

SUPREME COURT OF NIGERIA
30TH SEPTEMBER, 1994. SC. 255/1990
CORAM:- M. BELLO CJN, M. L. UWAIS, E. O.
OGWUEGBU, Y. O. ADIO, A. I. IGUH, JJSC.

HYACINTH NWACHUKWU NZERIBE DEFENDANT/APPELLANT

AND

DAVE ENGINEERING CO. LTD. PLAINTIFF/RESPONDENT

APPEALS - Concurrent findings - On the issue of loss suffered by the respondent - Where supported by abundant evidence - Whether the Supreme Court will disturb the findings.

COURTS - Discretion - Of trial court in refusing to grant a stay of proceedings - Whether wrongfully exercised.

DAMAGES - Establishment of the loss claimed - Trial judge's mere observation that loss could not be fully calculated - Whether a finding that the loss claimed was not established.

DAMAGES - Proof of loss - Where quantum of loss proved is precise and calculable - And the lower Courts awarded far less than amounts claimed - Whether attack on the awarded damage has any merit.

DAMAGES - Interfering with damages awarded by trial court - Where the award was not based on wrong principles - And there was no cross appeal to have the award enhanced - It will not be interfered with.

PLEADINGS - Averments in pleadings - When evidence is held to be in line with averred facts.

PRACTICE & PROCEDURE - Stay of proceedings - Where no ground was supplied on which to grant a stay - Whether pendency of interlocutory appeal per se - Will justify a stay of further proceedings.

FACTS

Before the Federal High Court Port Harcourt, the plaintiff/respondent claimed a refund of part of the money it deposited for the supply of 200,000 bags of cements by the defendant/appellant. It also claimed N50,000.00 as damages for breach of contract. The 2nd defendant being the bank that received the deposited amount dropped out of the case after some reconciliation between the parties that led to refund of part of the amount deposited since the defendant did not supply all the 200,000 bags of cement. The action proceeded against the present defendant only on the issue of damages for breach of contract. The trial court found that the plaintiff suffered a loss of N1.65 per bag of cement undelivered to it which it bought from the open market at a higher price.

But the trial court awarded a far lesser amount of damages in the sum of N25,000 for breach of contract to the plaintiff. The court made an observation that the loss suffered could not be fully calculated. The defendant did not present any evidence save his statement of defence that was filed. Relying on the observation of the said trial court, the defendant appealed to the Court of Appeal to set aside the damages awarded in favour of the plaintiff and the appeal was dismissed. The defendant has further appealed to the Supreme Court to determine whether the Court of Appeal was right in affirming the awarded damages of N25,000. The ultimate court also had to determine whether the trial court's refusal to stay further proceedings in view of the pending interlocutory appeal was properly approved by the Court of Appeal.

HELD (Unanimously dismissing the appeal per lead judgment of **IGUH JSC**)
Evidence in line with averred facts

1. It has to be pointed out that the evidence of P.W.2 as above set out is completely in line with the facts averred in the respondent's statement of claim. This is because evidence of the respondent's alleged loss of N1.63 per bag clearly fell within the profit range of between N1.38 and N1.88 pleaded in paragraph 31 of the respondent's statement of claim. The submission of learned appellant's counsel that the evidence of loss adduced at the trial by the respondent was at variance with its pleadings is, with due respect, incorrect and totally misconceived. (P. 80 L. 12)

Whether the loss claimed was not established

2. A lot of play was made by learned counsel for the appellant on the observation of the learned trial Judge to the effect that the entire total loss suffered by the respondent could not be fully or conveniently calculated or estimated.

Learned counsel appeared to have read into this observation, a finding by the learned trial Judge that the respondent had failed to establish the loss or damage claimed. With profound respect, I am unable to accept this submission of learned counsel on the issue. Clearly, the point being stressed by the learned trial Judge was that the respondent's losses which he tried to particularise were so enormous that they were certainly much more than it had claimed. (P.82 L.12)

Where quantum of loss is precise and calculable

3. From the concurrent findings of the trial court and the court of Appeal that the respondent sustained a loss of N1.65 per bag, the amount of damages awarded must be seen to be manifestly and indisputably very much less than the respondent's total loss in respect of a total of 46,560 bags which the appellant failed to supply. The quantum of loss proved and accepted by the court below under this head of damages is precise, quantifiable and calculable in simple arithmetic. This certainly amounts to much more than N71,328.80 in respect of the said 46,560 bags of cement. In the circumstance, I agree that the attack on the award of N25,000.00 damages by the learned trial Judge is completely without merit and legally untenable. (P.82 L.27)

Concurrent findings

4. The learned trial Judge, in the present case, found it established that the respondent suffered a loss of N 1.63 per bag of the total of 46,560 bags of cement which the appellant failed to supply to the said respondent. The court below affirmed this finding as justified. This court will not disturb these concurrent findings of fact of the trial court and the court of Appeal unless such findings are perverse or unsupported by evidence or a substantial error apparent on the face of the record of proceedings is established. There is abundant evidence in support of the said findings and I can see no reason to upset them. (P. 83 L.26)

Award of damages not based on wrong principles

5. In the present case, the learned trial Judge neither acted upon any wrong principle of law nor is the amount awarded so high as to make it an entirely erroneous estimate of the damage to which the plaintiff is entitled. On the contrary, what the learned trial Judge did was to award much less than the respondent established by evidence. This he was entitled under the law to do. There is no appeal by the respondent to have the award enhanced and I have

no reason to interfere with the same. (P. 84 L.9)

Pendency of interlocutory appeal per se does not ground a stay

6. It is clear from the above that the trial court was not supplied with any facts or valid grounds upon which to base the exercise of its discretion in favour of the appellant. This seems to me fatal to this application as an interlocutory appeal per se may not without more operate as or justify a stay of further proceedings in an action from which such an appeal has arisen. Each case must however depend on its peculiar facts and circumstances. But as I already stated, the onus is on the applicant who seeks a stay to satisfy the court that on the particular facts and circumstances of his case, the grant of such a stay of proceedings is desirable and in the interest of justice. (P. 86 L.14)

Whether Discretion was wrongfully exercised

7. In my view, both the trial court and the court below were right in their above observations and I fully endorse them. The ruling of the learned trial Judge on the issue was clearly a result of the exercise by him of his judicial discretion. It was neither shown that the discretion was exercised by the trial court upon some wrong principles nor that it was tainted by some illegality or substantial irregularity. In these circumstances, the court of Appeal was perfectly right not to have interfered with this exercise of discretion by the trial court. In my view, there is no merit in the attack of learned appellant's counsel on this score. (P.87 L.9)

NOTABLE POINTS OF INTEREST

IGUHJSC

1. Need to establish averment in pleadings by evidence

The first issue is that although pleadings were ordered in the suit and the appellant duly filed his Statement of Defence in which various defences were pleaded, it must be borne in mind that in law, an averment in pleadings is not tantamount to evidence and cannot be construed as such. Accordingly, an averment in pleadings, unless where the same is admitted, must otherwise be established or proved by evidence in default of which it must be discounted as unsubstantiated. (P. 78 L.30)

2. *Unchallenged evidence of a party*

In the second place, the law is clear that where evidence given by a party to any proceedings or by his witness is not challenged by the opposite side who had the opportunity to do so, it is always open to the court seised of the
5 matter to act on such unchallenged evidence before it. (P. 79 L.3)

3. *Failure by the Defence to offer any evidence - Implications*

There is thirdly the fact, as already pointed out, that the appellant, as defendant, offered no evidence whatsoever in his defence. In this sort of circum-
10 stance the evidence before the trial court obviously goes one way with no other set of facts or evidence weighing against it. There is nothing in such a situation to put on the other side of that proverbial or imaginary scale or balance, as against the evidence given by or on behalf of the plaintiff. The onus of proof in such a case is naturally discharged on a minimal of proof.
15 (P. 79 L 11)

4. *Damages to have been enhanced if asked for by respondents*

I should perhaps add that had the respondent cross-appealed or given the relevant notice to have the award enhanced, there are sufficient evidence and
20 compelling circumstances for this court to have considered such an appeal in favour of the respondent. (P.82 L.36)

5. *Requirement of strict proof of special damages*

The rule that special damages, unlike general damages, must be strictly proved
25 is well founded in law and has been repeatedly emphasized by this court. What this rule requires, in effect, is that anyone making a claim in special damages must prove strictly that he did suffer such special damages claimed. This, however, does not mean that the law requires an extraordinary measure of evidence or that the law lays down or requires a special category of evi-
30 dence to establish entitlement to special damages. (P.83 L.8)

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6. *Loss resulting from breach of contract*

The fact that damages are difficult to assess which is not the case in this
35 appeal, does not disentitle a plaintiff to compensation for loss resulting from a defendant's breach of contract. The fact that the amount of such a loss cannot be precisely ascertained, does not also deprive a plaintiff of all remedy. In the instant case, the appellant did not contest the fact that the plaintiff suffered loss resulting from the breach of the contract by him. His quarrel is as

to strict proof of the loss and damage. (P. 92 L. 11)

7. Damages - Question of Double Compensation

The question of double compensation did not arise in this appeal. The learned trial Judge awarded the plaintiff a lump sum of N25,000.00. “for breach of contract and damages”. (Underlining is for emphasis only). This expression did not mean separate awards of special and general damages. The amount did not even come near to the loss which the plaintiff proved. The learned counsel for the appellant should not have pitched his battle on an innocent observation of the learned trial Judge where he said: “The entire total amount lost in all cannot now be fully estimated.” The observation only showed the enormous loss suffered by the plaintiff (P. 92 L.28)

8. Exercise of Discretion not to be easily interfered with

An appellate court would not, generally, question the exercise of discretion by the trial Judge merely because it would have exercised this discretion in a different way if it had been in the position of the lower court. It ought to be very slow to interfere with the discretion of a trial judge unless it appears that the result of the order made below is to defeat the rights of the parties altogether, or that the trial Judge gave no weight or sufficient weight to important considerations. In such cases, an appellate court has power to review such an order and it is its duty to do so. (P.93 L.18)

REPRESENTATION

Chief U.N. Udechukwu for the appellant.

Dr. J.O. Ibik SAN, with Miss A. Okoye for the respondent.

CASES REFERRED TO

- Dumez Nig. Ltd. v. Ogboli (1972) 1 All NLR (PT.1) 241 30
- West African Shipping Agencies Nig. Ltd. v. Kalla (1978) 3 SC 21
- Odulaja v. Hadda (1973) 11 SC 357
- Akinfosile v. Ijose (1960) 5 FSC 192
- Anyia v. A.N.N. Ltd. (1992) 6 NWLR (Pt. 247) 319
- Omoregbe v. Lawani (1980) 3 - 4 SC 108 35
- Nwabuoku v. Otteh (1961) 1 All NLR 487
- Boshail v. Allied Commercial Exporters Ltd. (1961) All NLR 917
- Woluchem v. Gudi (1981) 5 SC 291
- Chinwendu v. Mbamali (1980) 3 - 4 SC 31

Flint v. Lorell (1935) 1 KB 360

Bola v. Bankok (1986) 3 NWLR (Pt. 27) 141

Vaswani v. Savalakh (1972) 12 SC 77

Shekoni v. Ojoko 14 WACA 504 5

Ejiofor v. Onyekwe (1972) 1 All NLR (Pt.2) 527

5 P.Z. & Co. Ltd. v. Ogedengbe (1972) 1 All NLR (Pt.1) 202

Kigo v. Holman (1980) 5 - 7 SC. 60

Michael v. Keun (1927) All E.R. (Reprint) 335

BOOK REFERRED TO

10 Chitty on Contracts (General Principles) 23rd Ed. paras 14 - 32

LEAD JUDGMENT BY IGUH JSC

In the Port Harcourt Judicial Division of the Federal High Court of
15 Nigeria, the plaintiff, who is now the respondent, claimed against the defendants as follows:-

(i) A declaration that the plaintiff is entitled to a refund of N149,635.20
being balance due to the plaintiff out of the sum of N624,000.00 deposited with
the 2nd defendant as Bank guarantee in favour of the 1st defendant in respect
20 of the purchase price of 200,000 bags of cement on board the ship
“M.V. Vori”

(ii) The sum of N50,000.00 being damages against the 1st defendant
for breach of contract.

Originally, there were two defendants in this case, namely, the 1st
25 defendant, who is now the appellant and the 2nd defendant, Mercantile Bank
of Nigeria Limited. The 2nd defendant following some reconciliation between
the parties, dropped out of the suit before its actual hearing commenced. The
hearing proceeded against the appellant only in damages for breach of contract.
At the conclusion of the said hearing, Osakwe J., entered judgment for
30 the respondent in the sum of N25,000.00 being damages for breach of contract.
Being dissatisfied with this judgment, the appellant lodged an appeal
against the same to the Court of Appeal, Enugu Division, which in a unanimous
decision dismissed the appeal on the 10th day of April, 1987. Aggrieved
by this decision of the Court of Appeal, the appellant has further appealed to
35 this court.

The facts of this case, in so far as they concern the issues for determination
in this appeal, are simple and straight forward. The appellant contracted in writing
to sell and deliver to the respondent 10,000 metric tons of bagged cement,
that is to say, 200,000 bags of cement ex ship “M.V. Vori”. The

agreed purchase price was N3.12 per bag. Pursuant to this agreement, the respondent obtained from the 2nd defendant, a bank guarantee for N624,000.00 being the total purchase price of the said cement to ensure prompt payment by the bank to the appellant as and when deliveries were made to the respondent.

In the course of deliveries, a dispute arose between the appellant and the respondent. This culminated in the institution of Suit No. FRC/PH/24/77 at the Federal High Court, Port Harcourt which ended in a non-suit hence the present action. The parties in compliance with an interlocutory order of the trial court had reconciled their irrespective inventories of all the cement delivered to the respondent and as a result executed Exhibit B. Exhibit B showed by consensus that 153,440 bags of cement were delivered by the appellant to the respondent while 43,760 bags were undelivered. There was however disagreement as to whether or not the remaining 2,800 bags of cement were infact delivered. In view, however, of the said consensus, the respondent obtained an interim order for a refund by the 2nd defendant of the sum of N86,531.20 representing un-utilised advance purchase price for the undisputed 43,760 bags of cement not delivered to the respondent. In consequence, the 2nd defendant ceased further participation in the case and remained the stakeholder of N58,736.00 vis-a-vis the disputed 2,800 bags of cement aforesaid.

The trial court duly heard evidence on the outstanding issues at the end of which judgment was entered against the appellant, the defence having offered no evidence. On appeal, as aforesaid, the Court of Appeal affirmed the decision of the trial court hence this further appeal.

The appellant's two grounds of appeal to this court, without their particulars, are as follows:-

"1. ERROR IN LAW

The learned Justices of the Court of Appeal erred in law when they upheld the decision of the learned Trial Judge who held that the plaintiff/respondent was entitled to general damages of N25,500.00 when on a calm view of the evidence adduced by the plaintiff/respondent vis-a-vis his statement of claim, there was no legal basis for such award.

2: ERROR IN LAW

Their Lordships Justices of the Court of Appeal erred in law when they failed to appreciate that the learned Trial Judge erred in law when he refused to stay proceedings in the substantive suit but proceeded to final judgment in spite of the fact that this notice had been drawn to the order of the Court of Appeal granting the appellant leave to appeal against an inter-

locutory ruling of the trial Judge in the suit on an issue which went to jurisdiction."

The parties, acting pursuant to the Rules of Court, exchanged their briefs of argument.

The two issues formulated on behalf of the appellant which we are
5 called upon to determine are as follows:-

*"(1) Whether in view of this finding of the court of trial to the effect that the plaintiffs loss could not be conveniently calculated and bearing in mind the specific pleading as to loss by the plaintiff the Court of Appeal was justified in confirming the award of N25,500.00 to the plaintiff for breach of
10 contract and damages."*

*(ii) Whether the Court of Appeal was right when it held that the High Court was justified in refusing to order a stay of proceedings on the ground that considering the fact and circumstances of the instant case the interlocutory appeal which was not before it for consideration and in re-
15 spect of which it had granted leave to appeal is frivolous."*

The respondent, for its own part, also identified two issues in its brief of argument as arising in this appeal for determination. These go as follows:-

*"(a) Whether the verdict of the Court of Appeal affirming the award
20 of N25,500 as damages for breach of contract is perverse.*

(b) Whether the court of appeal erred in refusing to interfere with the discretionary decision of the trial court refusing stay of proceedings."

A close study of the questions posed in the respondent's brief shows that they are substantially identical with the issue raised by the appellant in
25 his own brief of argument. I shall therefore adopt in this judgment, the set of questions formulated in the appellant's brief for my consideration of this appeal.

The pith and substance of the appellant's argument in respect of the first issue is that the award of N25,000.00 as damages to the respondent was
30 speculative and legally untenable in view, firstly of the finding of the trial court that the respondent's loss could not be conveniently calculated and secondly, of the further fact that the award of damages for breach of contract was based on evidence at variance with the pleadings. Citing the cases of *Dumex Nigeria Limited v. Ogboli* (1972) 1 All NLR (Pt.1) 241 at 249 - 251 and
35 *West African Shipping Agencies Nig. Ltd & Another v. Alhaji Musa Kalla* (1978) 3 S.C. 21 at 31-32, learned appellant's counsel, U.N. Udechukwu Esq., submitted that there is, in law, no room for recapitulative award and that the court cannot make an award of general damages taking into account things which it could have considered in awarding damages upon the specific par-

ticulars pleaded. He submitted that though strict proof means no more than such proof as would readily lend itself to quantification or assessment as held in *Odulaja v. Haddad* (1973) II S.C. 357, unless the plaintiff pleaded and proved facts which would assist the court in making the assessment or calculation, the court would decline to make the award. He contended that none of the claims pleaded in the statement of claim was strictly proved as required by law 5 and that one was therefore in sympathy with the learned trial Judge when he observed that from the evidence before him,

"the entire total loss in all cannot now be fully estimated. It seems to me that the losses suffered by the plaintiff cannot be conveniently calculated."

He submitted that this, in effect, is a finding that the losses had not 10 been strictly proved as required by law and he urged the court to answer the question posed in the first issue in the negative.

On the second issue, the appellant's complaint is that the court below failed to appreciate that by refusing to stay proceedings, the learned trial Judge had not only pre-empted the interlocutory appeal brought with the 15 leave of the Court of Appeal but had rendered the same nugatory thereby confronting the Court of Appeal with a *fait accompli*. He therefore contended that this is an injudicious exercise of discretion. He conceded that the pendency of an appeal does not operate as a stay of proceedings or stay of execution. He however submitted that it would produce a state of judicial 20 anarchy and chaos if appeal courts grant leave to appeal and lower courts fully aware of such a fact proceed with the hearing of the proceedings before them in a manner which would render the appeal nugatory.

Learned counsel finally urged the court to allow this appeal and order either that the judgments of the Court of Appeal and the trial court be set 25 aside and the court below ordered to first dispose of the pending interlocutory appeal while the fate of the substantive suit awaits the outcome of the said appeal or alternatively that the respondent's claims be dismissed.

Learned counsel for the respondent, Dr. J. O. Ibik, in his reply stressed that this appeal is against the concurrent findings of both the trial court and 30 the Court of Appeal. He urged that the appellant did not appear to have addressed the judgment of the court below which he was appealing against but appears instead to be quarrelling with the judgment of the trial court.

On the first issue, learned counsel contended that the trial court found that the loss suffered by the respondent was far in excess of N71,328.80 35 He described Exhibit as an admission by the appellant that he did not supply 43,760 bags of cement to the respondent. There is also the uncontroverted and unchallenged evidence of P.W.3 that the disputed 2,800 bags of cement were not supplied. The total number of bags of cement for which the appellant

was in breach is therefore 46,560. On the evidence before the trial court, Dr. Ibik stressed that the respondent would have made a profit of N3.12 per bag vis-a-vis contract price. He pointed out that it is significant this evidence was not refuted by the appellant. He contended that the strict proof of special damages does not connote proof of such special damages beyond reasonable
5 doubt as required in criminal cases as proof in civil law is on the balance of probabilities. He urged the court to hold that the award of N25,000 as damages for breach of contract is amply justified by the pleadings and the accepted evidence before the court and that the said award is indeed far less than the actual loss sustained by the respondents as specifically pleaded, claimed and
10 proved before the trial court.

On the second issue, learned respondent's counsel submitted that the subject matter of the case now on appeal reveals that the main relief claimed in suit No.FRC/PH/24/77 is entirely different from that claimed in the present action. He also argued that the parties and the issues in controversy
15 in both cases are different and distinguishable. He contended that the order of non-suit rather than a dismissal, entered in the first suit preserved the unsuccessful plaintiff's right of action hence the trial court had no difficulty in refusing the appellant's application for a stay of proceedings of the second suit. He added that the trial court was at all events not supplied with any
20 materials upon which to base the exercise of its judicial discretion in favour of the applicant. All that was before it was the bare statement of the appellant's counsel that his "application has been granted by the Court of Appeal; it stands to reason that this case be stayed by this court". He therefore submitted that the answer to the second issue must be in the affirmative. He urged
25 the court to hold that this appeal lacks merit and should be dismissed.

Before I proceed to consider the issue that were raised for determination in this appeal, it is necessary to bear in mind that the appellant offered no evidence in his own defence at the hearing before the trial court. Three basic legal issues have therefore arisen from this situation. The first issue is that
30 although pleadings were ordered in the suit and the appellant duly filed his Statement of Defence in which various defences were pleaded, it must be borne in mind that in law, an averment in pleadings is not tantamount to evidence and cannot be construed as such. Accordingly, an averment in pleadings, unless where the same is admitted, must otherwise be established or
35 proved by evidence in default of which it must be discountenanced as unsubstantiated. See *Akinfosile v. Ijose* (1960) 5 FSC 192; (1960) SCNLR 447; *Muraina Akanmu v. Adigun and Ano* (1993) 7 NWLR (Pt.304) 218 at 231; *Ohmiami Brick and Stone Ltd. v. A.C.B. Ltd* (1992) 3 NWLR (Pt.229) 260 at 293; *Anyah v. ANN*.

Ltd (1992) 6 NWLR (Pt. 247) 3 I9; and Honika Sawmill Nig. Ltd P. Mary Hoff (I 994) 2 NWLR (Pt. 326) 252 at 266.

In the second place, the law is clear that where evidence given by a party to any proceedings or by his witness is not challenged by the opposite side who had the opportunity to do so, it is always open to the court seised of the matter to act on such unchallenged evidence before it. See Isaac Omoreghe v. Daniel Lawani (1980) 3-4 S.C. 108 at 117; Odulaja v. Haddad (1973) 11 S.C. 357; Nigerian Maritime Services Ltd. v. Alhaji Bello Afolabi (1978) 2 S.C. 79 at 81; Boshali v. Allied Commercial Exporters Ltd (1961) All NLR 917; (1961) 2 SCNLR 322.

There is thirdly the fact, as already pointed out, that the appellant, as - defendant, offered no evidence whatever in his defence. In this sort of circumstance the evidence before the trial court obviously goes one way with no other set of facts or evidence weighing against it. There is nothing in such a situation to put on the other side of that proverbial or imaginary scale or balance, as against the evidence given by or on behalf of the plaintiff. The onus of proof in such a case is naturally discharged on a minimal of proof. See Nwabuoku v. Ottih (1961) 1 All NLR 487 at 490; (1961) 2 SCNLR 232; Oguma v. I.B.W.A. (1988) 1 NWLR (Pt. 73) 658 at 682 and Balogun v. UB.A. Ltd (1992) 6 NWLR (Pt. 247) 336 at 354. With the above principles of law, in mind, I will now turn to the two issues for determination.

On the appellant's complaint against the award of N25,000.00 general damages to the respondent, a few material facts are manifest on the pleadings and the evidence before the trial court. It is clear that the appellant neither pleaded in his statement of defence nor did he prove in court that he delivered the 200,000 bags of cement which he contracted to sell to the respondent. Most importantly is the further fact that the parties reconciled their figures which culminated in the signing of Exhibit B. Exhibit B is an unequivocal admission on the part of the appellant that he did not supply 43,760 bags of cement to the respondent. The trial court so found and this was affirmed by the court below.

There is also a dispute manifest in Exhibit B as to whether the appellant failed to supply an additional 2,800 bags of cement on the 31st December, 1977 to the respondent. P.W.2 testified that the said 2800 bags of cement were infact not delivered to the respondent. This piece of evidence stood contradicted and unchallenged. On the finding of the learned trial Judge, it seems to me clear that the total number of bags of cement for which the appellant was in breach stood at 46,560.

In pleading its loss, the respondent averred in paragraph 31 of its statement of claim that it would have sold the unsupplied cement at "between

N4.50 and N5.00 per bag”. This could have meant a profit of between N1.38 and N1.88 per bag vis-a-vis the contract price of N3.12 per bag. In his evidence in court, P.W.2 particularized the respondent’s loss as follows:-

“We had to buy cement from open market at N4.75 and thereby suffered a loss of N1.63k per bag because we contracted with the first defendant to supply us cement at N3. 12k per bag. It follows therefore that on the 2800 bags of cement not supplied to us by the first defendant, we suffered a total loss of N4564 .00. With respect to the 43,760 bags of cement for which we had been paid cash by court’s order, we also suffered a loss of N71,328.80”.

10 (Italics supplied)

It has to be pointed out that the evidence of P.W.2 as above set out is completely in line with the facts averred in the respondent’s statement of claim. This is because evidence of the respondent’s alleged loss of N1.63 per bag clearly fell within the profit range of between N 1.38 and N 1.88 pleaded in paragraph 31 of the respondent’s statement of claim. The submission of learned appellant’s counsel that the evidence of loss adduced at the trial by the respondent was at variance with its pleading is, with due respect, incorrect and totally misconceived.

The evidence of P.W.2 on the respondent’s loss remained unchallenged and uncontroverted by the appellant. The learned trial Judge in assessing this piece of evidence of loss adduced before the court had this to say:-

“The plaintiffs have proved to my satisfaction that the defendant did not supply them 2800 bags of cement which they had to buy outside at a higher price and thereby suffered a total loss of N4,564.00. The plaintiffs have also satisfied me beyond reasonable doubt that they deposited, with borrowed money from the Standard Bank of Nigeria, with the Mercantile Bank of Nigeria Ltd., Aba the sum of N625,000.00 for which they were paying an overdraft interest of 9% per annum....For the rest of the unsupplied cement under the contract they had to pay more for them in the open market, and the plaintiffs calculated that they might have lost on that, about N71,328.00. There was also the loss of use of their funds which was locked up in the bank pending the determination of this suit. The entire total amount lost in all cannot now be fully estimated. It seems to me that the losses suffered by the plaintiffs cannot be conveniently calculated either in terms of cash or inconvenience suffered.”

The Court of Appeal in affirming the above findings of the trial court observed as follows:-

“As a result of the appellant’s failure to supply 43,760 bags of cement, the

respondents, as disclosed in the evidence of P.W.2 were obliged to buy cement from the open market at N4.75 per bag in order to fulfil its obligations to sell cement to their customers. This witness testified that the difference between the control price and the open market purchase price was N 1.63 per bag and that the respondents therefore paid more to buy the cement which the appellant failed to deliver. The extra money spent on that account amounts to N71,328.80. Learned counsel for the respondents submitted that this amount represents a loss directly and naturally flowing from the appellant's breach since the respondents were obliged to purchase in order to meet its customers' demands - *PZ & Co. Ltd v. Ogedenghe*(1972) 1 All NLR (Pt.1) 202. It is further said that since the appellants knew the respondents were in the business of buying and selling cement to customers, it is reasonable to suppose that at the time they entered into the contract, both the appellant and the respondents contemplated that should the seller fail to deliver the goods, the buyer would have to buy in the open market to sell to their customers. If the buyer in such circumstances buys in excess of the contract price, the measure of damages to which such a buyer is entitled is the difference between the market value and the contract price.

The appellant, it must be noted, did not cross examine P.W.2 after the latter concluded his evidence-in chief. Furthermore the appellant did not give evidence or call any witness to testify in rebuttal of the respondents' evidence of their loss. The result was that the evidence of P.W.2 in support of the respondents' claim stood unchallenged and uncontradicted. The learned Judge accepted the evidence of P.W.1 and P.W.2 and found as a fact that the appellant had committed breach of contract and that the respondents have thereby suffered substantial loss and damage. Nevertheless in his assessment of damages recoverable by the respondents, the trial Judge proceeded to treat the unchallenged and uncontroverted evidence as "a guide", based upon which he awarded the respondent N25,000.00 against the appellant which sum is by far less than both the amount claimed by the respondent and the loss they incurred. I am therefore unable to understand the fury which the award has generated."

In my view, the Court of Appeal is entirely justified in making the above observations which I fully endorse. As I have already pointed out, it cannot be over-emphasized that a trial court is always entitled to accept and/or act upon uncontradicted and unchallenged evidence establishing loss legally recoverable in a given case. So in *Boshali v. Allied Commercial Ltd.*, (supra), at 921, the Judicial Committee of the Privy Council on an issue similar to the one under consideration had cause to observe as follows:-

“The only evidence as to loss came from the appellant whose evidence was not cross-examined The trial Judge was in their Lordships’ view fully entitled in the absence of any contrary evidence to take the figure of 6d per yard as the appellant’s loss of profit.”

See also *Odulaja v. Haddad* (supra), where this court per Irikefe, J.S.C.

5 as he then was, put the matter as follows:-

“In the particular circumstances of this case, therefore, coupled with the fact that the respondent had the opportunity of producing evidence in rebuttal of the appellant’s assessment of his loss of rent, but did not do so, we take the view that the learned trial Judge was right in his quantification
10 *of the loss on the available evidence.....”*

A lot of play was made by learned counsel for the appellant on the observation of the learned trial Judge to the effect that the entire total loss suffered by the respondent could not be fully or conveniently calculated or estimated. Learned counsel appeared to have read into this observation, a
15 finding by the learned trial Judge that the respondent had failed to establish the loss or damage claimed.

With profound respect, I am unable to accept this submission of learned counsel on the issue. Clearly, the point being stressed by the learned trial Judge was that the respondent’s losses which he tried to particularise
20 were so enormous that they were certainly much worse than it had claimed. The Court of Appeal was of a similar view when dealing with the issue, it concluded thus:-

“I am therefore unable to understand the fury which the award has generated.”

25 I entirely agree with the above observation of the court below. It seems to me plain that from the concurrent findings of the trial court and the Court of Appeal that the respondent sustained a loss of N1.65 per bag, the amount of damages awarded must be seen to be manifestly and indisputably very much less than the respondent’s total loss in respect of a total of 46,560
30 bags which the appellant failed to supply. The quantum of loss proved and accepted by the courts below under this head of damages is precise, quantifiable and calculable in simple arithmetic. This certainly amounts to much more than N71,328.80 in respect of the said 46,560 bags of cement. In the circumstance, I agree that the attack on the award of N25,000.00 damages by the
35 learned trial Judge is completely without merit and legally untenable. I should perhaps add that had the respondent cross-appealed or given the relevant notice to have the award enhanced, there are sufficient evidence and compelling circumstances for this court to have considered such an appeal in favour of the respondent.

It was also argued on behalf of the appellant that the general damages awarded sounded in special damages and that failure to prove them strictly as required by law is fatal to the respondent's claim.

In the first place, I entirely agree with learned appellant's counsel that a claim in special damages must, to succeed, be proved strictly and that the court is not entitled to make its own estimate on such an issue. See *Dumez (Nig.) Ltd v. Ogholi* (1972) 1 All NLR 241 and *Jaher v. Basma* 14 WACA 140. The rule that special damages, unlike general damages, must be strictly proved is well founded in law and has been repeatedly emphasized by this court. What this rule requires, in effect, is that anyone making a claim in special damages must prove strictly that he did suffer such special damages claimed. This, however, does not mean that the law requires an extra-ordinary measure of evidence or that the law lays down or requires a special category of evidence to establish entitlement to special damages. It does not mean either that an award in special damages cannot be made unless such damages are established beyond reasonable doubt as is the position in criminal cases. All that the rule requires is that the person making a claim in special damages should establish his entitlement to that type or class of damages by credible evidence of such character as would satisfy the court that he is indeed entitled to an award under that head, otherwise the general law of evidence as to proof on the balance of probabilities or by preponderance or weight of evidence which ordinarily applies in civil cases operates. See *Oshinjin and ors v. Alhaji Elias and ors* (1970) 11 All NLR 153 at 156. See too *Dumez (Nig) Ltd v. Patrick Ogholi* (1972) 1 All NLR (Pt.1) 241.

The learned trial Judge, in the present case, found it established that the respondent suffered a loss of N 1.63 per bag of the total of 46,560 bags of cement which the appellant failed to supply to the said respondent. The court below affirmed this finding as justified. This court will not disturb these concurrent findings of fact of the trial court and the Court of Appeal unless such findings are perverse or unsupported by evidence or a substantial error apparent on the face of the record of proceedings is established. See *Enang v. Adu* (1981) 11-12 S.C 25, *Lamai v. Orhih* (1980) 5-7 S.C. 28, *Woluchem v. Gudi* (1981) 5 SC. 291 at 326, *Ike v. Ughoaja* (1993) 6 NWLR (Pt. 301) 539, *Chinwendu v. Mhamali* (1980) 34 S.C 31 etc. There is abundant evidence in support of the said findings and I can see no reason to upset them.

The law is well settled that in order to justify reversing the trial Judge on the question of the amount of damages awarded, it will generally be necessary that this court be convinced either that:-

(a) the Judge acted upon some wrong principle of law or

(b) that the amount awarded was so extremely high or so very small as to make it in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled.

See Flint v. Lovell (1935) 1 KB 360, Zik's Press Ltd. v. Ikoku (1951) 13 WACA 188. Idahosa v. Oronsaye (1959) 4 FSC 165; (1959) SCNLR 407; Bala v. Bankole (1986) 3 NWLR (Pt. 27) 141. Onaga v. Micho & Co. (1961) 1 All NLR 238; (1961) 2 SCNLR 101; and Ijehu Ode Local Government v. Adedeji Balogun & Co. Ltd. (1991) 1 NWLR (Pt. 166) at 136. In the present case, the learned trial Judge neither acted upon any wrong principle of law nor is the amount awarded so high as to make it an entirely erroneous estimate of the damage to which the plaintiff is entitled. On the contrary, what the learned trial Judge did was to award less than the respondent established by evidence. This he was entitled under the law to do. There is no appeal by the respondent to have the award enhanced and I have no reason to interfere with the same. For all the reasons that I have given above, the answer to issue number 1 is in the affirmative.

The second issue questions the correctness of the refusal of the learned trial Judge to stay proceedings in the action pending the outcome of the interlocutory appeal against his said decision. For a fuller appreciation of what is involved under this issue, it is necessary to state briefly the facts relevant thereto. These are as follows:-

(a) The present action was instituted on the 23rd August 1978 sequel to a non-suit entered in an earlier suit which was between the present respondent and the appellant.

(b) The claims against the appellant in the earlier action FRC/PH/24/77) were for a declaration that the respondent was entitled to take delivery of 190,000 bags of cement ex MV. Vori, an injunction restraining the appellant from delivering any of the said consignment to any other persons, and N50,000.00 damages for breach of contract.

(c) In the instant case however, the claim against the appellant and the Bank is for a declaration that the respondent is entitled to a refund of undisbursed money which it deposited for payment of cement to be supplied by the appellant and, as against the appellant, personally, N50,000.00 as damages for breach of contract.

(d) After pleadings were duly filed and exchanged in the present case, the learned trial Judge directed the parties to reconcile their respective records as to the actual quantity of cement delivered by the appellant to the respondent and the balance undelivered. As a result of that exercise, the

respondent, the appellant and the Bank executed a settlement sheet dated 27th March 1979 - Exhibit "B".

(e) Based on the admission of the appellant per Exhibit 'B' aforesaid, and as a result of a successful interlocutory application to that effect, the learned trial Judge ordered the Bank to refund to the respondent out of the deposited purchase money, a sum of N86,531.20 representing the value of cement not supplied to the respondents by the appellant. The order was made on the 18th June, 1979. 5

(f) Thereafter in 1980 the appellant moved the trial court for stay of further proceedings pending the determination of his appeal in respect of the non-suit entered in the earlier action. The application was refused on the 12th November, 1980. The appellant thereafter sought for and obtained the leave of the court below to appeal therefrom on the 12th October, 1981. 10

(g) Subsequently, and after P.W.1 and P.W.2 had given evidence, the appellant asked the trial Judge orally to stay further proceedings which application the learned Judge refused. 15

The above are the circumstances under which the learned trial Judge was asked to order a stay of proceedings in the present action.

There can be no doubt that both the court of first instance and the appellate court have a duty to preserve the res for the purpose of ensuring that an appeal, if successful, is not rendered nugatory. See *Vaswani Trading Company v. Savalakh and Company* (1972) 12 S.C. 77 at 81 and *Kigo (Nigeria) Ltd v. Holman Bros (Nigeria) Ltd* (1980) 5-7 S.C 60 at 70. So too, where owing to a relevant appeal or pending action, the hearing of a case would work injustice to a party, such a case should be adjourned pending the determination of the appeal. See *Joseph Shekoni v. Chief Ojoko* 14 WACA 504. The onus, however, is on the party applying for a stay of proceedings to satisfy the court that in the special circumstances of his case, there exists some cogent or exceptional reasons which make the granting of such a stay of proceedings desirable. The exercise of such jurisdiction, being a matter of discretion of the court, will depend on the facts and circumstances of each case. Unless, that judicial discretion is shown to have been wrongly exercised or that such an exercise was tainted by some illegality or substantial irregularity, the appellate court will, on principle, not interfere with the exercise of that discretion. See *Anyah v. ANN. Ltd* (1992) 6 NWLR (Pt. 247) 331. 20 25 30

Adverting now to the facts and circumstances of the present case, 35 the vital question is whether it can be said that the learned trial Judge was justified in refusing an order for a stay of proceedings. In the first place, it must be observed that the reliefs claimed and the main issues in controversy in the two suits cannot be said to be the same. Secondly, the first of the two suits

ended in a non-suit and not in a dismissal. The unsuccessful plaintiff's right of action was therefore preserved as the interest of justice in such a situation demands that such a plaintiff should not forever be shut out from re-presenting his case. See Ejiofor v. Onyekwe and ors (1972) 1 All NLR (Pt. 2) 527; (1972) 12 S.C. 171. Thirdly, it must be noted that the application of learned counsel for the appellant for a stay of proceedings was not made until both P.W.1 and P.W.2 had testified in the proceedings. It was on the adjourned date for the cross-examination of P.W.2 that learned appellant's counsel submitted orally as follows:-

“In view of the order of the Federal Court of Appeal, I am not prepared to go on.....my application has been granted by the Court of Appeal. It stands to reason that this case be stayed by this court”

It is clear from the above that the trial court was not supplied with any facts or valid grounds upon which to base the exercise of its discretion in favour of the appellant. This seems to me fatal to this application as an interlocutory appeal per se may not without more operate as or justify a stay of further proceedings in an action from which such an appeal has arisen. Each case must however depend on its peculiar facts and circumstances. But as I already stated, the onus is on the applicant who seeks a stay to satisfy the court that on the particular facts and circumstances of his case, the grant of such a stay of proceedings is desirable and in the interest of justice.

The instant application for a stay of proceedings was opposed and the learned trial Judge in his ruling observed as follows:-

“On the 26th of November, 1981 when counsel for the 1st defendant, learned counsel Mr. Abuah said he would not go on with the case in view of the order of the Federal Court of Appeal, and having heard Dr. Ibik on the point, I made the following orders:-

“The order of the Federal Court of Appeal which is now before me speak for itself. It goes as follows:-

‘It is ordered that application be and is hereby granted. Applicants to file notice on the grounds of appeal on or before 11th November, 1981.

N50.00 costs assessed to the respondents.’

The grounds of appeal have been filed and I am being asked by the defendant, that by some implication, I should read into the above order of the Federal Court of Appeal, a stay of proceedings in this case. I am afraid, it is not within my powers to do so. I would be doing what the Federal Court of Appeal have never asked or ordered me to do. It may be that an application for 3, stay of proceedings was asked for but that does not appear in the order of the Federal Court of Appeal now before me. In the circumstances, I

have no choice but to go on with the case.”

The same issue was canvassed before the Court of Appeal and dismissed per the lead judgment of Katsina-Alu, J.C.A. as follows:-

“I do not think that an interlocutory appeal, without more, would justify a stay of further proceedings in an action from which such an appeal has arisen Considering the facts and circumstances of the instant case I think the trial Judge was justified in refusing to order a stay of proceedings in these circumstances”

In my view, both the trial court and the court below were right in their above observations and I fully endorse them. The ruling of the learned trial Judge on the issue was clearly a result of the exercise by him of his judicial discretion. It was neither shown that the discretion was exercised by the trial court upon some wrong principles nor that it was tainted by some illegality or substantial irregularity. In these circumstances, the Court of Appeal was perfectly right not to have interfered with this exercise of discretion by the trial court. In my view, there is no merit in the attack of learned appellant’s counsel on this score. Accordingly issue number two must be answered in the affirmative.

On the whole, I find no substance in any of the points urged on behalf of the appellant in this court to justify the reversal of the decisions of the trial court or the court below. Consequently this appeal fails and it is accordingly dismissed with N1,000.00 costs to the respondent against the appellant.

BELLO CJN

I have had the privilege of reading the lead judgment of my learned brother, Iguh J.S.C. in advance. I adopt it. The appeal is devoid of merit and I dismiss it with N 1,000.00 costs to the respondent.

UWAIS JSC

I have had the advantage of reading in draft the judgment read by my learned brother Iguh, J.S.C. I am in complete agreement with the reasoning and conclusion therein. I too will, therefore, dismiss the appeal and confirm the decision of the Court of Appeal with N 1,000.00 costs to the respondent.

OGWUEGBU JSC

I have the advantage of reading in draft the judgment just delivered by my learned brother Iguh, J.S.C. I am in complete agreement with him that this

appeal should be dismissed.

This is an appeal against the judgment of the Court of Appeal. Enugu Judicial Division given on 10:4:87. The appellant was the 1st defendant in the court of trial while the respondent was the plaintiff. The plaintiff claimed the following reliefs from the defendants :-

(i) A declaration that the plaintiff is entitled to a refund of the sum of N149,635.20 being balance due to the plaintiff out of the sum of N624,000.00 deposited with the 2nd defendant as bank guarantee in favour of the 1st defendant in respect of 200,000 bags of cement ex ship "M V. Voli".

(ii) The sum of N50,000.00 being damages against the 1st defendant for breach of contract.

The facts of the case have been fully set out in the lead judgment of my learned brother Iguh, J.S.C. I do not intend to repeat them. It was common ground that the 1st defendant (the appellant herein) did not supply the respondent (the plaintiff in the court of trial) the entire consignment of cement. There was however no agreement on the exact quantity of cement not supplied.

During the hearing, the learned trial Judge made an interim order for all the parties to reconcile their figures. This they did and it was embodied in exhibit "B" which was signed by the parties. Exhibit "B" showed that 153,440 bags of cement were supplied while 43,760 bags were not supplied. The parties were not agreed as to whether the remaining 2,800 bags of cement were supplied or not. On the basis of Exhibit "8", the learned trial Judge ordered the 2nd defendant (Mercantile Bank of Nigeria Ltd.) to refund the sum of N86,531.20 being the value of the 43,760 bags of cement which the parties agreed were not supplied to the plaintiff and which amount was still held by the 2nd defendant as deposit. Therefore, the 2nd defendant dropped out of the case and the hearing proceeded against the 1st defendant who is the appellant in this court.

The learned trial Judge at the close of the case entered judgment for the plaintiff in the sum of N25,000.00 being damages for breach of contract. The appellant being dissatisfied with the decision unsuccessfully appealed to the Court of Appeal. He has further appealed to this court against the decision of the court below.

The issues for determination formulated in the appellant's brief are:

"(i) Whether in view of this finding of the court of trial to the effect that the plaintiffs loss could not be conveniently calculated and bearing in mind the specific pleading as to loss by the plaintiff the Court of Appeal was

justified in confirming the award of N25,000.00 to the plaintiff “for breach of contract and damages”.

(ii) Whether the Court of Appeal was right when it held that the High Court was justified in refusing to order a stay of proceedings on the ground that considering the fact and circumstances of the instant case the interlocutory appeal which was not before it for consideration and in respect of which it had granted leave is frivolous.” 5

The gist of the contention of the learned appellant’s counsel on the first issue is that all the claims made by the plaintiff and particularised in paragraph 31 (a) - (c) of the statement of claim are capable of calculation; that it was the responsibility of the plaintiff to adduce sufficient evidence to enable the court calculate the loss and having failed to do so, the learned trial Judge had to say that the entire total amount lost by the plaintiff could not be fully estimated and that it seemed to him that the loss could not be conveniently calculated. 10

He submitted that if the plaintiff proved his paragraphs 31(a) to (c) of the statement of claim, there could be no difficulty in the calculation and he could have obtained appropriate awards thereby making it unnecessary to get a separate award under the claim for N50,000.00 general damages. 15

He contended that the plaintiff having set out his loss and damages in paragraphs 31 (a) - (c) of his pleadings, it is those loss and damages he must strictly prove in order to succeed there being no room for speculative award. He referred us to the cases of p.z. & Co. Ltdv. Ogedengbe (1972) 1 All NLR (Pt.1) 202 at 206; Dumez Nigeria Ltd. v. Ogboli (1972) 1 All NLR (Pt.1) 241 at 249 and 251; West African Shipping Agencies Nigeria Ltd. & Or. v. Kalla (1978) 3 S.C. at 31-33; and Chitty on Contracts (General Principles 23rd edition paras 14-32. 20

He argued that since the learned trial Judge held as he did that the total amount lost by the plaintiff could not be fully estimated, then the plaintiff could not be said to have proved his claim. In the circumstances, neither the trial court nor the court below was entitled to substitute speculation for proof he argued, issue submitted that the attack on the judgment of the court below by the learned counsel for the appellant is misconceived and untenable because the appellant did not plead or prove that he delivered the entire 200,000 bags of cement to the respondent, that Exhibit “B” is an unequivocal admission by the appellant that he did not supply 43,760 bags of cement which resulted in the refund of the sum of N86,531.20 to the respondent by the 2nd defendant for those bags of cement not supplied by the appellant. 30

Learned senior counsel referred to the evidence of P.W.2 on the failure of the appellant to supply 2,800 bags of cement on 31:12:77 which evidence

was not challenged or contradicted. He submitted that the number of bags of cement for which the appellant was in breach is 46,560.

He referred to paragraph 31(a) of the plaintiff's pleadings where it was averred that it would have sold the unsupplied bags of cement at between N4.50 and N5.00 per bag as against the contract price of N3.12 per bag.

5 He also referred to paragraph 31(c) of the statement of claim which alleged that the plaintiff purchased cement from other sources at higher price on account of the breach and the appellant did not in his pleadings deny those averments. It was the contention of the learned senior counsel that in view of the particulars of loss pleaded by the plaintiff and the evidence of P.W.2, it could not be
10 seriously argued that the plaintiff failed to prove its entitlement to N25,000.00 as general damages. He referred the court to the cases of Boshali v. Allied Commercial Bank Ltd. (1961) 4 All NLR 917 at 921, Odulaja v. Haddad (1973) 1 All NLR (Pt. 2) 191 and Incar Nigeria Ltd & or. v. Adegboye (1985) 2 NWLR (Pt. 8) 453 (C.A.)

15 The plaintiff in paragraph 31 of its statement of claim averred as follows:

"By the breach of the agreement by the 1st defendant and by the 2nd defendant wrongfully refusing to release the balance of the amount paid in by the plaintiff in connection with the said guarantee the plaintiff has been injured in its business and has suffered loss and damages

20 **PARTICULARS OF LOSS AND DAMAGES**

(a) Loss of profits which the plaintiff would have made from the said 47,960 bags of cement which was then selling between N4.50 and N5.00 per bag.

*(b) Loss of profits which the plaintiff would have made from invest-
25 ing the balancing of N149,635.20 (one hundred and forty nine thousand, six hundred thirty five naira twenty kobo) which the 2nd defendant refused to release to the plaintiff. The 2nd defendant charges 9% per annum on over-drafts.*

(c) Purchasing cement at higher price from other sources.

30 *The receipts issued to the plaintiff will be founded upon."*

What evidence did the plaintiff adduce in proof of the above averments? The P.W.1 (Godwin Nwobodo) testified that the appellant did not deliver any cement to the plaintiff on 31: 12:77 and that he was at the Borokiri Wharf otherwise called Pennington Jetty from where the bags of cement were being evacu-
35 ated throughout that day. He denied the suggestion that the appellant personally or otherwise loaded twelve lorries of loads of cement which were delivered to the plaintiff on the said day. P.W.2 (Daniel I. Nwizu) the plaintiff's Director in his evidence stated that he agreed with the appellant to supply him with 200,000 bags of cement at N3.12 per bag. He tendered Exhibit "B" where

all the parties reconciled their figures. Exhibit "B" conclusively showed that the appellant did not supply 43,760 of cement to the plaintiff. There is evidence of P.W.2 which was uncontradicted that the appellant did not supply 2,800 bags of cement to him. They were to have been supplied on 31: 12:77

For the non-supply of the 2,800 bags of cement, the plaintiff stated that he had to buy cement in the open market at N4.75 per bag to be able to execute 5 Federal Government contracts and also fulfil the obligations with its other customers who buy cement from it. It suffered a loss of N 1.63 per bag because it contracted with the appellant to supply it cement at N3.12 per bag .

Continuing, P.W.2 testified as follows:-

"It follows therefore that on 2,800 bags of cement not supplied to us 10 by the 1st defendant, we suffered a total loss of N4,464. With respect to 43,760 bags of cement for which we had been paid in cash by the court's order we also suffered a loss of N71 ,328.80 Since we had to buy cement at open market for N 1.63 above the amount we contracted to buy from the 1st 15 defendant at the beginning of this cement contract. The 1st defendant requested us to give him the sum of N624,000.00 for the value of 200,000 bags of cement at N3.12. Then we took an overdraft of N624,000.00 from Standard Bank of Nigeria Ltd. (First Bank) Enugu main Branch. We deposited this amount with the 2nd defendant at the request of the 1st defendant."

The appellant on his part did not deny the above averments and the 20 evidence led on them either in his pleadings or by evidence. They remained unchallenged and uncontradicted.

In his judgment, the learned trial Judge found and held as follows:-

"The plaintiffs have proved to my satisfaction that the defendant 25 did not supply them 2,800 bags of cement which they had to buy outside at a higher price and thereby suffered a loss of N4,564.00.

..... For the rest of the unsupplied cement under the contract they had to pay more for them in the open market and the plaintiffs calculated that they might have lost on that, about N71 ,328.80."

Having regard to the pleading and the evidence of P.W.2, it cannot be said that 30 the plaintiff did not prove the losses and damages which naturally flowed from the breach complained of. The plaintiff did not leave the trial court in any dilemma. The loss and damage proved by the plaintiff were quantifiable and calculable hence the court below per Aseme, J .CA. said:

"The attack on the award of damages by the learned trial Judge is 35 completely without any merit and had the respondent cross-appealed or given notice under Order 3 Rule 14(1) to have the award enhanced, there is sufficient evidence and compelling instances for this court to have considered such in favour of the respondent."

I entirely share this view.

The damages awarded were the estimated loss which directly and naturally resulted in the ordinary course of events from the appellant's breach. There was available market for the goods the subject matter of the contract. Damage was ascertained from the difference between the contract price and
 5 the market or current price at the time when the goods ought to have been delivered. In this case the market price at the time the appellant breached the contract was N4.75 per bag.

The fact that damages are difficult to assess which is not the case in this appeal, does not disentitle a plaintiff to compensation for loss resulting
 10 from a defendant's breach of contract. The fact that the amount of such a loss cannot be precisely ascertained, does not also deprive a plaintiff of all remedy.

In the instant case, the appellant did not contest the fact that the plaintiff suffered loss resulting from the breach of the contract by him. His quarrel is as to strict proof of the loss and damage. This court has in many
 15 decisions held that where evidence given by a party to any proceedings was not challenged by the opposite party who had the opportunity to do so, it is always open to the court seised of the proceedings to act on the unchallenged evidence before it. This is precisely what the court of trial did in this case and that decision was affirmed by the court below. See Isaac Omoreghee v. Lawani
 20 (1980) 3-4 S.C. 108 at 117; Odulaja v. Haddad (1973) II S.C. 35; Nigeria Maritime Services Ltd. v. Afolabi (1978) 2 S.C. 79 at 81-82; Boshali v. Allied Commercial Exporters Ltd. (1961) All NLR 917; Aghaje v. National Motors (1971) 1 UILR 487 at 490; and Doobay & ors v. Mohaheer (1967) 2 All ER 760 at 765 (1).

The question of double compensation did not arise in this appeal. The
 25 learned trial Judge awarded the plaintiff a lump sum of N25,000.00 "for breach of contract and damages". (Italics is for emphasis only). This expression did not mean separate awards of special and general damages. The amount did not even come near to the loss which the plaintiff proved. The learned counsel for the appellant should not have pitched his battle on an innocent observa-
 30 tion of the learned trial Judge where he said:-

"The entire total amount lost in all cannot now be fully estimated." The observation only showed the enormous loss suffered by the plaintiff. In the circumstances, the appeal on damages has no merit whatsoever.

The other issue is the refusal of the learned trial Judge to stay proceedings
 35 pending appeal. The granting of a stay of proceedings is a matter of discretion depending on the facts and circumstances of each case. All courts of record, whether trial or appellate possess inherent power to stay further proceedings pending the determination of an appeal filed in a case so as to preserve the subject matter of the litigation. See The Zamora (1916) 2 A.C. 77 and Kigo v.

Holman (1980) 5-7 S.C 60.

The learned trial Judge made an order of non-suit in an earlier suit. Thereafter, the plaintiff instituted the present action. It proceeded to trial and in the meantime, the present appellant who was the defendant in the earlier proceedings obtained the leave of the court below to appeal against the order of non-suit.

An application for stay of proceedings pending appeal was filed by the appellant in the court of trial. The learned trial Judge was satisfied that the two cases were entirely different and saw no purpose for postponing the hearing. He refused the application.

On refusal to stay proceedings, the court below said:-

"I do not think that an interlocutory appeal without more, would justify a stay of further proceedings in an action from which such an appeal has arisen. Each case must depend on its peculiar facts and circumstances."

An appellate court would not, generally, question the exercise of discretion by the trial Judge merely because it would have exercised this discretion in a different way if it had been in the position of the lower court. It ought to be very slow to interfere with the discretion of a trial Judge unless it appears that the result of the order made below is to defeat the rights of the parties altogether, or that the trial Judge gave no weight or sufficient weight to important considerations. In such cases, an appellate court has power to review such an order and it is its duty to do so. See Maxwell v. Keun & ors. (1927) All ER (Reprint) 335 at 338, Solanke v. Ajibola (1968) All NLR 46, and Charles Osenton v. Johnston (1942) 1 All ER 102.

From the facts and circumstances of this case, the learned trial Judge did not exercise his discretion wrongly when he refused the application for stay of proceedings pending an interlocutory appeal as no sufficient reasons were advanced to warrant the order sought and he did not usurp the function of the Court of Appeal as canvassed by the learned counsel for the appellant.

For the above reasons and those in the lead judgment of my learned brother Iguh, J.S.C., I too dismiss the appeal and abide by the order as to costs made by him.

ADIO JSC

I have had the benefit of reading, in advance, the judgment just read by my learned brother, Iguh, J.S.C. and I agree entirely with it. I too dismiss the appeal. I abide by the order for costs.