motors Ltd and Anor v. Wema Bank Ltd 1983 1SCNLR P.296
This position of the Law applicable in the usual way or in regular courts does not apply to arbitral proceedings. Section 12(3) of the Arbitration and Conciliation Act governs the issue of jurisdiction in arbitral proceedings. It states that:
3. In any arbitral proceedings a plea that the arbitral tribunal:
(a) does not have jurisdiction may be raised not later than the time of submission of the points of defence and a party is not precluded from raising such a plea by reason that he had appointed or participated in the appointment of an arbitrator……. and
(b) the arbitral tribunal may in either case admit a later plea if it consider that the delay was justified.

My Lords, the interpretation of the above and the position of the issue of jurisdiction in arbitral proceedings is that jurisdiction to hear and determine a dispute is raised before the arbitral panel within the time stipulated in the arbitral Act. It can only be raised after the stipulated period if the arbitral panel finds reasons for the delay justified. An appeal on the issue of jurisdiction can be entertained by the High Court provided there was no submission to jurisdiction. A party who did not raise the issue of jurisdiction before the arbitral panel is foreclosed from raising it for the first time in the High Court. The reason being that the foundation of jurisdiction in arbitration is submission.
In this matter the appellant participated in the arbitral proceedings. At no time did he raise the issue of jurisdiction of the arbitral panel to hear the dispute. The clear interpretation of the appellant's conduct is that it submitted to jurisdiction. It cannot raise the issue of jurisdiction on appeal. Issue NO.1 in the circumstances fails.

ISSUE NO.2
Whether the lower court was not wrong when it failed to hold that the Arbitrators misconducted themselves by taking evidence from the respondent without affording the appellant same opportunity.

At the arbitral proceedings it was agreed by counsel that the reference would be decided on the documents which were submitted to the panel and there would be no oral hearing.
The arbitral panel found the respondents claim before it to be in a confused state and so to resolve that confusion the respondents counsel was asked to clarify. Infact, the arbitrators stated in their awards thus:

"As a result of this apparent confused state of the claimant's claim, claimants counsel was asked by the Tribunal what his clients claim were, and he stated that it was the US $4.5 million or in the alternative the balance of nineteen cargoes of VGO/LPFO."

The claimant before the arbitral panel is the respondent/cross-appellant in this appeal. Learned counsel for the appellant observed that after learned counsel for the respondent provided the clarification learned counsel for the appellant was never invited to respond

to the clarification. He submitted that the solicitation of evidence of one party without allowing the other party to respond on the issue is a breach of the right to fair hearing. Reliance was placed on the 1999 constitution, Obeta v. Okpe 1996 9 NWLR pt. 473 p. 401
He urged us to resolve this issue in favour of the appellant. Responding learned counsel for the respondent observed that the document that was admitted by the arbitral panel reduced the appellant's liability from 19 cargoes to 18 cargoes, a finding which favoured the appellant, and the appellant did not object to the clarification. Learned counsel submitted that the appellant cannot complain about the admission of the affidavit of Emeka Ukpabo deposed to on 9/3/2000 when its counsel acquiesced to the admission of the document from which the appellant has benefited.
The question is whether the appellant was denied fair hearing in light of the agreed procedure to be adopted by the arbitration panel. The Court of Appeal reasoned as follows:

"With respect to the reasoning of the lower court that the panel had relied on some evidence in respect of which the respondent was not given an opportunity to react. I am with respect unable to agree with the lower court. It is correct that the panel in its award relied on an affidavit said to have been deposed to by MR. EMEKA UKPABO on 9/3/2000.
But the said affidavit was only relied upon to reduce what would have otherwise been the liability of the respondent on the appellant's claim. The case of the appellant as commonly acknowledge by all the parties was that the respondent has agreed to sell to the appellant 24 consignments of VGO. However, the respondent only supplied 5 cargoes. Initially, the appellant was claiming for loss of profit on 19 undelivered cargoes. The evidence let into the proceedings through the affidavit of MR. EMEKA UKPABO showed that another one cargo had been delivered thus reducing the claim of the appellant for non-delivery of 19 cargoes to 18 cargoes."

The above is correct, but I must avert my mind to whether the appellant was denied fair hearing. Section 36 of the constitution is mandatory. It states that:
36(i) In the determination of his civil rights and obligation, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manners as to secure its independence and impartiality.

A Judge, adjudicator, or arbitrator in resolving dispute should allow both parties to be heard and should listen to the point of view or case of both sides. Audi alteram partem and memo judex in causa sua are maxims denoting basic fairness and a canon of natural justice. See Ogundoyin v. Adeyemi 2001 13 NWLR pt.730 p.403
Saleh v. Monguno 2003 1 NWLR pt. 801 p.221
It is the duty of this court to find out if the appellant was denied a fair hearing. That is to say whether he was not given an opportunity to present his case.
In Masheshe General Merchants Ltd v. Nig Steel Products Ltd 1987 1 NWLR pt.55 p. 111. This court explained the role of counsel in handling a case. Excerpts:

A counsel who has been briefed and has accepted the brief... has full control of the case. He is to conduct the case in the manner proper to him, so far as he is not in fraud of his client. He can even compromise the case. He can submit to judgment. Sometime he could filibuster if he considers it necessary for the conduct of his case……."

At the arbitral proceedings, as with all proceedings counsel has general authority to decide in his discretion on how to conduct his case, and so for a party represented by counsel to say that he was denied fair hearing he must show that he was not allowed to present his case. Since learned counsel for the appellant did not object to the admission in evidence of the affidavit deposed to by MR. EMEKA UKPABI on 9/3/2000 he cannot be heard on appeal to say that he was denied fair hearing. The learned counsel for the appellant who acquiesced to that procedure cannot on appeal be heard to complain. Issue No.2 is resolved in favour of the respondent.

ISSUE NO.3
Whether or not the lower court was right in upholding the alternative award of the arbitrators having regard to the circumstances of the case.
In arriving at the award the arbitrators said:
...In the result we award to the claimant against the respondent the sum of US$4,500,000 (four million five hundred thousand US Dollars) as damages for the undelivered cargoes of VGO or LPFO of 25,000 metric tons each.

The arbitrators continued:

"Claimant also claims in the alternative, delivery of the undelivered cargoes. In our view it is only fair that it is entitled to this.

The award was thus made in the alternative as follows:
In the alternative, we order the delivery by the respondents to the claimant a total of 18 cargoes of LFPO of 25,000 metric tons each month for every consecutive month commencing from the month of January, 2001, for the next eighteen months. It is further ordered that if the respondents should default in any months delivery, the balance of cargoes will become due and exigible in cash at the rate of US $250,000 (two hundred and fifty thousand US Dollars) each, at the prevailing price in the oil market.

The Court of Appeal set aside the award of US $4,500,000 because no evidence was led to prove it and sustained the alternative award. That court had this to say:
" ...I set aside only the award of 54,500,00.00 as damages for loss of profit and uphold the alternative award that respondent should be made to supply LPFO as stated in the award."

The Court of Appeal justified the alternative award by observing that it is to enable the respondent (now appellant) perform its contractual obligation to supply the commodity VGO or LPFO. The main claim for $4,500,000.00 failed because it is in the nature of

special damages and there was no evidence led to prove that the respondent was entitled to it. The position of the law is that when the main claim fails the court should consider the alternative claim and if found to be proved or sustainable grant it.

Learned counsel for the appellant observed that the relief granted is different from what was claimed. He argued that the arbitral proceedings ought to be set aside on ground of misconduct in that the Tribunal raised issues suo motu without affording parties opportunity to address on it and that damages awarded were not pleaded and/or proved. He submitted that where arbitrators have been guilty of misconduct the award is liable to be set aside. Reliance was placed on Taylor Woodrow (Nig) Ltd v. S.E. GMBH 993 4 NWLR pt. 286 p.127
He urged this court to resolve this issue in favour of the appellant.
Learned counsel for the respondent observed that the award was made in the alternative, in that where the first was not feasible the second would suffice. He further observed that the Court of Appeal set aside one part of the award and sustained the alternative. Concluding he contended that the award was not reviewed by the Court of Appeal rather it was sustained in part. He urged this court to resolve the issue in the negative. I must say straightaway that appeals are argued on issues formulated from grounds of Appeal. Consequently arguments must be confined to issues. Arguments not related or relevant to the issue under consideration would be discountenanced.
A look at the arguments canvassed by the appellant on this issue shows they are not related or relevant to answer the question whether the Court of Appeal was right in upholding the alternative award. Arguments smuggled in, apparently to enhance counsel submissions on an issue would equally be overlooked if it is irrelevant to the issue. Submissions of learned counsel for the appellant on this issue are in most cases not relevant.

The Court of Appeal justified the alternative award by observing that it is to enable the respondent (now appellant) perform its contractual obligation to supply the commodity, VGO or LPFO. The main claim for $4.500, 000 failed because it is in the nature of Special damages and there was no evidence led to prove that the respondent was entitled to it. It is well settled that when the main claim fails, the court should consider the alternative claim and if found to be proved, justified or sustainable, grant it. The Court of Appeal in my view was correct to sustain the alternative claim in part. Granting the alternative claim would enable the respondent (now appellant) perform its contractual obligation to supply the outstanding cargoes of LPFOs'.

ISSUES NO.4
Whether or not the cost awarded by the Lower court against the appellant was justified
Learned counsel for the appellant observed that the award of cost of N7,500 against the appellant by the Court of Appeal did not take cognizance of the fact that the appeal of the respondent at the Court of Appeal did not totally succeed and the monetary award of US$4,500,000 was set aside and the
same court did not take cognizance of the success of the cross appeal. Relying on N.B.C.I. v. Alfijir (Mining) Nig Ltd 1994 14 NWLR pt. 638 p. 176

He submitted that the award of cost was not done judicially and judiciously as the court did not take into consideration that the cross-appellant against whom the cost was awarded, succeeded partly in its cross-appeal and the respondent who was the appellant in the lower court did not totally succeed in its appeal. He urged the court to resolve this issue in favour of the appellant.
Relying on UBA Ltd v. Stalbau Gmbh 1989 3 NWLR pt.110 p.374.
Learned counsel for the respondent submitted that the award of costs can only be overturned if the appellant is able to show what principles of law that ought to be taken into consideration that were omitted and which ones that ought to be taken into consideration or what relevant fact on record was ignored.
Concluding his argument learned counsel urged this court to resolve this issue in the affirmative because the appellant has not shown what principles were wrongly omitted or taken into consideration. The award of cost is entirely at the discretion of the court, costs follow the event in Litigation. It follows that a successful party is entitled to costs unless there are special reasons why he should be deprived of his entitlement. In making an award of costs the court must act judiciously and judicially. That is to say with correct and convincing reasons.
See Anyaegbunam v. Osaka 1993 5 NWLR pt.294 p.449
Obayagbona v. Obazee 1972 5 SC p.247

This court will not interfere with the way a trial court or the Court of Appeal exercises its discretion, but would be compelled to interfere if the discretion was wrongly exercised, or the exercise was tainted with some illegality or it is in the interest of justice to do so.
See University of Lagos v. Aigoro 1985 1 NWLR pt.1 p. 143
Under this issue Learned counsel asks this court to set aside the award of costs of N7,500 made in favour of the respondents, as appellant before that court. Order 5 Rule 6 of the Court of Appeal rules applicable as at 30/5/03 when the judgment of the Court of Appeal was delivered and costs of N7,500 awarded states that:
“Where the costs of an appeal are allowed they may… be fixed by the court at the time when the judgment is given.”
Bearing in mind the fact that the respondent was successful in his appeal in the court below the award of N7,500 is reasonable. I do not find it excessive, neither is it in breach of any known rules on costs. To my mind the learned justices of the Court of Appeal exercised their discretion judicially and judiciously in awarding costs of N7,500.

ISSUES NO.5
Whether or not the lower court was not in error in considering issues which were not pleaded before the court.

Learned counsel observed that the Court of Appeal exceeded its bounds by delving into extraneous issues not placed before it. Reliance was placed on Abbas v. Solomon 2001 15 NWLR pt.735 p. 144.
He observed that the alternative award which was held valid by the Court of Appeal was an order of specific performance referred to the Arbitral Panel for determination by the parties, further observing that none of the parties before the Court of Appeal presented

any case of review of the Award of the Arbitrators. He submitted that the Court of Appeal was incompetent to go outside the scope of the issues submitted for determination before it. He urged that this issue be resolved in favour of the appellant. Learned counsel for the respondent observed that the Court of Appeal did not go outside the realm of the matter placed before it by the parties.
To my mind the alternative claim was granted because there was a contractual obligation to be fulfilled by the appellant. The circumstances of the case made it equitable and in the interest of justice and fair play that the Court of Appeal was correct to sustain the award and in doing so that court did not go outside what was before it.
I now consider the Cross-Appeal.
In an appeal the respondent is to defend the appeal but where he is not satisfied with a finding of the trial court that he considers fundamental to the case, or where he seeks a reversal of a finding he can only seek redress in the appeal court by filing and arguing a cross-appeal. The filing of a cross-appeal does not relieve the respondent of the task of defending the judgment on appeal, on all other findings therein that he is satisfied with. This cross-appeal is in respect of the aspect of the Court of Appeal judgment which set aside the award of $4,500,000 United States Dollars. In setting aside the monetary award of $4,500,000 made in favour of the respondent/cross-appellant the Court of Appeal had this to say:

"Now in this case it is apparent on the face of the record that the basis of the award of US $4,500,000 to the appellant as special damages for loss of profit was what the arbitrators considered reasonable rather than evidence in proof thereof."

The reason why the Court of Appeal set aside the monetary sum for $4,500,000 was because the sum claimed was in the nature of Special damages and no evidence was led to prove it before the award for the said sum was made by the Arbitral Panel. Learned counsel for the respondent/cross appellant, Chief M.L Ahamba, SAN observed that where a point of fact is not in issue, or contested by the adverse party, e.g. in the pleadings, no evidence is required to be led before the point of fact is accepted. Reliance was placed on Section 75 of the Evidence Act.
Akintola v. Solano 1986 2 NWLR pt.24 p. 598. He argued that since the claim for the sum of $4,500,000.00 was not challenged by the adverse party at ought to be granted. Reliance was further placed on Nwadike v Ibekwe 1987 pt.67 p. 718
Oguma v. IBWA 1988 1 NWLR pt.73 p. 658.
Contending that where there is improper traverse by the defendant, the plaintiff pleadings stands proved. He urged us to allow the cross-appeal. MR. I.L. ALABI, learned counsel for the appellant/cross-respondent observed that Special damages must be strictly proved and the failure by the defendant to challenge the item of claim for Special damages does not lessen the burden of strict proof on the plaintiff. Reference was made to Agunwa v. Owukwe 1962 2SCNLR p. 275
Odinaka v. Moghalu 1992 4 NWLR pt.233 p.1
Imana v. Robinson 1979 3-4 SC p.1
Oshinjinrin v. Elias 1970 1 ANLR p.153
He urged us to hold that the Court of Appeal was right to set aside the award of Special

damages made by the arbitral panel on the ground that there was no evidence before the panel to justify the award.
The claim for $4,500.000.00 US Dollars was for anticipated loss of profit. That is to say if the appellant/cross-respondent had in accordance with the contract of the parties delivered to the respondent/cross-appellant the outstanding cargoes, the respondent/cross-appellant would have made a profit of US $250,000.00 on each cargo. The claim of the respondent/cross-appellant was thus in the nature of Special damages for loss of profit.
Section 75 of the Evidence Act States that:
"No fact needs to be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings. Provided that the court may, in its discretion require the facts admitted to be proved otherwise then by such admissions.
The interpretation of Section 75 of the Evidence Act is that where both parties have agreed on a fact in issue, no further proof of such fact is necessary as it is no longer an issue between them. See: Din v. African Newspapers of Nig Ltd 1990 21 NSCC pt.2 p.313.
Cardoso v. Daniel 1986 2 NWLR pt. 20 p.1
The proviso gives power to the courts to require that a fact be proved even though it was admitted. The provision gives a wide discretion to Judges where facts are admitted to still insist on proof by credible and sufficient evidence.
Now, can what appears to be an admission apply to a claim for special damages, or put in another way, can a claim for special damages succeed because it is admitted. I do not think so. Special damages are never inferred from the nature of the act complained of. They do not follow in the ordinary course as is the case with General damages. They are exceptional and so must be claimed specially and proved strictly. See Incar v. Benson 1975 3SC p.117
Odulaja v. Haddad 1973 11 SC p. 351
In this case there was no evidence led in support of the award of $4,500,000.00 US Dollars. Evidence ought to be led before an award for special damages is granted. To succeed in a claim for special damages it must be claimed specially and proved strictly. The fact that it appears to be admitted does not relieve the party claiming it of the requirement of proof with compelling evidence. Special damages are exceptional in character and so there is no room for inference by the court. It is unreasonable to consider a claim for special damages reasonable in the absence of proof. A claim for special damages succeeds on compelling evidence to justify it and not on the sums claimed appearing reasonable to the court.
The Court of Appeal was correct to set aside the award for the sum of $4,500,000.00 US Dollars, since there was no evidence to support it. All the authorities relied on by learned counsel for the respondent/cross-appellant to justify the award are unhelpful as they are on preparation of pleadings, proper traverse and admitted facts. None of them say that a special damage for a stated sum is proved if admitted. That is not the position of the Law. Special damages must be strictly proved.

In the absence of a shred of evidence to support the claim for US $4,500,000.00 the Court of Appeal was correct to set it aside. The cross-appeal in view of what I have been saying also fails and it is hereby dismissed.
For the avoidance of doubt, the appeal and the cross appeal fail and they are both dismissed.
Both sides shall bear their own costs.

A. M. MUKHTAR, J.S.C.: In the Federal High Court sitting in Abuja, the appellant in this court sought the court to set aside the arbitral award by Chief Hon. Dr. Nnaemeka-Agu, Alhaji the Honourable Abdullahi Ibrahim, SAN, and Chief the Hon. Bayo Ojo, SAN, 12th December, 2000, awarded in favour of the respondent.
In the affidavit in support of the application were the following depositions:-
"28 (i) that the arbitrators found that the original contract – the Term contract had been novated and then proceeded to make award under an arbitration clause in the term contract which had ceased to exist.
(ii) that there was no agreement between the parties herein as to submit any dispute under any novated agreement to arbitration.
(iii) that the respondent at no time agreed to forgo its insistence that the term contract had expired on 7th October; 1996;
(iv) that the parties herein are companies incorporated under the laws of Nigeria and the contract was to be performed in Nigeria;
(v) that the applicant was not given fair opportunity to present its case."
The learned Federal High Court Judge in the course of setting aside the award stated thus:-
"In this case the arbitrators raised the issue of waiver suo motu. The applicant was not given the opportunity of meeting, the point of waiver. It is the law once an issue is raised suo motu the parties are to be allowed to address on it. See PROVITIONAL LIQUIDATOR, TAPP IND. VS. TAPP IND. (1995) 5 NWLR (PT. 3939. The applicant was denied fair hearing on that issue. On the damages awarded by the arbitral panel, it must be stated that special damages must be specifically pleaded and proved. See NWOBOSI VS. A.C.B. LTD (1995) 6 NWLR (PT. 404) 658."
The applicant appealed to the Court of Appeal and there was also a cross-appeal by the respondent, but dissatisfied with the decision of the Court of Appeal, the respondent has appealed to this court. Briefs of argument were exchanged by the learned counsel for the parties and adopted at the hearing of the appeal. The issues formulated for determination in the briefs of argument have been reproduced in the lead judgment.
The issue of jurisdiction is serious and fundamental, and a cardinal principle of law is that it can be raised at any stage of proceedings, right from a trial court to the level of the highest court in the land i.e. this court. See NDIC v. C.B.N 2002 7 NWLR part 766 page 272.
It is elementary law that once a court has no jurisdiction to entertain and determine a matter, whatever transpired in the process of the proceedings before that court is of no legal effect or purpose and all the trouble of hearing and determination becomes an exercise in futility and becomes a nullity. See Aremo II v. Adekanye 2004 13 NWLR part 891 page 575, Skenconsult v. Ukey 1981 SC. 6, and Araka v. Ejeagwu 2000 15 NWLR

part 692 page 684.
This position of the law as regards proceedings in regular courts do not extend to proceedings before an arbitral panel, as such proceedings are governed by the Arbitration and conciliation Act 1990.
As for the complaint on fair hearing, a careful perusal of the record of proceedings reveals that the appellants were given ample opportunity to be heard, and so the principle of audio alteram partem was met, and he was not denied fair hearing within the meaning of Section 36(1) of the Constitution Federal Republic of Nigeria.
For the foregoing reasoning and the fuller ones in the lead judgment delivered by my learned brother Rhodes-Vivour JSC, and I am in full agreement with him that the appeal and the cross-appeal lack merit and deserve to be dismissed. I also dismiss the appeals and abide by the consequential orders in the lead judgment.

WALTER SAMUEL NKANU ONNOGHEN, J.S.C.: I have had the benefit of reading in draft the lead judgment of my learned brother RHODES-VIVOUR, JSC just delivered. I agree with his reasoning and conclusions that the appeal and cross appeal have no merit and ought to be dismissed.
My learned brother has effectively demonstrated why the conclusion should be as reached by him and I cannot improve on same. I therefore order accordingly.
I abide by the consequential orders made in the said lead judgment including the order as to costs.

FRANCIS FEDODE TABAI, J.S.C.: I have read, in advance, the lead judgment prepared by my learned brother Rhodes-Vivour, JSC and I agree with his conclusion dismissing both the appeal and cross-appeal for lack of merit. My learned brother examined each of the five issues in considerable details and I do not consider it necessary to recapitulate same. I also dismiss both the appeal and cross and abide by the order on costs contained in the lead judgment.

J. A. FABIYI, J.S.C.: I have read before now the judgment just delivered by my learned brother – Rhodes-Vivour, JSC. I agree with the reasons therein contained and the conclusion that both the main appeal and the cross-appeal lack merit and should be dismissed.
An arbitral award dated 12th December, 2000 was made in favour of the respondent/cross-appellant. The appellant/cross respondent sought to set it aside at the Federal High Court, Abuja. On 31st October, 2001, Okeke, J set aside the award.
The learned trial Judge found that the arbitrators raised the issue of waiver suo motu without giving the applicant thereat the opportunity of meeting the point of waiver. The second reason given was that the arbitral panel awarded special damages without particulars and specifically pleaded and proved facts.
The respondent/cross-appellant herein appealed to the court below. Thereat, the appellant/cross respondent filed a preliminary objection and cross-appealed. The court below handed out its own judgment on 30th June, 2003 which precipitated this appeal and a cross-appeal. When the appeal was heard on 31-01-2011 each learned counsel adopted and relied on briefs of argument filed on behalf of his client.

The first issue touches the jurisdiction of the Arbitration Panel to entertain the matter placed before it. Jurisdiction is very fundamental and should be determined at the on-set in any proceedings. This is because it is the life wire of any court or Tribunal. If a court has no jurisdiction to hear and determine a case, the proceedings remain a nullity ab initio no matter how well conducted and decided. A defect in competence is not only intrinsic but extrinsic to the entire process of adjudication. See: Madukolu v. Nkemdilim (1962) 2 SCNLR 341; Oloba v. Akereja (1988) 3 NWLR (Pt. 84) 508.
The appellant's complaint in issue 1 is that since novation of the original contract had occurred, the arbitration clause therein had been rendered nugatory. As such, the Arbitration Panel lacked the competence to arbitrate between the parties.
Novation is the substitution of a new contract for an existing one between the same or different parties. It is done by mutual agreement. It is never presumed. The requisites for novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation and the validity of the new one. Blyther v. Pentagon Federal Credit Union D. C. Mun. App. 182 A 2d, 892, 894. See: Black's Law Dictionary, Sixth Edition at page 1064.
Generally, in arbitration agreements, where the arbitration clause is a part, the arbitration clause is regarded as separate. So where there is novation, purpose of contract may fail but the arbitration clause survives. See: Heyman v. Darwin Ltd. (1942) AC 356 at 373.The purpose of arbitration might have failed, but the arbitration clause which is not one of the purposes of the contract survives. The two courts below were correct when they found that modification of the terms of the obligation in the original contract with new terms on 27-9-99 did not extinguish the arbitration clause in the original contract. The complaint of the appellant in this regard is of no moment.
The above is fortified by the fact that the appellant submitted to the order for arbitration made by the trial court on 03-05-2000. It should not back out from same.
Further, the issue of jurisdiction of the Arbitral Panel was not taken timeously as dictated by the provision of section 12 (3) (a) of the Arbitration and Conciliation Act, 1990 which states as follows:-
"12(3) In any arbitral proceedings a plea that the arbitral tribunal
(a) does not have jurisdiction may be raised not later than the time of submission of the points of defence and a party is not precluded from raising such a plea by reason that he had appointed or participated in the appointment of an arbitrator."
The appellant has not adduced any reason to show that the delay in raising objection was justified. In short, the issue touching on jurisdiction is resolved against the appellant as it 'has suffered a judicial derailment'.
The next issue relates to the complaint of the appellant in respect of the document admitted for clarification by the Arbitration Tribunal. The appellant's counsel acquiesced to the admission of the document for clarification. Liability of the appellant was reduced from 19 cargoes to 18 of same. Counsel to the appellant did not object to the proceedings adopted and was not at any stage shut out. The appellant cannot, with all sincerely, complain about the admission of the affidavit of Emeka Ukpabo sworn on 9/3/2000 to which counsel had no objection and from which the appellant benefited. I cannot fathom the want of fair hearing and the premium placed on the provision of

section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria in the prevailing circumstance. This issue is also resolved against the appellant.
In respect of the cross-appeal, I should state it without equivocation that since there is no scintilla of evidence in support of the award of $4,500,000 US Dollars as special damages, same fell flat. Compelling evidence is required to back up a claim for special damages. It cannot rest on what the Arbitration Panel felt reasonable in its own whims and caprices. See: Oshinjinrin v. Elias (1970) 1 All NLR 153; Imana v. Robinson (1979) 4-4 SC 1; Odinaka v. Moghalu (1992) 4 NWLR (Pt. 233) 1. In short, the court below was right in setting aside the stated award of $4,500,000 US Dollars. There is no big deal about the complaint in the cross-appeal.
For the above reasons and the fuller ones ably adumbrated in the lead judgment, I too, feel that the main appeal as well as the cross-appeal should be dismissed for lack of merit. I order accordingly and hereby endorse the order relating to costs as contained in the lead judgment.

Appearances

Mr. I.L. Alabi For Appellant

AND

Chief M.I. Ahamba SAN with him James Ugbolu For Respondent