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Can an Allotment of Shares Pursuant to a Defective Application Form be Invalidated?

A Review of *Ogada Industries Ltd v. Union Homes Savings and Loans Plc*

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Can an allotment of shares be invalidated for reason of an improper application form?

This was an important issue which the Court of Appeal had to resolve in the recent case of *Ogada Industries Ltd v Union Homes Savings and Loans Plc & 2 Ors.* (2019) LPELR-48334(CA)

Background Facts

In 2007, Union Homes Savings and Loans Ltd (“UHSL”) floated a rights issue, and an existing shareholder, Ogada Industries Ltd (“Ogada”), applied for 11,277,420 units of shares. It attached an unendorsed third-party cheque to its application form. However, the Central Bank of Nigeria (“CBN”) rejected Ogada’s application because “there was no evidence of payment for the value of the shares to be allotted”. Consequently, the Registrar sought to refund the application money, but Ogada refused and demanded for the market value of the shares, dividends, and bonus.

Aggrieved, Ogada filed a petition against UHSL, the Issuing House, and the Registrars at the Securities and Exchange Commission (“SEC”),

claiming damages for losses allegedly suffered from breach of contract and negligence. UHSL confirmed receipt of Ogada’s application form and payment for the shares but was unable to satisfactorily explain why the payment instrument was not sent to the Issuing House for transmission to the CBN. Eventually, the SEC ruled in favour of Ogada but denied the claim for damages arising out of UHSL’s alleged breach of contract. Dissatisfied, Ogada appealed to the Investments and Securities Tribunal (“IST”) seeking damages for breach of contract and negligence.

At the IST proceedings, UHSL sought to introduce fresh evidence to show that the third-party cheque which the Applicant tendered in payment for the shares was not endorsed, and that the application form for the subject shares was improperly completed. The application was dismissed on the ground that the fresh evidence was fraught with uncertainties. More importantly, in interpreting Rule 61(2) of the Securities and Exchange Commission Rules and Regulations (SECRR) 2006, which listed the improper completion of application forms (amongst others) as a valid ground for rejecting an application for shares; the IST held that the improper completion of the form does not operate to vitiate the transaction, but merely rendered the application voidable.

The IST found Ogada entitled to the claim for the market value of the shares but refused the claim for damages. The Claimant further appealed to the Court of Appeal, and UHSL cross-appealed.

The Appeal

At the Court of Appeal, the principal issue between the parties revolved around the correct interpretation of Rule 61(2) of the SECRR 2006, which voids an improperly completed application form, and lists such circumstance as a valid ground for rejecting an application for shares.

The Cross-Appellants (UHSL, the Issuing House, and the Registrar) argued that the IST wrongly exercised its discretion in dismissing the Cross-Appellants' application for leave to adduce fresh evidence and urged the Court to vacate the judgement of the IST. It was further argued that the IST erroneously applied the doctrine of estoppel to a void contract, when it held that the Cross-Appellants had, by accepting the defective application form and instrument of payment, waived their right to rescind the contract for allotment of shares to Ogada.

Conversely, Ogada (Appellant/Cross-Respondent) argued that UHSL had, by its acceptance of the defective form, admitted that the application forms and the instrument of payment were valid. It also argued that UHSL was negligent in failing to transmit the payment instrument, as the CBN's reason for rejecting the application for UHSL's shares was "evidence of payment not attached".

In its judgment, the Court of Appeal permitted the fresh evidence sought to be tendered by the Cross-Appellants as this was a material issue that could have affected the outcome of the IST proceedings. With respect to the issue of the alleged nullity of the application vis-à-vis the acceptance of the form and cheque by the 1st Cross-Appellant, the court held that the provision of the SECRR 2006 cannot be waived because its provisions carry the weight of its parent legislation, the Investment and Securities Act. Accordingly, the application was properly rejected having been invalidated by the application of Rule 61(2) of SECRR 2006. The court further held that the Appellant was not entitled to any monetary compensation because the award of damages was predicated on validity of the application and instruments of payment.

Comment

This case brings to fore a critical need to exercise care and diligence in the administrative process of buying shares. Applicants should note that even though a defective application form/payment instrument is accepted without reservation, any allotment of shares thereto may be invalidated by the mandatory application of Rule 61(2) of SECRR 2006. Whilst different problems may arise where the completion of the form and payment is electronic, the same underlying principle remains.



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