

SUPREME COURT OF NIGERIA
25TH FEBRUARY, 1994. SC. 81/1990.
CORAM:- M. L. UWAI, E. O. OGWUEGBU,
U. MOHAMMED, Y. O. ADIO, A. I. IGUH, JJSC.

UNION BEVERAGES LTD APPELLANT
AND	
1. PEPSI COLA INTERNATIONAL LTD	
2. JOHN-HOLT LTD RESPONDENT
3. SEVEN-UP BOTTLING CO. LTD.	
4. PEPSI COLA INC.	

APPEALS - *Interlocutory Injunction - Court of Appeal - Where there is no serious question of law in existence whether Court of Appeal was right in upholding refusal of injunction.*

CONTRACTS - *Parties - Breach of contract allegation against the wrong party - Legal implications.*

INTERLOCUTORY INJUNCTIONS - *Compensation - Where loss alleged can be adequately compensated in damages - (Whether) injunction will be not granted*

INTERLOCUTORY INJUNCTIONS - *Enforceable right - Proof that injury is caused to plaintiff - without showing an infringement of plaintiff's legally enforceable right - (whether) interlocutory injunction will not be granted.*

INTERLOCUTORY INJUNCTIONS - *Late amendments - Application against the wrong party - Substitution of the right party after refusal of injunction - (Whether) of any use*

PARTIES - *Joinder - Plaintiffs failure to join a party who ought to have been joined - (Whether) proceedings is not rendered a nullity thereby - On ground of Court's lack of competence or jurisdiction.*

FACTS

The Plaintiff/Appellant filed an action against the 1st - 3rd Defendants/Respondents before the Lagos High Court seeking a declaration, perpetual injunction and claiming various millions of naira as damages for breach of a franchise Exclusive Bottling Appointment Agreement. Appellant alleged that the exclusive franchise agreement was between it and the 1st Respondent covering a specified geographical area. That the 1st Respondent's termination of the agreement with the purpose of granting the franchise to 2nd and 3rd Respondents was wrongful, null and void. Application ex parte filed by Appellant for an interim injunction supported by the various agreements and the termination notice was granted by the trial court.

Upon the discharge of the interim injunction, the trial Judge refused to grant Appellant's application for interlocutory injunction to restrain the Respondents from carrying on with the alleged breach of the franchise exclusive bottling agreement, a prayer similar to the interim injunction prayer earlier granted. Appellant's appeal to the Court of Appeal was dismissed, as that court found no nexus between the Appellant and the 1st Respondent in respect of the said franchise agreements. Appellant being dissatisfied has further appealed to the Supreme Court to determine inter alia, whether the Court of Appeal came to a right decision in all the circumstances of the case. It is obvious from the records that it was after the refusal of the interlocutory injunction by the High Court that the 4th Respondent was made a party to the suit. And that the alleged agreements exhibited were between the Appellant and 4th Respondent, not the 1st Respondent as alleged by Appellant.

HELD (unanimously dismissing the appeal)

1. The fact that the act of a defendant is causing injury to the plaintiff is not sufficient for the purpose of determining whether an application for an interlocutory injunction should be granted. The application will not be granted if it is not shown that the alleged act of the defendant constitutes an infringement of a legally enforceable right of the plaintiff. (p.30 L23)
2. Failure of a plaintiff to join a party who ought to have been joined will not render proceedings a nullity on the ground of lack of Court's competence or jurisdiction. Rather the court may deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. (p.36 L16)

3. Appellant's complaint of breach of some franchise agreements by virtue of unlawful or unjustifiable termination was a complaint which the Appellant in view of the exhibited documents might make against the 4th and not the 1st Respondent. This is because the act of the 4th Respondent could not be imputed to the 1st Respondent as there was no legal basis for such imputation. (p36 L22)

4. Substituting the 4th Respondent for the 1st Respondent wherever the allegation concerned the execution or termination of the franchise agreements after the refusal of the application, may enhance the Appellant's chances in the substantive suit but it was too late as far as the application for interlocutory injunction which is the subject of this appeal is concerned. (p.36 L35)

5. It is only where the type of loss alleged by an applicant cannot be adequately compensated in damages that an interlocutory injunction can be granted. The learned trial Judge's finding that any injury the Appellant might suffer could be compensated for by the award of damages is not to be interfered with. (p.37 L.9)

6. There is no serious question of law in existence which was to be tried between the appellant and the 1st Respondent. And the Court of Appeal came to a right decision in all the circumstances of this case. (p39 L34)

PER OGWUEGBU JSC *"While it is the law that no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party yet in the absence of a proper party before the court, I think that it will be idle for the court to make an order of interlocutory injunction against strangers to a contract or a party to it who is not before the court."* (p.42 L22)

REPRESENTATION

Dr. (Miss) O. Sofola with Miss R. Odogun for the Appellant.
FR.A. Williams SAN, with J. U. Igwe for the Respondents.

CASES REFERRED TO

1. Day v. Brownrigg (1878) 10 Ch.D.2
2. Akapo v. Hakeam-Habeeb (1992) 6 N.W.L.R. (pt. 247)
3. Braide v. Adoki (1931) 10 N.L.R. 15
4. Morohunfola v. Kwara College of Technology, (1990) 4 N.W.L.R. (pt.145)

5. Obeya Memorial Hospital & Anor. v. Attorney-General of the Federation & Anor. (1987) 3 N.W.L.R. (pt. 60) 325
6. Onyesoh v. Nnebedum (1992) 3 N.W.L.R. (pt. 229) 315
7. Ogunleye v. Oni (1990) 2 N.W.L.R. (pt. 135) 745.
8. Imah v. Okogbe (1993) 9 N.W.L.R. (pt. 316) 139
9. Hadmor Production Ltd. & Ors. v. Hamilton & Anor (1983) 1 A.C. 191
10. Ikpeazu v. African Continental Bank (1965) N.M.L.R. 374.
11. Lagos State Development and Property Corporation & Ors. v. Nigerian Land and Sea Food Ltd. (1992) 5 N.W.L.R. (pt. 224) 653.
12. Okoye & Ors. v. Nigeria Construction & Furniture Co. Ltd. (1991) 6 N.W.L.R. (pt. 199) 501.
13. Uku v. Okumagba (1974) 3 S.C 35 4.
14. Osurinde v. Ajamagun (1992) 6 N.W.L.R. (pt. 246) 156

LEAD JUDGMENT BY ADIO JSC

The appellant, as plaintiff, instituted an action, in the Lagos High Court, against the 1st, 2nd and 3rd respondents, as defendants and the appellant's claim was as follows:

"1. A declaration that the 1st defendant's letter dated 22nd December, 1988, purporting to terminate the Exclusive Bottling Appointment Agreement dated 19th January, 1976 is invalid, wrongful, null and void and of no effect whatsoever and should in the interest of justice be set aside.

2. The plaintiff also claims from the said 1st defendant the sum of N50,000,000.00 as damages for the wrongful breach of the said Exclusive Bottling Appointment Agreement.

3. The plaintiff claims against the 2nd and 3rd defendants jointly and severally N50,000,000.00 damages for trespass to the plaintiff's goods namely, Pepsi bottles and crates.

4. The plaintiff claims from the 2nd and 3rd defendants jointly and severally the sum of N50,000,000.00 damages for wrongful inducing a breach of the said Exclusive Bottling Appointment Agreement between the plaintiff and the 1st defendant.

5. The plaintiff claims from the 1st, 2nd and 3rd defendants jointly and severally the sum of N50,000,000.00, damages for conspiracy to injure the plaintiff in its business.

6. The plaintiff also claims against the 1st, 2nd and 3rd defendants a perpetual injunction restraining them, their servants, workmen, privies or agents or otherwise howsoever from interfering with Exclusive Bot-

There was an application, ex parte, for an interim injunction made by the appellant to restrain the respondents, their servants etc., from bottling, selling or distributing or taking any step towards implementing any agreement between themselves jointly or severally by which Pepsicola or Mirinda or Teem or any other Pepsicola range of products would be bottled, sold or distributed within Lagos, Oyo, Ondo or Ogun States of Nigeria or from otherwise taking any step contrary to the interests of the appellant under the franchise Exclusive Bottling Appointment Agreement dated 19th January, 1976, and its Subsidiary Amending Agreement dated 26th June, 1985 and the Franchise Exclusive Bottling Appointment Agreement dated 1st January, 1983. The application was supported by an affidavit in which it was deposed, inter alia, that the claim was based on the exclusive franchise agreements made between the appellant and the 1st respondent and that it was agreed under the said agreements that the appellant would have the exclusive right to bottle, sell and distribute the beverages mentioned in the said agreements within the geographical area of Lagos and Western States consisting of Lagos, Oyo, Ondo and Ogun States. It was further deposed that contrary to and in breach of the aforesaid agreements, the 1st respondent wrongfully purported to terminate the aforesaid agreements with immediate effect. It was also deposed that the intention of the 1st respondent was to grant sole franchise to the 2nd respondent and to sign franchise agreement with the 3rd respondent in relation to the beverages to which the aforesaid agreements between the appellant and the 1st respondent related.

The documents attached to the affidavit in support of the application were as follows:-

- (a) Exhibit "MBO1" -Pepsi Cola Agreement -p.31,
- (b) Exhibit "MB02" -Amendment of Exhibit "MBO1" - p.16,
- (c) ExhibitMB03" -Teem Agreement- p.18,
- (d) Exhibit"MB04 -Notice of termination of Agreements - p.23.

It is sufficient, for the present purpose, to state that the ex parte application for interim injunction was granted by the trial court. What led to the present appeal was the refusal by the learned trial Judge to grant an application by the appellant for an interlocutory injunction against the 1st, 2nd and 3rd respondents, the terms of which were similar to the terms of the interim injunction, and the discharge by the learned trial Judge of the

interim injunction earlier granted. A copy of the ruling of the learned trial Judge, on the point, is at pages 128 to 132 of the record of proceedings. Dissatisfied with the aforesaid ruling, the appellant appealed to the Court of Appeal which dismissed the appeal of the appellant. It's judgment is at pages 214-225 of the record of proceedings.

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It has to be noted, at this stage, that the affidavit in support of the application for interim injunction and the affidavit in support of the application for interlocutory injunction clearly alleged that the relevant agreements relating to the aforesaid franchise allegedly granted to the appellant were between the appellant and the 1st respondent and that it was the 1st respondent that purported to terminate the agreements in question. Indeed, the 4th respondent was not made a party to this action until after the application for the interlocutory injunction had been refused and the interim injunction earlier granted was discharged. The foregoing was obvious from the heading of the relevant ruling of the learned trial Judge dated 10th March, 1989. The respondents before the learned trial Judge, on that date, were the 1st, 2nd and 3rd respondents. The 4th respondent had not become a party in the case.

The Court of Appeal held, inter alia that though the appellant's claim was based on the alleged franchise agreements between itself and the 1st respondent, the aforesaid agreements did not show any nexus between the appellant and the 1st respondent. The court then examined the point whether there was any serious question to be tried between the appellant and the 1st respondent and came to the conclusion that there was none.

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Dissatisfied with the judgment of the Court of Appeal, the appellant has appealed to this court. In accordance with the rules of this court, the parties filed and duly exchanged briefs. The three issues set down in the appellant's brief are sufficient for the determination of this appeal. The three issues, which were based on the grounds of appeal, are as follows:

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"1. Whether the Court of Appeal was right to have decided the appeal before it other than by examining the High Court decision appealed from.

2. If the answer to 1 is in the affirmative, whether the Court of Appeal was right to have held that the plaintiff had shown no legal right that could be protected by an injunction given the affidavit evidence before it.

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3. Whether the Court of Appeal had come to a right decision, in all the circumstances of the case."

The submission made for the appellant, in relation to the question raised under the first issue, was that the learned trial Judge was wrong to have refused the application for an order of interlocutory injunction which was based on an affidavit the contents of which were identical with the contents of the affidavit in support of the application for an order of interim injunction earlier granted by the court particularly when the contents of the aforesaid affidavits had not been contradicted by the 1st, 2nd and 3rd respondents. The appellant pointed out that the point aforesaid was raised before the Court of appeal but it was not considered by the court. It was, therefore, contended that in law, an appellate court's duty in an appeal was to examine whether the trial court had come to a correct decision and that it ought not to entertain any points not canvassed before or considered by the trial court in its decision. Further, it was argued that there was ample affidavit evidence before the learned trial Judge that the activities of the 1st, 2nd and 3rd respondents were damaging the appellant and would prove fatal if not restrained and that similar and more up to date affidavit evidence was before the Court of Appeal.

I deal with the last point first. What was required in this case before the application for the interlocutory injunction could be granted was not only affidavit evidence that the alleged activities of the 1st, 2nd and 3rd respondents were damaging the appellant and would prove fatal if not restrained. This is because the fact that the act of a defendant is causing injury to the plaintiff is not sufficient for the purpose of determining whether an application for an interlocutory injunction should be granted. The application will not be granted if it is not shown that the alleged act of the defendant constitutes an infringement of a legally enforceable right of the plaintiff. See *Day v. Brownrigg* (1878) 10 Ch. D. 2; and *Akapo v. Hakeam-Habeeb* (1992) 6 NWLR (Pt.247) 266. It is a fundamental rule of law that the court will grant an injunction only to support or protect a legal right. If the applicant has no legal right recognised by law, there is no power to grant an injunction. See *Braide v. Adoki* (1931) 10 NLR 15; and *Morohunfola v. Kwara College of Technology* (1990) 4 NWLR (Pt. 145) 506. Another fundamental rule of law is that it is for an applicant for an interlocutory injunction to satisfy the court that there is a serious question to be tried as between him (applicant) and the defendant (respondent). An application for an interlocutory injunction must satisfy the court, if he is to succeed, that there is a serious question to be tried in addition to his satisfying the court that he has a right which ought to be protected. See *Ohem Memorial*

Hospital & Anor. v. Attorney-General of the Federation & Anor. (1987) 3 NWLR (Pt.60) 325; and Onyesoh v. Nnebedum (1992) 3 NWLR (Pt.229) 315. The complaint, in this connection, was that as the learned trial Judge did not consider or consider sufficiently, the requirements that the appellant must satisfy him that the appellant had a recognised legal right requiring protection by an interlocutory injunction and that there was a serious question to be tried, the Court of Appeal should not have considered and determined those questions, as the duty of an appellate court was only to examine and determine whether the learned trial Judge was or was not correct on the decision which he had reached. The submission in my view oversimplified the duty of an appellate court. An appellate court may not confirm or affirm a decision of a lower court if the lower court in reaching the decision did not consider at all or consider adequately and determine fundamental relevant questions before reaching a decision. If the fundamental relevant questions not considered by the trial Judge are capable of being determined on the basis of admitted facts or documentary evidence before the lower court and do not depend on credibility of witnesses, the appellate court not only has power but is under a duty to determine such relevant questions. If a trial court fails to consider and evaluate the evidence adduced by both parties to a dispute on certain relevant issues and make necessary findings, there is a duty on the appellate court to consider and evaluate such evidence and to make proper and necessary findings. so long as the issue of credibility of witnesses is not involved. See Ogunleye v. Oni (1990) 2 NWLR (Pt.13S) 745; and Imah v. Okogbe (1993) 9 NWLR (Pt.316) 159. There was, therefore, substance in the submission for the respondents that the aforesaid contention for the appellant could not be sustained. It was wrong to take a restricted or narrow view of the duty of an appellate court. It was in the affidavit filed by the appellant in support of the application for the interlocutory injunction that it was deposed that the appellant was the holder of franchises granted to the appellant by the 1st respondent authorising the appellant to manufacture and produce certain beverages; that the franchises were still existing; that the 1st respondent unlawfully and without justification purported to terminate the franchises; and that the 1st, 2nd and 3rd respondents conspired to violate the aforesaid franchises granted to the appellant. In the circumstances, the questions whether the alleged franchises were, in fact, granted to the appellant by the 1st respondent and. if so, whether the 1st respondent had purported or threatened to terminate the franchises unlawfully or without justification became relevant. It was by giving consideration to those questions that one would be able to determine whether:-

(a) the appellant had a legal right requiring protection by an interlocutory injunction; and

(b) whether there was a serious question to be tried between the
5 appellant and the 1st respondent.

As a matter of law, those two issues, that is, legal right of the appellant requiring protection by interlocutory injunction, and the existence of serious question to be tried between the appellant and the 1st respondent, were conditions precedent to the exercise of discretion by the learned
10 trial Judge in relation to whether or not to grant an interlocutory injunction. In other words, a court has a discretion on the question whether or not to grant an interlocutory injunction but the discretion has to be exercised in accordance with established principle which is that an interlocutory injunction should not be granted where the applicant does not have a legal right
15 requiring protection by interlocutory injunction or where the applicant has not proved that there is a serious question to be tried between him and the respondent. Therefore, the principle, enunciated in *Hadmor Productions Ltd. & Ors. v. Hamilton & Anor. (1983) 1 A.C. 191* does not apply. If the Court of Appeal was right in its finding that the aforesaid conditions precedent to the power of the court to exercise its discretion to grant or refuse an
20 interlocutory injunction were not satisfied and the reasons given by the learned trial Judge for his refusal of the order were also right, then the finding of the Court of Appeal would constitute an additional ground for sustaining the ruling of the learned trial Judge. If on the other hand, the
25 finding of the Court of Appeal was right but the reasons given by the learned trial Judge for the refusal of the order were wrong, it meant that an interlocutory injunction could not, in any event, have been properly granted to the appellant. The foregoing questions will be considered when dealing with the questions raised under the second and third issues.

30 If, as has been shown above, the question whether the appellant had a legal right which had been infringed or adversely affected was relevant for the determination of the question whether interlocutory injunction should be granted to it, then the question raised under the second issue becomes relevant. The aforesaid question is whether the Court of Appeal
35 was right to have held that the appellant had shown no legal right that could be protected by an injunction given the affidavit evidence before it. The Court of Appeal, after evaluating the affidavit evidence and the submissions of the learned counsel for both parties, on the point, stated, *inter alia*, as follows:-

"The point for decision here is a simple one. Appellants legal rights are founded on the franchises Exhibits MBO1, MBO2, and MBO3 which he has alleged were terminated by the 1st defendant.

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As I have said, the rights of the appellant are rooted in the franchises and if as Chief Williams has demonstrably shown in the argument that the agreement is not between the appellant and the 1st defendant, but between the appellant and the Pepsi Cola Inc., which was not a party before the court at the time the injunction was asked for. Since there is no nexus between the appellant and the 1st defendant based upon any franchise agreement, the question of a breach by virtue of Exhibit MB04, which incidentally was not issued by the 1st defendant, there can be no question of any actionable wrong or infringement of legal right that needs to be protected by an injunction.

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This is simple, and I do not think I need to cite any authority to support this.

In this connection, it was submitted for the appellant that the claims brought by the appellant were not limited to the purported termination of the franchises or a declaration that the franchises remained valid. The claim for trespass to goods being hijacked from the market and the interference of the 2nd and 3rd respondents were substantiated and were independent claims. According to the appellant, the affidavit evidence established the continuing nature of the infringements and clearly protection was needed for the appellant. In the appellant's view a submission that necessary party had not as yet been joined could not be tantamount to saying the appellant did not possess rights under the exhibited agreements. It was also submitted that, in law, the non-joinder or misjoinder of a party could not be a ground for refusing an injunction where the urgency or need for one was shown before a court. In the view of the learned counsel for the appellant, there was sufficient nexus among the various Pepsi Cola organisations and if the Court of Appeal had considered the totality of the evidence before it, the court could not have said that there was no nexus between the 1st and the 4th respondent.

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In the case of the respondent, the submission made for them was that the matter deposed to in the affidavit in support of the application for interlocutory injunction and all the documents attached to the affidavit showed that the alleged franchise agreements which formed the basis of the application were between the appellant and the Pepsi Cola Inc., and

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that the alleged franchise agreements were terminated by the Pepsi Cola Inc. The learned counsel pointed out that at all material times the Pepsi Cola Inc., was not yet a party to the case.

I think that it is necessary to set out the relevant matters deposed
5 to in the affidavit in support of the application for interlocutory injunction. They were, inter-alia as follows:-

*"2. That the claim herein is founded in exclusive franchise agree-
ments made between the plaintiff and the 1st defendant.*

10 *3. That by virtue of an Exclusive Bottling Appointment Agreement dated 19th January, 1976 made between the plaintiff and the 1st defendant it was agreed that the plaintiff would have the exclusive right to bottle, sell and distribute the beverage known and sold under the trademarks PEPSICOLA and PEPSI within the geographical area of Lagos and West-
15 ern States' namely the Lagos, Oyo, Ondo. AND Ogun States of Nigeria. Attached herewith and marked Exhibit 'MBO1' is a copy of the said Exclusive Bottling Appointment Agreement.*

*4. That by virtue of an amending agreement dated 26th June, 1985 it was agreed between the plaintiff and the 1st defendant that the
20 said Exclusive Bottling Appointment Agreement referred to in paragraph 2 above would be extended to cover the beverage bottled, sold and distributed under the trade mark 'MIRINDA'. Attached herewith and marked 'MB02' is a copy of the agreement.*

*5. That by virtue of an Exclusive Bottling Appointment Agreement
25 dated 1st January. 1983 made between the plaintiff and the 1st defendant it was agreed between the parties that the plaintiff would bottle, sell and distribute certain beverages known and sold under the trade mark 'TEEM', in the said territory covered by the Exclusive Bottling Appointment Agree-
ment for PEPSICOLA and PEPSI referred to in paragraph 2 above. The
30 said Exclusive Bottling Appointment Agreement for TEEM is attached here- with and marked Exhibit 'MBO3'.*

*6. That contrary (to) and in breach of the aforesaid franchise agree-
ments, the 1st defendant wrongfully purported to terminate not only the
35 Exclusive Bottling Appointment Agreement dated 19th January, 1976 but all other agreements and authorisations also with immediate effect. At- tached herewith and marked Exhibit 'MB04' is the copy of the said pur- ported letter of termination.*

10. That the 1st defendant intends and has manifested its inten-

tion to grant a single franchise to cover the whole of Nigeria which it is purporting to grant to either the 2nd or 3rd defendant.

14. That the 2nd and 3rd defendants have been buying up and destroying empty bottles and plastic crates belonging to the plaintiff with a view to crippling their production so that a formal complaint had to be made to the police.

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16. That unless restrained the defendants will continue to take steps to harm the plaintiffs enterprise and damage irremediably their market and viability.

18. That there are serious questions of law with far reaching consequences to be determined by this Honourable Court in this suit. "

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It is quite clear from what were deposed to in the affidavit in support of the application, the copies of the alleged franchise agreements attached to the affidavit, and the letter terminating the franchise agreements also attached to the affidavit, that though it was alleged that it was the 1st respondent that granted the franchises to the appellant and further alleged that it was the 1st respondent that unlawfully and without justification terminated the franchise agreements, the true position was that it was the 4th respondent that granted the franchises to the appellant under the aforesaid franchise agreements and that it was the 4th respondent that actually terminated the said franchise agreements. The 1st respondent did not, in fact, do anything in connection with the execution of the said franchise agreements or the termination thereof. What was involved was much more than mere mis-joinder or non-joinder. The party, who was later joined as the 4th defendant in this case in relation to whom there might be a cause of action in relation to the alleged execution of franchise agreements and the termination ,thereof was not yet a party to the case at the time that the application for an interlocutory application was made and at the time that it was refused.

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The alleged franchise agreements showed that the 1st respondent was not a party to them. In the circumstance, the 1st respondent could not purport to terminate them on any ground because generally only parties to a contract can enforce it. A person who is not a party to it cannot do so even if the contract was made for his benefit and purports to give the right to sue upon it. See *Ikpeazu v. African Continental Bank (1965) NMLR 374; Lagos State Development and Property Corporation & Ors. v. Nigerian Land and Sea Food Ltd. (1992) 5 NWLR (Pt.244) 653*. Even if, as was suggested, the 1st respondent was a subsidiary of the Pepsi Inc., or the

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Pepsi Cola Inc., was a parent company of the 1st respondent, a subsidiary company has its own separate legal personality. So, generally the act of a subsidiary company cannot be imputed to the parent company nor can the act of the parent company be imputed to the subsidiary company. Each of the four defendants/respondents was a corporate body having its own legal
 5 personality separate and different from the others. Each of them was capable of suing or being sued in its own name. There was no legal basis for suing the 1st respondent for what the 4th respondent had done. It is otherwise if one of them acts as a servant or an agent of the other but that was not the case in the present circumstances. Consequently, it could properly
 10 be said that there was no nexus between the appellant and the 1st respondent or a nexus between the appellant and the 4th respondent on the basis of the affidavit and the documents attached to it.

One of the submissions made by the learned counsel for the re-
 15 spondents was that the High Court lacked jurisdiction to entertain the application in the absence of the 4th respondent. Proceedings will not be a nullity on the ground of lack of competence of the court or lack of jurisdiction where a plaintiff fails to join a party who ought to have been joined. In such a case, the court may deal with the matter in controversy so far as
 20 regards the rights and interests of the parties actually before it. See *Okoye & Ors. v. Nigeria Construction & Furniture Co. Ltd. (1991) 6 NWLR (Pt.199) 501*. The complaint by the appellant that it was granted franchises to manufacture and produce certain beverages in some parts of Nigeria by virtue of some franchise agreements and that while the agreements existed they were
 25 terminated unlawfully or unjustifiably was a complaint which the appellant might, in view of the documents attached to the affidavit in support of the application, have made against the 4th respondent and not against the 1st respondent. It has been shown that, in law, the act of the 4th respondent could not, in the circumstances of this case, be imputed to the 1st respon-
 30 dent. There was no legal basis for such imputation. It could very well be that it was due to inadvertence that acts done or purported to be done by the 4th respondent were attributed or imputed to the 1st respondent without showing or demonstrating what was the nexus between the 1st respondent and the 4th respondent warranting such
 35 imputation. An attempt was, after the refusal of the application in question, made in the statement of claim to remedy the situation by substituting the 4th respondent for the 1st respondent wherever the allegation concerned the execution of the franchise agreements or the termination thereof. That may enhance the chances of the appellant in the substantive suit but

it was too late as far as the application for interlocutory injunction, which is the subject of this appeal, is concerned.

In the present case, there were three aspects of the appellant's claim. The first was the alleged existence of the appellant's right derived under some franchise agreements allegedly executed between the appellant and the 1st respondent. The second aspect alleged a conspiracy among the 1st, 2nd and 3rd respondents to do things adversely affecting the interests or rights of the appellant and damages for such things that they had done, and the third was perpetual injunction against 1st, 2nd and 3rd respondents. The learned trial Judge expressed the view that he did not believe that there was any conspiracy among the 1st, 2nd and 3rd respondents to injure the rights or interests of the appellant and that, in any case, the injury, if any, that the appellant might suffer could be compensated for by the award of damages. The Court of Appeal did not disturb those findings. It is only where the type of loss alleged by an applicant for interlocutory injunction cannot be adequately compensated for by award of damages that an interlocutory injunction can be granted pending the determination of the substantive suit. See *Akapo's case supra*. So, what was left and the most important aspect of the appellant's claim for consideration was wholly dependent on the alleged franchise agreements allegedly executed between the appellant and the 1st respondent which the 1st respondent allegedly terminated. Allegations of the appellant in relation to that aspect of the appellant's claim could or should have been against the 4th respondent and not against the 1st respondent. In the circumstance, there was a non-joinder of a necessary party in the case, that is, the 4th respondent. If a complaint is made against a person in an action and the questions or issues involved in the complaint cannot be effectually and completely determined or settled in the absence of the person, such a person is a necessary party and ought to be joined in the suit. See *Uku v. Okumagba (1974) 3 S.C. 35*. The purpose of joining a particular person as a party is to ensure that that person is bound by the result of the action. That is the only way in which the fundamental questions in the action can be effectually and completely settled or determined. See *Osunrinde v. Ajamogun (1992) 6 NWLR (Pt.246) 156*. If the appellant wanted an interlocutory injunction to be granted to it to restrain the termination of the franchise agreement unlawfully or without justification, the party against which the order of the court should properly be directed was the 4th respondent which unfortunately was not at the material time, yet made a party in the case. The Court of Appeal came to a right conclusion when it held that the appellant did not establish that it had a

right capable of being protected by means of an interlocutory injunction. The answer to the question raised under the second issue is in the affirmative.

I now come to the question raised under the third issue which is whether the Court of Appeal had come to a right decision, in all the circumstances of the case. What remains to be considered, in this connection, is whether a serious question of law to be tried between the appellant and the 1st respondent was involved. I have pointed out above that there were three aspects of the appellant's claim, as presented. The first had to do with the question whether the franchises allegedly granted to the appellant by the 1st respondent were still existing and that the letter purporting to terminate them was invalid. The second aspect related to the various sums being claimed as damages against one or more of the respondents for certain things allegedly done by them, and the third aspect was for a perpetual injunction against all the respondents restraining them from interfering with the aforesaid agreements. It has also been pointed out that in relation to the second aspect, the finding of the learned trial Judge that the injury, if any, which the appellant might suffer could be compensated by the award of damages, was not disturbed by the Court of Appeal and that this court did not think that the failure of the Court of Appeal to disturb the finding was wrong. In the circumstance, interlocutory injunction could not be granted in relation to that aspect of the appellant's claim. The successes, if any, of the appellant's claim in relation to the first aspect and the third aspect, that is declaration that the letter terminating the agreements were void and perpetual injunction restraining the respondents from interfering with the franchise agreements, respectively, depended entirely on the validity of the franchise agreements and the ability of the appellant to enforce them against the 1st respondent as at the time that the application for an interlocutory injunction, as made by the appellant and refused in the trial court. The Court of Appeal, on the question whether there was a serious question to be tried stated, inter alia, as follows:

"The question, and it will always remain so, is whether there is a serious question to be tried between the parties?"

In this matter, the absence of any direct legal relationship between the appellant and the 1st respondent on the issue of franchise agreement does render the non existence of a serious question to be tried in (the) proceedings so obvious.

The submission of the learned counsel for the appellant was that even in the absence of a direct legal relationship between the appellant and

the 1st respondent, there was in this case a serious question of law to be tried. In the view of the learned counsel for the appellant. the franchise agreements exhibited showed that the appellant has right to complain and that to hold that the non-joinder of a party meant the appellant could not be protected from proven attack amounted to the triumph of technicality 5 over justice. The contention of the learned counsel for the respondents was that assuming there was a serious question to be tried, that serious question could not be tried in the absence of the 4th respondent. What was deposed to in the affidavit in support of the application for interlocutory injunction was that the franchise agreements were executed between the appellant 10 and the 1st respondent and that it was the 1st respondent that unlawfully and unjustifiably terminated them. The true position, as shown by the copies of the agreements and of the letter purporting to terminate them. was that the franchise agreements were executed by the appellant and that it was the 4th respondent that purported to terminate them. Indeed, as at the 15 time that an application for an interlocutory injunction was made to and refused by the trial court, the 4th respondent was not yet a party to this case. The question involved in the first aspect of the appellant's claim which related to the validity or otherwise of the letter terminating the franchise agreements was a question to be tried between the appellant and the 4th 20 respondent that was a party to the agreements and could certainly, in the present circumstances, not be a question to be tried between the appellant and the 1st respondent who was not a party to the franchise agreements. In short, as far as the first aspect of the appellant's claim was concerned a proper defendant was not yet a party to the case. The position is the same 25 in relation to the third aspect of the appellant's claim which was for a perpetual injunction as the appellant could not have been able to establish his alleged right to the franchise to be protected by the perpetual injunction in the absence of the 4th respondent. In the case of the second aspect of the appellant's claim it has been held that an award of damages would 30 adequately compensate the appellant for any injury it might suffer. In the circumstance, one really could not see what serious question of law existed which was to be tried between the appellant and the 1st respondent. The answer to the question raised under the third issue is in the affirmative. The Court of Appeal had come to a right decision in all the circumstances of 35 the case.

The appeal does not succeed. The judgment of the Court of Appeal and its order for costs are affirmed. The appeal is dismissed with N1,000.00 costs to the respondents.

UWAIS JSC

I have had the advantage of reading in draft the judgment read by my learned brother, Adio. J.S.C. I entirely agree with the reasoning and conclusion therein ..

Accordingly, the appeal lacks merit and it is hereby dismissed with
5 N1,000.00 costs to the respondents.

OGWUEGBU JSC

I have had the advantage of reading in draft the judgment just
10 delivered by my learned brother Adio, J.S.C. I agree with him that the appeal be dismissed.

This is an interlocutory appeal from an order of Adeniji, J. dated 10th March, 1989 dismissing the plaintiff/appellant's application for interlocutory injunction against the first three respondents in this appeal. The
15 plaintiff who was dissatisfied with the order made by the learned trial Judge appealed to the Court of Appeal, Lagos Division. That court dismissed the plaintiff's appeal and a further appeal is now before us.

As was stated in the lead judgment, the fourth defendant/respondent was not a party to the proceedings leading to this appeal in the courts
20 below until it was joined as a party on the 28th of September, 1989. The appellant had earlier obtained an order of interim injunction ex parte before the matter was heard on notice and refused.

The appellant submitted the following issues for determination in the appeal:-

- 25 *"1. Whether the Court of Appeal was right to have denied the appeal before it other than by examining the High Court decision appealed from.*
- 2. If the answer to 1 is in the affirmative, whether the Court of Appeal was right to have held that plaintiff had shown no legal right that*
30 *could be protected by an injunction given the affidavit evidence before it.*
- 3. Whether the Court of Appeal had come to a right decision, in all the circumstances of the case."*

The respondents on their part identified two issues for determination,
35 namely:

"(i) In the absence of Pepsi Cola Inc. as a party to the proceedings before the High Court at the time when the plaintiffs applied for an order for interlocutory injunction. had the High Court the jurisdiction to have granted the plaintiffs' application for such injunction.

(ii) Is the Court of Appeal correct in holding that the plaintiff was not entitled to the order for injunction on the ground that it has failed to establish that there was an actionable wrong or infringement of a legal right that needs to be protected by an injunction, there is a serious question to be determined between the parties.

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In the appellant's first issue for determination, it is submitted that in law, an appellate court's duty in an appeal is to examine whether the trial court had come to a correct decision and should not entertain any points not canvassed before or considered by the trial court in its decision.

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For the respondent, it was contended that this submission is untenable and we were referred to Order 1 rule 20(4) and (5) of the Court of Appeal Rules:-

Order 1 rule 20(-1-) and (5) provide:-

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(4) The Court of Appeal shall have power to draw inferences of fact and make an order which ought to have been given or made and to make such further or other order as the case may require including any order as to costs.

(5) The powers of the court under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court below, or by any particular party to the proceedings in that court. or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice: and the court may make any order on such terms as the court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

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The appellant's contention appears to overlook the above provision of the rules of the court below which pronounced the decision that gave rise to this appeal. Indeed, the main function of an appellate court is to determine whether an error has been committed by the trial court and correct the same if satisfied that there is one.

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However, where the trial court arrives at a correct decision based on any legal ground or grounds, it is my view that an appellate court can affirm that decision on grounds other than the grounds relied upon by the trial court if all the materials on which this power can be exercised are before the appellate court.

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In the instant appeal, I would say that the court below affirmed the decision of the trial court with additional reasons, namely that the appellant failed to establish that (1) there was an actionable wrong or infringement of legal right that needs to be protected by injunction and (2)
5 that there is a serious question to be tried between the parties.

As to the appellant's failure to establish a legal right, the learned counsel for the appellant submitted that the claims brought by the plaintiff were not limited to the purported termination of the franchises or a declaration that the franchise remained valid and that the interference by the
10 2nd and 3rd defendants were substantiated and were independent claims (claims 2, 3 and 6). She submitted that non-joinder or mis-joinder cannot be a ground for refusing an injunction where the urgency and need for one is proved before the court.

The court below stated that there is no nexus between the appel-
15 lant and the 1st defendant based upon any franchise agreement and that Exhibit MB04 was not issued by the 1st defendant.

Claims 3, 4 and 6 and the other claims are dependent on the existence of the franchise agreements of which the Pepsi Cola Inc. is a key actor who was not before the court when the application for interlocutory
20 injunction was made and dismissed. The first defendant/respondent is a total stranger to Exhibits 'MBO1, MBO2, MBO3'.

While it is the law that no cause or matter shall be defeated by reason of the mis-joinder or non-joinder of any party yet, in the absence of a proper party before the court, I think that it will be idle for the court to
25 make an order of interlocutory injunction against strangers to a contract or a party to it who is not before the court. The learned trial Judge was of the view that there was no conspiracy between the first three respondents to injure the rights of the appellant and that the remedy is in damages rather than granting an interlocutory injunction. This finding was not disturbed by
30 the court below.

I agree with the view of Ademola, J .C.A. that we should move away from the concept of whether the applicant asking for an injunction has a strong prima facie case that will make the court to grant him the remedy he is asking for and approach the issue as to whether there is a
35 serious question to be tried between the parties.

For the above reasons and the fuller reasons given by my learned brother Adio, J.S.C. I too dismiss the appeal and affirm the decision of the court below. I award N1,000.00 costs to the respondents.

MOHAMMED JSC

I agree that this appeal must fail for the reasons given by my learned brother, Adio, J.S.C., in the lead judgment, just read. I only wish to add by way of emphasis that the appellant found itself in this awkward situation through its own avoidable mistakes. All the documentary evidence exhibited by the appellant to the affidavit in support of the motion before the High Court seeking for an interlocutory injunction show that the agreement which formed the basis of the application and which was mentioned therein was with Pepsicola Inc. Also it G was the company which terminated the agreement. Despite all these facts the appellant commenced its action against the 1st, 2nd and 3rd respondents and after the ruling had been delivered it belatedly added the 4th respondent.

The issue of non-joinder or mis-joinder which the learned counsel for the appellant has argued and on which he referred to various authorities is not relevant here. Those cases refer to joinder before a decision or Order has been made. In the case in hand, the joinder of the 4th defendant was made after the enrollment of the order. Can the 4th respondent be made answerable to an order made before the company was made a party to the suit? The obvious reply is NO.

The third issue raised by Dr. Sofola, that the defendant was part of a conglomerate, multinational company existing in various countries under various names could have been helpful to the appellant if evidence has been adduced to show that the 4th defendant is a subsidiary of the 1st, 2nd or 3rd defendants and was operating on behalf of anyone of them. The companies are to all intent and purposes one, their corporate veil could be pierced and each could be held liable for the action of the other. If ever one company can be said to be the agent or employee, or tool or simulacrum of another the two companies would be treated as one. In the case of DHN Food Distributors v. London Borough of Tower Hamlets (1976) 3 All E. R. 462 the Court of Appeal pierced into the corporate veil of three companies and treated them as one for the purposes of a claim for compensation. Lord Denning gave his opinion in that case as follows:

"We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group."

This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent says. A striking instance is the decision of the House of Lords in Harold Holdworrr & Co. (Wakefied) Ltd. v Caddies. So here. This group is virtually the same as partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

Calling the respondents in this appeal conglomerate and multi-national is not enough to convince the court that they could be treated as one. It must be established through evidence, documentary or otherwise that the companies are one before the claim of the appellant could be granted against all of them.

For these reasons and fuller reasons given by my learned brother, Adio, J.S.C., this appeal is dismissed. I abide by all the consequential orders made in the lead judgment including the assessment and award of costs.

IGUH JSC

I have had the privilege of reading in advance a copy of the lead judgment of my learned brother, Adio, J.S.C. just delivered.

I agree with his reasoning and conclusion.

Accordingly, I too will dismiss the appeal and affirm the judgment and orders of the Court of Appeal with N1,000.00 costs to the respondents.