

SUPREME COURT OF NIGERIA

16TH JULY, 1993. SC.310/1989

**CORAM:- M. L. UWAIS, A. G. KARIBI-WHYTE,
O. OLATAWURA, U. OMO, I. L. KUTIGI, M. E. OGUNDARE,
E. O. OGWUEGBU, JJSC**

1. ALEX OLADELE ELUFIOYE
2. SEGUN EWEDEMI
3. ARIWODO OGECHI
4. FELIX OGBANDU
5. FRIDAY OSUYA APPELLANTS
6. SEGUN ADESANYA
7. AKIN OKE
8. K. ARIYO.
9. BASSEY E. BASSEY
10. GANIYU O. BELLO

AND

1. IBRAHIM HALILU
2. DAYO ADEMOYERO
3. JOHN EGBUCHIRI
4. DANIEL NWANYANWU
5. WAHAB O. ONAKOYA
6. SAMUEL OBI
7. RAPHAEL O. AKINNIRANYE
8. PETER IDAGHARA AGONO
9. LAMIDI OLANREWAJU RESPONDENTS
10. RALPH A. OBIECHE
11. KEHINDE BELLO
12. ADEAGBO A. TAIWO
13. UNION BANK OF NIGERIA LTD.
14. BANK OF CREDIT & COMMERCE
INTERNATIONAL LIMITED
15. ALLIED BANK OF NIGERIA LIMITED
16. AFRICAN CONTINENTAL BANK LTD.
17. FIRST BANK OF NIGERIA LTD.
18. NATIONAL UNION OF BANKS,
INSURANCE AND FINANCIAL
INSTITUTIONS EMPLOYEES

CIVIL CAUSES - Trade Union - alleged breach of provisions of a Trade Union's constitution by officers in overstaying their term of office without organising elections - right conferred on individual members of the Union to initiate action at their own expense - whether the common law rule in *Foss v. Harbottle* is applicable - where Plaintiff's complaints is against ultra vires act by the company - whether the first exception to the common law rule arises

CONSTITUTIONAL RIGHTS - Where the civil rights and obligations of the Plaintiffs are affected - powers conferred on the court by s. 6(6) (b) of the 1979 Constitution - whether detrimentally affected by the rule in *Foss v. Harbottle* - as to deny locus standi to plaintiffs

COMMON LAW - The rule in *Foss v. Harbottle* - when the second exception to the rule - is held not to arise

COURTS - Preliminary objection - where trial Judge goes far beyond what is required in reaching a conclusion at the preliminary stage - that ought only to be reached at the final stage - is it proper for the same Judge to continue hearing of the substantive action

JUDICIAL PRECEDENTS - Earlier decision of the Supreme Court in *Abubakri v. Smith* in *Suo Motu* issue raised by the Supreme Court - as to what effect s. 6 (6) (b) of the 1979 Constitution will have on the said decision

LEGISLATION - Trade Union Act 1973 - provision authorising any five members to take legal action - whether applicable in this case - to grant locus standi to plaintiffs

LOCUS STANDI - Trade Union - action against strong prima facie breaches of the Union's Constitution - by individual members of the Union - whether the Plaintiffs have locus standi

FACTS

The Plaintiffs are individual members of the National Union of Banks, Insurance, Financial Institutions Employees. The first to eleventh Defendants are elected and part-time officers of the Union which

is the 18th Defendant. The 12th Defendant, the Acting General Secretary of the Union is its full-time national officer, whilst the 13th - 17th Defendants are banks where the union has or is believed to have accounts. Before the Lagos High Court, by way of originating summons, Plaintiffs challenged various acts of the Defendants that were alleged to be contrary to the Union's Constitution. They complained that Defendants who have over-stayed their constitutional term in office, refused to call a National Delegates Conference for purposes of conducting new elections. Plaintiffs' motion *ex parte* to restrain the Defendants from parading themselves as officers of the Union and operating the Unions account was granted. In a motion filed by some of the Defendants to set aside the interim injunction, the trial Judge without concluding a hearing of the Plaintiffs' submissions, set aside the interim order earlier granted by him, on the view that the justice of the case requires an early trial rather than listening to the motions. Plaintiffs appeal against this ruling was granted by the Court of Appeal on the ground that their fundamental constitutional right to fair hearing had been breached. The aggrieved Defendant's appeal against this decision is the first appeal before the Supreme Court.

Although pleadings had been exchanged in respect of the substantive suit, the Defendants filed a preliminary objection contesting that the court has no jurisdiction and the Plaintiffs have no *locus standi* to bring the action. Both the trial court and Court of Appeal dismissed the said preliminary objection. Dissatisfied Defendants have further appealed to the Supreme Court, and this is the second appeal. The apex Court had to determine *inter-alia*, whether the common law rule enunciated in *Foss v. Harbottle* is applicable to this suit and whether the plaintiffs have the *Locus Standi* to bring the action. The rule in *Foss v. Harbottle* which has some exceptions is that the court will not interfere at the suit of a minority of members of a company against an irregularity in the Company's internal affairs which is capable of confirmation by a simple majority of members. The Supreme Court *suo motu* raised an issue as to the position of its 1973 decision in *Abubakri v. Smith* in the light of s. 6 (6) (b) of the 1979 Constitution.

HELD (dismissing the appeal by a majority decision, with Ogundare JSC dissenting in part)

1. The special right conferred on the Plaintiffs as individual members of the Union by Rule 7 (v) of their constitution, to initiate action at their own expense whenever any breach of their constitution arises, is a special right given to members of a Trade Union which said right was neither contemplated nor considered in the non-statutory common law rule as enunciated in the case of *Foss v. Harbottle*. (p. 165 L7)

2. The rule in *Foss v. Harbottle* and the right conferred on the Plaintiffs by Rule 7 (v) of their constitution are complimentary rather than conflicting. This is because Plaintiffs' right under Rule 7 (v) arises only in case of a breach of the Union's constitution, coupled with a readiness on the individual's part to foot the litigation bill. As the rule in *Foss v. Harbottle* will still apply in other cases unheeded, the instant case is an exception to that general common law rule. (p. 165 L19)

3. Action by individual members to restrain the company from doing an illegal or ultra vires act being the first exception to the rule in *Foss v. Harbottle*, the Plaintiffs' complaints are against strong prima facie breaches of the Union's constitution which unless legally justified constitute ultra vires acts. (p. 165 L27)

4. In order to determine whether the acts the Plaintiffs are complaining against are intra vires, the Court has to hear the parties and locus standi, therefore, has to be granted the Plaintiffs. (p. 165 L36)

5. The Plaintiffs' submission that the acts complained against fall under the second exception to the rule in *Foss v. Harbottle* being acts which cannot be ratified by only a simple majority of the Union is not acceptable since the type of voting and the need for prior registration of the decision with the Registrar of Trade Unions cannot make the decision of a majority that of a minority. (p. 165 L38)

6. Where the civil rights and obligations of the Plaintiffs as individuals are affected as in this case, the courts in the exercise of their judicial powers under section 6 (6) (b) of the 1979 Constitution can look

into such rights and obligations thereby granting locus standi to the Plaintiffs. Such guaranteed constitutional right cannot be detrimentally affected by the common law rule in Foss v. Harbottle. (p.167 L12)

5 7. The decision of the Supreme Court in Abubakri v. Smith has not been wholly affected by the operation of s. 6 (6) (b) of the 1979 constitution. The finding in that case that the rule in Foss v. Harbottle is binding on Trade Unions is still good law. It is only where the right and obligations of an individual are in issue that there may be a conflict since locus standi is available to the individual. (p. 167 L18)

8. By virtue of the provisions of section 16 of the Trade Union Act, 1973, which allows any five or more members of the Union to apply 15 for an injunction restraining unlawful or unauthorised application of the funds of a trade Union, the Plaintiffs who are ten members have the necessary locus standi and their action could not have been struck out. (p. 167 L33)

20 9. Although the learned trial Judge could not have intended to decide the most crucial issue in the substantive case when dealing with the motion, he went far beyond what was required in disposing of a preliminary objection. For the trial Judge to have come to the conclusion that there was a blatant breach of the Union's constitution at 25 this preliminary stage, it will be difficult for him not to come to a final conclusion that there was a breach. As such hearing of the substantive case is ordered to proceed before another Judge de novo. (p. 168 E39)

30 PER OGUNDARE JSC (in his dissenting opinion) *"It would, therefore, appear that the Plaintiffs have not even exhausted the rights given them under the Union's Constitution before coming to seek relief in court. (p. L). In my respectful view, Rule 7 (v) of the constitution of 18th defendant appellant Union cannot validly confer locus standi on its members where a rule of law does not so confer the status....."* (p. 192 L27)

REPRESENTATION

Chief F.R.A. Williams, SAN (with him, T.E. Williams and J. J. Nweze),
for the Appellants

A.M.O. Obe (Mrs) (with her, O. Ochokwu and I. A. Ladejobi (Miss))
B.E. Mbagwu (with him, Y. Madariola (Miss)), for the Respondents

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CASES REFERRED TO

1. Foss v. Harbottle (1843) 2 Ha. 461; 67 E.R 189
2. Heyting v. Dupont (1963) 1 WLR 1192
3. Abubakri & ors v. Smith & ors (1973) N.S.C.C 451
4. Oduduru v. National Union of Hotel and Personnel Services
Workers App. No. FCA/L/226/83 (Unreported)
5. Nigerian Civil Service Union v. Essien (1985) 3 N.W.L.R. 306
6. Agbonikhena v. Egbe (1987) 2 N.W.L.R. 494
7. Mac Dougall v. Gardiner (1875) 1 CR. 13
8. Burland v. Earle (1902) A.C 83
9. Cotter v. National Union of Seamen (1929) 2 CH. 58
10. Edwards v. Hailiwell (1950) 2 A.E. 1064
11. Re Hookers settlement (1955) CR. 55

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STATUTES & RULES

1. Trade Union Act 1973 No. 31 s. 16 (1)
2. Constitution of Nigeria 1979 ss. 6 (6) (b), 236 (1) 13.
3. High Court Rules order 39 Rule 2
4. Trade Union's Act Cap. 437 Laws of Nigeria 1990 s. 18(1)

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BOOK REFERRED TO

Chitty on Contract (26th Edition) 448

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LEAD JUDGMENT BY OMO JSC

The plaintiffs in this case are members of the National Union of Banks, Insurance, Financial Institutions Employees, which Union is the 18th defendant. The 1st to 11th defendants were elected as part-time officers of the 18th defendant (hereinafter referred as "the Union" simpliciter), at its last National Delegates Conference held between 26th and 28th November 1985. The 12th defendant is a full-time national officer of the Union, its substantive Deputy General Secretary, and its Acting General Secretary with effect from 15/9/87 when

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the substantive holder of that office retired. The 13th to 17th defendants are Banks where the union has or is believed to have accounts.

The plaintiffs, on 1st December 1988, instituted by way of originating summons an action in the High Court of Lagos State Claiming the following reliefs:-

5 (i) a determination of the question whether the respective terms of office of each of the 1st-11th defendants expired on 28/11/88 having regard to the provisions of Rule 10(iii) of the Constitution of the 18th Defendant Union (hereinafter referred to as "the Union");

10 (ii) a determination whether the declaration made by the 151 defendant on 19/11/88 to the effect that the National Delegates Conference of the Union would not be held in November 1989 (sic) but at some other time in or before November 1988 (sic) is inconsistent with the Constitution of the Union and therefore null and void;

15 (iii) a declaration that only a National Delegates Conference can alter the provisions of the Constitution of the Union and that the purported decision of the National Executive Council (NEC) that no National Delegates Conference of the 18th Defendant Union be held in November 1988 is a violation of the Constitution of the Union and
20 that the same is null and void and of no effect;

(iv) a declaration that the respective terms of office of each of the 1st-11th defendants ceased at the expiration of three years from the 28th of November 1985;

25 (v) injunction to restrain each of the 1st-11th defendant from (a) performing the functions of his office (b) parading himself as an officer of the Union and (c) operating any Bank accounts of the Union or disposing, receiving, negotiating or dealing with any assets of the Union;

30 (vi) mandatory injunction directing the 12th defendant to summon a National Delegates' Conference:

an injunction restraining the bankers of the Union from honouring any cheques or payment orders etc until a proper National Delegates Conference shall have been held.

35 By a motion on notice also dated 1st December 1988 the plaintiffs sought:-

"(i) An Injunction restraining the 1st-11th defendants and each of them from:-

(a) performing any of the functions of the respective office to

which he was elected in November 1985;

(b) parading himself as an officer of the union or as a member of the National Executive Council thereof;

(c) operating any of the Bank Accounts of the Union in any Bank or from disposing of, receiving, negotiating or in any way dealing with any of the assets of the Union pending the final determination of this action; 5

(ii) An Injunction restraining the 13th, 14th, 15th, 16th and 17th defendants from honouring any cheques or orders for payment of money or for the disposal of or other dealing in any security or assets of the 18th defendant union except and until a proper National Delegates Conference shall have been held and fresh officers of the 18th Defendant Union shall have been elected for that purpose by the 18th defendant union pending the final determination of this action; 10 15

(iii) Such further or other Order or Orders as this Honourable Court may deem fit to make in the circumstances."

At the same time, and on the same day, the plaintiffs also filed an ex parte motion seeking the same reliefs as in the motion on notice pending the determination of the motion on notice filed herein or until further order. 20

On the 5th of December, 1988 the plaintiffs' motion ex parte was heard by Adeniji J. who granted the prayers sought and made the necessary orders pursuant thereto, "until further order", with a return date of 12/12/88 being fixed. But on the 8th December 1988 an application was filed on behalf of the 1st, 3rd, 4th, 6th, 8th, 9th 25 defendants alone or alternatively with 18th defendant for an order:-

(i) setting aside the ex parte order made by Adeniji, J. on 5/12/88 on the application of the plaintiffs; and 30

(ii) such further or other orders as the court may deem fit.

On the 13th December the court decided to take the two applications, calling on counsel for the 1st, 3rd and other defendants who filed the setting aside application to move his motion. Counsel for the 2nd, 7th, 10th, 11th, 12th and 18th defendants next spoke, 35 opposing the application. Whilst counsel for the plaintiffs was addressing the court in opposition to the application for setting aside, the two motions were adjourned to 15/12/88. On that day, as the plaintiffs' counsel rose to resume his arguments, he was interrupted

by the Judge, who proceeded to deliver a prepared ruling, in which he took the view that what the justice of the case required in the circumstances is an early trial, and not arguments and/or ruling on the two motions. He then fixed a date for hearing and at the end of his ruling the order at interim injunction made by him on the 5th December, 1988 was set aside.

Dissatisfied by the setting aside of the interim injunction and generally, the ruling of the High Court, the plaintiffs appealed against same to the Court of Appeal. On the 28th November 1989, the Court of Appeal delivered its judgment on that appeal which it allowed, on the ground that the plaintiffs' fundamental constitutional right to fair hearing had been breached. It also proceeded to set aside the order of Adeniji J. discharging the ex parte order of interim injunction which he made against the defendants. The 1st, 3rd, 4th, 5th, 6th, 8th, 9th and 18th defendants were aggrieved by the judgment of the Court of Appeal, and have therefore appealed against same to this court by notice of appeal dated 4/12/89. This is the first appeal between the parties in this case.

With regard to the substantive action between the parties in the High Court, pleadings were duly filed and exchanged. But before hearing could proceed, counsel for the 1st, 3rd, 4th, 6th, 8th, 9th and 18th defendants filed a notice in which he set out the following preliminary objections, namely, that:

"(i) The court has no jurisdiction to entertain the action because, at common law an action of this nature does not lie at the instance of individual members of the 18th defendant union and the right of action conferred by Section 16(1) of the Trade Union Act 1973 No.31 is exercisable only at the instance of 'any five or more members of the union'. Seven of the plaintiffs, to wit - the 2nd, 3rd, 4th, 6th, 7th, 9th and 10th plaintiffs have not subscribed to the funds of the 18th defendant union as prescribed by law and by Rule 4(1) of the Constitution of the union.

(ii) In so far as the claims (or some of them) constitute legal proceedings instituted for the purpose of directly enforcing:

(a) an agreement for the application of the funds of a trade union; and

(b) an agreement binding on the National Executive Council in its relationship with the union.

the court has no jurisdiction to entertain such claims.

(iii) Even if (which is not conceded) the plaintiffs are qualified to sue under Section 16(1) of the Trade Union Act, 1973, they can only sue as such individuals in respect of a claim for an injunction to restrain any unauthorised or unlawful application of the funds of a trade union. Accordingly the plaintiffs have no locus standi to claim any of the other reliefs contained in the originating summons. In other words, it is not competent for the plaintiffs herein to invoke the jurisdiction of the court in this action."

On 7/1/89, Segun, J., after hearing counsel on this objection, stated in his ruling that he did not see any merit in the preliminary objection filed and argued, and therefore dismissed same with costs to the plaintiffs. The 1st set of defendants appealed to the Court of Appeal against this ruling. Hearing in the Court of Appeal was before a full court in view of the issues raised in the briefs of the parties filed in that court. The Court of Appeal delivered its reserved judgment on the 15th February 1990, dismissing the preliminary objection filed, holding that the action before the High Court is competent, and ordering that hearing resumes before Segun, J. Against this judgment the 1st set of defendants have again filed an appeal in this court. This is the second appeal in the case. Eight grounds of appeal were filed by the 1st set of respondents (hereinafter called defendants only) against the decision of the Court of Appeal. They are:

(i) The Court of Appeal erred in law in holding that the pronouncement of Segun J. to the effect that three of the rules of the union were "blatantly violated" by the defendants/appellants and that the plaintiffs have an undoubted right to protect their interests "did not disqualify him from adjudicating on the merit of the issues arising on the originating summons."

Particulars of Error

a) Objection based on the rule in *Foss v. Harbottle* is an objection to the jurisdiction of the court as was made clear in *Heyting v. Dupont*.

(b) In the premises the decision of Segun J. on the validity of the preliminary objection raised by the appellants should have been limited to the sole question of law, namely, whether or not the court had jurisdiction to entertain or grant the reliefs claimed at the instance of the plaintiffs.

(c) In order to decide whether or not the court had jurisdiction, it was unnecessary and irrelevant for it to consider or determine whether or not the appellants had "blatantly violated" three of the rules laid down by the constitution of the union.

(d) A determination of a vital issue which will arise and become relevant only if the court has jurisdiction ought to be determined after both parties have indicated that no further affidavit evidence is intended to be filed and, in any event, after the court has been addressed on the issue.

(ii) The Court of Appeal erred in law in failing to observe that a determination as to whether or not the court has jurisdiction does not involve an adjudication on any issue relating to the matter or matters in controversy between the parties.

Particulars of Error

The particulars under ground (i) hereof are repeated.

(iii) The Court of Appeal erred and misdirected itself in law and on the facts in holding as follows:-

"No provision similar to Rule 7(v) of the Constitution of the 18th defendant was in issue in Foss v. Harbottle. Nor do the Articles and Memorandum of Companies in Nigeria provide for the equivalent of Rule 7(v). Indeed, it is the absence of such a provision that, no doubt, gave birth to the Rule in Foss v. Harbottle, which was a rule based on common sense and natural justice".

Particulars of Error and Misdirection

(a) Only the law, including enactments of the legislature, can confer jurisdiction on courts of law.

(b) It is (with much respect to the Court of Appeal) erroneous to conceive that it is possible to derive jurisdiction or right of access to a court of law from an agreement between the parties or from the constitution of a trade union.

(c) The absence of provision similar to Rule 7(v) from Articles and Memorandum of Association or cases such as Foss v. Harbottle is due to the reasons given in (a) and (b) above. It has nothing to do with the "birth" of the Rule in Foss v. Harbottle.

(iv.) The Court below erred in law in failing to observe that apart from jurisdiction which inheres in all courts of law at common law and which is preserved by Section 6(6)(a) of the 1979 Constitution of the Federal Republic of Nigeria, it is not open for any group of

private citizens - including the members of a registered trade union to make an agreement (including a constitution) conferring upon the court a jurisdiction that otherwise it would lack.

(v) The court below erred in law in failing to uphold the submission of the appellants to the effect that Section 16(1) of the Trade Union Act 1973 must construed as laying down the scope or area of exception to the Rule in *Foss v. Harbottle*. 5

(a) Particulars under ground (iii) are repeated.

(b) Unless to the extent to which it expressly so provides, a statute should not be construed as repealing or amending the common law. 10

(vi) The court below erred in law in failing to observe that the reliefs claimed by the plaintiff in this action were reliefs which, under the Rule in *Foss v. Harbottle* only the 18th defendant can claim and that the mere allegation that there has been a breach of the rules of the union constitution cannot give every individual member of the company the right to sue. 15

Particulars

(a) Each and every claim on the originating summons is one in respect of which only the union can sue at common law under the rule in *Foss v. Harbottle*. 20

(b) None of the aforementioned claims come within the exceptions laid down by Section 16 of the Trade Union Act.

(c) In the premises the court below should have held that the High Court has no jurisdiction to try the action. 25

(vii) The court below erred in law in holding that the High Court has jurisdiction to try this action.

Particulars of Error

(a) The basis of objection to jurisdiction when founded on the Rule in *Foss v. Harbottle* is that the plaintiff before the court lacks the standing (or *locus standi*) to invoke the jurisdiction of the court. 30

(b) That being so the court below erred in considering that it was possible for the company or the shareholders to waive the operation of the Rule. See *Heyting v. Dupont* (1963) 1 WLR 1192 which in fact decided the opposite. 35

(viii) The court below erred in law in allowing Alao Aka-Bashorun Esq. to purport to represent the 18th defendant in the proceedings before them.

(a) The Notice of Preliminary Objection as well as the Notice of Appeal herein was filed by counsel - F.R.A. Williams. Esq. S.A.N. for the 18th defendant and others.

(b) The attempt of Mr. Alao Aka-Bashorun to nullify the Notice of Appeal deservedly failed.

(c) In the premises there was no basis for according recognition to Alao Aka-Bashorun Esq. as counsel for the 18th defendant."

Two sets of briefs were filed by the parties - one each in respect of each appeal. In view of the fact that a determination of the issues raised in the main appeal will determine the fate of the first appeal, it is proposed in this judgment to consider the main appeal only. Although the 15th defendant filed a brief it stated therein that it took a neutral position and would abide by the court's resolution of the matter. It therefore preferred no oral submissions.

In their brief in the main appeal the defendants set out the issues for determination as follows:-

(i) Whether the provision of Rule 7(v) of the Constitution of the 18th defendant renders the Rule in *Foss v. Harbottle* inapplicable to that Union.

(ii) Whether in the light of the provisions of Section 16 of the Trade Union Act, 1973, it is permissible for ten individuals who allege that they are members of the union to sue for the reliefs claimed by the plaintiffs in this action.

(iii) Whether, notwithstanding the fact that the learned trial Judge determined in his ruling on the appellants' Preliminary Objection that certain rules of the Constitution were "blatantly violated" by the appellants, the Court of Appeal was correct in deciding that further proceedings should resume before Segun J.

The plaintiffs adopted the issues framed by the defendants taking exception only to the discussion by the defendants of the representation by counsel of the 18th defendant, which issue it stated is not referred to in the issues framed.

It is convenient at this stage to note that after hearing the parties in this appeal on 8th February, 1993, and adjourning for judgment, this court found it necessary to recall the parties to further address it on the following question, to wit:

"What is the position of our decision (My note: that is, the Supreme Court) in Abubakri & Ors. v. Smith & Ors. (1973) NSCC

451 in the light of the provisions of Section 6 Subsection (6)(b) of the Constitution of the Federal Republic, 1979"

Both sides filed supplementary briefs on this question, but only defendants' counsel was present on the day fixed for further address, although he did no more than rely on his supplementary brief.

In coming to the conclusion that there is no merit in the preliminary objection of defendants' counsel set out hereinbefore, Segun J. in his ruling of 7/12/89 set out the rule in *Foss v. Harbottle* (1843) 2 Ha. 461; 67 E.R. 189 and decided it is not applicable to this case before him because Rule 7(v) of the Constitution of the 18th defendant gave any individual member of the union the right to initiate action at his own expense in connection with any breach of the Constitution. The plaintiffs who have shown from their affidavit in support of their originating summons prima facie evidence of breaches of the Constitution of their Union therefore have a locus standi to come to court to challenge such breaches, in protection of their vested interest. The Union's Constitution, he further stated, having been duly registered under the Trade Union Act has the force of law, and should not be ignored. In the Court of Appeal fuller submissions were made on the preliminary objection. That court was also invited to hold that, it's previous decisions in (1) *Oduduru v. National Union of Hotel and Personnel Services Workers Appeal No: FCA/L/226/83* delivered on 30/3/85 (unreported) (2) *Nigerian Civil Service Union v. Essien* (1985) 3 NWLR (Pt. 12) 306; (3) *Agbonikhena v. Egbe* (1987) 2 NWLR (Pt.57) 494 to the effect that Trade Union members had locus standi where their constitution gives them similar right as under Section 7(v) of the Constitution aforementioned, were given per incuriam, and are therefore not binding on that court. The court below rejected that invitation, holding that its decisions were binding on it. In addition to upholding the locus standi of the plaintiffs having regard to the provision of its constitution (Rule 7(v) refers), Section 16(1) of the Trade Union Act was held to give the plaintiffs the right to come to court in this case where the wrongful dissipation of union funds is involved. In both instances the rule in *Foss v. Harbottle* did not apply. In this court, as stated earlier, three issues for determination were agreed by the parties. The first asks

"(1) Whether the provision of Rule 7(v) of the Constitution of the 18th defendant renders the Rule in *Foss v. Harbottle* inapplicable

to that Union."

The Rule in *Foss v. Harbottle* provides that where a wrong is done to a company or where there is an irregularity in the management of its internal affairs, which is capable of confirmation by a simple majority of its members, the court will not interfere at the suit of a minority of its members. In *MacDougall v. Gardiner* (1875) 1 CR. 13(25), Mellish L.J. further explained it as follows:-

"If the thing complained of is a thing which, in substance, the majority of the company are entitled to do, or if something has been done irregularly that the company are entitled to do regularly, or if something has been done illegally which a majority of the company are entitled to do legally, there can be no use in having litigation about it. The ultimate and, no doubt, is, that a meeting has to be called, and then ultimately, the majority gets its wishes"

15 In *Burland v. Earle* (1902) A.C. 83(93), Lord Davey said:-

"It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover money or damages alleged to be due to the company the action should prima facie be brought by the company itself."

As stated in defendants' brief this rule has two limbs (1) that in respect of any wrong against the union only the union can sue in its own name (2) that the court will not interfere in any transaction where it is within the power of the majority of shareholders to ratify or undo such transaction. Although originally applied to companies, this rule was subsequently held applicable to Trade Unions. The Supreme Court 30 so held in *Abubakri & Ors. v. Smith & Ors.* (1973) 8 NSCC 451. This rule is however subject to exceptions, in which instances, individual members can take action against their company or Union. These are (1) to restrain the company from doing an illegal or ultra vires act (2) to prevent a fraud on a minority e.g. to recover the company's property from persons who have taken it for themselves; and who can by 35 using their controlling interest in the company/union prevent it from taking any such action vide *Burland v. Earle* (supra) (3) To restrain the company, which has power to do an act sanctioned by a special resolution, from doing same by an improperly passed resolution vide

Cotter v. National Seamen (1929) 2 Ch. 58(69). (4) To protect the invasion of their individual rights as members vide Edwards v. Halliwell (1950) 3 A.E.R. 1064. Under this exception, an individual shareholder can sue in his own name. That this is a well-established common law rule is beyond any dispute.

Rule 7(v) of the Constitution of the 18th defendant provides 5
that:-

"Any member shall have the right to initiate action at his own expense in connection with any breach of the Constitution"

The submission of defendants' counsel is that this provision of 10
the Constitution of the Union-cannot overrule the common law rule in Foss v. Harbottle. That Constitution, it is further argued, is only a contract between the members of the Union inter se and cannot overrule the common law vide Re Hookers Settlement (1955) CR. 55, where Dankwerts J. declared (at page 58) that: 15

"An ordinary person has not the power, as the legislature has, of course to impose upon a Judge of the Chancery Division a jurisdiction which is not given him by the procedure of the courts or by any statute."

Similarly, parties cannot by consent, he urged, amend the Con- 20
stitution of Nigeria or overrule the common law. That can only be done by specific legislation. The contention of Aka-Bashorun, Counsel for defendants that the registration of the Union's Constitution under the provisions of the Trade Union Act of 1973 gave it force of 25
law, and that membership of the union thereby became a constitutional right under Section 37 of the Constitution, was rejected by the Court of Appeal, which held that no such rights were conferred on Union members and that the Trade Union cannot by an act intended to bring sanity into its proceedings acquire any higher status than 30
other similar organisations/associations. Counsel to present defendants/appellants adopted the arguments and conclusions of the Court of Appeal. In their brief the defendants repeated the submission rejected by the court below that its decisions commencing with 35
Oduduru's case and ending (as at then) at Agbonikhena's case were given per incuriam. In so far as they laid down the rule that any provision, such as Section 7(v) now under consideration, has the effect of enabling any member of the Union to initiate action at his own expense in connection with any breach of the Constitution, they

should, he further submitted, be overruled. He repeated that the Constitution of a union, as is the case with any other binding unincorporated association, has the effect of a contract binding among the members of the union or association vide Faramus Film Artistes' Association (1963) 2 K.B. 527 (549); Bonsor v. Musician's Union
 5 (1956) A.C. at pages 135/6. The error inherent in the decision in Oduduru and other cases, he submitted finally, becomes apparent when the full effect of its introduction of an agreement between the parties is spelt out; and it reads thus:-

10 *"Any member shall have the right to initiate action at his own expense in connection with any breach of the Constitution and for this purpose, the members of the union shall not be subject to the Rule in Foss v. Harbottle".*

This in his view shows that the Constitution of the Union has
 15 clearly usurped or purported to usurp the function of the legislature.

On the specific question raised by this court as to the position of this court's decision in Abubakri v. Smith (supra), in the light of Section 6 sub-sec. (6)(b) of the Constitution of the Federal Republic of Nigeria, defendants' counsel, as stated earlier, filed a supplementary brief. In it he invited this court to hold that the proposition of law
 20 affirmed in Abubakri v. Smith (1973) NSCC 451 remains valid and sound notwithstanding the provisions of Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria 1979, mainly, because:-

25 *"(1) The aforementioned provisions of the 1979 Constitution are designed to ensure that, without prejudice to the inherent powers of the superior courts of law established by the said Constitution, those courts are limited to the hearing and determination of disputes and controversies affecting the civil rights and obligations of the party*
 30 *seeking redress in the courts.*

(2) One of the principles embodied in the decision of the Supreme Court Abubakri v. Smith is that only an association or a majority of its members can seek redress for a wrong done to the association and an action at the suit of individual members for redress in
 35 *respect of such a wrong will not be entertained.*

(3) The second principle embodied in the decision of the Supreme Court in Abubakri v. Smith is that the court will not interfere at the instance of an individual member or group of members of an association to interfere with a matter which might or can be made

binding on the association by the decision of a majority of its members. This principle is in line with the inherent powers of superior courts of law which are expressly preserved by the 1979 Constitution."

In their brief the plaintiffs have submitted that they have a locus standi to pursue their claims in court, which derives from the provisions of Rule 7(v) of the Constitution of the Union, and also Section 16 of the Trade Unions Act of 1973.

In *Foss v. Harbottle* or other cases based or relying on it, where the plaintiffs were debarred from seeking relief in the courts, no equivalent provision was considered. The plaintiffs therefore submitted that the rule in *Foss v. Harbottle* regulates only the jurisdiction of the court in cases of associations which have not entered into such a contract. Secondly, the acts complained of come within what are termed exceptions to the rule but are really interpretations thereof. These confine the operation of the rule to (a) intra vires actions (b) acts which can be ratified by a simple majority of the association, as against actions which need more than a simple majority or extra provisions to become binding on members. This is so because the acts complained of are breaches of the constitution. The defendants (1st to 11th) are attempting to extend their terms of office which had expired, contrary to the specific provisions of the; Constitution. Since they no longer hold office it is also sought to prevent them from handling the assets of the union in breach of its provisions vide *Mbene v. Ofili* (1968) 1 ALR (Comm) 235, where the Executive Council of a union had appointed persons as officials of the union irregularly when it had no power to do so, and it was held that the appointments were an ultra vires act of the council thereby bringing the complaint within the exceptions to the rule in *Foss v. Harbottle*. The question whether the acts are ultra vires is one for the High Court, which once a strong prima facie case is shown of a breach of the constitution, cannot exclude the plaintiffs by application of the rule in *Foss v. Harbottle* without making a determination that the acts complained of are intra vires, the very question which they are asked to determine in the substantive action. Furthermore the only way ultra vires acts can be regularised by the union is by a constitutional amendment. These can only be carried out by a majority vote in a secret ballot, which is not a simple majority ballot, per Rule 7(ii) of the Union's constitution.

More than a simple majority is also required because of Rule 34(ii) which provides that any alteration or amendment "shall not be valid until they have been registered with the Registrar of Trade Unions" The amendment is therefore not within the power of the association alone to pass before it can become effective. On the defendants' comments that the grant of locus standi by application of Rule 7(v) "alters or abolishes" the rule in *Foss v. Harbottle*" regulation of the court's jurisdiction", the plaintiffs stated as follows:-

"Once it is recognised that the rule in Foss v. Harbottle gives the court jurisdiction to entertain the complaint of a member against an ultra vires act which cannot be ratified by a simple majority of that association, it follows that the agreement or contract set out in Rule 7(v) of the Union's Constitution does not confer any new jurisdiction on a court which would otherwise have had none."

These comments are therefore irrelevant. Since the rule in *Foss v. Harbottle* excludes the jurisdiction of the courts in respect of specific agreements in specific circumstances, the correct formulation of the effect of Rule 7(v) should be that:

"Any member shall have the right to initiate action at his own expense in connection with any breach of the constitution in accordance with (the exceptions to) the rule in Foss v. Harbottle"

In their supplementary brief on the question raised by this court for further address i.e. as to the effect of Section 6(6)(b) of the 1979 Constitution on this court's decision in *Abubakri v. Smith* (supra), the plaintiffs made the following submission in conclusion:-

"(a) In so far as the decision of the Supreme Court in Abubakri v. Smith confirmed the right of a member of an association to sue to protect his personal rights it remains good law in accordance with the subsequent enactment of 6(6)(b) of the 1979 Constitution.

(b) In so far as Abubakri v. Smith and the rule in Foss v. Harbottle appear to confer standing on persons to complain about wrongs done to associations of which they are members notwithstanding that no personal rights or obligations are in issue, it would conflict with 6(6)(b) of the 1979 Constitution and to that extent would not be good law.

(c) Abubakri v. Smith however does not give consideration to the contractual rights and obligations of members of an association, and breach of the rules or constitution of an association such as a trade union may constitute a breach of the rights of its members,

who would therefore have standing under 6(6)(b) of the 1979 Constitution to complain of such breach.

(d) Despite such standing under 6(6)(b) of the 1979 Constitution, the courts may still decline to exercise jurisdiction (and thereby deny standing) to a person seeking an order which would be futile or unenforceable for the reasons given in Abubakri v. Smith." 5

It is agreed by all that Rule 7(v) of the Constitution of the 18th defendant confers a right on its individual membership. That right, as clearly spelt out therein, is a right to initiate action, whenever any breach of the Constitution arises, and at the expense of the individual concerned. The condition that the union's funds should not be affected is obviously intended to guard against frivolous actions. The defendants are against a free exercise of this right because it will, they contend, overrule the common law rule in *Foss v. Harbottle*. This rule is not a creation of statute, and it is correct as submitted by plaintiffs' counsel that the special right given to members of a Trade Union in this case, (Rule 7(v) refers), and the earlier ones dealt with by the Court of Appeal i.e. *Oduduru and others (supra)*, was not contemplated or considered in *Foss v. Harbottle*. If it was, the decision may well be quite different. I do not see the relationship between the rule in *Foss v. Harbottle* and the right provided by Rule 7(v) as one of conflict; or the rule being overruled by the right. I think they are complementary one to the other. This must be so because the right to be exercised under Rule 7(v) only arises in case of a breach of the Constitution, and where also the individual is prepared to foot the bill of the litigation. In other cases, the rule in *Foss v. Harbottle* will apply unheeded. It is therefore per se really an exception to the general rule in *Foss v. Harbottle*. This brings me to the second submission of plaintiff's counsel, which is, that the provision of Rule 7(v) is really one of the exceptions that have come to be accepted to the aforesaid rule. Firstly, it comes under the first exception noted earlier in this judgment, that is, actions by individual members to restrain the company from doing an illegal or ultra vires act. The acts complained against, and which form the basis of the originating summons taken out are strong prima facie breaches of the constitution. If the facts alleged are right, and there are no legal justifications for them, they do constitute ultra vires acts. In order to determine whether the acts alleged are inter vires the court has to hear the parties. *Locus standi* 35

therefore has to be granted the plaintiffs. It is also the submission of the plaintiffs that a second exception to the rule in *Foss v. Harbottle* covers the acts complained of. These are acts which cannot be ratified by a simple majority only of the union. This comes under the second limb of the rule as set out in defendants' brief. I am not so
5 sure that the plaintiffs are on very firm ground here. The contention is that since the amendment to the union's constitution requires the vote of a majority voting by secret ballot and that such amendment further requires registration with the Registrar of Trade Unions to be
10 valid, it is not an act that a simple majority simpliciter can perform. I think this argument is straining the point. Firstly, it means that all amendments to the constitution are exceptions to the rule in *Foss v. Harbottle*. Secondly, that even if they are passed by a majority they come under the exception simply because the voting is by secret
15 ballot. Thirdly, that even if the majority passes it by secret ballot it still is not covered by the rule because, and only because, it can only become valid and binding on the membership after it has been registered by a non-Union member - the Registrar of Trade Unions. I am quite sure that is not what the second limb of the rule in *Foss v.*
20 *Harbottle* contemplates. The type of voting and the need for prior registration cannot make the decision of a majority that of a minority. I am therefore unable to accept plaintiffs' second submission. The plaintiffs' formulation, of the correct position once it is accepted that
25 an individual member of the union can exercise the right given to him under Rule 7(v) is however more correct, as against defendants'.

The third submission of the plaintiffs which I now proceed to consider is that the breach of the provisions of the constitution of the Union raises questions as to the civil rights and obligations of parties
30 to the contract. It is trite that a contract confers rights and obligations on parties to it. What are in issue here are whether the rights in question are those directly connected with the plaintiffs e.g. the right to vote in Union elections or the wider rights under Rule 7(v) which guarantees to members the right to have the affairs of the Union
35 managed in accordance with its constitution. It also gives them the right of being watch dogs or "busy bodies" to prosecute those who breach the constitution. What they are empowered to defend here are rights arising from the contractual relationship between the union and its members, and between the members inter se. Chitty on Con-

tracts (26th edition) paragraphs 688 (page 448) confirms this position thus:-

"The relationship between a member of a trade union and the union itself is contractual, and the terms of the contract are to be found in the rules of the union. A member of a trade union has in general the right to take proceedings to enforce compliance with the union's own rules in relation to matters such as election of officers and other internal regulations." 5

Section 6(6)(b) of the 1979 Constitution provides that:-

"The judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions or proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person." 10
(Italics mine) 15

Once the civil rights and obligations of the plaintiffs as individuals are affected, as I hold they are here the courts in exercise of their judicial power set out above can look into such rights and obligations, and for that purpose the plaintiffs have a locus standi before them. Such right guaranteed under the Constitution cannot be in any way detrimentally affected by the common law rule in *Foss v. Harbottle*. 20

The question raised as to the effect that Section 6(6)(b) of the 1979 Constitution may have on the decision in *Abubakri v. Smith* (supra) can be considered here. Both sides appear to agree that that decision has not been wholly affected by the operation of Section 6(6)(b). It's finding that the rule in *Foss v. Harbottle* is binding on Trade Unions is still good law. So also are its enunciation of that rule and its applicability to the facts before it in that case. It is only where the right and obligations of an individual are in issue, and such a case does not fit into the exceptions under the rule in *Foss v. Harbottle*, that there may be a conflict since locus standi is available to the individual in a determination of his rights and obligations, whether or not these concern a Trade Union and it is in respect of matters to which the rule in *Foss v. Harbottle* is normally applicable. The facts in *Abubakri v. Smith* (supra) per se do not however fit such a case. 25 30 35

The second issue asks whether in the light of the provisions of Section 16 of the Trade Union Act, 1973, it is permissible for ten

individuals who allege that they are members of the Union to sue for the reliefs claimed by the plaintiffs in this action. Section 16(1) of the Trade Union Act provides as follows:-

5 *"Without prejudice to the right of any person having a sufficient interest in the relief sought to apply for an injunction to restrain any unauthorised or unlawful application of the funds of a trade union, a injunction restraining any such application of the funds of a trade union may be granted by the appropriate High Court upon the application of the Attorney-General of the Federation or of the Registrar, or of any five or more members of the Union."* (note: Italics mine)

The simple and straightforward answer to the question posed in yes. Having conceded that, defendants proceeded in their brief to argue what is not part of the issue raised in an effort to show that the 15 decisions in the Oduduru line of cases are wrong. I consider these arguments in the circumstances irrelevant, and do not intend to consider them here. It is enough to reiterate that whilst Section 16(1) of the Trade Union Act (supra) allows five members of the Union to sue in the circumstances set out, ten members instituted the present action. The plaintiffs therefore have the necessary locus standi and their 20 action could not have been struck out. The third issue seeks to disqualify Segun J. from further adjudicating in this matter because of the finding he made that the defendants (appellants) "blatantly" violated the constitution of the Union, which finding really belongs to a 25 final decision on the substantive claim. This it is submitted the trial Judge had no right to do vide Egbev. Onogun (1972) 1 ANLR (Pt.1)95 (98' 99); Ojukwu v. Governor of Lagos State (1986) 3 NWLR (Pt.26) 39 (45). In the later case Nnaemeka-Agu, J.C.A. (as he was 30 then) had observed on the matter thus:-

35 *"I cannot over-emphasize the need for trial Judges in interlocutory rulings desisting from making any findings which may prejudice the substantive case. It is true that if the above findings were rightly made and allowed to stand, they have completely knocked the bottom out of the substantive suit. In the circumstances and in fairness to the learned trial Judge, it is only right that the case be remitted for trial before another Judge."*

Plaintiffs have submitted that the comments of the learned trial Judge against which the plaintiffs have complained are merely a re-

cap of the claims placed by the plaintiffs before the court, and that they do not in any way amount to a determination of the substantive issue. The plaintiffs had not contested the facts by filing a counter-affidavit, unlike the cases cited when the applications were for an interlocutory injunction and affidavits were filed contesting the facts.

Whilst I do not think the learned trial Judge meant to decide the most crucial issue in the substantive case, when dealing with the application for him, the language he used in making that finding went far beyond what was required in disposing of a preliminary objection. If he came to the conclusion that there was a blatant breach of the constitution at this stage of the proceedings, it must be difficult for him not to come to a final conclusion that there was a breach. In the interest of justice therefore hearing of the substantive action should proceed before another Judge (not Segun, J.) and I so order.

In conclusion, the judgment of the court below is hereby affirmed, except as to the order that the trial should resume before Segun J. That order is set aside, and replaced with an order that hearing should commence de novo before another Judge of the High Court.

The 1st to 11th defendants have persisted in exhausting all the appeal procedures, even though they lost in both the High Court and the court below. They will now pay costs, which I assess at N1,000.00 to the plaintiffs.

UWAIS JSC

I have had the privilege of reading in draft the judgment read by my learned brother Uche Omo, J.S.C. I agree with the judgment: The plaintiffs have the locus standi to bring the action. Accordingly, I too will dismiss the appeal and affirm the decision of the lower court. I agree that the case should be heard by a Judge other than Segun, J.

The plaintiffs are entitled to N1,000.00 costs against the defendants.

KARIBI-WHYTE JSC

I have read the judgment of my learned brother Omo, J.S.C.

in this appeal. I agree with him entirely in the reasoning and conclusion dismissing the appeal. I wish only to make a modest contribution to the question of the effect of Section 6(6)(b) of the Constitution 1979 if any, on the decision of this court in *Abubakri & Ors. V. Smith & Ors. (1973) 8 NSCC 451*.

5 This court has suo motu formulated the following question for consideration of counsel in this case. Counsel submitted written briefs:-

"What is the position of our decision in Abubakri & Ors. v. Smith & Ors. (1973) 8 NSCC 451 in the light of the provisions of section 6 subsection (6)(b) of the Constitution of the Federal Republic of Nigeria, 1979."

10 The question arose after addresses of counsel.

My learned brother Omo, J.S.C. has set out the facts of this case in considerable detail. I need not repeat them. I adopt them. I am however concerned in this judgment with the facts in this appeal which endorse the application of the common law principle that an individual may in certain circumstances be allowed to bring an action to protect the property of a company or an association to which he belongs.

20 In the instant case, the 18th defendant union is the defendant. Plaintiffs have brought this action to direct the 12th defendant who is the Acting General Secretary of the Union to comply with the provisions of the Constitution, and to stop further violation of its provisions. There is also a claim to restrain the 1st-11th defendants from performing the functions of the office to which there is an existing appointee and operating the Bank Account of the 18th defendant union. The defendants have raised preliminary objection which was overruled by the trial Judge. The appeal to the Court of Appeal was dismissed. They have further appealed to this court. The preliminary objection was that plaintiffs have no locus standi to bring this action.

25 The common law principle which has been long settled in *Foss v. Harbottle (1843) 2 Hare 461*, states that where a wrong is done to a company or where there is an irregularity in its internal management, which is capable of being rectified by a simple majority of the members, the court will not interfere at the suit of a minority of the members to rectify the wrong or regularise the irregularity. This principle is founded on the rationale that since the rectification of the wrong or irregularity is intra vires the company or association which

can ratify the act complained of by the majority who have the powers to do so, it is an idle exercise for the court to interfere. The ultimate authority being the decision of the majority, it can always get its wishes done. Hence in such actions concerning wrongs to the company, the company, and not any other person is the proper plaintiff - See *MacDougall v. Gardiner* (1875) 1 Ch. 13 and *Burland v. Earle* (1902) A.C. 83. 5

These principles have been formulated into two rules which govern the initiation of actions in respect of wrongs done to incorporated companies or other associations. These are that:- 10

1. Actions in respect of wrongs done to companies must be brought by the company and in its own name.

2. The court will not interfere in respect of such actions if the wrong done or irregularity complained of is within the vires of the majority to rectify. 15

This is the rule of the supremacy of the majority. However, there have been exceptions to the application of these rules where:-

(a) There are individual membership and qualified minority rights - *Edwards v. Halliwell* (supra).

(b) The action brought is to restrain the company from doing illegal acts or acts ultra vires - *Burland v. Earle* (1902) AC. 83 20

(c) The action is designed to prevent a fraud on the minority - See *Alexander v. Automatic Telephone Co.* (1900) 2 Ch. 56; *Edwards v. Halliwell* (1950) 2 All ER 1064; *Pavlidis v. Jensen* (1956) Ch. 565. 25
Abubakri & Ors. v. Smith & Ors (supra) the Supreme Court approved and applied the above enunciated principles. The facts of the case were that plaintiffs and defendants are members of the Jamatul-Muslim of Lagos. The 1st plaintiff was the Secretary. The 2nd plaintiff was the Treasurer. Both of them were so elected under the Constitution of the religious community. Following dispute among the members, the defendants purporting to have abrogated the constitution, went on to elect members of the Jamat under a new constitution and set of rules and regulations established by them. They retained in their possession all the records, books, monies and other properties of the Jamat. They appointed members of an executive who usurped the offices and functions of the duly elected executive under the original constitution. They also collected funds on behalf of the Jamat and have failed to give an account. The plaintiffs there- 35

upon brought an action in their own names seeking:

(i) an order restraining the defendants from holding out themselves as members or officers of the Jamat-ul-Muslim of Lagos.

(ii) a true account of the moneys and other collections made by the defendants and payment over to the plaintiffs or duly elected
5 Treasurer of the religious body; and

(iii) surrender of all documents, including files, letters, books and paraphernalia of office, and other properties of the body held by the defendants as such officers.

10 The Defendants without filing a statement of defence applied for the dismissal of the suit on the two alternative grounds (a) that plaintiffs could not obtain judgment against them either jointly or severally (b) that the statement of claim disclosed no cause of action and is vexatious, frivolous and an abuse of the process of the court.

15 The learned trial Judge dismissed the claim because the plaintiffs had no locus standi to bring the suit. Relying on *Edwards v. Halliwell* (supra), he held that the association was not joined as plaintiff or defendant in a suit to which the main claimant is the religious community and no private or individual interest was involved. In respect
20 of the claim for an account, the funds and other properties in issue are those of the Jamat. Only the Jamat was rejecting the third claim. The learned trial Judge held that the rule in *Foss v. Harbottle* was applicable to this case. The Supreme Court dismissed the appeal against the judgment of the learned Judge. The cases of *McDougall v.*
25 *Gardiner* (1875) Ch.D 13; *Cotter v. National Union of Seamen* (1929) 2 Ch. 58 were cited and relied upon.

Consideration of the decision in *Abubakri v. Smith & Ors* (supra) in the light of Section 6(6)(b) of the Constitution 1979 was raised
30 suo motu by this court. Counsel were afforded opportunity to argue the point. They submitted very helpful written briefs urging their own views on the issue.

It is pertinent at this point to turn to Section 6(6)(b) of the Constitution 1979 which provides as follows:-

35 "(6) *The judicial powers vested in accordance with the foregoing provisions of this section -*

x x x x

(b) shall extend to all matters between persons, or between government or authority and any person in Nigeria and to all actions

and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."

The decision in *Abubakri & Ors. v. Smith & Ors* (supra) has become relevant because of the opinion expressed by the Supreme Court. It was there said, referring to the Rule in *Foss v. Harbottle* (supra).

"that the Rule would not apply to individual members who can establish that their personal rights, as distinct from those of the union (or the Jamat in the present case) have been invaded." *Heyting v. Dupont & Anor* (1963) 3 All E.R. 97 was cited and relied upon.

In my opinion the suggestion in this dictum is that the rule in *Foss v. Harbottle* (supra) will not apply to exclude a person who can establish a personal right as distinct from that of the association. In this sense it is *ad idem* with section 6(6)(b) of the Constitution 1979 where there is *locus standi* if the determination of the civil rights and obligations of the plaintiff is involved.

Chief Williams, S.A.N. in his brief has brought out clearly the scope of Section 6(6)(b) of the Constitution 1979. It concerns (i) the subject matter of the exercise of judicial powers, (ii) the subjects of the exercise of the power, and (iii) those who can invoke the exercise of judicial powers. I agree with this analysis. This court has pointed out in *Senator Adesanya v. The President of the Republic of Nigeria* (1981) 2 NCLR 358; (1981) 5 S.C. 112 that the competence to invoke the exercise of the judicial powers of the Constitution is limited to the determination of any question as to the civil rights and obligations of the person invoking the exercise of the power - See also *Thomas v. Olufosoye* (1986) 1 NWLR (Pt.18) 669; *Oloriode v. Oyebe* (1984) 1 SCNLR 390.

In *Abubakri v. Smith & Ors* (supra) the Supreme Court rejected the contention of plaintiffs/appellants that their personal or contractual rights have been infringed, as having not been borne out by the pleadings. Not that, if properly pleaded, such rights could not have been involved. There was no evidence of a breach of contract, or that their personal rights have been violated. The offices which were filled are not personal. The books, files and other articles of property seized by the respondents are those of the Jamat which is neither a party to the action, nor was the action on its behalf. This is not a rejection of the principle and a suggestion that a determination

of the civil rights and obligations of the plaintiff must be involved. It seems to me clear from the above discussion that *Abubakri v. Smith & Ors.* (supra), has followed the well settled common law principles governing actions instituted in respect of wrongs done to an incorporated body or other associations.

5 The question to be answered is whether Section 6(6)(b) which came into force on the 15th October, 1979 after *Abubakri v. Smith & Ors.* was decided has had any effect on the decision. Is there any conflict? I have not been able to discover any real conflict between
10 Section 6(6)(b) and the rule in *Foss v. Harbottle*. In each case it is the civil rights and obligations of the person that is the subject matter for determination.

I have already reproduced the provisions of Section 6(6)(b) of the Constitution 1979. In my analysis of the section and the decisions
15 on it, it is clear that any person who is able to show that his civil rights and obligations are involved is entitled to invoke the judicial powers of the constitution. Similarly in *Foss v. Harbottle* the subject matter for determination is the wrong done to the company or association.

The Supreme Court said much the same thing in *Abubakri v. Smith & Ors.* (supra) when it stated that the pleadings did not disclose that the personal or contractual rights of the plaintiffs were infringed. That the *Jamat* was not a party to the action.

But surely this is not the basis for the application of the rule in
25 *Foss v. Harbottle* (supra). Under the rule the company or the association is the real plaintiff. The action is to remedy a wrong done to the company. Hence the civil rights and obligations of the person bringing the action is not relevant to his competence to bring the action, which in any event is in the name of the company. Thus the wrong or
30 the irregularity complained of is against the company or association but the relief is against the majority of the members. This is why where the injury or wrong complained of can be cured by the resolution of a simple majority of its members, the court has always declined to interfere. This is because the court does not want to embark
35 upon a futile exercise of its coercive powers.

Where however, the wrong complained of cannot be sanctioned by an ordinary resolution of the members, or is *ultra vires* the company or association, an action can be brought in the name of the company against the wrongdoers to protect the interest of the com-

pany.

This is where what constitutes the civil rights and obligations in a member of an association or company which has rules and regulations and a constitution becomes relevant. Rule 7(v) of the Constitution of the Union provides as follows:-

"Any member shall have the right or initiate action at his own expense in connection with any breach of the Constitution." ⁵

It was argued that this rule confers a right on members and empowers them to prosecute breaches of the Constitution of the union and vests in every member that power. Thus, there is a contractual right to protect the constitution of the union. I think that the contention is right. The rule alone can confer a right of action even where the individual or personal right of the person bringing the action is involved in the determination. It is not in conflict where the exercise of the right is to protect a breach of the constitution in the name of the company. Rule 7(v) of the Constitution of the Union to it vests in members independent right of action even where arising from wrongs to the Union is constitutional and not in conflict with Section 6(6)(b) of the Constitution 1979. It is within the provision and spirit of Section 6(6)(b). ^{10 15 20}

It is pertinent to compare this with the Senator Adesanya case, which was concerned with the non-compliance with a provision of the Constitution 1979, or Thomas v. Olufosoye which was the constitution of the Anglican Church. In each case it was held that the civil rights and obligations of the plaintiff were not involved. No similar power as in Rule 7(v) was conferred on citizens in Adesanya case, or members of the congregation in Thomas v. Olufosoye. ²⁵

On the other hand, the constitution of Jamat-ul-Islam, or that of a Trade Union, as in this case constitute a binding contract amongst the members who subscribed to it. It is important to point out that in neither the Adesanya case, or Thomas v. Olufosoye did the plaintiff sue as a member of an association. The action was brought by individuals to enforce their purported right. ³⁰

In the instant case, plaintiffs are members of a Trade Union, the 18th defendant Union, and are parties to the contract inter se i.e the defendants and other members of the Union. ³⁵

Rule 7(v) quoted above guarantees members the right to manage the affairs of the union in accordance with its constitution and to

protect the breach of the constitution.

Thus wherever there is breach of the provisions of the 18th defendant's Union, it raises the question of the civil rights and obligations of its members who are parties to the contract. The breach ipso fact confers on them the same right which section 6(6)(b) vest in
5 individuals and can be invoked in appropriate circumstances. Hence the only considerations of the court in the recognition of this right and the exercise of this jurisdiction is whether plaintiff has brought this case within the exceptions to the rule in *Foss v. Harbottle*. Thus
10 where the complaint of the plaintiff is with respect to an intra vires act casus cadit. This is because the wrong against the company complained of can be sanctioned by the decision of a simple majority of its members.

In the instant case, the fact absent in *Abubakri v. Smith & Ors*
15 (supra) are all present. The acts complained of are shown to be ultra vires the constitution of the 18th Defendant's Union. The action itself was brought in the name of the Union. The Union is a party to the case and the plaintiffs have disclosed the wrongs done. It was also proved that the wrongs complained of cannot be sanctioned by the
20 resolution of a simple majority of its members, but will require amendment of the constitution of the Union.

It is clear therefore from the provisions of Section 6(6)(b) of the Constitution 1979, and analysis of the Rule in *Foss v. Harbottle* as
25 applied in our courts, that the decision in *Abubakri v. Smith & Ors* (supra) decided before the enactment of the 1979 Constitution has not made any alteration in the right of action for wrongs done against a company or association at common law. Accordingly, the following conclusions must be drawn from a comparison of the situation be-
30 fore and after the promulgation of the Constitution 1979.

1. An action can be brought to correct wrongs done to a company only where the wrong done to the company cannot be corrected by a simple majority of the company. The Court will not interfere in such cases.

35 2. An action can be brought to correct ultra vires acts done to the company by the majority of its members.

3. *Abubakri v. Smith & Ors* (supra) conferred rights on members of the association who complain about wrongs done to the association, if the action is brought in the name of and on behalf of the

association.

4. Abubakri v. Smith & Ors (supra) was not concerned with the contractual rights and obligations of members of an association and breach of its rules which may constitute a breach of the rights of its members. It therefore did not decide the issue, such as could have come under the preview of Section 6(6)(b) of the Constitution 1979. 5

There is therefore no conflict between Abubakri v. Smith & Ors and Section 6(6)(b) of the Constitution 1979.

I agree with the opinion of my learned brother Omo, J.S.C. in his judgment when he said:- 10

"The acts complained against, and which form the basis of the originating summons taken out are strong prima facie breaches of the Constitution. If the facts alleged are right, and there are no legal justifications for them, they do constitute ultra vires acts." 15

In the circumstances of this case and the facts before the court, in the pleadings the preliminary objection of the defendant appears to me premature. It was properly overruled. For the reasons given in the leading judgment of Omo, J.S.C. which I adopt, and for the reasons stated above, the Court of Appeal was right to have dismissed the appeal. I also will and hereby dismiss the appeal. However, I also direct that the case be heard before another Judge of the High Court of Lagos State. 20

Costs in the sum of N1,000.00, shall be paid by the 1st, 3rd- 25
10th and 18th Defendants to the plaintiffs.

OLATAWURA JSC

The facts, the issues for determination and the grounds of appeal are already set down in the lead judgment of my learned brother, Uche Omo, J.S.C. I agree with his reasoning and conclusions. I only wish to comment on the issue raised by the Court after we had adjourned for judgment on 8th February, 1993. The issue is: 30

"What is the position of our decision in Abubakri & Ors. v. Smith & Ors. (1973) NSCC 451 in the light of the provisions of Section 6 sub-section 6(b) of the Constitution of the Federal Republic of Nigeria 1979"

In Abubakri v. Smith & Ors (supra) this court on page 451 of

the report said:"

"We, therefore, hold that the Rule in *Foss v. Harbottle* applies to an unincorporated association possessing a constitution or a set of rules and regulations entitling it to sue and be sued as a legal entity, and that the *Jamat-ul-Muslim of Lagos* is such a body. It follows that
 5 the Rule in *Foss v. Harbottle* applies to this religious body in the same way and to the same extent as it does to a limited liability company or a trade union." (my emphasis).

This decision was given on 27th June, 1973 i.e. more than 6
 10 years before the 1979 Constitution of the Federal Republic of Nigeria. In other words, will the position still be the same notwithstanding S.6 (6)(b) of the 1979 Constitution of the Federal Republic of Nigeria? This sub-section provides:-

"The judicial powers vested in accordance with the foregoing
 15 provisions of this section

(b) shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."

20 In so far as the analysis of the judicial powers exercisable under S.6 (6)(b) of the 1979 Constitution are concerned, I am in full agreement with the defendants' analysis by Chief Williams, S.A.N. in the supplementary brief. I will also limit the interpretation to the third
 25 category i.e.

"the persons who are competent to invoke the exercise of these powers."

This will inevitably bring us to those persons who have locus standi. In this appeal the issue now is: whether the plaintiffs are competent to invoke the exercise of the powers for the determination of
 30 their rights and obligations. It should be borne in mind that as at the time *Abubakri v. Smith* (supra) was decided the unlimited jurisdiction of the High Court as laid down in section 236(1) of the 1979 Constitution and amplified in S.6 (6)(b) of the same 1979 Constitution was
 35 not in force. The Constitution in force was the 1963 Constitution without similar provision.

Although the case of *Abubakri v. Smith* (supra) covers the case of an unincorporated association with a constitution, the court was mindful of those whose personal rights as distinct from that of the

union have been invaded. The Supreme Court on page 457 said:-

"It is necessary to add the Rule (i.e. Foss v. Harbottle) would not apply to individual members who can establish that their personal rights as distinct from those of the union (or the Jamat on the present case) have been invaded."

If the interpretation of S.6(6)(b) of the 1979 Constitution is to the effect that no individual member of the association has the right to sue for an action which is ultra vires the constitution of the association then Abubakri v. Smith (supra) will no longer apply.

Two of the reliefs claimed by the plaintiffs and covered by the pleadings prima facie show the personal rights and obligations in respect of which jurisdiction of the court is based. These reliefs are

(iv) and (v). They read as follows:-

"(iv) A declaration that the respective terms of office of each of the 1st-11th defendants ceased at the expiration of three years from the 28th of November 1985;

(v) Injunction to restrain each of the 1st-11th defendants from:

(a) performing the functions of his office;

(b) parading himself as an officer of the Union; and

(c) operating any Bank Accounts of the Union or disposing, receiving, negotiating or dealing with any assets of the Union."

The 18th Defendant's Constitution in so far as the competence of a member to institute an action is governed by Rule 7(v) of the Constitution of the National Union of Banks, Insurance and Financial Institutions Employees (NUBIFIE). It states:-

"Any member shall have the right to initiate action at his own expense in connection with any BREACH of the Constitution."

(Capitals supplied for emphasis)

And when one takes the exceptions in Foss v. Harbottle into account, and in this case the exception is an infringement of a constitutional right of a member, which in this case is ultra vires the association or in this case the Trade Union, the rule in Foss v. Harbottle cannot be invoked. The majority cannot pass ordinary resolution to cure the illegality if proved. The Court's duty will be to intervene at the instance of the minority. It appears to me that S.6(6)(b) of the 1979 Constitution empowers individual to sue once he can establish that his personal rights have been breached. I agree with my learned brother Uche Omo, J.S.C. in the lead judgment when he said:-

"The acts complained against, and which form the basis of the originating summons taken out are strong prima facie breaches of the Constitution. If the facts alleged are right, and there are no legal justifications for them, they do constitute ultra vires acts."

5 We should bear in mind that the Supreme Court has observed that the contention of the appellants in Abubakri's case that their personal or contractual rights had been infringed were not borne out by their pleadings. That is not the position here.

10 The objection raised by the defendants appears to me premature in view of the pleadings by the plaintiffs and it was properly over-ruled.

I will also order that the case be heard by another Judge of the Lagos State High Court.

15 In the final analysis and for the fuller reasons set out in the lead judgment, I will dismiss the appeal, but for the avoidance of doubt, I repeat that the case be heard before another Judge of the Lagos State High Court. I also award the sum of N1,000.00 as costs against the defendants (1st, 3rd - 10th and 18th) in favour of the plaintiffs.

20

KUTIGI JSC

25 I have had the advantage of reading in draft the judgment of my learned brother Omo, J.S.C. just delivered. I agree that the appeal should be dismissed and it is hereby dismissed. The judgment of the Court of Appeal is affirmed but the hearing should now commence de novo before another Judge of the High Court. I endorse the order for costs contained in the lead judgment.

30

OGWUEGBU JSC

I have read the judgment of my learned brother Omo, J.S.C. in this appeal. I agree with his reasons and conclusions.

35 There are two appeals before us involving the parties to the proceedings. One is against the decision of the Court of Appeal dated 28th November, 1989. The plaintiffs appealed to the Court of Appeal against the ruling of interim injunction made in favour of the plaintiffs without allowing the plaintiffs' counsel to conclude his address on it. The Court of Appeal allowed the plaintiffs' appeal on the

ground that the plaintiffs were denied a fair hearing. The defendants have appealed to this court against the said judgment. This is the first appeal.

The second appeal is also brought by the defendants who were also dissatisfied with the decision of the Court of Appeal dismissing their appeal on the competence of the High Court to entertain the action of the plaintiffs. 5

The following issues are submitted for determination in respect of the first appeal:-

"(i) Whether it was proper for the High Court to exercise the powers conferred on it under Order 39 Rule 2 in the circumstances of this case particularly before the learned counsel for the plaintiffs has concluded his address; 10

(ii) Whether the court below was correct in concluding that the High Court denied the plaintiffs a hearing on the application to discharge the ex-parte order for interim injunction" 15

The following three issues are submitted for consideration and determination in the second appeal:-

"(i) Whether the provision of Rule 7(v) of the Constitution of the 18th defendant renders the Rule in Foss v. Harbottle inapplicable to the union. 20

(ii) Whether in the light of the provision of Section 16 of the Trade Union Act, 1973, it is permissible for ten individuals who allege that they are members of the union to sue for the reliefs claimed by the plaintiffs in this action. 25

(iii) Whether, notwithstanding the fact that the learned trial Judge determined in his ruling on the preliminary objection that certain rules of the constitution were 'blatantly violated' by the appellants, the Court of Appeal was correct in deciding that further proceedings should resume before Segun, J." 30

After hearing arguments on both appeals, this court adjourned for judgment. During the court's deliberation on the judgment it was found necessary to invite counsel to address the court on the question which I set out hereunder: 35

"What is the position of our decision in Abubakri & Ors. v. Smith & Ors. (1973) NSCC 451 in the light of the provisions of Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1979."

Both learned counsel filed and exchanged original and supplementary briefs.

This judgment will be confined to the second appeal as the decision on it will determine the fate of the first appeal.

In respect of the second appeal, Chief Williams, S.A.N. submitted that the rule in *Foss v. Harbottle* 67 E.R. 189 has two basic limbs (a) that in respect of any wrong against the union, only the union can sue in its own name and (b) that the court will not interfere in any transaction where it is within the power of the majority of shareholders to ratify or undo such transaction. He said that it is a rule of the common law which goes to the jurisdiction of the court. He cited the case of *Burland v. Earle* (1902) A.C. 83 at 93.

He submitted that the first limb of the rule is procedural and concerns locus standi and the only way an unincorporated association can complain to it is by representative action while the second limb arises from the nature of the contract among the members of the association. If there are irregularities in the conduct of the affairs of the association and such irregularities relate to matters which the majority of the members can regularise under the constitution of the association, then the court will not interfere at the instance of an individual member or group of individuals. He referred to *Edwards v. Halliwell* (1950) 2 All E.R. 1064.

He said that the decisions of the Court of Appeal in *Oduduru v. National Union of Hotels, etc* FCA/L/126/83 (Unreported) delivered on 13/3/85; *Nigerian Civil Service Union v. Essien* (1985) 3 NWLR (Pt.12) 306; and *Agbonikhena v. Egba* (1987) 2 NWLR (Pt.57) 494 which support the view that the provision of Rule 7(v) of the 18th defendant's constitution has the effect of enabling any member of the union to initiate at his own expense in connection with any breach of the constitution were given per incuriam and should be overruled in so far as they laid down this proposition.

He said that the constitution of the 18th defendant Union, like that of any other unincorporated association, has the effect of a contract binding among the members of the union or association. He referred to and relied on *Faramus v. Film Artistes' Association* (1963) 2 K.B. 527 at 549; and *Bonsor v. Musician's Union* (1956) A.C. at 135-136.

We were urged to hold that there is no way whereby any agree-

ment can be construed to alter or abolish the rule in *Foss v. Harbottle*.

As to Section 16(1) of the Trade Unions Act, he submitted that the effect of the Act is to enable not less than any five members or a trade union to sue in respect of the unauthorised or unlawful application of the funds of a trade union notwithstanding the rule in *Foss v. Harbottle* and that they can do so if the action is instituted "for an injunction to restrain any unauthorised or unlawful application of the funds of a trade union."

As to the question raised by the court, Chief Williams S.A.N. said that two propositions of law are established by this court in Abubakri's case, namely:-

(i) the court has no jurisdiction to entertain any action by individual members of an unincorporated association in respect of a wrong alleged to be done by the association.

(ii) the court has no jurisdiction to entertain an action by individual members of such an association in respect of a matter which might or can be made binding on the association by a simple majority of the members of the association.

He submitted that if the above propositions of law are inconsistent with Sec. 6(6)(b) of the 1979 Constitution, the latter will prevail that the decision of this court in *Abubakri v. Smith* (supra) to the effect that a High Court has no jurisdiction to entertain an action to redress a wrong done to a religious body or association at the instance of individual members thereof suing in their own right is in no way inconsistent with Sec. 6(6)(b) of the 1979 Constitution.

He further submitted that courts have inherent powers to prevent abuse of their process and that these powers are expressly preserved by Sec. 6(6)(b) of the 1979-Constitution. He finally submitted that this court should hold that the proposition of law affirmed by it in *Abubakri v. Smith* (supra) remains valid and sound notwithstanding the provisions of Sec. 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1979 .

Mrs. Ayo Obe for the plaintiffs/respondents submitted in her brief of argument that the rule in *Foss v. Harbottle* is one of common law; that it derives from decisions made by Judges on the basis of the facts of particular cases before them and two important consequences flow from that:-

(i) that if the material facts of a particular case are distinguish-

able from those of the cases in which the rule in *Foss v. Harbottle* was applied, then the rule may not be applicable.

(ii) that what is called "The Rule in *Foss v. Harbottle*" as applied by common law jurisdictions today is not simply the ratio of the decision in *Foss v. Harbottle* supra but the aggregate of all decisions in
5 which the rule has been considered and either applied or not applied.

Learned counsel stated that no equivalent of Rule 7(v) of the 18th defendant union was considered in *Foss v. Harbottle* or any
10 other cases in which the rule in *Foss v. Harbottle* was applied to debar plaintiffs from seeking relief in the courts. Counsel said that the rule in *Foss v. Harbottle* regulates only the jurisdiction of the court in cases of associations which have not entered into such a contract - Rule 7(v); that the rule in *Foss v. Harbottle* provides that no action in
15 respect of wrong done to an association will lie at the suit of individual members of the association against intra vires act which could be ratified by a simple majority of the members.

It was part of her submission that what is called exceptions to the rule are no more than interpretations of it; that a breach of the
20 constitution of a trade union cannot be ratified by an ordinary majority of the members and where an act is done in breach of an association's constitution, it is necessarily ultra vires; that the right to sue under Rule 7(v) of the 18th defendant's constitution is a right to
25 sue given in respect of "any breach of the constitution" and therefore an exception to the rule in *Foss v. Harbottle*. As a consequence, the plaintiffs' complaints are against acts which are ultra vires.

Learned counsel therefore submitted that the plaintiffs have locus standi to ask the High Court to determine whether the pur-
30 ported extension of the terms of office of the 1st to 11th defendants is indeed ultra vires or whether it is valid.

Counsel contended that Rule 7(v) of the plaintiffs' constitution falls within the scope or area of permissible exclusion of the rule in *Foss v. Harbottle* and claims v (c) and v(ii) are clearly designed to
35 restrain unauthorised and unlawful application of the 18th defendant union's funds since the 1st to 11th defendants are not lawful officers of the 18th defendant union.

As to the question raised in the decision of Abubakri's case in the light of Section 6(6)(b) of the 1979 Constitution, learned counsel

submitted:-

"...to the extent that 6(6)(b) of the 1979 Constitution gives standing to a person whose own civil rights and obligations are in issue, the exception to the rule in Foss v. Harbottle above, as confirmed in Abubakri v. Smith conforms with the present constitutional provisions." 5

She said that the rule in Foss v. Harbottle does not deny a person standing because his personal rights and obligations are not in issue, nor was such the basis of the ousting of the plaintiffs in Abubakri v. Smith. 10

Counsel distinguished the facts of the cases of Adesanya v. President of the Federal Republic of Nigeria (1981) 2 NCLR 358; (1981) 5 S.C. 112; and Thomas v. Olufosoye (1986) 1 NWLR (Pt.18) 669 from the facts of the present case as well as that of Abubakri v. Smith. She submitted that there is no conflict between S.6(6)(b) of the 1979 Constitution and the rule in Foss v. Harbottle. 15

Counsel further stated that a contract confers rights and imposes obligations on the parties to it; that in the present case, 'the civil rights and obligations of the plaintiffs are in issue.

Learned counsel submitted that the breach of the provisions of the 18th defendant union's constitution raises questions as to the plaintiffs' civil rights and obligations as parties to the contract the basis upon which the judicial powers of the Federation can be involved by them, is therefore established and the acts complained of in the present case are ultra vires the 18th Defendant Union's constitution which cannot be sanctioned by a simple majority. 20 25

It is necessary to examine the scope of the rule in Foss v. Harbottle supra in relation to this appeal, Rule 7(v) of the 18th defendant's union constitution and S.18(1) of the Trade Union's Act Cap. 437 Laws of the Federation of Nigeria, 1990. 30

A clearer statement of the rule in Foss v. Harbottle is contained in the judgment of Mellish, LJ. in MacDougall v. Gardiner (1875) 11 Ch.D. 13 at 25 where he said:-

"In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there 35

can be no use in having litigation about it. The ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled are the masters of, the majority in substance shall be entitled to have their will followed?"

Rule 7(v) of the 18th defendant union's Constitution reads:

'Any member shall have the right to initiate action at his own expense in connection with any breach of the Constitution.'

Section 18(1) of the Trade Unions Act provides as follows:-

'Without prejudice to the right of any person having a sufficient interest in the relief sought to apply for an injunction to restrain any unauthorised or unlawful application of the funds of a trade union, an injunction restraining any such application of the funds a trade union may be granted by the appropriate High Court upon the application of the Attorney-General of the Federation or of the Registrar, or of any five or more members of the union'."

The rule in *Foss v. Harbottle* applies only where the majority can cure the irregularity or illegality complained of by passing an ordinary resolution. It does not apply where the act is absolutely illegal and incapable of being confirmed by such majority. In such a case, the court will interfere at the instance of the minority. The court will also interfere where the act complained of is ultra vires the company.

Rule 7(v) of the 18th defendant union's constitution confers an express right on individual 'members of the union to initiate an action at his own expense in connection with any breach of the constitution of the union. It is a contractual right.

The plaintiffs/respondents complaints in the originating summons are in respect of breaches of the constitution of the union excepting claims v(c) and vii which I will discuss later. Prima facie, the 1st to 11th defendants' terms of office should have expired in November, 1988 having been elected into office in November, 1985 (Rule 10(iii)).

In answer to the first issue, I would say that Rule 7(v) of the constitution of the 18th defendant union is another exception to the rule in *Foss v. Harbottle* and it renders the said rule of common law inapplicable to the 18th defendant union in so far as breaches of the

constitution of the said union is concerned. My answer is therefore yes.

Rule 7(v) of the 18th defendant's union gives each member of the union including the plaintiffs locus standi to sue in respect of any breach of the constitution.

Additionally, Section 18(1) of the Trade Unions Act Cap.437, ⁵ Laws of the Federation of Nigeria, 1990 (former S.16(1) of the Trade Unions Act, 1973) confers locus standi on any five members of the plaintiffs' union to apply to the appropriate High Court for an injunction to restrain any unauthorised or unlawful application of the 18th ¹⁰ defendant union's funds. Claims v(c) and vii of the plaintiffs' Originating Summons are covered by S.18(1) of the said Trade Unions Act. These two claims at least are sufficient signals that the plaintiffs are not "busy bodies" who should be driven away from the judgment ¹⁵ seat. I will therefore answer the second issue for determination in the positive.

On the third issue for determination, the offending passage of the ruling of Segun, J. reads:-

"The above three rules in the constitution of the union were ²⁰ blatantly violated by the defendant/applicants and the plaintiffs have an undoubted right to protect their interest."

It was argued on behalf of the plaintiffs that the above comment was a re-cap of the claims placed before the court by the plaintiffs and that it did not in any way amount to a determination of the ²⁵ substantive issue. The trial Judge had not determined the issues in the substantive suit, the comment, however, created the impression that he had taken a stand which is adverse to the case of the defendants. It is therefore proper in the interest of justice to remit the case to another Judge of the High Court for hearing de novo. ³⁰

On the issue raised by the court namely:-

"What is the position of our decision in Abubakri & Ors. v. ³⁵ Smith & Ors. (1973) NSCC 451 in the light of the provisions of Section 6 subsection 6(b) of the Constitution of the Federal Republic of Nigeria, 1979,"

the said decision was given when the 1963 Constitution of the Federal Republic of Nigeria was in operation and before the 1979 Constitution came into force.

In Abubakri & Ors. v. Smith & Ors supra, the plaintiffs' claim

was for an order restraining the defendants from holding out themselves as members or officers of the Executive Committee of the Jamat-ul-Muslim of Lagos. The plaintiffs also asked for an account and for surrender of all documents and properties of the said religious body held by the defendants. The defendants applied for the
5 dismissal of the plaintiffs' claim on the grounds:-

"(i) that even if the averments in their statement of claim were admitted, the plaintiffs could not obtain judgment; and

*(ii) that their statement of claim discloses no cause of action is
10 frivolous, vexatious and an abuse of process of the court."*

The learned trial Judge accepted all the plaintiffs allegations in the statement of claim as established but ruled that their claim for an injunction failed because they had no locus standi to bring the suit since they did not sue in a representative capacity nor join the Jamat
15 either as plaintiff or as the defendant in the suit in which the main claim concerned the rights of the community as a community and no private rights or individual interests of the plaintiffs were involved. See *Edwards & Ors. v. Halliwell & Ors. (1950) 2 All E.R. 1064.*

On appeal, this court held that the rule in *Foss v. Harbottle*
20 (supra) applied to an unincorporated association such as the Jamat, possessing a constitution, or a set of rules and regulations entitling it to sue as a legal entity; that the rule would not apply to individual members of the Jamat if they can establish that their personal rights,
25 as distinct from those of the Jamat, have been invaded. The court further held that a court should not make an order which is unenforceable or of no avail, for there is nothing to prevent the Jamat-ul-Muslim Society, the acquiescence of the general members of which is presume from their silence on the complaints, from convening a
30 meeting after the ruling and restoring the defendants to the status quo ante.

Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1979 provides that:-

*"The judicial powers vested in accordance with the foregoing
35 provisions shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."*

In *Abubakri & Ors. v. Smith & Ors* supra, the High Court dis-

missed the plaintiffs' claims on the basis of lack of locus standi when they failed to sue in a representative capacity nor to join the Jamat as a defendant.

This court in dismissing the appeal stated as follows:-

"It is necessary to add that the rule would not apply to individual members who can establish that their personal rights, as distinct from those of the trade union (or the Jamat in the present case), have been invaded. Thus, in Heyting v. Dupont & Ors. (1963) All 3 E.R. 97, the court declined to entertain a suit brought by a plaintiff shareholder against a director and the company for payment of damages by the first defendant to the company for misfeasance as a director, it being held that the rule in Foss v. Harbottle precluded the exercise of jurisdiction by the court"

From the above passage, it can be seen that the decision in Abubakri v. Smith is in conformity with S.6(6)(b) of the 1979 Constitution. It reiterated that an individual member of an unincorporated trade union who can establish that his personal rights have been violated can maintain an action to establish those rights. Such a member will no doubt show in his pleadings, those personal rights which gave him the right to sue.

For the above reasons and the reasons set out in the judgment of my learned brother, Omo, J.S.C., the judgment of the court below is hereby affirmed except as to the hearing of the case by Segun, J. That order is set aside. It is substituted by an order for hearing de novo by another Judge of the Lagos State High Court.

The respondents are entitled to costs which I assess at N1,000.00.

OGUNDARE JSC (DISSENTING)

I have been privileged to read in advance the judgment just delivered by my learned brother, Omo, J.S.C. With utmost reluctance but with profound respect, I have come to the conclusion that I have to defer with his reasoning as regards the right of the plaintiffs to sue in respect of claims (i) - (vi). For the reasons I have give in this judgment. I hold that they have no such right. Subject to this reservation I agree with his judgment particularly as regards Question (iii).

The facts and the issues for determination in this appeal have

been fully set out in the judgment of my learned brother, I need not go over them in detail again. The main question calling for determination in this appeal is whether the common law Rule in *Foss v. Harbottle* (1843) 2 Hare 461 applies to disentitle the plaintiffs from pursuing their claim in the action they instituted against the defendants, particularly the 1st, 3rd, 4th, 5th, 6th, 8th, 9th, 10th and 18th defendants - in effect, whether the plaintiffs have locus standi to sue. The objection brought by these defendants to the court's jurisdiction was overruled by the learned trial Judge (Segun, J.). On appeal, the Court of Appeal upheld the learned trial Judge's decision. The defendants affected have further appealed to this court. Learned leading counsel for the parties filed and exchanged their respective written briefs of argument and proffered oral submissions at the hearing of the appeal.

In the course of our considering our decision on the appeal, it became necessary to invite learned counsel for the parties to address us further on the following question:-

"What is the position of our decision in Abubakri & Ors v. Smith & Ors. (1973) NSCC 451 in the light of the provisions of Section 6 subsection (6)(b) of the Constitution of the Federal Republic of Nigeria, 1979."

In response to this invitation, learned leading counsel for the parties filed supplementary briefs.

Chief Williams, S.A.N. for the defendants/appellants sets out the Rule in *Foss v. Harbottle* and argues that as the rule regulates the jurisdiction of the court, a statute for the purpose is necessary to alter or abolish it. Learned Senior Advocate divides the rule into two limbs and observes that the first limb relates to any wrong against the Union where only the Union can sue in its own name. The second limb, according to him, is that the court will not interfere in any transaction where it is within the power of the majority of shareholders to ratify or undo such transaction. Learned Senior Advocate further submits in his brief as follows:-

"It is submitted that on analysis it will be seen that the first limb of the rule is purely procedural and concerns locus standi to invoke the jurisdiction of courts of law. The only way in which an unincorporated association can complain of a wrong to the association is by the procedure of representative action ex hypothesis such a wrong is not

a wrong against any particular individual member as such. Accordingly no individual member can sue. The second limb of the rule arises from the nature of the contract among the members of the association. If there are irregularities in the conduct of the affairs of the association and such irregularities relate to matters which the majority of the members can regularise under the constitution of the association then the court will not interfere at the instance of an individual member or group of individuals. It will leave the matter to be redressed by the association. See generally Edwards v. Halliwell (1950) 2 AER 1064."

Chief Williams refers to certain decisions of the Court of Appeal on which the learned trial Judge based his decision, that is to say: Oduduru v. National Union of Hotels, etc FCA/L/126/83 (Unreported) delivered on 13/3/85; Nigerian Civil Service Union v. Essien (1985) 3 NWLR (Pt.12) 306; and Agbonikhena v. Egba (1987) 2 NWLR (Pt.57) 494 and submits that those decisions were given per incuriam and should be overruled by this court in so far as they lay down the proposition that a rule in the constitution of a union enabling any member of the union "to initiate action at his own expense in connection with any breach of the constitution" of the Union ousts the application of the rule in Foss v. Harbottle. Learned Senior Advocate concedes it that a member of a Union can sue where there is a breach of his individual rights. He argues that the constitution of the 18th Defendant/appellant Union, like that of any other incorporated association, has the effect of a contract binding among members of the union or association. He refers to Faramus v. Film Artistes Association (1963) 2 KB 527, 549 per Diplock LJ. (as he then was) and Bonsor v. Musicians Union (1956) A.C. 104, 135-136 per Lord MacDermott. He then submits that private individuals cannot by agreement confer jurisdiction on any court or Judge.

Chief Williams refers to Section 16(1) of the Trade Union Act, 1973 (now section 18(1) of the Trade Union Act, Cap 437 Laws of the Federation of Nigeria, 1990) and submits that the locus standi given 5 or more members of a union to sue only relates to a claim "for an injunction to restrain any unauthorised or unlawful application of the funds of a trade union" and that this is an exception to the rule in Foss v. Harbottle. He submits that as section 16(1) defines or limits the scope or area of permissible exclusion of the rule in Foss v.

Harbottle, it is not competent for a trade union to enlarge that scope or area by an agreement between or among themselves as it is contemplated in Rule 7(v) of the Constitution of the 18th defendant/appellant Union. Learned Senior Advocate further submits that section 16(1) does not authorise the plaintiffs to bring any of the claims
5 in the present action in their own name.

On the issue in respect of which we invited learned counsel to address us, Chief Williams submits that *Abubakri & Ors. v. Smith & Ors* (supra) is not inconsistent with section 6(6)(b) of the Constitution and remains valid and sound.
10

Mrs. Obe, learned leading counsel for the plaintiffs submits that the rule in *Foss v. Harbottle* is a common law rule and applies only to acts intra vires the corporate or unincorporate body. Learned counsel observes that as plaintiffs' claims relate to breaches of the
15 union's constitution, the acts complained of are ultra vires the union. She admits that the rule in *Foss v. Harbottle*, therefore, does not apply to deny the plaintiffs locus standi to sue. She refers to Rule 7(v) of the union's constitution and submits there is no conflict between it and the rule in *Foss v. Harbottle*. as a rule similar to it was not considered in the case. She argues in her brief thus:
20 "Rule 7(v) squarely within the rule in *Foss v. Harbottle*.

The rule in *Foss v. Harbottle* provides that no action in respect of a wrong done to an association will lie at the suit of individual
25 members of the association against an intra vires act which could be ratified by a simple majority of members. The rationale is that if the majority of members is entitled to regularise the act complained of, then it is useless to litigate the point because a meeting of the association can by majority sanction the act complained of, but if the majority
30 indeed complain and will not regularise the act, they ought to agree to the use of the name of the association.

As observed above, the rule in *Foss v. Harbottle* comprises not only the rule itself, but the interpretations and/or exceptions to the rule. When the real meaning of the rule is considered, it will be seen
35 that at least two of what are commonly called 'exceptions' to the rule, are in fact no more than interpretations of it. Thus if it is said that the rule in *Foss v. Harbottle* will not apply where the act complained of is ultra vires, this is the logical result of the restriction of the rule to intra vires acts. Equally, if only acts which can be ratified by a simple ma-

jority of the association are covered by the rule, acts which cannot be so ratified must automatically fall outside it. In short, the rule in *Foss v. Harbottle* leaves untouched the court's unlimited jurisdiction to entertain the complaint of a member against an ultra vires act or one which would require some sanction other than a simple majority of the association itself to regularise it. 5

Now the plaintiffs submit that a breach of the constitution of a trade union cannot be ratified by an ordinary majority of the members, and that if an act is done in breach of an association's constitution it is necessarily ultra vires. Attention is drawn to the wording of Rule 7(v) of the constitution in this case, quoted above. The right to sue is given in respect of any breach of the constitution'. It is therefore submitted that Rule 7(v) is in fact the very embodiment of the true meaning of, or the exceptions to the rule in *Foss v. Harbottle* referred to." 10 15

Learned counsel submits that as the plaintiffs had required rights under the constitution which is the contract binding the union members, they are entitled by virtue of Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1979 to enforce those rights.

Mrs. Obe refers to Section 28(1) of the Trade Unions Act (Cap. 437) and submits that as the Registrar of Trade Unions has a role to play in the alteration of a union's constitution, the Rule in *Foss v. Harbottle* will not apply since the rule envisages a situation where the majority of the members of the Union can act at will. She submits that Rule 7(v) gives the plaintiffs the right to sue. 20 25

On the question on which we invited counsel to address us further, Mrs. Obe submits:-

"(a) In so far as the decision of the Supreme Court in Abubakri v. Smith confirmed the right of a member of an association to sue to protect his personal rights it remains good law in accordance with the subsequent enactment of 6(6)(b) of the 1979 Constitution. 30

(b) In so far as Abubakri v. Smith and the rule in Foss v. Harbottle appear to confer standing on persons to complain about wrongs done to association of which they are members notwithstanding that no personal rights or obligations are in issue, it would conflict with 6(6)(b) of the 1979 Constitution and to that extent would not be good law. 35

(c) Abubakri v. Smith however does not give consideration to the contractual rights and obligations of members of an association, and breach of the rules or constitution of an association such as a trade union may

constitute a breach of the rights of its members, who would therefore have standing under 6(6)(b) of the 1979 Constitution to complain of such breach.

(d) Despite such standing under 6(6)(b) of the 1979 Constitution, the courts may still decline to exercise jurisdiction (and thereby deny standing) to a person seeking an order which would be futile or unenforceable for the reasons given in Abubakri v. Smith,"

The first question to ask is: what is the rule in Foss v. Harbottle? In that case, Sir James Wigram, the Vice-Chancellor lay it down thus:-

"On the first point it is only necessary to refer to the clauses of the Act to show that whilst the supreme governing body, the proprietors at a special general meeting assembled, retain the power of exercising the functions conferred upon them by the Act of in-incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the plaintiffs on the present record. This is effect purports to be a suit by cestue que trusts complaining of a fraud committed or alleged to have been committed by persons in a fiduciary character. The complaint is that those trustees have sold lands to themselves, ostensibly for the benefit of the cestui que trusts. The proposition I have advanced is that, although the Act should prove to be voidable, the cestui que trusts may elect to confirm it. Now, who are the cestui qui trusts in this case? The corporation, in a sense, is undoubtedly the cestui que trusts; but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporation must be taken to have come into the corporation upon the terms of being liable to be so bound. How then can this court act in a suit constituted as this is, if it is to be assumed, for the purposes of the argument, that the powers of the body of the proprietors are still in existence, and may lawfully be exercised for a purpose like that I have suggested? Whilst the court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority is decisive to show that the frame of this suit cannot be sustained whilst that body retains its functions. In order then that this suit may be sustained it must be shown either that there is no such power as I have supposed remaining in the proprietors, or, at least, that all means have been resorted to and found ineffectual to set that body in motion."

The scope of this rule was explained by Mellish LJ. in McDougall v. Gardiner (1875) Ch.D 13,25-6 in the following words:-

"In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that, as I understand it, is what has been decided by the cases of Mozley v. Alston; and Foss v. Harbottle.

In my opinion that is the rule that is to be maintained. Of course if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing, and there the minority are entitled to come before this court to maintain their rights; but if what is complained of is simply that something which the majority are entitled to do has been done or undone irregularly, then I think it is quite right that nobody should have a right to set that aside, or to institute a suit in Chancery about it, except the company itself."

This dictum was cited with approval by this court in Abubakri & Ors. v. Smith & Ors. (1973) NSCC 451, 456; (1973) 1 All NLR 634, 641. And in Edwards & Anor v. Halliwell & Ors. (1950) 2 All E.R. 1064, 1066-1067, Jenkins L.J. observed:-,

"The rule in Foss v. Harbottle, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio. No wrong had been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the

company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied all as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right."

5 (Italics mine)

The above dictum was equally cited with approval by this court in Abubakri & Ors. v. Smith & Ors (supra). It follows, in my respectful view, that the rule - it is undoubtedly a common law rule - applies where:-

(a) The act complained of is within the competence of the body -
10 whether incorporate or unincorporate - to do by the act of a majority of its members;

(b) the act though done irregularly, it is within the competence of the majority to do it regularly;

(c) the act though done illegally, it is within the competence of the
15 majority to do it legally.

In view of the above dicta approved by this court, I cannot see the significance in the difference between acts that are intra vires and acts that are ultra vires in the application of the rule in Foss v. Harbottle.

It remains for me to say that the act complained of or relied on as
20 constituting the cause of action must be one properly belonging to the general body of the company or association. The Rule will not apply to a cause of action which an individual member can assert in his own right. As this court, per Elias C.J.N. put it in Abubakri & Ors. v. Smith & Ors. (supra) at page 643:-

25 "*It is necessary to add that the rule would not apply to individual members who can establish that their personal rights, as distinct from those of the union (or the Jamat in the present case), have been invaded. Thus, in Heyting v. Dupont and Anor. (1963) 3 All E.R. 97, the court declined to entertain a suit brought by a plaintiff shareholder against a director and the*
30 *company for payment of damages by the first defendant to the company for misfeasance as a director; it being held that the rule in Foss v. Harbottle precluded the exercise of jurisdiction by the court. The action, however, proceeded only in respect of the personal claims which both parties made against each other in respect of their respective shareholding properties."*

35 To the extent, therefore, that the rule in Foss v. Harbottle preserves the right of the individual members of a body corporate or association to sue where their personal or individual rights, as opposed to those of the corporation or association, have been infringed, it is not in conflict with Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria 1979

which provides:

"The judicial powers vested in accordance with the foregoing provisions of this section -

(b) shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person." (Italics mine)

Thus, the judicial powers vested in the courts by Section 6 of the 1979 Constitution can only be invoked by anyone who can show that his civil rights and obligations have been infringed. This is the majority view of this court in *Adesanya v. President* (1981) 2 NCLR 358, 385; (1981) 5 S.C. 112 expressed by Bello, J.S.C.

(as he then was) in these words:-

"Although the powers appear to be wide, they are limited in scope and content to only matters, actions and proceedings 'for the determination of any question as to the civil rights and obligations of that person'. It seems to me that upon the construction of the subsection, it is only when the civil rights and obligations of the person, who invokes the jurisdiction of the court, are in issue for determination that the judicial powers of the courts may be invoked.' In other words, standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of."

This majority view has been expressly approved by this court in other cases that have followed - see: *Oloriode v. Oyebi* (1984) 1 SCNLR 390; *Thomas v. Olufosoye* (1986) 1 NSCC 323.

I also agree with both learned leading counsel for the parties as submitted in their respective supplementary briefs that *Abubakri & Ors. v. Smith & Ors* (supra) was rightly decided. I must however point out that neither *Abubakri & Ors. v. Smith & Ors.* nor the rule in *Foss v. Harbottle* confers "standing on persons to complain about wrongs done to associations of which they are members notwithstanding that no personal rights or obligations are in issue", as postulated in submission (b) in the respondents' Supplementary Brief. On the contrary both authorities deny standing to members in such an event.

As regards submission (c) in the respondents' Supplementary Brief, it is, with respect, incorrect to say that "*Abubakri v. Smith* however:-

"does not give consideration to the contractual rights and obligations of members of an association, and breach of the rules or constitution of an association such as a trade union may constitute a breach of the rights of its members....."

"Indeed, the facts in *Abubakri v. Smith* show that the religious body there concerned had a constitution. The facts in that case are that the plaintiffs and the defendants were members of *Jamat-ul-Muslim of Lagos*, an incorporated religious association. The plaintiffs averred in their statement of claim that they were duly elected officers of the association but
 5 that the defendants unconstitutionally elected new officers in their places and that the books and other properties including funds belonging to the *Jamat*, were being wrongly withheld by the defendants. The plaintiffs did not sue in a representative capacity or join the association as plaintiff or defendant nor did they allege that their personal or contractual rights had
 10 been infringed. The defendants applied in limine for dismissal of the suit on the ground either (a) that even if the plaintiffs' averments were established they could not obtain judgment, or (b) that the statement of claim discloses no cause of action. This court held:-

1. That the rule in *Foss v. Harbottle* applies to an unincorporated
 15 association possessing a constitution or set of rules and regulations entitling it to sue and be sued as a legal entity, such as the *Jamat-ul-Muslim of Lagos*.

2. That the court is precluded from exercising jurisdiction in an action by individual members of the association in respect of a wrong alleged
 20 to be done to the association, except where they can establish that their personal rights, as distinct from those of the association, have been invaded.

3. Even if the plaintiffs' allegations in this case are taken as established, the court should not make an order which is unenforceable or of no
 25 avail, for there is nothing to prevent the *Jamat*, the acquiescence of the general members of which is presumed from their silence on the various complaints made by the appellants, from conveying a meeting after the court's ruling and restoring the respondents to the status quo ante.

Again, in *Alhaji Ahmed Agbaje & Ors. v. Chief Salami Agboluaje & Ors.* (1970) 1 All NLR 21, followed in *Abubakri v. Smith*, the Islamic Missionary Society to which the parties belonged had a constitution. It was contended by the plaintiffs that (i) the amendments to the Society's 1949 Constitution made in 1966 were not passed by a properly constituted executive committee of the Society as there was no duly elected executive
 35 committee for the year 1966 and (ii) the executive committee meeting at which the amendments were passed was not properly constituted as the 1st and 2nd appellants were not given due or any notice thereof and did not therefore attend. It was held by this court, per Sir Udoma, J.S.C. at pages 25-26 that:-

"... It is trite law that a court cannot make an unenforceable order. In a case of this kind, in view of the undisputed averment that the amendments complained of were popular, if even the evidence of the appellants was accepted and the relief sought granted, there would have been nothing to prevent the respondents soon thereafter from summoning a meeting of the society and passing a proper resolution ratifying the amendments, the subject matter of the complaint. In a recent case the Court of Appeal in England in reversing *Pennyquick J.* held that even in the absence of an express power to alter the rules governing a club, such power can be implied from a favourable response by a majority of members by their acquiescence in a change of constitution. See *Abbatt and Ors. v. Treasury Solicitor and Ors.* (1969) 1 WLR 1575."

This court distinguished the case of *Young v. Ladies Imperial Club Ltd.* (1920) All E.R. 220 where a member of the club was to be expelled on the scandalous ground that her conduct was injurious to the character and interest of the club. The Court of Appeal in England held that as the member's expulsion in those circumstances would have left a stigma on her reputation and character, the reason for such expulsion required the widest airing. Thus, it is not in all cases that breach of an association's constitution or rules and regulations will ground in a member of the association the right to sue but only where, as in *Young v. Ladies Imperial Club Ltd.* the member's civil rights and obligations can be said to be infringed. It must be shown that the member's personal interest will immediately be or has been adversely affected by the action or that he has sustained or is in immediate danger of sustaining an injury to himself, and which interest or injury is over and above that of the general membership of the association. The member must have some justiciable interest which may be affected by the wrong complained of or that he will suffer injury or damage as a result of the wrong.

Coming now to the facts of the present case on hand, the plaintiffs by originating summons had claimed from the defendants as hereunder:- 30

"(i) Whether having regard to the provisions of Rule 10(iii) of the Constitution of National Union of Banks, Insurance and Financial Institutions Employees (hereinafter referred to as 'the Constitution of the Union') the respective terms of office of each of the 1st- 11th defendants expired on the 28th of November, 1988. 35

(ii) Whether the declaration made by the 1st defendant to a purported meeting of the National Executive Council of the 18th Defendant Union, the National Union of Banks, Insurance and Financial Institutions held on the 19th of November, 1988 to the effect that the National Del-

legates' Conference of the 18th Defendant Union would not be held in November 1988 but at some other time in or before November 1989 is inconsistent with the Constitution of the union and therefore null and void.

(iii) *A declaration that only a National Delegates' Conference of the 18th Defendant Union can alter the provisions of the Constitution of the Union and that the purported decision of the National Executive Council (NEC) that no National Delegates' Conference of the 18th Defendant Union be held in November 1988 is a violation of the Constitution of the Union and that the same is null and void and of no effect.*

(iv) *declaration that the respective terms of office of each of the 1st - 11th defendants ceased at the expiration of three years from the 28th of November, 1985 being the date of their last election to office.*

(v) *An injunction restraining the 1st - 11th defendants and each of them from:-*

(a) *performing any of the functions of the respective office to which he was appointed in November 1985;*

(b) *parading himself as an officer of the 18th Defendant Union or as a member of the National Executive Council thereof;*

(c) *operating any of the Bank Accounts of the 18th Defendant Union in any Bank or from disposing of, receiving, negotiating or in any way dealing with any of the assets of the 18th Defendant Union.*

(vi) *A mandatory Injunction directing the 12th defendant - the General Secretary of 18th Defendant Union - to summon and service a National Delegates' Conference for the purpose of Constitution in lieu of the Delegates' Conference which should have been summoned for November 1988.*

(vii) *An Injunction restraining the 13th, 14th, 15th, 16th and 17th Defendants from honouring any cheques or orders for payment of money or for the disposal of or other dealing in any security or assets of the 18th Defendant Union, except and until a proper National Delegates' Conference shall have been held and fresh officers of the 18th Defendant Union shall have been elected for that purpose by the 18th Defendant Union."*

In the supporting affidavit, the 2nd plaintiff deposed to the fact that 1st and 4th defendants committed breaches of the Union's Constitution by

(i) refusing to call a National Delegates' Conference for November 1988 with a view to electing new officers but rather both defendants postponed the conference to a later date on or before November 1989 thereby unconstitutionally extending their period of office and (ii) running the accounts of the union in the various bank accounts to the exclusion of the 12th defendant who was the Acting General Secretary of the Union. Nowhere in the

43 paragraph affidavit did he allege infringement of the civil rights and obligations of any or all the plaintiffs. It would appear from the general tenor of the affidavit that the majority of the members of the union were on the side of the defendants/appellants. For if it were not so, nothing could have stopped the plaintiffs to request for a special National Delegates' Conference under Rule 8(iv) of the Constitution of the union which provides:- 5

"A Special National Delegates' Conference may, however, be held at the discretion of the National Executive Council and at such time and place it may decide or on receipt by the General Secretary of a request in writing (resolution) for such a conference to be held from a majority of the zonal councils acting on written requests from Branch Committees." or request the 12th defendant who appeared, from the affidavit of the 2nd plaintiff, to be not on the side of the 1st and 4th defendants, to summon an Ordinary National Delegates' Conference as provided for in Rule 8(v) which states:- 10

"Subject to the provisions of the Constitution the General Secretary, in consultation with the President, shall have the power to summon an Ordinary National Delegates' Conference subject further to ratification by the National Executive Council." 15

It would, therefore, appear that the plaintiffs have not even' exhausted the rights given them under the union's constitution before coming to seek relief in court. 20

In my respectful view, under the Rule in Foss v. Harbottle they lack standing to bring this action. Having regard, however, to paragraphs 36, 37 and 39 of the 2nd plaintiff's affidavit which read:-

"36. That it is therefore clear that the account of the union in the 13th defendant is being operated contrary to the provisions of the Constitution of the Union, and as a result the funds of the union in the 13th Defendant Bank which as at July 1988 stood in excess of N500,000.00 are now virtually exhausted." 25

37. That having thus virtually exhausted the said account, the 1st and 4th defendants have now attempted to transfer funds in excess of N750,000.00 standing to the credit of the union from the, 14th Defendant (Allied Bank of Nigeria Ltd.) to the 13th defendant Bank, as shown by a letter dated the 10th of October 1988, a copy of which is now produced and shown to me marked 'DE5'." 30

39. That the funds of the union are therefore in serious danger of being wasted and alienated by persons who under the Constitution of the Union have ceased to hold office." 35

and section 18(1) of the Trade Unions Act (Cap.437) which provides:-

"18(1) Without prejudice to the right of any person having a sufficient interest in the relief sought to apply for an injunction to restrain any unauthorised or unlawful application of the funds of a trade union, an injunction restraining any such application of the funds of a trade union may be granted by the appropriate High Court upon the application of the
5 Attorney-General of the Federation or of the Registrar, or of any five or more members of the Union."

I will hold that the plaintiffs have locus standi to sue as in their claim (vii) only.

It has been forcefully argued before us by Mrs. Obe that Rule 7(v) of
10 the union's constitution confers locus standi on the plaintiffs to sue in respect of all the claims. Chief Williams, on the other hand, has argued that the union's constitution being a contract binding all the members of the union cannot override the common law rule in *Foss v. Harbottle* (supra) and that the members by agreement cannot confer jurisdiction on the court
15 where otherwise it has none. I am more attracted to the arguments of Chief Williams on this point.

Now, Rule 7(v) provides:-

"Any member shall have the rights to initiate action at his own expense in connection with any breach of the Constitution."

20 Except to the extent that a breach of the Union's Constitution infringes the civil rights and obligations of a member, the above rule is unconstitutional. For the judicial powers of a court can only be invoked as provided for in section 6(6)(b) of the 1979 Constitution of the Federal Republic of Nigeria. I may also add that the rule in *Foss v. Harbottle* is a rule of law
25 which does not owe its legitimacy to an agreement of members of an association. The Rule determines in whom is the right to sue in respect of wrongs done to an association as a body, as distinct to wrongs done to its members. It may be that the associations, etc, in the cases in which the rule has been applied did not have provisions in the rules and regulations governing
30 them similar to the provisions of Rule 7(v) above. That does not, in my respectful view, affect the binding effect of the rule on members of 18th Defendant/Appellant Union. It may equally be argued that as breaches of the constitution of a union raise justifiable issues, there should be a right to sue. The reply to this argument is best expressed in the words of Obaseki,
35 J.S.C. in *Oloriode v. Oyebe* (supra) at page 296:-

"When a party's standing to sue is in issue in a case, the question is whether the person whose standing is in issue is a proper party to request an adjudication of a particular issue and not whether the issue itself is justifiable."

In my respectful view, Rule 7(v) of the constitution of 18th defendants/appellants union cannot validly confer locus standi on its members where a rule of law does not so confer that status. Afortiori, it cannot do so where the Constitution of the Federal Republic of Nigeria 1979 does not so confer such a standing. The Constitution of an association cannot alter a rule of law. What can alter a rule of law is either a statute, as is the case with. Section 18(1) of the Trade Union Act Cap. A37 vis-a-vis the rule in Foss v. Harbottle or the Constitution of the Federal Republic of Nigeria. The Rule in Foss v. Harbottle is not one of a court's jurisdiction, in its strict sense, but one of standing to sue.

From all I have been saying above, I will answer questions (i) and (ii) in the negative except that claim (vii) is saved by the provisions of Section 18(1) (formerly 16(1) of the Trade Union Act Cap.437. Consequently, I must also hold that Oduduru v. National Union of Hotels, etc. (supra); Nigerian Civil Service Union v. Essien (supra); and Agbonikhena v. Egba (supra) were wrongly decided and I would overrule them. Consequently, I would strike out claims (i) - (vii) if this appeal rests with me.

As regards question (iii), I agree entirely with the reasoning and conclusion of my learned brother Omo, J.S.C. I will order that claim (vii) be tried before a Judge of the High Court of Lagos State other than Segun, J.

Although this appeal has succeeded substantially, I do not consider it a proper case to award costs in favour of the appellants. I, therefore, order that each party should bear its costs of this appeal.

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