**METAL CONSTRUCTION (W.A) LIMITED AND OTHERS**

**V.**

**MRS. D.A. MIGLIORE AND ANOTHER**

IN THE SUPREME COURT OF NIGERIA

THE 28TH DAY OF SEPTEMBER, 1979

SC. 35/1979

**LEX (1979) - SC. 35/1979**

OTHER CITATIONS

2PLR/1979/16 (SC)

(1979) 6-9 S.C. (REPRINT) 118

**BEFORE THEIR LORDSHIPS**

GEORGE SODEINDE SOWEMIMO, JSC

AYO GABRIEL IRIKEFE, JSC

CHUKWUNWEIKE IDIGBE, JSC

KAYODE ESO, JSC

ANTHONY NNAEMEZIE ANIAGOLU, JSC

**BETWEEN**

1. METAL CONSTRUCTION (W.A) LTD.

2. TAIWO OKEOWO

3. OLATUNDE AYOOLA - Appellant(s)

**AND**

1. MRS. D.A. MIGLIORE

2. AIRALDO MANGILI - Respondent(s)

**REPRESENTATION**

F.R.A. WILLIAMS, SAN For Appellant

AND

KEHINDE SOFOLA, SAN, (with him, Kayode Sofola) For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

ESTATE ADMINISTRATION/PLANNING:- Rights of Administrators of a deceased person’s estate to control of his incorporeal assets – Company Shares – Right to new Certificate and Rectification of Company’s Membership Register – Duty of Company to ensure same without delay

COMPANY LAW:- Shares of a company – Transfer of majority shares of company to Administrators of the Estate of its deceased owners – How effected – Award of new Certificate and Rectification of Company Register – Duty of Company thereto – Where refused or unduly delayed – Right of Administrators to enforce same

CAPITAL MARKET LAW:- Shares of a company – Transfer of same to Estate of deceased owner – Applicable rules – Rectification of Register – Duty of Company thereto

CHILDREN AND WOMEN LAW:- *Widow/Children (Minors) and Estate Administration –* Right of widow and children to inherit estate of deceased father – Rectification of the Register of the company as to award them majority share holding of a company owned by deceased spouse/father-  *Widow/Children (Minors)and Justice Administration –* Attempt to use technical rules of court and legislation to defeat the ends of justice concerning the rights of a widow and her children– How treated

**PRACTICE AND PROCEDURE ISSUES**

COURT - POWER OF COURT**:** Power of the Court of Appeal to amend record of the Trial Court so as to comply with the facts proved before that court and decision given by it – Justification

JUDGMENT AND ORDER**:-** Cases tried on pleadings where issues joined appear clearly thereon – Whether judgments of the courts are generally based on issues so joined

**MAIN JUDGMENT**

G. S. SOWEMIMO, J.S.C. (DELIVERING THE LEADING JUDGMENT):

On the 25th day of June, 1979 we dismissed this appeal and ordered -

"1.     That the Register of Shares showing the deceased member, Mr. Sergio Migliore as owner of 107500 shares of N2.00 each should be rectified within 7 days of today and the names of the respondents herein be substituted, for that of the deceased, as current owners of the said 107500 shares;

2.       That within two days of the said rectification of the Register aforesaid that the appellants herein (and the 1st appellant who has never objected to the endorsement in the said Register of the names of the respondents as owners of the shares aforesaid in particular) should deliver to the respondents herein a new shares certificate for the number of shares aforesaid, as Administrators of the estates of Sergio Migliore (deceased)."

The appeal came as a further appeal, from the Federal Court of Appeal, Lagos, arising from a judgment delivered by the Federal Revenue Court, Lagos, in which the former court affirmed the judgment of the lower court but ordered rectification of the Register before the delivery of the new shares certificates to the administrators of the estates of the deceased member.

Before us on appeal, Chief Rotimi Williams appeared for all the appellants, although we drew his attention to the fact that the 1st appellant had always had a separate legal representative, and from the nature of what was contained in the record, the 1st appellant did not oppose the application of the respondents in the Federal Revenue Court; it appeared to us surprisingly that he could have been described as an appellant before us, but, nevertheless, we allowed learned counsel to argue the case since he said he represented all the appellants. He intimated us that he did not intend to put forward any arguments on the grounds of appeal relating to the findings of fact by the Federal Revenue Court, and they were abandoned. He based his submission on law. The grounds of  law which he argued most extensively read as follows:-

"The learned Judges of the Federal Court of Appeal erred in law and  did grave injustice to the appellants by deciding the appeal upon grounds not relied upon by the Judge in his judgment and by granting a relief not prayed for either in the court below or in the Court of Appeal particularly when-

(a) there was no application in the court below or before the Federal Court of Appeal to amend the claim on the Originating Summons;

(b) no notice was served on the appellants that the respondents will or intend to contend that the decision of the Federal Revenue Court should be varied or that it should be affirmed on grounds other than those relied on by that court;

(c) no arguments were invited from counsel and no opportunity was given to prepare arguments on whether or not

(i)   it is appropriate for the Court of Appeal to grant a relief other than that claimed by the respondents in their Originating Summons; and

(ii)   whether on the facts and circumstances herein it was appropriate to grant such other relief as aforesaid."

The facts of this case are not in dispute. The originating summons which reads:-

"Let the above-named METAL CONSTRUCTION (WEST AFRICA) LIMITED whose registered office is situate at 13, Burma Road, Apapa and TAIWO OKEOWO, of 20A, Ajose Street, Maryland, Ikeja, Director of the respondent Company, Metal Construction (West Africa) Limited and OLATUNDE AYOOLA of Plot 3-6, Alhaji Adejumo Avenue, Ilupeju Industrial Estate, Ikeja, an officer of the respondent Company, Metal Construction (West Africa) Limited, attend one of the Judges sitting at the Federal Revenue Court Lagos on Friday the 21st day of March 1977 at the hour of nine o'clock in the forenoon on the hearing of an application by the above-named applicants for:

(a)     An order pursuant to Section 82 of the above-mentioned Decree that the respondent Company, Metal Construction (West Africa) Limited and the Directors and officers thereof do forthwith deliver to the Applications a Certificate for 107500 shares of N2.00 each in the capital of the respondent Company, Metal Construction (West Africa) Limited in accordance with the Companies Decree 1968 and the Articles of Association of the said company;

(b)     An order restraining the respondents by themselves, their servants, agents or proxies from amending the Articles of Association of the company pending the hearing and determination of this application; and

(c)     That the respondents do pay the cost of and incidental to this application."

We wish to refer to paragraphs of the 2nd respondent's affidavit in support of the originating summons deposing to facts which the learned Judge in the Federal Revenue Court ultimately accepted; these are:-"-

5. That there were subsequent increase of the share capital of the company between 1965 and 1966 and by 7th March, 1974, the share capital was N400,000 and the said Mr. Sergio Migliore was allotted 187,500 shares of N2.00 each while Mrs. D.A. Migliore had 12,500 shares also of N2.00 each.

6. That in 1974, in order to comply with the Nigerian Enterprises Promotion Decree 1972, the 2nd respondent, Mr. Taiwo Okeowo, was invited to take up 40% shares in the said company which he did. As a result, Mr. Sergio Migliore had 53.75% shares, Mrs. D.A.Migliore had 6.25% shares while Mr.Taiwo Okeowo had 40% shares in the company.

7. That on 16th October, 1974, Mr. Sergio Migliore died in Italy after a protracted illness and was survived by his widow, the 1st applicant, and two children who are minors.

8. That on 21st July, 1975, Letters of Administration of the estate of the said Mr. Sergio Migliore (deceased) were granted to the Applicants and on 10th October, 1976, the said Letters of Administration were modified to reflect the share holdings of the said Mr. Sergio Migliore, deceased. Attached herewith and marked 'AM2' is a photostat copy of the Letters of Administration.

9. That towards the end of October, 1976, I lodged with the Secretary, the 3rd respondent, Letters of Administration granted in favour of the Applicants together with the share certificate and the sum of N10.00 and requested delivery of a new certificate in favour of the Applicants by virtue of the grant in respect of 107500 shares of the deceased, the late Mr. Sergio Migliore but the company had refused to do so.

10. That I have no knowledge of the reasons which prompted the company to refuse...

Chief Rotimi Williams' argument was that in the Originating Summons the section under which relief was claimed was in pursuance of Section 82 of the Companies Decree 1968. This section deals specifically with two types of transactions:-

(i)   Transfers between two parties witnessed by an instrument;

(ii) Allotment of shares to applicants.

In the Federal Revenue Court without any reference to the provisions of this law, the learned trial Judge after considering the affidavits, counter affidavits and the oral evidence before him, gave the following judgment:-

"I do order that the respondent company and the directors and officers thereof do deliver to the applicants a share certificate for 107500 shares of N2.00 each in the capital of the respondent company." (All underlinings ours)

On appeal to the Federal Court of Appeal the court held:-

"The evidence on record does not show that the appellants objected to the order for certificate because there was no 'transfer instrument'. That was not the cast at the trial. Article 27 speaks of any person entitled to a share in consequence of death of a member or otherwise than by transfer, may subject to the regulations... be registered as a member upon production of the share certificate and such evidence of title as may properly be required by the Board, or may, subject to the said regulations, instead of being registered himself transfer such shares...

There is nothing in the proceedings to show the administrators asked anywhere that the shares should be transferred, apart from reference to Section 82 in the summons. The request was that the administrators be registered as members as provided in Article 27. Article 15 provides that every registered member of the company is entitled to one share certificate, and this is what the administrators asked for after they would have been duly registered as members.

The question therefore is whether the court has power to make the order under the Articles of Association of the company and the Companies Decree 1968. We have already expressed the view that on the evidence the trial court could not make the order under Section 82 of the Decree for the reasons already given.

The next question is whether the trial court could have made the order on the evidence before it having regard to the issue contested at the trial, and whether in the circumstances it is proper and just to invoke the provisions of Section 16 of the Federal Court of Appeal Decree 1976.

There is no doubt that the order which the administrators sought comes within Section 115 of the Companies Decree 1968 and Article 27 of the company. Section 115 provides-

'(1) If-

(a) the name of any person is without sufficient cause entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member the person aggrieved ... may apply to the court for rectification of the register.'

There is no dispute that Sergio Migliore who held 107500 shares is dead, and that his interest now devolves on the administrators of his estate. By his death, Sergio Migliore ceased to be a member of the company and the administrators are entitled to ask and have requested to be registered in his place as provided in Article 27. The trial court found 'that they have presented both the letters of administration and the share certificate together with the required fees to the Board.' There is no appeal against this finding. That was the only matter in issue at the trial court. As already observed Article 15 provides every member shall be entitled to one certificate."

The main compliant of Chief Williams before the Federal Court of Appeal and before us here was that if the respondents wanted to support the judgment of the Federal Revenue Court that a new shares certificate for 107,500 shares of N2.00 each be delivered to them and the Register of shares rectified, then reasons other than that given by the trial Judge should be given and that the appellants should be notified under the rules of both the Supreme Court and the Federal Court of Appeal. That was not done.

Further, he contended that if the Court of Appeal intended to exercise its powers under Section 16 of the Federal Court of Appeal Decree No. 43 of 1976, by substituting Section 115 for Section 82 of the Companies Decree 1968, then in such a case, arguments should be received from either side; because it was fundamental that when a party claims relief for "transfer", it will be wrong, without hearing the other side to grant him relief for rectification of the shares Register, which he did not claim.

Generally speaking, in cases tried on pleadings where issues joined appear clearly thereon, judgments of the courts are based on issues so joined. We find in this case that although the claim as expressed in the originating summons is one for delivery of shares certificate, pursuant to Section 82 of the Companies Decree, to the Administrators it was clear from the affidavits employed by parties in support of their respective case that, in substance, what was in issue was whether or not the Register of Shares should be rectified. That was clearly the case before the Federal Revenue Court. On this issue the Federal Court of Appeal after citing the cases of *Scott v. Frank F. Scott (London) Ltd. (1940) 1 Ch 794 at 805; In Re - Key & Son Ltd. (1920) 1 Ch 467; Macdonald v. Empire Garage TLR Oct. 8th 1975; Shaw v. Shaw (1954) 2 QB 429 at 441*; made the following observations:

"We are satisfied that at the trial, the relief which the Administrators sought was clear to all the parties and evidence was led on the issue. The issue was that the Administrators were entitled to be registered as members in respect of the 107500 shares held by the deceased and by virtue of the registration entitled to a certificate of those shares. The trial court had the power to make the order by virtue of Section 115 and not Section 82...and Article 27 of the company (i.e. Articles of Association of the company) copiously quoted by the 3rd appellant in his counter-affidavit supports the claim..." (Underlining and brackets ours).

We wish only to make a brief reference to Section 16 of the Federal Court of Appeal Decree No.43 of 1976 under which that court acted. The provisions of that section was cited in the judgment of the Federal Court of Appeal in the instant case and observations have been made on the technicality of the objection raised before them. After a careful study of the proceedings in the Federal Revenue Court, we not only share the view expressed in the underlined passages of the quotation above but are satisfied that the parties did not put any other case before the Federal Revenue Court. The question which arises in this appeal, therefore, is whether the Federal Court of Appeal was wrong in making the order it did without insisting on a re-trial of the case in the lower court on an amended claim.  
   

A Court of Appeal has an inherent power to amend the record of the trial court so as to comply with the facts proved before that court and decision given by it. This is a very necessary power which the Appeal Court always exercise if and when necessary to prevent the occurrence of substantial injustice; whether the required amendment be formal (as in Divisional Chief Gbogbolulu of Vakpo v. Head Chief Hodo (1941) 7 WACA 164) or quasi-substantial (as in Clack v. Wood (1881-2) 9 QBD 276). In Gbogbolulu, a writ of summons in respect of an action in the Magistrate's court did not show that the proceedings related to the parties in their representative capacities but the action was clearly fought on that basis, the West African Court of Appeal allowed an amendment (even at that stage of the proceedings) to avoid the occurrence of substantial injustice - see 7 WACA at 165.

In Clack v. Wood (supra), the jury in the trial court had found certain issues in favour of the plaintiff but not on all the issues; the plaintiff ought therefore not to succeed. The verdict therefore should have been in favour of the defendant. On appeal by the plaintiff the Court of Appeal amended the record by entering verdict for the plaintiff ONLY on the specific issues the jury had found in his favour but affirmed the judgment i.e. gave judgment for the defendant. Jessel, M.R. made the following observation:

"... The proper way of dealing with the case at the time would have been to enter a verdict for the plaintiff on the two issues respecting the fraudulent representations, and then it would have been competent for the Judge to deal with the judgment.

"The question remains what ought this court to do now? The orders applicable to the case are Order LVIII, rule 5, and Order LIX, rule 2. If the application had been made at the time to the Judge, there is no doubt that he could have amended the record under Order LIX, rule 2 and directed the findings of the jury to be altered. Then Order LVIII rule 5 says that 'the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the court of first instance' and again, that 'the Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further order as the case may require.' Therefore it is plain that we can order the record of the trial to be amended..." (Underlining supplied).

It seems to us that the powers of the Federal Court of Appeal under Section 16 of Decree No.43 of 1976 and of this court under Section 22 of the Supreme Court Act No.12 of 1976 are wide enough as to allow the type of measure taken by the Court of Appeal in Clack v. Wood (supra) pursuant to Order LVIII mentioned in that case; and this is quite apart from the inherent powers of this court to prevent the occurrence of any substantial injustice. The case having been fought substantially in the Federal Revenue Court on the basis of the right to have an alteration of the Register of Shares, there could have been no injustice to the appellants if an amendment had been carried out in that court; at best they could have been entitled to their costs. We are satisfied that such an amendment is desirable even at this stage, in all the circumstances of this appeal. It was for this reason that we allowed the amendment and made the orders already referred to.

Accordingly, we dismissed the appeal and having made the order stated earlier on, awarded costs of N375.00 to the respondents.