

SUPREME COURT OF NIGERIA
11TH FEBRUARY, 1994, SC 208/1992.
CORAM:- S. M. A. BELGORE, A. B. WALI,
E. O. OGBEGBU, U. MOHAMMED, S. U. ONU, JJSC.

HONIKA SAWMILL (NIG.) LTD. APPELLANT

AND

MARY OKOJIE HOFF RESPONDENT
(Substituted for Arthur Morgan Hoff)

EVIDENCE - Burden of proof - Pleadings - Defendant's failure to reply to plaintiff's averment - removes burden of proof from plaintiff - as such averment shall be treated as admitted by Defendant.

PLEADINGS - Joinder of issues - where defendant did not join issues with plaintiff - whether tantamount to an admission.

PRACTICE & PROCEDURE - Exhibits - failure to plead or place reliance on an exhibit - whether any defence can avail defendant in respect of that exhibit.

PRACTICE & PROCEDURE - Pleadings - defendant's failure to specifically deny plaintiffs averments - coupled with the admission of some of the averments - plaintiff held to be entitled to succeed - on the strength of the pleadings and evidence.

STATUTES - Evidence Act - Burden of proof placed by s. 135 of the Act - held not discharged - by the defendant.

FACTS

The plaintiff/Respondent (now deceased) was appointed a general manager of the Appellant Company, on a salary of N36,000.00 per annum. Appellant terminated the appointment of the Respondent at the expiration of his resident's permit with no desire to extend his expatriate quota and with an intention to repatriate the Respondent. The Respondent filed an action before the High Court, Benin - City against the Appellant seeking various declarations and injunction, claiming the sum of N279,

153.00 as arrears of salary and damages for wrongful dismissal.

Pleadings were filed and duly exchanged. Appellant admitted some material averments and failed to specifically deny or lead evidence in denial of Respondent's averment in respect of his claim for arrears of salary. The trial court found in favour of the Respondent for most of his claim, refusing the declaration for wrongful dismissal, N36,000.00 damages and the injunction sought. Appellant's appeal to the court of Appeal was dismissed. On further appeal by the Appellant to the Supreme Court, the appeal court had to determine whether from the state of the pleadings and evidence led, the Court of Appeal was right in holding that the Respondent was entitled to succeed.

HELD (unanimously dismissing the appeal)

1. Failure by the Appellant in its Statement of Defence to join issue with the Respondent in two paragraphs of his Amended Statement of Claim is deemed to be an admission of those averments by the Appellant. And as the Appellant failed to reply to the Respondent's averments, the Respondent patently bears no burden of proof. (p.68 L1)

2. Since the Appellant did not specifically plead in its statement of Defence, nor establish at the trial by evidence full or part payment of the salary of N36,000.00 per annum (being claimed by the Respondent) it is no use speculating that some unspecified amount of money was paid to the Respondent as salary. (p.68 L20)

3. By virtue of section 135 of the Evidence Act, the burden which lay on the appellant to show what and how much was paid by way of salary to the Respondent has not been discharged, (p.68 L39)

4. In as much as the Appellant neither pleaded nor placed reliance on Exhibit G in accordance with the Bendel State High Court Rules, no defence in respect of that exhibit will avail the Appellant.

5. Appellant's contention that by reason of its failure to obtain work permit for the Respondent, his position as General Manager terminated by operation of law, is untenable in view of the admission made by the Appellant in its statement of Defence. (p70 L20)

PER OGWUEGBU JSC “Non-payment of salary is a fact which is necessary to establish the cause of action and the specific denial of the averment either that no salary is owed or part of it has been paid is also a fact which is necessary to establish the defence to it. In the special circumstances of this case, payment or non-payment of salary is in my view material.” (p.7/4 L3)6)

REPRESENTATION:

H.I.R. Odiase Odiase for the Appellant - absent.

Tolue Esekody Esq. for the Respondent.

CASES REFERRED TO

1. U.B.A. Trustees Ltd v. Nigergrob (1987)3 NWLR (part 62) 600
2. Onwumere V. Agwunedu (1987) 3 NWLR (part 62) 673 at 682
3. I.A.L. Ltd. v. Shika Bros. (1987) 4 NWLR (part 63) 92 at 101
4. Idika v. Erisi (1988)2 NWLR (part 78) 563
5. Obmiami Bricks & Stone (Nig) Ltd v. A.C.B. Ltd (1992)3 NWLR (part 229) 260
6. Sanusi v. Ameyogun (1992)4 NWLR (part 237) 527 at 547 and 553
7. Smith v. Anderson (1880)5 Ch. D 242 at 275
8. Odume v. Nnachi (1964) 1 All NLR 229
9. Ajibade v. Mayowa (1978)9 and 10 SCI.
10. Joseph Mangtup Din v. African Newspaper of Nigeria Ltd. (1990)3 NWLR (part 139) 392
11. Pioneer Plastic Containers v. Commissioner of custom and Excise (1967) Ch. 597
12. Slee Transport v. Oluwasegun (1973)3 ECSLR (part 11)117 at 118
13. George v. U.B.A. (1972) (part 2) All NLR 347
14. Kate Enterprises Ltd. v. Daewoo (Nig.) Ltd. (1985) 2 NWLR 116
15. Hewitt v. Macquire (1851)7 Exch. 80
16. Okoye & Ors v. Nigeria Construction & Furniture Co. Ltd & Ors. (1991)6 NWLR 501 at page 522
17. Onobruhere & Ors. v. Esegine & or. (1986) 2 S.C. 385 at 397
18. Ndiakaeme & Ors. v. Egbuonu & Ors. 7 W.A.CA 53
19. Din v. African Newspaper Ltd (1990) 3 N.W. L.R (pt. 139)392 at 405

STATUTES & RULES REFERRED TO

1. Supreme Court (Amendment) Rules 1991 0. 6 r. 5(1) (b), 0.2 r. 9
2. Evidence Act s. 74
3. High Court (Civil Procedure) Rules of Bendel State 1976 0.13 r. 9

LEAD JUDGMENT BY ONU JSC

In the High Court of the defunct Bendel State holden in Benin City, Arthur Morgan Hoff, a Swedish National, then living and working in Benin City as plaintiff, by an Amended Statement of claim, sued the defendant company (Honika Sawmil (Nigeria) Limited) of which he was Managing Director/General Manager, claiming the following reliefs:-

1. A declaration that the letter reference number HNS/MH/Vo., 5/5 dated 20th February, 1986 purportedly written to the plaintiff by the defendant together with the letters of 18th February and 4th March, 1986 determining the plaintiff's appointment as the General Manager of the defendant Company is wrongful and amounts to wrongful dismissal.

2. A declaration that the plaintiff's agreement with the defendant Company subsists.

3. A declaration that as long as the agreement of 22nd May, 1978 subsists the defendant is under an obligation in the said agreement to apply for and obtain requisite permits for the plaintiff so as to give effect to the said agreement.

4. A declaration that the plaintiff is entitled to his arrears of salary of N36,000.00 (Thirty Six Thousand Naira) per annum from 1st January 20 1979 to 20th February, 1986 amounting to N258,000.00 (Two Hundred and Fifty Eight Thousand Naira).

5. N36,000.00 (Thirty Six Thousand Naira being damages for wrongful dismissal.

6. An injunction to restrain the defendant by itself its servants or 25 agents or otherwise however from further interfering with the plaintiffs right under the said agreement.

And the plaintiff claims the sum of N279,153.00 (Two Hundred and Seventy Nine Thousand One Hundred and Fifty Three Naira) being arrears of salary and damages for wrongful dismissal as follows:

30	Arrears of salary from 1st January 1978 to 20th February. 1986 at N36,000 per annum	... N258,000.00
	Damages for wrongful dismissal	... N36,000.00
		... N294,000.00
35	Less drawings of	... N14,847.00
	 N279,153.00

Pleadings were ordered, filed and delivered. The plaintiff later sought and obtained leave to amend both his Writ of Summons and the State-

ment of Claim. The case thereafter went to trial and after counsel had addressed the trial court, the latter found in favour of the plaintiff for most of his claims except the declaration for the purported wrongful dismissal, the claim for N36,000.00 damages and injunction.

Being dissatisfied with the trial court's decision the defendant company thereafter referred to as appellant) appealed to the Court of Appeal Benin. The plaintiff also cross-appealed. See the Notice and Grounds of Appeal at pages 105 - 107 of the trial court's Record.

I wish to pause here to give a resume of the facts of the case leading to the appeal as follows:-

The plaintiff (now deceased) and who in the rest of this judgment I shall refer to as the respondent, was by a letter dated December 15, 1978 (Exhibit 'B' hereof) appointed the General Manager of the appellant. His position as the Managing Director of more or less a sinecure colouration, was by virtue of an agreement (Exhibit 'A'), entered into between him and the appellant. When the appellant informed the immigration Authorities of the determination of the respondent's appointment following the expiration of his resident permit with no desire on their part to extend his expatriate quota and its manifest intention to repatriate him, the respondent therefore instituted the suit giving rise to this appeal in order; presumably, to call the company's bluff and to stem the action of the immigration Authorities.

During the pendency of the appeal in the Court of Appeal, the respondent died. Whereupon, the present respondent, his widow, was substituted with the leave of court. (See pages 124- 126 of the Record).

The Court below when it eventually heard the appellant's appeal, dismissed same and allowed the respondent's cross-appeal.

The appellant still dissatisfied, has further appealed to this court attacking the decision on four grounds set out at pages 190-192 of the Record.

Briefs of argument were filed and exchanged by the parties in accordance with the rules of this court. The motion filed by learned counsel for the appellant seeking leave to raise and argue fresh points not taken in the courts below pursuant to Order 6 Rule 5(1)(b) Supreme Court (Amendment) Rules, 1993 not having been made on 29th November, 1993 when the appeal came up for hearing, was struck out.

The appellant's issues for determination in the appeal are:

1. Was the Court of Appeal right in its implied decision that the

deceased plaintiff had discharged the primary burden of proving his case?

2. Was the Court of Appeal right in treating the original respondent as an ordinary employee of the appellant company, thus shifting the onus of proving that the original respondent was paid his salaries on to the
5 appellant.

3. Was the Court of Appeal right in not taking account of the fact that the original respondent was not just a director but the Managing Director of appellant Company, whose relationship with the appellant company was governed by the Companies Act, 1968, and the ordinary rules of company law.
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Only one issue has been submitted as arising for determination on behalf of the respondent. It states:

"Was the Court of Appeal right in holding that having regard to the
15 state of the pleadings and evidence led, the respondent was entitled to succeed on his claims as varied?

At the hearing of this appeal on 29th November, 1993 the learned counsel for the appellant who had due notice of the hearing date but was absent without cause or excuse being shown, had his brief regarded as
20 having been argued. Learned counsel for the respondents submitted and in her brief by way of preliminary objection that with the striking out of the appellant's motion to argue a motion to raise new points on appeal, grounds 3 and 4 of the appeal grounds as well as issues 2 and 3 no longer arose. She thereafter adopted her brief on that date and urged us to dismiss the
25 appeal.

I see the force in learned counsel for respondent's contention in her preliminary objection made pursuant to Order 2 Rule 9 of the Supreme Court (Amendment) Rules 1991 to the effect that grounds 3 and 4 of the appeal grounds, do not arise from the decision appealed against. When
30 therefore in ground 3 the appellant complains that:

3. The Court of Appeal erred in law and on facts by failing to draw a distinction between plaintiff/respondent as an employee simpliciter and the plaintiff/respondent as a member of the company holding 40 per
35 cent shares these are matters being raised or complained of which are neither matters on which issues were joined nor tried in the trial court. They therefore do not arise from the decision appealed against. Nor were they canvassed in the court below. To argue them on appeal herein therefore requires leave of this court. Since such leave has not been sought and

obtained, the ground (ground 3) cannot be relied upon for the distillation of issue, or; In issue upon which an argument may be founded and proffered. See U.B.N Trustees Ltd. v. Nigergroup (1987) 3 NWLR (Pt.62) 600; Onwumere v. Agwunedu (1987) 3 NWLR (Pt.62) 673 at 682; I.A.I Ltd. v. Shika Bros (1987) 4 NWLR (Pt.63) 92 at 101 and Idika v. Erisi (1988) 2 NWLR (Pt.78) 563.

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Similarly, I agree with learned counsel for respondent's submission that the particulars furnished in support of ground 4 are unrelated to the ground and so ought to be discountenanced. For instance, while ground 4 complains that -

"The Court of Appeal erred in law when it held that the combined effect of Exhibits 'C' and 'F' was that plaintiff/respondent cross/appellant had been wrongly dismissed as General Manager"

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the ensuing particulars in support thereof are unrelated to what the grouse in the ground is all about. For purposes of clarity, the particulars which now talk of Exhibit 'A' instead of Exhibits 'C' and 'F' states as follows:-

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"The grant of the relief that Exhibit 'A' (the agreement) was still subsisting was not necessary for the award of arrears of salary up to 20/2/86.

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The effect therefore was that the relationship of the parties as 60 percent and 40 percent holders of the shares of defendant, a company established under the Companies Decree 1968 persisted. Their conduct towards each other would therefore be related by the said Decree, having regard to their rights under the agreement Exhibit "A".

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From the foregoing, grounds 3 and 4 being non sequitur ought to be and are accordingly struck out.

Further, as appellant's Issues 2 and 3 do not in my view arise from the decision appealed against; the preliminary objection of learned counsel to the respondent to these issues is also accordingly sustained. They are both unarguable and so struck out.

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What remains of the appellant's issues, namely Issue one, by and large, overlaps the respondent's lone issue which to my mind, is more comprehensive and I opt for it in the argument of this appeal.

In proffering the argument of the appeal in his brief, learned counsel for the appellant first referred us to that portion of the lower court's judgment wherein the learned trial judge held inter alia as follows:-

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"In dealing with the question whether the original respondent was entitled to arrears of salary at the stipulated rate, the learned trial judge

upheld the submission of the learned counsel for the respondent that the respondent only had to show that he received no salary during the relevant period and the onus would shift on the appellant to prove that the salary was paid. In this connection, the learned trial Judge pointed out, rightly in my view, that the averment in paragraph 9 of the Amended Statement of

5 *Claim was not specifically denied in the Statement of Defence and concluded, also rightly in my view, that the aforesaid averment in paragraph 9 of the Amended Statement of Claim should be deemed as admitted*

.....

- 10 *Where a defendant fails to specifically deny a material averment in the Statement of Claim and it is impossible to infer a denial thereof from the Statement of Defence, the material averment in the Statement of Claim will be deemed established."*

He thereafter submitted that the above constituted a general state-

15 ment of the law but that in the circumstances of this case, it would not be applicable. He contended furthermore that the fact that a claim is not denied does not relieve a plaintiff of the burden of adducing evidence of primary facts. He called in aid the cases of Obmiami Bricks & Stone (Nig.) Ltd. v. A.C.B. Ltd. (1992) 3 NWLR (Pt.229) 260; Sanusi v. Ameyogun

20 (1992) 4 NWLR (Pt.237) 527 at 547 and 553. After learned counsel had urged us to bear in mind that Exhibit "A" was not repudiated by the appellant but that the rights of the respondent were reaffirmed in Exhibits "C" and "F", it had become unnecessary he contended, to decide that Exhibit "A" was still subsisting. What was necessary for the respondent to prove, he

25 argued, was that he was General Manager for the whole period claimed and that he was entitled to N36,000.00 a year as salary for the whole of the period as pleaded. Counsel next demonstrated how Exhibit "B" showed that the respondent was appointed General Manager on an annual salary of N36,000.00 on 15th December, 1978. The period claimed by him was

30 from 1st January, 1979 to 20th of February, 1986. The lower Court, he contended, noted that part of this period was statute-barred and so made allowance for it in its final award. The lower court, it is further argued, did not advert its mind to Exhibit "G" which emanated from the respondent himself and which exhibit shows quite clear in the respondent's own words

35 that his position as General Manager was dependent on the Expatriate Quota granted to appellant. Learned Counsel therefore submitted that the respondent's position therefore terminated by operation of law in 1982 adding that the respondent's attempt to equate "residence permit" with "Expatriate

Quota" is most untenable.

Learned counsel for the appellant further maintained that the respondent's appointment depending as it did on Expatriate Quota of the appellant contained in Exhibit 'C', confirmed in Exhibit 'F', it was in consonance with the substance of paragraphs 7, 12, 16, 18 and 19 of the Amended Statement of Claim. In the face of the evidence adduced by the respondent, argued learned counsel, it is a perverse finding of fact to hold that he was General Manager for the whole period and therefore entitled to N36,000.00 per year.

Besides, it is submitted, a further example of the respondent's failure to discharge the primary burden of proving his claim, focused on his admission that he did pay himself some salaries. This was after claiming all through his evidence-in-chief and part of the cross-examination that he did not pay himself any salary - obviously lying to get as much money as he could, it is added. The respondent, it is also shown, paid himself quite a good deal of money; such that Exhibits H-H5 depict him as the beneficiary of numerous sums of money, most of which were N3,000.00 the equivalent of his monthly salary. As a director, the fiduciary duty he owed to the appellant, it is maintained, put him in a position very much like that of a trustee. The case of *Smith v. Anderson* (1880) 5 Ch.D 242 at 275 was cited in support of the proposition. As a trustee, the respondent, it was further argued, owed a duty to account for all monies that came into his possession. In conclusion, to exemplify that the respondent failed to discharge the primary burden of adducing evidence in proof of his claim, could be seen in his payment of substantial part of appellant's money to himself as to render the award of the entire sum he claimed as resulting in a grave miscarriage of justice.

Now, in paragraph 9 of the Amended Statement of claim, the respondent pleaded thus:

"9. The plaintiff will show at the hearing that since the agreement between him and the defendant company he has duly performed his obligations therein, but received no salaries as per the letter of appointment."

It is clear that the appellant in the Statement of Defence (See pages 16-20 of the trial court's record) failed to join issue with the respondent in respect of paragraph 9 of the Amended Statement of Claim above in an Amended Statement of Defence or by filing a Reply thereto. However, following the purport of his pleadings, the respondent after his evidence-in-

chief on 22nd January, 1987, admitted the following under cross-examination at page 29 of the record thus:

"I remember that sometime, I paid myself some salaries. I cannot remember now. I was receiving my pay by cheque and I was a cosignatory to the cheque. The defendant's books were audited and I am sure but not certain that the amounts I paid to myself by way of salary is not included in the amount the auditor certified as due to me. My family was here occasionally and for sometime. Apart from the salary I am claiming, I had other source of income from my friends. During this period I remitted money home to my family under Home Remittance Scheme. This was done through Central Bank of Nigeria. At the time I make home remittance, I usually filed the form as the percentage of my salary from the defendant. During this time the defendant made no profits. The defendant was indebted to the Banks on overdraft."

(Italics mine)

However, when further pressed, the respondent under cross-examination unhesitatingly said as follows:-

"...There is an audit account of the company. This is the copy of the Audit Report. Counsel seeks to tender the Audit Report.

MR. ESEKORDI: - No Objection

COURT - Honika Sawmill (Nig.) Limited- State-ment of Affairs - as at 30th September, 1985 admitted and marked Exhibit "E". All that the Chairman of the Defendant company paid will be seen in Exhibit "E". I have seen page 7 of Exhibit "E". Counsel seeks to tender page 7.

MR. ESEKORDI: - No Objection

COURT - page 7 of Exhibit "E" is admitted and marked Exhibit "E"

At page 7 of Exhibit "E", namely Exhibit "E", the following illuminating information about the affairs of the appellant vis-a-vis the respondent in paragraph 02 came into focus and it pertinently states, to wit:

"02. MR. MORGANHOFF - N370,640.00

This is made of his accrued salary since October 1978 at N36,000.00 per annum, as per his letter of employment duly covered by the Board of Directors' Resolutions of 20th October, 1978 and 11th April, 1981; accrued simple interest on his loan Account of N159,829.43 at 10% per annum since April 1977 as per Deed of Assignment dated 11th March,

1977; Cash contribution of N9,779.62; less drawings of N9,147.89 and cost of food and drinks amounting to N14,846.70"

P.W.2, Felix Adogbeji Ogbondu, a Chartered accountant of the firm of Eyewumi Rone and Company in his testimony at page 52 of the record (explaining the figures depicted on page 7 of Exhibit "E" at Exhibit "E1" in paragraph 02) corroborated the respondent's evidence, thus confirming his pleading in paragraph 9 of the Statement of claim to which the appellant deliberately failed to provide an answer by way of an averment in its Statement of Defence. He said:

"We prepared the defendant's statement of affairs, Exhibit "E" is the copy of the said statement of affairs. As at the date Exhibit "E" was prepared the figures arrived at by us show that the plaintiff's accrued salary is N249,000.00 interest on loan of N159,829.00 at 10% per annum from April, 1977 is N135,855.27; the cash the plaintiff ejected (sic) into the defendant company is N9,779.62.

From the record, we found that the plaintiff drew N9,147.89 out of the company. A sum of N14,846.70 was the amount shown expended for the plaintiff's food and drinks. The total amount due to the plaintiff after taken (sic) all these figures into account, is N370.640.30."

The pleading by the appellant in paragraph 9 of the Statement of Defence therefore that it denied respondent's paragraph 10 of the latter's Amended Statement of Claim and put him to the strictest proof thereof alleging into the bargain some structural reorganisation in 1986 of the Company which was in accordance with Exhibit "A", left in appellant case a most feeble defence.

It is in the light of the above that I take the view that on the state of the pleadings, the averments in paragraphs 9 and 10 of the Amended Statement of Claim ceased to be in controversy, regard being had to the appellant's failure to specifically deny these averments. See *Odume v. Nnachi* (1964) 1 All NLR 229 and *Ajibade v. Mayowa* (1978) 9 and 10 S.C. 1

See also section 74 of the Evidence Act which provides that:-

"No fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions,"

(Italics mine)

I am of the firm view therefore that in failing to join issue or adequately join issue with the respondent in his paragraphs 9 and 10 of his Amended Statement of Claim in its Statement of Defence, the appellant is deemed to have admitted those averments. See Joseph Mangtup Din v. African Newspaper of Nigeria Ltd. (1990) 3 NWLR (Pt.139) 392 and Pioneer Plastic Containers v. Commissioners of Custom and Excise (1967) Ch. 597 where it was held that where facts are admitted, no evidence is admissible in proof of those facts. In the circumstances of this case, in so far as the appellant failed to reply to the respondent's averments, the respondent patently bears no burden. See also Ehimare v. Emohonyon (1985) 1 NWLR (Pt.2) 117 at 183 As Oputa, J.S.C. indeed put it in George Onobruhere and Another v. Esegine & Another (1986) 2 Sc. 385 at 397.

"An onus of proof does not exist in vacuo" He continued; "The burden of proof is merely an onus to prove or establish an issue. There cannot be any burden of proof where there are no issues in dispute between the parties. For example, if the plaintiff's claim is admitted that will be the end of the story..."

It is noteworthy that in the case in hand, the appellant neither pleaded in its Statement of defence nor established at the trial by evidence full or part payment of the salary of N36,000.00 or indeed any amount made to the respondent. The fact not having been specifically pleaded by it e.g. by way of counterclaim, it is no use inferring or speculating that some unspecified amount of money was paid to the respondent as salary. See Din v. African Newspapers (Nig) Ltd. (supra); Slee Transport v. Oluwasegun (1973)3 ECSLR (Pt.11) 117 at 118 and George v. U.B.A. (1972) (Pt.2) 1 All NLR 347. This is moreso, when so to say, from the horse's own mouth, the appellant through its counsel's cross-examination of the respondent unearthed the contents of Exhibits E and E1 and through the examination-in-chief of PW.2, elicited evidence thereat which instead of derogating from the respondent's case, rather strengthened it with regard to his (respondent's) strong and credible claims to the arrears of salary and other heads of claims awarded in his favour. It is no use saying as herein contended by the appellant that the respondent had, when pressed under cross-examination, admitted remembering he at some time paid himself some salary and that in doing so, filed the form relating to the percentage of his salary from the appellant. As by virtue of section 135 of the Evidence Act.

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

The burden which lay on the appellant in the instant case to show what and how much by way of salary was paid to the respondent, has not, in my respectful view, been discharged. Indeed, as this court held in *Kate Enterprises Ltd. v. Daewoo (Nig.) Ltd.* (1985) 2 NWLR (Pt.5) 116.

"The burden of proof is not a burden that does not shift at all. It is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence."

Vide section 130 of the Evidence Act.

As this court also aptly put it in *Obmiami Bricks and Stone (Nig) Ltd. v. A.C.B. Ltd.* (supra) at pages 293 - 294

"It must be appreciated that there cannot be a better notice of the case a party intends to make than his pleadings. It is a mere notice and can never be a substitute for the evidence required in proof of the facts pleaded ... Unless a party through skilful cross-examination discredits the case of the other party, he is still bound to lead evidence in support of his own pleading ..."

As in the instant case the conduct of the appellant savours of confession and avoidance or a demurrer, all the averments by the respondent in respect of his arrears of salary were deemed to have been admitted. Where such a defence is the sole plea the defendant (appellant herein) is bound by his admission, as it will effectively be precluded at the trial from denying the facts as alleged. See *Hewitt v. Macquire* (1851) 7 Exch. 80. and *Leonard Okoye & Ors v. Nigerian Construction & Furniture Co. Ltd. & ors.* (1991) 6 NWLR (Pt.199) 501 where at page 522 Akpata, J.S.C. held:

"In demurrer proceedings pursuant to Order 29, Rules 1 to 3, the facts averred in a plaintiff's statement of claim are conceded by the defendant and the plaintiff is spared the trouble and what may be difficult task of establishing the factual allegations contained in the statement of claim."

In fairness to the respondent, his answer under cross-examination as herein before set out in this judgment as well as his explanation depicted that he was not sure whether payment of his salary was reflected in the audited accounts (See page 29. lines 13-18 of the record) but the same should not be read in isolation. When married to the evidence of P.W.2 at page 52 of the record to the effect that "N14,846.70K was the amount

shown expended on the plaintiffs food and drinks" and in Exhibit "E", paragraph 02 under the heading "Morgan Hoff" where the word "drawings" was used, it becomes a question of semantics whether it was Salary or Drawings that was meant. What is important, however, is that the learned trial judge took into account all these - be they salaries or drawings and the court below, rightly in my view, assessed the sum found to be due to the respondent by a conclusion arrived at which, in my view, is unassailable.

The appellant's submission that the court below "did not advert its mind to Exhibit "G" which emanated from the original respondent himself cannot therefore be justified. This is moreso, when it is glaring that respondent pleaded the purport and effect of Exhibit G (See page 44, of the record in paragraph 15 of the Amended Statement of Claim) which he tendered at the hearing of the case and it was not part of appellant's case that respondent's employment and payment of salary was dependent on expatriate quota granted to the appellant. In as much as it (appellant) neither pleaded Exhibit "G" nor placed reliance on it in accordance with Order 1 Rule 5 of the then Bendel State High Court (Civil Procedure) Rules that defence would not in my opinion, avail it.

Finally, the appellant's contention that, based on the fact that the position of the respondent as General Manager terminated by operation of law by reason of the failure of the appellant to obtain work permit for him, is to say the least, untenable. This is because the respondent's Amended Statement of Claim in paragraph 6 (See page 42 lines 7-15) was clearly admitted by the appellant in its paragraph 6 of the Statement of Defence. See page 17, lines 5-14 wherein it pleaded:

"The defendant admits paragraphs 5 and 6 of the plaintiffs Statement of Claim to the extent that he was offered appointment as its General Manager on annual salary of N36,000.00 (Thirty-six Thousand Naira) per annum but states that the said offer was made by a letter dated 15th December, 1978 and the appointment was to be effective from 1st January, 1979. At the trial of this action, the defendant shall rely on the said letter, notice to produce which is hereby served on the plaintiff."

The result of all I have been saying is that issue 1 is answered in the affirmative while the decision of the court below is hereby accordingly affirmed.

The appellant's appeal lacking merit, as it does, is accordingly dismissed with costs assessed in respondent's favour in the sum of N1,000.00.

BELGORE JSC

I had the privilege of reading in draft the judgment of my learned brother, Onu, J.S.C. and I agree this appeal lacks merit. For the reasons advanced in the judgment which I adopt as mine, I also dismiss this appeal with N1,000.00 costs to respondent.

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WALI JSC

I have read before now, the judgment of my learned brother, Onu, J.S.C., with which I agree.

It is for those same reasons that I also hereby dismiss this appeal and abide by the consequential orders made in the lead judgment.

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OGWUEGBU JSC

I had a preview of the judgment just delivered by my learned brother, Onu, J.S.C. and I agree with his reasons and conclusion.

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In his amended statement of claim, the original plaintiff/respondent Arthur Morgan Hoff who died in the course of the proceedings and was substituted by his wife, the present respondent claimed the following reliefs from the defendant/appellant:-

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"1. A declaration that the letter dated 20th February, 1986 purportedly written to the plaintiff by the defendant together with the letter of 18th February and 4th March, 1986 terminating the plaintiff's appointment as the General Manager of the defendant company is wrongful and amounts to wrongful dismissal.

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2. A declaration that the plaintiff's agreement with the defendant subsists.

3. A declaration that as long as the agreement of 22nd May, 1978 subsists the defendant is under an obligation in the said agreement to apply for and obtain requisite permits for the plaintiff so as to give effect to the said agreement.

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4. A declaration that the plaintiff is entitled to his arrears of salary of N36,000.00 (Thirty Six Thousand Naira) per annum from 1st January 1979 to 20th February, 1986 amounting to N258,000.00 (Two Hundred and Fifty Eight Thousand Naira).

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5. N36,000.00 (Thirty Six Thousand Naira being damages for wrongful dismissal.

6. *An injunction to restrain the defendant by itself its servants or agents or otherwise however from further interfering with the plaintiff's rights under the said agreement.*

And the plaintiff claims the sum of N279,143.00 (Two Hundred and Seventy Nine Thousand One Hundred and Forty Three Naira) being arrears of salary and damages for wrongful dismissal as follows:

Arrears of salary from 1st January 1979 to 20th February, 1986 at N36,000 per annum	... N258,000.00
Damages for wrongful dismissal	... N36,000.00
10 Less drawings of	... N14,847.00
	N279,153.00"

The original plaintiff/respondent (now deceased) was by a letter Exhibit "B" appointed a general manager of the defendant/appellant company on a salary of N36,000.00 per annum. He holds a forty percent share in the appellant company.

His appointment was determined by Exhibit "F". By Exhibit "A" he also acted as the Managing Director of the appellant company and no remuneration was attached to this office. The original plaintiff/respondent 20 instituted the action giving rise to this appeal when the appellant wrote to the Immigration Authorities of the termination of the plaintiff's appointment and its intention to repatriate him. The other facts relevant to the appeal have been fully set out in the lead judgment.

Four grounds of appeal were filed by the appellant. From the four 25 grounds of appeal, three issues were identified in the appellant's brief of argument as arising for determination in the appeal. On 25th October, 1993, the appellant's counsel filed a motion on notice for leave to raise and argue fresh points not taken in the courts below as indicated at page 5 lines 1-17 and page 16 line 15 to page 17 line 19 of the appellant's brief of 30 argument.

When the appeal came up for hearing on 29/11/93, the appellant and its counsel were absent and there was no explanation for their absence. The court being satisfied that the appellant had due notice of the motion and the appeal, struck out the application to raise and argue the 35 said fresh points not taken in the courts below for want of prosecution and treated the appellant's appeal as having been argued on the brief of argument pursuant to Order 6 Rule 8(6) of the Supreme Court Rules, 1985 as amended. The respondent's counsel adopted and relied on the respondent's brief of argument filed on 29.1.93 and urged the court to dismiss the ap-

peal.

Issues two and three were covered by grounds three and four of the grounds of appeal.

Those grounds having been struck out, the appellant was left with grounds one and two on which the first issue for determination is based. This remaining issue for determination reads:

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"Was the Court of Appeal right in its implied decision that the deceased plaintiff had discharged the primary burden of proving his case?"

The only issue for determination arising from the grounds of appeal identified by the respondent is:-

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Was the Court of Appeal right in holding that having regard to the state of the pleading and the evidence led, the respondent was entitled to succeed on his claims as varied."

Both issues mean the same thing except that of the respondent's issue is more elegantly formulated.

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I will now proceed to deal with the question., In paragraphs 9-11 of the amended statement of claim, the plaintiff/respondent averred as follows:-

"9. The plaintiff will show at the hearing that since the agreement between him and the defendant company, he has duly performed his obligations therein, but received no salaries as per the letter of appointment.

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10. The plaintiff will lead evidence to show that from the inception of his service contract there was a drawing of N9,147.89 (Nine Thousand One Hundred and Forty Nine (sic) Naira eight (sic) Nine Kobo) but made a further case contribution of N9,779.62. The plaintiff will rely on the statement of affairs prepared by Messrs. Eyewunmi Rone and Chartered Accountants.

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11. The plaintiff will give credit to the defendant to the tune of N14,214.97 being the cost of food and drinks consumed by the plaintiff as shown in the statement of affairs prepared by Messrs. Eyewunmi Rone & Co, Chartered Accountants,"

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The court below upheld the view of the learned trial judge that the respondent only had to show that he received no salary during the relevant period and the onus shifted on the appellant to prove that the salary was paid. The court below also upheld the finding of the learned trial judge that the averment in paragraph nine of the amended statement of claim set out above was not specifically denied in the statement of defence hence the averment in the said paragraph should be deemed admitted.

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The learned appellant's counsel argued in his brief that the conclusion of the courts below on paragraph nine of the amended statement of claim is only a general statement of the law and should not apply to the 5 circumstances of this case. He further argued that the fact that a claim is not denied does not relieve a plaintiff of the burden of adducing evidence of primary facts. He cited the case of Obimiami Bricks & Stone (Nig.) Ltd. v. A.C.B. Ltd. (1992) 3 NWLR (Pt.229) 260 at 293-294 and Sanusi v. Ameyogun (1992) 4 NWLR (Pt.237) 527 at 547 and 553.

10 It was argued on behalf of the respondent that on the state of the pleadings, the averments in paragraphs 9 and 10 of the amended statement of claim ceased to be in controversy having regard to the appellant's failure to specifically deny the averments. We were referred to the cases of Odume v. Nnachi (1964) 1 All NLR 229 and Ajibade v. Mayowa & Ors. 15 (1978) 9- 10 S.C. and section 74 of the Evidence Act.

It was further argued that in the circumstances, the respondent bore no burden. Counsel cited the cases of Pioneer Plastic Containers v. Commissioners of Customs & Excise (1967) 1 All E.R. 1053 and George Onobruhere & Ors. v. Esegine & Ors. (1986) 2 S.C. 385 at 397 among 20 others in support of her contention.

There is no doubt that the appellant failed to deny specifically the material averment contained in paragraph 9 of the amended statement of claim. I have read the statement of defence several times to discover the specific denial but failed. Rather in paragraph 6 of the statement of de- 25 fence, the appellant admitted that the respondent was offered appointment as its general manager on annual salary of N36,000.00 and that the said offer was made by a letter dated 15th December, 1978 effective from 1st January, 1979 (Exhibit "B").

There is in the instant case a failure on the part of the appellant to 30 deny specifically the material averment contained in paragraph 9 of the amended statement of claim. By implication, the appellant is deemed to have admitted the same and no further proof of that fact is necessary. This is a basic rule of pleading. See Ndiakaeme & Ors v. Egbuonu & Ors. 7 WACA 53 and Din v. African Newspapers Ltd. (1990)3 NWLR (Pt.139) 35 392 at 405.

Non-payment of salary is a fact which is necessary to establish the cause of action and the specific denial of the averment either that no salary is owed or part of it has been paid is also a fact which is necessary to establish the defence to it. In the special circumstances of this case, pay-

ment or non-payment of salary is in my view material: It is an important and traversable issue which the appellant should not have glossed over in its statement of defence.

In paragraph 15 of the statement of defence, the appellant averred:-

"15. The defendant states in reply to paragraph 18 of the plaintiff's statement of claim that the plaintiff's claims are incompetent and that the claim for entitlement of his salary in the sum of N36,000.00 (Thirty Six Thousand Naira) per annum from December, 1978 is statute barred and the said claims should be dismissed with substantial costs."

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The appellant not only failed to deny specifically the material averment in paragraph 9 of the amended statement of claim, it also took an objection in point of law. The burden of establishing the issues rested squarely on him. He cannot be allowed to shift the onus.

In addition, Order 13 rule 9 of the former Bendel State High Court (Civil Procedure) Rules, 1976 provides:-

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"The defendant's pleading or defence shall deny all such material allegations in the pleading as the defendant intends to deny at the hearing. Every allegation of fact, if not denied specifically or by necessary implication, or stated to be not admitted shall be taken as established at the hearing."

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Moreover, section 75 of the Evidence Act Cap. 112 Vol. 8 Laws of the Federation of Nigeria, 1990 provides that:-

"No fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleading:

25

Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

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(Italics mine emphasis only).

The trial court was not asked to exercise its discretion and none was exercised. The case of Obmiami Bricks & Stone (Nig.) Ltd. (supra) cited by the learned counsel for the appellant in his brief or argument does not support the appellant's case. Rather it supports the case of the respondent.

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This court in that case at page 293 last paragraph was dealing with a situation where both parties pleaded on a fact. The Court stated

that unless a party through skilful cross-examination discredits the case of the other party, he is still bound to lead evidence in support of his own pleading. This proposition did not in any way displace the rule of pleading that what has been admitted requires no further proof. Both parties must have joined issue on the point. However, no issue was joined between the
5 parties in the present case as to payment or non-payment of salaries. The appellant did not make it an issue in his pleading and in my view, no amount of answers extracted in cross-examination will cure that fundamental lapse in the appellant's pleading.

The decision of the Court of Appeal has not been faulted. The
10 appeal has no merit. For the above reasons and the fuller reasons contained in the lead judgment, I too dismiss the appeal. The respondent is entitled to costs which I assess at N1,000.00 against the appellant.

15 **MOHAMMEDJSC**

I agree with the judgment just read by my learned brother, Onu, J.S.C., that this appeal ought to be dismissed. I have had the privilege of reading my brother's opinion, in draft, before now. After going through the facts of this case, I agree with the respondent's counsel that the only issue
20 for determination of this appeal is:

"Was the Court of Appeal right in holding that having regard to the state of the pleading and the evidence led, the respondent was entitled to succeed on his claims as varied."

The issue is fundamentally factual and the lead judgment has
25 considered all the salient points canvassed in this appeal. I have nothing more to add. This appeal is devoid of any merit and I dismiss it. I shall also award N1,000,000.00 costs in favour of the respondent.

Appeal Dismissed.

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