

**SUPREMECOURTOFNIGERIA**  
3RDFEBRUARY, 1995, SC. 253/1989  
**CORAM: S.M.A. BELGORE, LL, KUTIGI,**  
**M.E. OGUNDARE, V.O. ADIO, A.I. IGUH, JJSC.**

1. A.I. EGBUNIKE  
2. MARIA GOLDOBIAGELIEGBUNIKE ..... APPELLANTS  
(Trading as Metropolitan Paints and Chemicals Co.)

AND

AFRICAN CONTINENTAL BANK LTD. .... RESPONDENT

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COURTS - Consideration of totality of the evidence - Duty of the judge to determine weight of evidence - Minimum evidence is enough - Where there is no evidence on the other side.

EVIDENCE - Unchallenged evidence - That is not incredible - And not discredited by cross examination - Whether the court can rely on it.

EVIDENCE - Unnecessary evidence - In support of admitted averment - Is to be ignored by the court.

PLEADINGS - Admission - Where appellants did not admit some material facts - Whether Court of Appeal was correct - In stating that material averments had all been admitted.

PLEADINGS - Admission - Requires no evidential proof - However plaintiff that leads evidence on admitted averment - Must ensure it is in accordance with that averment - Since parties are bound by their pleadings.

PLEADINGS - Denial of an averment - Where defendant admitted an averment - But denied it subsequently - Is that averment denied sufficiently?

PLEADINGS - Evidence - Averment in the statement of claim that is not admitted - Need to adduce evidence in its support.

PLEADINGS - Failure to give evidence - By a defendant in support of his material

averment - The averment will be taken as abandoned - Failure to give evidence in challenge of that of plaintiff - Is deemed acceptance of the fact - In spite of the general traverse.

PLEADINGS - Onus of proof - Is on the party who asserts - Material averment in the statement of defence - Whether plaintiff is to adduce evidence in its rebuttal.

STATUTES - Bills of Exchange Act s. 45(1) - That discharges the drawer of bill - That was not presented for payment - From liability - Whether applicable.

### **FACTS**

The appellants operated a current account with the respondent's Abakaliki branch, which was being managed by the 1st appellant's brother. Appellants paid in two cheques for the sum of N678,000 made by them in favour of themselves and drawn on the Co-operative Bank of Eastern Nigeria. Appellants withdrew the sum of N661,000 on the same date that they paid in the said two cheques. The cheques were never sent for clearing by the then manager of the respondent or anybody. The respondent sued the appellant for the sum of N800,312.28 being balance of overdraft with compound interest at a particular date. And claimed compound interest of that amount until it is fully paid.

The appellants rested their case on the respondent's case and did not call any witness nor did they testify. The trial court dismissed the respondent's case on the ground that the case was not proved beyond reasonable doubt when the basis was allegation of fraud. Respondent's appeal to the Court of Appeal was upheld by that court which entered judgment for the respondent. Being dissatisfied, the appellants have now appealed to the Supreme Court to determine inter alia, whether the court below was right to say that the material averments in the plaintiffs pleading had all been admitted in the Statement of Defence in this case.

**HELD** (Unanimously dismissing the appeal per lead judgment of **ADIO JSC**) Bills of Exchange Act s. 45(1) - Whether applicable

1. In the circumstance, the provision of section 45 of the Act is not applicable in this case. Consequently, the appellants were not discharged under the provisions of the section. (P. 382 F)

Admission - Requires no evidential proof

2. The legal position is that averments in the Statement of Claim which are admitted in the Statement of Defence require no evidential proof. However, a plaintiff who, in spite of an admission by the defendant of an averment in the Statement of Claim, leads evidence on the averment has to ensure that the oral evidence led by him is strictly in accordance with die said averment. Parties are bound by their pleadings and any evidence which is at variance with the plaintiffs Statement of Claim goes to no issue and should be completely ignored by the court. (P. 386 B)

Unnecessary evidence - Is to be ignored

3. If the evidence led is superfluous or unnecessary because the fact in issue has been admitted by a party's opponent, all that the court has to do is to ignore it. In this case, the appellants did not state any aspect of the case, and I am not aware of any, in respect of which there was an admission of die averment in the Statement of Claim and in respect of which the evidence led by the respondent was at variance with the relevant averment in the Amended Statement of Claim. (P.386E)

Admission - Where appellants did not admit some facts

4. On the question of the state of the pleadings before the respondent commenced leading of evidence, my view, with respect to the court below, is that it was not correct to state, as the court below stated per Oguntade, J.C. A., that the material averments in the respondent's pleading had all been admitted or to state that as all the facts in the Statement of Claim were admitted, the respondent was without further ado entitled to judgment. It is clear from the averments in the Amended Statement of Claim and the Amended Statement of Defence, particularly those of them set out above, that if the aforesaid pleadings were read as a whole, as they should be read, mere were material averments in the Amended Statement of Claim which the appellants did not admit. (P. 386 G)

Averment that is not admitted

5. The respondent, in order to succeed, had to adduce evidence in support of any averment, in the Amended Statement of Claim which was not admitted by the appellants in their Amended Statement of Defence, otherwise such an averment would be deemed to have been abandoned. This is because mere averments without proof of the facts pleaded are no proof of such facts if they are not admitted. (P. 387 D)

Onus of proof - Is on the party who asserts

6. I have also pointed out in this judgment that, according to the averment in the Amended Statement of Defence, the debt or overdraft had been allegedly taken over by a limited liability company subsequently incorporated by the appellants. It was for the respondent to adduce evidence in rebuttal of the purported take over of liability for the debt or overdraft by the newly incorporated limited liability company, in anticipation of any evidence, on the point, that the appellants might adduce. This is because in civil cases the onus of proving a particular fact is fixed by the pleadings. The onus does not remain static but shifts from side to side and the onus of adducing further evidence is on the party who will fail if such evidence is not adduced.

(P.389C)

Courts - Consideration of totality of the evidence

7. It is the duty of a judge to consider the totality of the evidence before him and to determine which has weight and which does not have weight by putting the evidence on an imaginary scale. However, minimum evidence which can discharge the burden of proof is enough where there is no evidence to be put on the other side. (P. 391 F)

Unchallenged evidence

8. In the present circumstances, it is reasonable to conclude that the evidence led by the respondents through its witnesses was unchallenged and uncontradicted and there was nothing to show that the evidence was incredible. Evidence which is unchallenged and uncontradicted, if credible, ought to be accepted as there is nothing on the other side to balance. Further, if the evidence led on the facts pleaded is admissible, relevant, uncontradicted and not discredited by cross-examination, a court can legally rely and act on it. (p. 391 G)

Pleadings - Failure to give evidence

9. With reference to the averments in the Amended Statement of Defence and in particular the averment that the respondent agreed that a limited liability company subsequently incorporated should take over the liability of the appellants for the debt or overdraft, it is sufficient to say that pleading cannot constitute evidence and a defendant who does not give or lead evidence in support of the averments in his pleading or in challenge of the evidence of the plaintiff is deemed to have accepted the facts adduced by the plaintiff notwithstanding the general traverse. Finally, if a party to an action fails to or does not lead evidence in support of the averments in his pleading, the averments will

be taken as having been abandoned. (P. 392 A)

Denial of an averment

B 10. In my view, the averment in paragraph 10 of the Amended Statement of Claim was not denied or sufficiently denied by the appellants. The result is that apart from the oral evidence led by the respondent, on the material points, which was uncontradicted and unchallenged, there was in addition the averment in paragraph 10 of the Amended Statement of Claim, which was not denied or  
C sufficiently denied in the Amended Statement of Defence, to the effect that, inter alia, as at 26th November, 1979 the debit balance of the said overdraft with compound interest stood at N800,312.28. (P. 393 A)

#### D **NOTABLE POINTS OF INTEREST**

##### **ADIOJSC**

##### ***1. Error of lower court - Reversal not in all cases***

E It is not every error committed by a lower court that will lead to the reversal of its judgment by appellate court. In order that the judgment may be reversed on account of such error, the error must have substantially affected the result of the decision. Further, where the complaint is about alleged errors of law or misdirection committed by the lower court, the success of the ground or grounds of appeal alone is not sufficient to warrant the reversal of the judgment  
F of the lower court unless the errors in law or misdirection affected the judgment in a way that is crucial to the decision. (p. 388 B)

##### ***2. Facts admitted - Forms part of agreed facts of the case.***

G Further, any fact admitted by a defendant in his pleading is taken as established and forms part of the agreed facts of the case. (P. 389 A)

##### ***3. Traverse - Needs to be specific***

H In order to raise an issue of fact, a defendant should properly traverse an averment in the Statement of Claim either expressly or by necessary implication. Therefore, if the defendant refuses to admit a particular allegation in the statement of claim he must state so specifically and not by stating that he is not in a position to admit or deny the allegation. Such a plea is no sufficient denial of the averment in the Statement of Claim. (P. 392)

**4. When answers to some issues are no longer fundamental**

As the evidence led by the respondent, which was uncontradicted and unchallenged, related to all the material averments in the Amended Statement of Claim (whether admitted or not admitted in the Amended Statement of Defence) and adequately supported the judgment that the court below entered for the respondent, the answers to the questions raised under the first, second and the third issues formulated in the appellants' brief are no longer fundamental as the error, if any, of the court below could not, in the circumstances, have caused a miscarriage of justice. (P. 393 C)

**OGUNDAREJSC****5. Issue of applicability of s.45 Bills of Exchange Act**

With respect to the learned Senior Advocate, one expects the Appellants to have filed a reply Brief to the new point raised in the Respondent's Brief. Not only that, the issue of the discharge of Appellants' responsibility by section 45 of the Bills of Exchange Act is a fundamental issue. Although some of the averments in the pleadings might support such a defence (I express no opinion in that), the fact remains that the trial Court was not addressed on the issue neither was it raised in this Court as is done in the amended ground (iii), leave of the Court ought to have been first sought and obtained. In my respectful view, the preliminary objection is well taken and I therefore, strike out ground (iii). (P. 396 G)

**6. Need to adduce evidence for the defence**

The factual situation is that although the Respondent might not have been given judgment on the state of the pleadings, it however, called witnesses in support of its case. On the other hand the Appellants did not adduce any evidence. It is right to say, therefore, that the evidence for the Respondent stood unchallenged and as such evidence supported Respondent's case judgment ought to have been entered by the learned trial Judge in his favour. (P. 403 B)

**REPRESENTATION**

Chief F.R.A. Williams with J.U. Igwe and Mrs. A. Williams for the appellants.  
Mr. Nwokoye for the Respondent.

**CASES REFERRED TO**

Obimiami Brick of Stone (Nig.) Ltd. v. A.C.B. Ltd (1992) 3 NWLR (Pt. 229) 260

- Ohiaeri v. Akabeze (1992) 2 NWLR (Pt.221) 1  
 Adegbeite v. Ogunfaolu (1990) 4 NWLR (Pt.146) 578  
 Olubode v. Salami (1985) 2 NWLR (Pt.7) 28  
 Ayola v. Adebayo (1969) 1 All NLR 159  
 B Okparaeke v. Egbuonu (1941) 7 WACA 53  
 Okubule v. Oyagbola (1990) 4 NWLR (Pt.147) 723  
 Nigerian Maritime Services Ltd. v. Afolabi (1978) 2 SC 79  
 Mogaji v. Odojin (1978) 4 SC 91  
 Buraimoh v. Bamgbose (1989) 3 NWLR (Pt.109) 352  
 C Federal Capital Development Authority v. Naibi (1990) 3 NWLR (Pt.138) 270  
 Lewis & Peat Ltd v. Akhimien (1976) 1 All NLR (Pt. 1) 460

### **STATUTES & RULES REFERRED TO**

- Evidence Act s. 137(10)  
 D Bills of Exchange Act ss.45, 41(3), 46(2)(a), 50(2)(c)  
 Supreme Court Rules 0.6 r.6(1)

### **LEAD JUDGMENT BY ADIO JSC**

E The respondent's claim against the appellants, jointly and severally, in the High Court of Justice, Anambra State of Nigeria was, as stated in paragraph 18 of the Amended Statement of Claim, as follows:-

F *"(i) the sum of N800,312.28 (eight hundred thousand three hundred and twelve naira twenty-eight kobo) balance of overdraft with compound interest at the rate of 10% per annum as at close of business on the 26th November, 1979.*

G *(ii) compound interest at the rate of 10% per annum with monthly rests until the debt is fully repaid or judgment is obtained counting from 27th November, 1979"*

Pleadings were duly filed and exchanged. The respondent filed a Statement of Claim which was amended with the leave of the court. The appellants filed a Statement of Defence which was also amended with the leave of the court.

H The evidence led by the respondent, a banker, was that the appellants were current account customers of the Abakaliki branch of the bank. Sometime, in 1978, the appellants paid into their account at the bank two cheques made by them in favour of themselves and drawn on the Co-operative Bank of Eastern Nigeria. Before the two cheques were cleared, the first appellant requested for a withdrawal of some funds from the amount for which

the aforesaid cheques were issued. He was allowed to do so and in fact did so with the approval or consent of one Mr. Egbunike, the bank manager who happened to be a brother of the 1st appellant. The aforesaid Manager of the

bank caused the account of the appellants in the bank to be credited with the amount for which the said cheques were issued and immediately allowed the appellants to withdraw from the account. B

The amount that the appellants withdrew was N661,000.00 and the two cheques, which the appellants issued in favour of themselves and which they paid into their current account in the respondent bank, were for the total sum of N678,000.00. It was subsequently discovered that despite the fact that the appellants were allowed by the then Manager of the respondent to withdraw the said sum of N661,000.00 on the same day that they paid the said two cheques for the sum of N678,000.00 which were made by them in favour of themselves, into their account. The aforesaid two cheques for the sum of N678,000.00 were never sent for clearance by the then Manager of the respondent or anybody. They have since then disappeared and nobody knew where they were. In effect, those two cheques were never presented for clearance or for payment. The appellants rested their case on the respondent's case and did not call any witness to testify for them. C D

The learned trial Judge, after consideration of the evidence before him and the submissions of the learned counsel for each party, dismissed the respondent's claim. He held that allegation of fraud or of commission of a criminal offence was the basis of the respondent's claim and, therefore the provisions of section 137(1) of the Evidence Act applied. The respondent, according to the learned trial Judge, had to prove its case beyond reasonable doubt but, in his view, the respondent failed to discharge the burden. E F

Dissatisfied, the respondent lodged an appeal against the judgment to the Court of Appeal. The court below allowed the appeal. It set aside the judgment of the learned trial Judge and entered judgment for the respondent. The court below held that the Amended Statement of Defence filed by the appellants did not comply with the rules applying to pleadings. The Amended Statement of Defence was evasive and in some respects equivocal. It pointed out that in one instance, the appellants admitted an averment in the Amended Statement of Claim while in the same Amended Statement of Defence the appellants denied the averment in question. The court below expressed the view that upon a true and fair construction of the Amended Statement of Defence, the reasonable conclusion was that the appellants admitted the respondent's claim. The court below did not share or endorse the view of the learned trial Judge that the basis of the respondent's claim was allegation of fraud or of crime and G H



held that even if section 137(1) of the Evidence Act applied, the respondent discharged the burden of proving its case beyond reasonable doubt.

Dissatisfied with the judgment of the Court of Appeal, the appellants have lodged an appeal to this court. In accordance with the relevant rules, the parties have duly filed and exchanged briefs. There were four issues identified for determination in the appellants' brief while the respondent, in its brief, identified five issues in addition to the four issues in the appellants' brief. The four issues in the appellants' brief and the seventh and ninth issues in the respondent's brief are sufficient for the determination of this appeal. The four issues identified for determination in the appellants' brief are as follows:-

*"(i) Whether it is correct in law to say that 'the material averments in the plaintiff's pleading had all been admitted' in the Statement of Defence in this case.*

*(ii) Whether, having regard to the fact that the trial in the High Court was conducted on the footing that all the averments in the Statement of Claim had to be proved it is open to the Court of Appeal to have allowed the plaintiff's appeal on the ground that there was no need for any witnesses to have been called to testify to the facts already admitted on the pleadings.*

*(iii) In the alternative to Questions (i) and (ii) and on the hypothesis that all the facts in the Statement of Claim were admitted and regarded as proved, was the court below correct in concluding that the plaintiff was 'without further ado entitled to judgment.'*

*(iv) Was the court below correct in the view it took regarding the reference by the defendants to a 'newly incorporated company. "*

*The two additional issues formulated in the respondent's brief, and which are relevant for the determination of this appeal, are as follows:-*

*"(vii) As the defendants/appellants did not appeal against the finding of the Court of Appeal that their defence at the trial amounted to confession and avoidance, whether the defendants/appellants are not liable on the 'confession' (or indeed, admission) if the 'avoidance' fails?*

*(ix) Has section 45 of the Bills of Exchange Act discharged the defendants from liability to pay the sum claimed?"*

When this appeal came before this court for hearing, the learned counsel for the respondent raised a preliminary objection, on the basis of the previous notice which had been given, that the appellants could not competently raise in this appeal the issue of the applicability of section 45 of the Bills of Exchange Act as the issue was not raised before the learned trial Judge and in the court below and no leave had been granted to the appellants to raise it

in this court. The brief reply of the learned Senior Advocate for the appellants was that the appellants could raise the issue as a party could not in his pleadings be expected to plead law.

The objection was well taken. The question whether section 45 of the Bills of Exchange Act applied was not raised in any of the lower courts and leave to raise it in this court was not sought and obtained. Even if it can be raised in this court, the circumstances, as will be shown hereunder, were such that the appellants were not discharged under the provisions of the section. The question was raised under issue (ix) in the respondent's brief. The submission in the appellants' brief was that section 45 of the Bills of Exchange Act was applicable to this case and by virtue of the provision of the section the appellants had been discharged from liability in respect of the cheques drawn by them on the Cooperative Bank of Eastern Nigeria, Aba, which were delivered to the respondent in consideration of the amount of N678,000.00 credited to their (defendants) current account with the respondent bank.

The submission in the respondent's brief was, inter alia that the payee of the two cheques in question was not the respondent. On the contrary, the payees of those two cheques were the appellants themselves. It was also submitted that in view of the fact that the two cheques were not presented for payment coupled with the evidence that they were lost or destroyed, section 45 of the Bills of Exchange Act did not apply.

When this appeal came up for hearing, the learned Senior Advocate for the appellants pointed out that the main issue related to the two cheques which were debited to the appellants' account in the respondent bank. He also pointed out that it was common ground that the two cheques were credited to the account of the appellants and that on the basis of the account being credited the appellants were allowed to withdraw from the account. The learned Senior Advocate stated further that it was also common ground that the two aforesaid cheques were never presented for payment at Aba. In his view, the crux of this matter was the non presentation of the two cheques in Aba. The learned Senior Advocate pointed out that cheques were bills of exchange and submitted that if a person received a cheque issued by another person, he would have no cause of action against the person from whom he received it unless the cheque was presented for payment and was dishonoured. If the two cheques in question in this case were not presented for payment then section 45 of the Bills of Exchange Act applied. The learned Senior Advocate for the appellants concluded his argument by submitting that a person might accept a cheque and treat it as cash. If, as in this case, the learned Senior Advocate further submitted, the cheque was issued by the same person on his other account and paid into his account and the cheque disappeared

section 45 of the Bills of Exchange Act would not be applicable. It would be up to the bank that accepted the cheque as cash and credited the customer immediately to take whatever action open to it. The provision section of 45 of the Bills of Exchange Act is as follows:-

*“45( 1) Subject to the provisions of this Act, a bill must be duly be presented for payment. If it be not so presented the drawer and the endorsers shall be discharged.”*

As earlier stated, it was common ground that the appellants issued their two cheques in question in favour of themselves on their account at the Co-operative Bank at Aba and that they paid them into their account in the respondent bank. It was the respondent's case that their two cheques in question had not been cleared before they were allowed to withdraw N661,000.00 on the same day on the basis of their two cheques paid into their account at the respondent bank. Unknown to the respondent, the then Manager of the respondent bank did not cause the cheques to be cleared and it was subsequently discovered that the cheques had disappeared. In the circumstance, the presentment, of the cheques for payment could not reasonably be expected having regard to the dishonourable conduct of the then Manager of the respondent who happened to be a brother of the first appellant. Consequently, section 41(3) of the Bills of Exchange Act becomes applicable. Paragraph (b) of section 41 (3) of the Act excuses presentment of a bill of exchange for acceptance and such bill may be treated as dishonoured by non-acceptance where, after the exercise of reasonable diligence, such presentment cannot be effected. Presentment for payment is also dispensed with under section 46(2)(a) of the Act where, after the exercise of reasonable diligence, presentment for payment cannot be effected. A notice of dishonour is dispensed with under Section 50(2)(c)(i) of the Act, as regards the drawer, where (as in this case) the drawers and the drawees are the same persons. In the circumstance, the provision of section 45 of the Act is not applicable in this case. Consequently, the appellants were not discharged under the provisions of the section.

The questions raised under the first, second and the third issues will be considered together. The question raised under the first issue was whether it was correct in law for the court below to state, per Oguntade, J.C.A., in the lead judgment that the material averments in the respondent's pleading had all been admitted in the Amended Statement of Defence in this case. The material averments in the Amended Statement of Claim are as follows:-

*“2. The defendants were formerly resident at Aba and now at Onitsha and at any other times material to this claim carry on business at Aba, Abakaliki and else where in Nigeria, under the name and style of Metropolitan Paints and Chemical Company.*

3. On or about the 17th February, 1978, the defendants opened a current account with the plaintiff's Abakaliki Branch and thereafter operated the same account by making payments and withdrawals.

4. The said account was at all material times opened, maintained and operated in the individual names of the 1st and 2nd defendants. B

5. On or about the 8th day of March, 1978 the defendants paid into their account No. 9180 two Co-operative Bank of Eastern Nigeria Limited Aba Branch Cheques Nos. A37588 and A373589 for the sum of N330,000.00 and N348,000.00 respectively, which said cheques were issued by the defendants against their account at the said Bank at Aba. The defendant's account was accordingly credited with the total sum of N678,000.00. Thereafter the plaintiff's functionaries at Abakaliki made no effort to clear the said cheques. There was no record showing how and when the cheques were dispatched to Aba for clearing neither was there any trace of the schedule advice of cheques purchased in the file for cheques outwards schedule for in the plaintiff's Aba Main Branch. There has so far been no trace of the said cheques. C D

6. Immediately after paying in the said cheques on the 8th March, 1978 the defendants asked to be allowed to withdraw the sum of N661,000.00 from the said account. The defendants did so fully aware that their account at the Co-operative Bank of Eastern Nigeria was in "RED". The plaintiff's Abakaliki Branch Manager, Michael Egbunike (the 1st defendant's brother) promptly granted the defendant's request and allowed them to withdraw the said sum without bothering to have the effects of the said cheques cleared. E

8. On or about the 11th October, 1978 the defendant's account No. 9180 was debited with the two Aba cheques purchased for N330,000.00 and N348,000.00 which were paid into the said account on 8th March, 1978 and this resulted in a debit of over N670,000.00 on the account aforesaid. The decision by the plaintiff to debit the said account as based on the findings of their Chief Inspector as regards the said account and the transactions pleaded hereof. A debit voucher dated 10th October, 1978 was promptly sent to the defendants through their Aba address. Moreover, a letter was addressed to the defendants informing them of the cheques and the management's decision to debit their account. F G

9. The defendants' account thereafter became overdrawn in the sum of N711,848.03 (seven hundred and eleven thousand eight hundred and forty-eight naira, three kobo), with compound interest at the rate of ten per cent per annum with monthly rests.) H

11. On or about the 4th day of November, 1979 the 1st defendant at

Abakaliki submitted to the plaintiff photocopy of a certificate of incorporation of Metropolitan Paints and Chemical Company as a limited liability company. The said document indicated that the company was incorporated on 24th July, 1979. The 1st defendant asked the plaintiff to transfer the debt to the incorporated company.

B 13. The plaintiff did not at any time material to "this claim agree with either the defendants or the incorporated company for repayment of the overdrawn account to commence as from the 30th day of June, 1980 or at all. This is more so because the incorporated company has no account with the plaintiff.

C 14. The plaintiff in its letter to the defendants dated 5th November, 1979 promptly and clearly restated the above position to the defendants aforesaid for the avoidance of any doubts.

D 15. Despite repeated demands made of them by the plaintiff the defendants have failed and/or neglected to pay the said balance of overdraft of N800,312,28"

The appellants filed an Amended Statement of Defence and the relevant averments are, inter alia as follows:

2. The defendants admit paragraphs 1,3,9 and 10 of the Amended Statement of Claim.

E 4. The defendants state in answer to paragraph 4 of the Amended Statement of Claim that the said paragraph is true as regards events up to the 25th of July when the assets and liabilities of the defendants were transferred to the Metropolitan Paints and Chemical Company Ltd.

F 6. Save and except that the defendants paid in two cheques totaling N678,000.00 into the plaintiff Company's branch at Abakaliki on the 8th of March, 1978, the defendants make no further admission with regard to paragraph 5 of the Amended Statement of Claim and will put the plaintiff to the strictest proof of the allegations therein.

G 7. In further answer to paragraph 5 of the Amended Statement of Claim the defendants state that their account could not have been credited with the sum of N678,000.00 without the Co-operative Bank of Eastern Nigeria Aba branch cheques being cleared as required by normal banking regulations.

H 8. The defendants deny paragraph 6 of the Amended Statement of Claim and would put the plaintiff to the strictest proof of the allegations contained therein.

9. In further answer to paragraph 6 of the Amended. Statement of Claim the defendants state that the bank draft for N661,000.00 given to the defendants was a different transaction altogether. The draft was as a result of an overdraft facility enjoyed on a continuing bases by Metropolitan Paints

and Chemical Company Ltd. from the plaintiff company. The defendants also state that this was not the first time the Metropolitan Paints and Chemical Co. Ltd. Enjoyed such facility from the plaintiff's company.

10. The defendants admit that the amount contained in the Bank Draft referred to in paragraph 7 of the Amended Statement of Claim was paid to the defendants in the normal course of business. They state in further reply that the said bank draft had nothing to do with the cheques referred to in paragraph 5 of the Amended Statement of Claim. B

11. Save and except that the account of the defendants was debited with the sum of N678,000.00, the defendants deny that their own cheques were ever sent to Aba or were returned unpaid to the plaintiff company or were eventually sent to the defendants and will put the plaintiff to very strict proof of the allegations contained in paragraph 8 of the Amended Statement of Claim. C

12. The defendants deny paragraph 10 of the Amended Statement of Claim and will put the plaintiff to strict proof of the allegations contained therein. D

13. By a letter dated the 25th of July 1979, the plaintiff company was advised that the Metropolitan paints and Chemical Company Ltd. had taken over the assets and liabilities of the defendants."

Oguntade, J.C.A., in the lead judgment of the Court below, gave consideration to the averments in the pleadings of the parties. He stated, inter alia as follows: E

"Since the defendants admitted that it paid in the two cheques for N678,000.00 and since the defendants did not deny that they were allowed to withdraw N661,000.00 on the very day the two cheques for N330,000.00 and N348,000.00 were paid in; and since the defendants have admitted that the two cheques were never presented to their Co-operative Bank of Eastern Nigeria, Aba Branch for payment, it seems to me that the material averments in the plaintiff's pleading had all been admitted." F

It was submitted for the appellants that the object of pleadings was to define issues so that each party would be aware of the case he had to meet and that he would not be taken by surprise at the trial. It was also submitted that where (as alleged by the court below in this case) all the material allegations in the Statement of Claim were admitted, a plaintiff should not be allowed to elaborate his case in any way by way of admitting evidence which might embroider the facts alleged in the Statement of Claim. The submission made for the respondent was that as the respondent could not predict what the learned trial Judge would make of the appellants' admissions in the Amended Statement of Defence, the respondent led evidence to prove the averments in G H

the Amended Statement of Claim emphasizing the personal liability of the appellants as claimed as opposed to the corporate liability set up by the appellants. An admission, if any, it the appellants' Amended Statement of Defence of an averment in the Amended Statement of Claim was not made an issue in the grounds of appeal of the respondent and no admission by the  
B appellants was made an issue before the learned trial Judge. It was argued further that as a matter of law, any evidence, which, in any case, was at variance with the averments in the pleadings would go to no issue and the court could ignore it.

The legal position is that averments in the Statement of Claim which  
C are admitted in the Statement of Defence require no evidential proof. See *Obmiami Brick & Stone (Nig) Ltd. v. African Continental Bank Ltd. (1992) 3 NWLR (Pt. 229) 260*. However, a plaintiff who, inspite of an admission by the defendant of an averment in the Statement of Claim, leads evidence on the averment has to ensure that the oral evidence led by him is strictly in accord-  
D dance with the said averment. Parties are bound by their pleadings and any evidence which is at variance with the plaintiff's Statement of Claim goes to no issue and should be completely ignored by the court. See *Ohiaeri v. Akabeze (1992) 2 NWLR (Pt. 221) 1*. So, our law does not permit evidence to be given to embroider the facts alleged in a Statement of Claim.

E If the evidence led is superfluous or unnecessary because the fact in issue has been admitted by a party's opponent, all that the court has to do is to ignore it. In this case, the appellants did not state any aspect of the case, and I am not aware of any, in respect of which there was an admission of the averment in the Statement of Claim and in respect of which the evidence led by  
F the respondent was at variance with the relevant averment in the Amended Statement of Claim. If there was any such evidence at the trial an objection should have been taken to its admissibility. Even if there was such evidence which the appellants allowed the learned trial Judge to admit, that would not have converted the admission of the relevant averment to a denial of it; the  
G appellants' admission stated in the Amended Statement of Defence will remain intact.

On the question of the state of the pleadings before the respondent commenced leading of evidence. my view, with respect to the court below, is that it was not correct to state, as the court below stated per *Oguntade, J.C.A.*,  
H that the material averments in the respondent's pleading had all been admitted or to state that as all the facts in the Statement of Claim were admitted, the respondent was without further ado entitled to judgment. It is clear from the averments in the Amended Statement of Claim and the Amended Statement of Defence, particularly those of them set out above, that if the aforesaid plead

ings were read as a whole as they should be read, there were material averments in the Amended Statement of Claim which the appellants did not admit. For example, the averment in the Amended Statement of Claim was that it was on the basis of the two cheques for the total amount of N678,000.00 issued by the appellants in favour of themselves on their account at the Cooperative Bank of Eastern Nigeria, Aba and paid into their account at the respondent bank at Abakaliki that they were allowed to withdraw immediately thereafter the sum of N661,000.00 from their account at the respondent bank. Not only did the appellants not admit the aforesaid averment. their own averment, on the point was that their said two cheques were issued by them in connection with another transaction. They further averred that the alleged debt or overdraft mentioned in the Amended Statement of Claim had been taken over by another company subsequently incorporated. The contention of the respondent in the Amended Statement of Claim was that it never agreed with the alleged or purported taking over of the debt or overdraft from the appellants by the company subsequently incorporated.

The result of the foregoing analysis is that the respondent. in order to succeed, had to adduce evidence in support of any averment. in the Amended Statement of Claim which was not admitted by the appellants in their Amended Statement of Defence. otherwise such an averment would be deemed to have been abandoned. This is because mere averments without proof of the facts pleaded is no proof of such facts if they are not admitted. See Adegbite v. Ogunfaolu (1990) 4 NWLR (Pt. 146) 578. It has been shown above that at least there was one material averment in the Amended Statement of Claim which the appellants did not admit. So, it was not correct to state, as the court below stated, that the material averments in the respondent's pleading had all been admitted in the Amended Statement of Defence in this case. It has also been shown that if the respondent wanted to succeed it had to adduce evidence to prove at least the aforesaid material averment in the Amended Statement of Claim which was not admitted in the Amended Statement of Defence. That is the reason (according to its own version) why the appellants issued the two cheques for N678,000.00 in favour of themselves, on their account at the Co-operative Bank, Aba and paid them into their account at the respondent bank at Abakaliki. There was also the allegation in the Amended Statement of Defence that the debt or overdraft had been taken over by a limited liability company subsequently incorporated. There was need to adduce evidence by the respondent in rebuttal of the alleged or purported take over. Therefore, if all the averments in the Amended Statement of Claim were admitted or regarded as proved, the court below was, with respect, not correct in concluding



ing that the respondent was “*without further ado entitled to judgment*”

Though my answers to the questions raised under the first and the third issues are in the negative, the question whether the alleged error or misdirection on the part of the court below could lead to a reversal of its judgment is a different matter. It is not every error committed by a lower court that will lead to the reversal of its judgment by an appellate court. In order that the judgment may be reversed on account of such error, the error must have substantially affected the result of the decision. See *Olubode v. Salami* (1985) 2 NWLR (Pt. 7) 282. Further, where the complaint is about alleged errors of law or misdirection committed by the lower court, the success of the ground or grounds of appeal alone is not sufficient to warrant the reversal of the judgment of the lower court unless the errors in law or misdirection affected the judgment in a way that is crucial to the decision. See *Ayoola v. Adebayo & Ors* (1969) 1 All NLR 159 at p. 164; and *Osifale v. Odi* (No. 1); (1990) 3 NWLR (Pt. D 137) 130. The question whether the alleged errors of law or misdirection will result in the reversal of the judgment of the court below will be considered later in this judgment.

The question raised under the second issue was whether, having regard to the fact that the trial in the High Court was conducted on the footing that all the averments in the Amended Statement of Claim had to be proved it was open to the Court of Appeal to have allowed the respondent’s appeal on the ground that there was no need for any witnesses to have been called to testify to the facts already admitted on the pleadings. The record of proceedings in the appeal showed clearly that the appeal of the respondent was allowed on the basis of what the court below thought was the merit of the case after giving consideration to the relevant issues and not merely upon the ground that there was no need for any witness to have been called to testify to the facts already admitted on the pleadings. It certainly would not have been proper for the parties in this case to conduct the trial in the High Court on the footing that all averments in the Amended Statement of Claim had to be proved. If they did so, that was their business. The law applying to the conduct of cases in the High Court included the law of evidence (Evidence Act) and the law regulating procedure (the High Court Civil Procedure Rules). Whatever may be the footing upon which the parties to a case may decide to conduct their case. The relevant provisions of the Evidence Act and the civil procedure rules applicable in the court in question will apply except where it is otherwise provided by law. If certain facts averred in the Amended Statement of Claim are admitted in the Amended Statement of Defence then no evidential proof of the facts is required and it will not be necessary to call any witness to

testify to the fact already admitted. See Ohmiami Brick & Stone (Nig) Ltd. v. African Continental Bank Ltd. (supra). Further, any fact admitted by a defendant in his pleading is taken as established and forms part of the agreed facts of the case. See Okparaeke etc v. Eghuonu & Ors (1941) 7 WACA 53 at 54; Uredi v. Dada (1988) 1 NWLR (Pt. 69) 237. In this case, I have shown that at least one material averment in the Amended Statement of Claim was not admitted by the appellants. The onus was on the respondent to adduce evidence to prove the averment because the onus of proving a particular fact is on the party who asserts it. See Okuhuiev v. Oyaghola (1990) 4 NWLR (Pt. 147) 723; and Ike v. Ughoala (1993) 6 NWLR (Pt. 301) 539. I have also pointed out in this judgment that according to the averment in the Amended Statement of Defence, the debt or overdraft had been allegedly taken over by a limited liability company subsequently incorporated by the appellants. It was for the respondent to adduce evidence in rebuttal of the purported take over of liability for the debt or overdraft by the newly incorporated limited liability company, in anticipation of any evidence, on the point, that the appellants might adduce. This is because in civil cases the onus of proving a particular fact is fixed by the pleadings. The onus does not remain static but shifts from side to side and the onus of adducing further evidence is on the party who will fail if such evidence is not adduced. See Nigerian Maritime Services Ltd.v. Afolabi (1978) 2 S.C. 79, 84; and H.M.S. Ltd. v. First Bank (1991) 11NWLR (Pt. 167) 290. The crucial issue, as I have earlier stated, is whether the court below was right in entering judgment for the respondent after consideration of the case on its merit and that issue will subsequently be determined in this judgment.

There was controversy in the briefs filed by the parties about the statement made by Oguntade, J.C.A., in the lead judgment that the appellants having admitted that their account with the respondent was in the debit to the tune of N711,848.03 the respondent was without further ado entitled to judgment. The learned Justice of the Court below was also quoted as having stated as follows:-

*“In paragraph 9 of the Amended Statement of Claim. the plaintiff, pleaded that the account of the defendants became overdrawn in the sum of N711,848.03 and that this amount included compound interest at*

*the rate of ten percent. The defendants expressly admitted this in paragraph 2 of the Amended Statement of Defence.”*

I think that what was involved in relation to the amount allegedly owed by the appellants was far more than the sum of N711,848.03 and more complicated than the issue involved in the alleged admission of N711.848.03 as the amount due from the appellants. The Amended Statement of Defence of the appellants was in total disarray in relation to this aspect of the matter. In paragraph 10 of the Amended Statement of Claim the respondent averred as follows:-

“As at 26th November, 1979 the debit balance of the said overdraft with compound interest stood at N800,312,28 (eight hundred thousand three hundred and twelve naira twenty-eight kobo). The said debit balance is reflected in the defendants’ statement of account which will be founded upon at the trial of this suit. The defendants were supplied their own copy of the statement of account regularly.”

In paragraph 2 of the Amended Statement of Defence, the paragraphs of the Amended Statement of Claim admitted by the appellants included paragraph 10 of the Amended Statement of Claim quoted above. Somehow, the appellants averred in paragraph 12 of the Amended Statement of Defence that they denied paragraph 10 of the Amended Statement of Claim and would put the respondent to strict proof of the allegations therein. So far, no step has been taken to sort out the conflicting averments, in relation to paragraph 10 of the Amended Statement of Claim, which are in paragraphs 2 and 12 of the Amended Statement of Defence. The legal consequence of such conflicting averments in pleadings will be considered and determined when dealing with the consideration of the case on its merit.

The next question for consideration is the question raised under the seventh issue formulated in the respondent’s brief. It is that as the appellants did not appeal against the finding of the court below that their defence at the trial amounted to confession and avoidance, whether the appellants were not liable on the ‘confession’ (or indeed admission) if the ‘avoidance’ failed. The court below held that the defence of the appellants was confession and avoidance, consistent with its view, which has been described in this judgment as not being entirely correct, that the appellants admitted all the material averments in the respondent’s Amended Statement of Claim and its view that the only defence of the appellants was that a limited liability company subsequently incorporated had, with the alleged consent of the respondent, taken over the appellants’ liability for the debt or overdraft.

The contention in the respondent's brief was that as the appellants did not appeal against the aforesaid finding, it is deemed to be correct. As the appellants failed to prove the allegation that a limited liability company had, with the agreement of the respondent, taken over the appellants' liability, the court below was right in entering judgment for the respondent. B

The respondent led evidence through the PW1, W2, and W3 on the material averments in the Amended Statement of Claim whether they were admitted or not admitted in the Amended Statement of Defence. The evidence aforesaid also covered the issue whether the respondent ever agreed that a limited liability company subsequently incorporated should take over the appellants' liability for the debt or overdraft. In short, the evidence covered all the material averments in the Amended Statement of Claim, whether admitted or not by the appellants in the Amended Statement of Defence, establishing the liability of the appellants for the debt or overdraft. The evidence also included evidence that the respondent never agreed that a limited liability company should take over the liability of the appellants for the debt or overdraft. The aforesaid witnesses of the respondent were cross-examined by the learned counsel for the appellants and none of the witnesses were shaken on the evidence which he gave. The appellants did not lead any evidence in support of the averments in their Amended Statement of Defence; they rested their defence on the respondent's case. The foregoing certainly had some serious legal implications or consequences. C D E

It is the duty of a judge to consider the totality of the evidence before him and to determine which has weight and which does not have weight by putting the evidence on an imaginary scale. See *Mogaji v. Odojin* (1978) 4 S.C. 91 at p. 93. However, minimum evidence which can discharge the burden of proof is enough where there is no evidence to be put on the other side. See *Buraimoh v. Bamgbose* (1989) 3 NWLR (Pt. 109) 352. In the present circumstances, it is reasonable to conclude that the evidence led by the respondents through its witnesses was unchallenged and uncontradicted and there was nothing to show that the evidence was incredible. Evidence which is unchallenged and uncontradicted, if credible, ought to be accepted as there is nothing on the other side to balance. See *Adejumo v. Ayantegbe* (1989) 3 NWLR (Pt. 110) 417. Further, if the evidence led on the facts pleaded is admissible, F G H

392 Egbunike v. A.C.B. Ltd. (1995) 2 KLR Adio JSC relevant, uncontradicted and not discredited by cross-examination, a court can legally rely and act on it. See *Obmiami's* case, *supra*. With reference to the averments in the Amended Statement of Defence and in particular the averment that the respondent agreed that a limited liability company subsequently incorporated should take over the liability of the appellants for the debt or overdraft, it is sufficient to say that pleading cannot constitute evidence and a defendant who does not give or led evidence in support of the averments in his pleading or in challenge of the evidence of the plaintiff is deemed to have accepted the facts adduced by the plaintiff notwithstanding the general traverse.

C See *Federal Capital Development Authority v. Naibi* (1990) 3 NWLR (Pt. 138) 270; and *Obmiami's* case *supra*. Finally, if a party to an action fails to or does not lead evidence in support of the averments in his pleading, the averments will be taken as having been abandoned. See

D *Federal Capital Development Authority's* case *supra*.

The foregoing was not all. The paragraphs of the Amended Statement of Claim admitted in paragraph 2 of the Amended Statement of Defence included paragraph 10 of the Amended Statement of Claim. In paragraph 12 of the Amended Statement of Defence, the appellants denied paragraph 10 of the Amended Statement of Claim. In other words, in the same pleading the appellants admitted paragraph 10 of the Amended Statement of Claim and also denied the aforesaid paragraph of the Amended Statement of Claim. In order to raise an issue of fact, a defendant should properly traverse an averment in the Amended Statement of Claim either

F expressly or by necessary implication. Therefore, if the defendant refuses to admit a particular allegation in the statement of claim he must state so specifically and not by stating that he is not in a position to admit or deny the allegation. See *Lewis & Peat Ltd. v. Akhimien* (1976) 1 All NLR (Pt. 1) 460. Such a plea is no sufficient denial of the averment in the

G Statement of Claim. See *Obiaeri's* case (*supra*). The situation is even worse in this case than in the case where a defendant pleads that he is not in a position to admit or deny an averment in the Amended Statement of Claim. This is a case in which there are two conflicting pleas one of

H which could not stand while the other subsisted. What was very significant was that the conflicting pleas in the Amended Statement of Defence were deliberate. The court below, in its judgment, referred and drew attention to the conflicting pleas in the appellants' pleading but even in this court no step was taken to regularise the situation. In my view, the

averment in paragraph 10 of the Amended Statement of Claim was not denied or sufficiently denied by the appellants. The result is that apart from the oral evidence led by the respondent, on the material points, which was uncontradicted and unchallenged, there was in addition the averment in paragraph 10 of the Amended Statement of Claim. which was not denied or sufficiently denied in the Amended Statement of Defence, to the effect that, inter alia, as at 26th November, 1979 the debit balance of the said overdraft with compound interest stood at N800,312,28. That was the amount for which the court below gave judgment. Having regard to the totality of the evidence before the court the answer to the question raised under issue (vii) in the respondent's brief is in the affirmative. As the evidence led by the respondent, which was uncontradicted and unchallenged. related to all the material averments in the Amended Statement of Claim (whether admitted or not admitted in the Amended Statement of Defence) and adequately supported the judgment that the court below entered for the respondent, the answers to the questions raised under the first, second and the third issues formulated in the appellants' brief are no longer fundamental as the error, if any, of the court below could not, in the circumstances, have caused a miscarriage of justice.

On the whole, the appeal does not succeed and it is hereby dismissed. The judgment of the court below for the sum of N800,312.28 together with compound interest at the rate of 10% per annum with monthly rests and with effect from 27/11/79 till the debt is fully paid and the order for costs of N500 awarded to the respondent are hereby affirmed. The respondent is awarded N 1,000.00 being costs of the proceedings in this court.

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**BELGORE.JSC**

I read in advance the judgment of my learned brother Adio, J.S.C. and I agree with his reasoning in affirming the judgment and orders of Court of Appeal. For the same reasons I dismiss this appeal and affirm the decision of the Court of Appeal.

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**KUTIGI.JSC**

I read in advance the judgment just delivered by my learned brother Adio. J.S.C. I agree with the conclusion that the appeal lacks merit and ought

to be dismissed. It is accordingly dismissed with costs as assessed. I also endorse the consequential orders contained therein.

B  

**OGUNDARE JSC**

I have had the advantage of a preview of the judgment of my learned brother Adio, J.S.C. just delivered. I agree with him that this appeal lacks merit and should be dismissed. I however, wish to say a few words of my own.

C      The facts briefly are as follows: The respondent was a Banker to the appellants at all times material to this case. The appellants' Current Account No. 9180 was opened on 17/2/78 at the Abakaliki branch of the respondent and was being maintained and operated in the individual names of the appellants.  
D On 8th day of March, 1978, that is, barely three weeks after opening the account. The appellants paid into the said account two Co-operative Bank of Eastern Nigeria Ltd. (Aba branch) cheques Nos. A37588 and A 37589 for the sum of N330,000.00 and N348,000.00 respectively. The said cheques were issued by the appellants in their own favour against their account at the said  
E Co-operative Bank at Aba. The appellants' account with the respondent was credited with a sum of N678.000.00 being the total sum of the two cheques. For unexplained reasons the two cheques were not presented for payment and indeed there has been no trace of them ever since. On 8th of March, 1978, that is, the day of the lodgments into the account, the appellants requested, and  
F were allowed by the respondent's Abakaliki Branch Manager to withdraw the sum of N661,000.00 from the said account even though those cheques had not been cleared as required by normal banking practice. It may, however, be of interest to mention that the respondent's Branch Manager at the relevant time, Michael Egbunike was the 1st appellant's brother.

G      Following the findings of the Respondent's Chief Inspector the appellant's account No.9180 with the respondent was on 11th October, 1978 debited with the sums of N330,000.00 and N348,000.00 being the amounts on the appellants' cheques credited on 8th March, 1978 to their account with the  
H respondent and drawn on their account with the Co-operative Bank of Eastern Nigeria, Aba branch. A debit voucher to that effect was sent to the appellants by the respondent. Their account became overdrawn to the sum of N771,848.03. As at 26th November, 1979 the debit balance of the said overdraft with interest had risen to N800,312.28.

Meanwhile, the appellants had incorporated their business in the name of Metropolitan Paints and Chemical Company Limited and requested the respondent to transfer their indebtedness to the new company. The respondent refused and later sued the appellants claiming:-

*“(i) The sum of N800,312.28 (eight hundred thousand three hundred and twelve naira twenty-eight kobo) balance of overdraft with compound interest at the rate of 10% per annum as at close of business on the 26th November, 1979.*

*(ii) Compound interest at the rate of 10% per annum with monthly rests until the debt is fully repaid or judgment is obtained counting from 27th November, 1979.”*

At the trial, 3 witnesses testified in support of respondent's case. The appellants led no evidence for the defence. After addresses by learned counsel for the parties the learned trial Judge found for the appellants and dismissed respondent's claims. The respondent appealed successfully to the Court of Appeal which court set aside the judgment of the trial High Court and entered judgment in favour of the respondent in terms of its claims. The appellants, being dissatisfied, have now appealed to this Court upon the following amended grounds of appeal:

*“(i) The court below erred in law in finding or in coming to the conclusion that the defendants have ‘admitted that their account with the plaintiffs (sic) was in the debit to the tune of N711,848.03’ and that accordingly the plaintiff was ‘without further ado entitled to judgment.’*

*(ii) The court below erred in law in failing to observe that both parties conducted their cases at the trial on the footing that there was no admission by the defendants that they were owing the plaintiff a kobo: Accordingly, the plaintiff ought not to have been permitted to put his case on a completely different footing before the Court of Appeal.*

*(iii) The court below erred in law in entering judgment in favour of the plaintiff when there was clear evidence before it that at the time when the current account of the defendants with its (i.e. plaintiff's) Abakaliki Branch was debited with the sum of N678,000.00 on 11/10/78, the two cheques issued by the defendants and delivered to the plaintiff for N330,000.00 and N348,000.00 had never been presented for payment.*

*(iv) The court below took a wrong view of the facts when it held that:*



*‘The defendants tried to prevail on the plaintiff that a newly incorporated company would take over the existing account of the defendants and its debts; and also that the debt would be paid instalmentally with effect from 30th June, 1980. The plaintiff did not agree with these proposals.’”*

B (The particulars are omitted)

In the appellants’ brief of argument, the following issues are set out as calling for determination:

*“(i) Whether it is correct in law to say ‘the material averments in the plaintiff’s pleading had all been admitted’ in the Statement of Defence in this case.*

*(ii) Whether, having regard to the fact that the trial in the High Court was conducted on the footing that all the averments in the Statement of Claim had to be proved it is open to the Court of Appeal to have allowed the plaintiff’s appeal on the ground that there was no need for any witnesses to have been called to testify to the facts already admitted on the pleadings.*

*(iii) In the alternative to Question (i) and (ii) and on the hypothesis that all the facts in the statement of Claim were admitted or regarded as proved, was the court below correct in concluding that the plaintiff was ‘without further ado entitled to judgment.*

*(iv) Was the court below correct in the view it took regarding the reference by the defendants to ‘a newly incorporated company.’”*

In the respondent’s Brief a preliminary objection was raised notice of which was given in the Brief to the effect that Ground (iii) of the amended Grounds of Appeal is incompetent in that it is being raised for the 1st time in this Court without obtaining the leave of Court and without complying with Order 6 rule 6(1) of the Rules of this Court. The objection was argued in extenso both in the Brief and in the oral address by learned counsel for the respondent Mr. Nwokoye. It is the contention of Mr. Nwokoye that the ground raises an issue requiring further evidence. The appellants have not filed any reply Brief on this point raised in the respondent’s brief nor did Chief Williams SAN learned leading counsel for the appellants address us on it other than to say that it was an issue of law. With respect to the learned Senior Advocate, one expects the appellants to have filed a reply brief to the new point raised in the respondent’s brief. Not only that. the issue of the discharge of appellants’ responsibility by Section 45 of the Bills of Exchange Act is a fundamental issue.

Although some of the averments in the pleadings might support such a defence (I express no opinion in that), the fact remains that the trial Court was not addressed on the issue neither was it raised in this Court as is done in the amended ground (iii), leave of this Court ought to have been first sought and obtained. In my respectful view, the preliminary objection is well taken and I, therefore, Strike out ground (iii), I may, however, observe that in the issues set out in the appellants' brief no one of them is predicated on this ground. I also observe that on page 5 of the appellant's brief, the following appears:

*"5. - Liability of defendants*

*The Court of Appeal overlooked the most vital fact affecting the liability of the defendants as drawers of the two cheques for N330.000.00 and N348.000.00. This was the fact that the two cheques were never presented for payment to the Co-operative Bank of Eastern Nigeria. Section 45 of the Bills of Exchange Act enacts as follows:-*

*'Subject to the provisions of this ordinance, a bill must be duly presented for payment. If it be not so presented the drawer and endorsers shall be discharged.'*

The arguments in section 5 of the Brief do not arise out of the 4 issues set out in the appellants' brief. I, therefore, also discountenance it.

The respondent's brief sets out what is referred to as 5 additional issues for determination. In my respectful view having regards to the grounds of appeal. I think the issues as set out in the appellant's brief will suffice to dispose of this appeal. I will take the first 2 issues together as was done by Chief Williams in his brief. In the Amended Statement of Claim the respondent pleaded, inter alia, as follows:

*"1. The plaintiff is a Company incorporated in Nigeria with Limited Liability having its registered office in Lagos and carrying on business at Abakaliki as bankers.*

*2. The defendants were formerly resident at Aba and now at Onitsha and at any other times material to this claim carry on business at Aba, Abakaliki and elsewhere in Nigeria, under the name and style of Metropolitan Paints and Chemical Company.*

*3. On or about the 17th February, 1978, the defendants opened a current account with the plaintiff's Abakaliki Branch and thereafter operated the same account by making payments and withdrawals. The plaintiff*

at the trial of this suit will found on a copy of resolution dated 16/2/78 appointing the 1st defendant the sole signatory to their account.

4. The said account was at all material times opened, maintained and operated in the individual names of the 1st and 2nd defendants.

B 5. On or about the 8th day of March, 1978 the defendants paid into  
their account No: 9180 two Cooperative Bank of Eastern Nigeria Limited  
Aba Branch Cheque Nos A37588 and A373589 for the sum of N330,000.00  
and N348,000.00 respectively, which said cheques were issued by the defen-  
dants against their account at the said Bank at Aba. The defendants account  
C was accordingly credited with the total sum of N678,000.00. Thereafter the  
plaintiffs functionaries at Abakaliki made no effort to clear the said cheques.  
There was no record showing how and when the cheques were dispatched to  
Aba for clearing neither was there any trace of the schedule advice of cheques  
D Main Branch. There has so far been no trace of the said cheques. The tellers  
with which the said cheques were paid in will be founded upon at the trial.

6. Immediately after paying in the said cheques on the 8th March.  
1978 the defendants asked to be allowed to withdraw the sum of N661,000.00  
E from the said account. The defendants did so fully aware that their account  
at the Co-operative Bank of Eastern Nigeria was in 'RED'. The plaintiff's  
Abakaliki Branch Manager, Michael Egbunike (the 1st defendant's brother)  
promptly granted the defendant's request and allowed them to withdraw the  
said sum without bothering to have the effect of the said .

F .....

7. On or about the 16th day of March 1978 the defendants lodged  
in their account two bank drafts Nos. D.4128317 for N331,000.00 and  
128318 for N330,000.00 (totalling N661,000.00) issued on Martin Street,  
Lagos Branch of the plaintiff. On the same day the defendants insisted on  
G withdrawing the total amount even though to their knowledge they had no  
funds at their Cooperative Bank of Eastern Nigeria Limited Aba account to  
cover their two earlier cheques lodged into their account No. 9180 on 8th  
March 1978. The plaintiffs Manager, Mr. Michael Egbunike once more al-  
lowed the defendants to withdraw the said sum on borrowed A.C.B. Limited  
H Cheque No. 026538 dated 16th March, 1978. The said cheque will be founded  
upon at the trial of this suit.

8. On or about the 11th October, 1978 the defendant's account No. 9180 was debited with the two Aba cheques purchased for N330,000.00 and N348,000.00 which were paid into the said account on 8th March, 1978 and this resulted in a debit of over N670,000.00 on the account aforesaid. The decision by the plaintiff to debit the said account was based on the findings of their Chief Inspector as regards the said account and the transactions pleaded hereof. A debit voucher dated 10th October, 1978 was promptly sent to the defendants through their Aba address. Moreover, a letter was addressed to the defendants informing them of the cheques and the management decision to debit their account. The plaintiff will at the trial found on the debit voucher as well as the said letter and the defendants are hereby given notice to produce the same. B C

9. The defendants' account thereafter became overdrawn in the sum of N771,848.03 (Seven hundred and seventy one thousand eight hundred and forty-eight naira, three kobo), with compound interest at the rate of ten per cent per annum with monthly rests. D

10. As at 26th November, 1979 the debit balance of the said overdraft with compound interest stood at N800,312.28 (eight hundred thousand three hundred and twelve naira twenty-eight kobo). The said debit balance is reflected in the defendants' statement of account which will be founded upon at the trial of this suit. The defendants were supplied their own copy of the statement of account regularly. E

11. On or about the 4th day of November, 1979 the 1st defendant at Abakaliki submitted to the plaintiff photocopy of a certificate of incorporation of Metropolitan Paints and Chemical Company as a limited liability company. The said document indicated that the company was incorporated on 24th July, 1979. The 1st defendant asked the plaintiff to transfer the debt to the incorporated company. F

12. In a letter dated the 6th day of November, 1979, referred to as 1/2/79 signed by the 1st defendant as the Managing Director and addressed to the plaintiff, in reply to the plaintiff's demand letter, the 1st defendant argued that the debt was to be repaid as from the 30th day of June, 1980, and assured the plaintiff that the defendants will honour their obligation. This letter will be founded upon at the trial of this suit. The defendants are hereby given notice to produce at the trial of this suit copy of the plaintiff's demand letter to which the defendants were replying. The plaintiff will at the trial H

*found on a letter from the Ag. Chief Inspector A.C.B. Ltd. on the subject matter dated 3/10/78.*

13. The plaintiff did not at any time material to this claim agree with either the defendants or the incorporated company for repayment of the overdrawn account to commence as from the 30th day of June, 1980, or at all. This is more so because the incorporated company has no account with the plaintiff."

In their own Amended Statement of Defence, the appellants pleaded inter alia as hereunder:

"1. Save as is herein expressly admitted the defendants deny each and every allegation of facts contained in the Statement of Claim appearing as if they were set out seriatim and denied specifically and will plead and rely on all legal and equitable defences which may be open to the defendants and will specially plead and rely on:-

(a) Laches and (b) Acquiescence  
(c) Estoppel Conduct

2. The defendants admit paragraphs 1,3,9 and 10 of the Amended Statement of Claim.

3. The defendants in answer to paragraph 2 of the Amended Statement of Claim state that the allegations contained in the said paragraph are true as to the period up to the 25th of July 1979 when the assets and liabilities of Metropolitan Paints and Chemical Company were taken over by Metropolitan Paint and Chemical Co. Ltd.

4. The defendants state in answer to paragraph 4 of the Amended Statement of Claim that the said paragraph is true as regards events up to the 25th of July when the assets and liabilities of the defendants were transferred to the Metropolitan Paints and Chemical Company Ltd.

5. In further reply to the said paragraph 4 of the Amended Statement of Claim the defendants state that they ceased to carry on any business or operate the accounts since the said 25th of July, 1979.

6. Save and except that the defendants paid in two cheques totaling N678,000.00 into the plaintiff company's branch at Abakaliki on the 8th of March, 1978, the defendants make no further admission with regard to paragraph 5 of the Amended Statement of Claim and will put the plaintiff to the strictest proof of the allegations therein contained.

7. In further answer to paragraph 5 of the Amended Statement of Claim the defendants state that their account could not have been credited with the sum of N678,000.00 without the Co-operative

Bank of Eastern Nigeria Aba Branch cheques being cleared as required by normal banking regulations.

8. The defendants deny paragraph 6 of the Amended Statement of Claim and would put the plaintiff to the strictest proof of the allegations contained therein.

9. In further answer to paragraph 6 of the Amended Statement of Claim the defendants state that the bank draft for N661,000.00 given to the defendants was a different transaction altogether. The draft was as a result of an over-draft facility enjoyed on a continuing bases by Metropolitan Paints and Chemical Company Ltd. from the plaintiff company. The defendants also state that this was not the first time that Metropolitan Paints and Chemical Co. Ltd. Enjoyed such facility .

.....  
10. The defendants admit that the amount contained in the Bank Draft referred to in paragraph 7 of the Amended Statement of Claim was paid to the defendants in the normal course of business. They state in further reply that the said Bank draft had nothing to do with the cheques referred to in paragraph 5 of the Amended Statement of Claim. The rest of paragraph 7 of the Amended tatement of Claim is denied and the plaintiff will be put to strict proof of the allegations H therein contained.

11. Save and except that the account of the defendants was debited with the sum of N678,000.00 the defendants deny that their own cheques were ever sent to Aba or were returned unpaid to the plaintiff company or were eventually sent to the defendants and will put the plaintiff to very strict proof of the allegations contained in paragraph 8 of the Amended Statement of Claim.

12. The defendants deny paragraph 10 of the Amended Statement of Claim and will put the plaintiff to strict proof of the allegations contained therein.

13. By a letter dated the 25th of July 1979, the plaintiff company was advised that the Metropolitan Paints and Chemical Company Ltd. had taken over the assets and liabilities of the defendants . Paragraph 11 of the Amended Statement of Claim in so far as it conflict with the foregoing statement is denied.

14. *The defendants deny that the letter dated 6th November, 1979 was referred to as 1/12/79 but admit the rest of paragraph 12 of the Amended State of Claim. The defendants will also rely on this letter.*

15. *The defendants deny paragraph 13 of the Amended Statement of Claim and will put the plaintiff to strict proof of the allegations therein contained. In further reply thereto, the defendants state that at no time did the plaintiff indicate that it was not ready and willing to receive payments from the Metropolitan Paints and Chemical Co. Ltd. nor did it require the said company to open a new account with the said plaintiff's company but had by conduct represented to the defendants that it was willing to treat with the company.*

The complaint of the appellants is that the lower court, per Oguntade, J.C.A. was wrong having regard to the state of the pleadings to say that “the material averments in the plaintiff's pleadings had all been admitted”. This is what Oguntade, J.C.A. said:

“Although the plaintiff pleaded in paragraph 5 of the Amended Statement of Claim, that the two cheques for N330,000.00 and N348,000.00 were drawn on the defendants' account with the Co-operative Bank of Eastern Nigeria Limited, Aba, the defendants did not aver that their account at the Aba Branch of Co-operative Bank of Eastern Nigeria was debited for the sum of N678,000.00 being the face value of the two cheques.

Indeed, the defendants in paragraph 11 of the defence admitted that the cheques were not sent to Aba, or returned unpaid to the plaintiff or eventually sent to the defendants.

Be it noted that it was the case of the plaintiffs that the two cheques could not be traced. In other words, they were lost and never presented for payment against the account of the defendants at Aba. Since the defendants admitted that it paid in the two cheques for N678,000.00 and since the defendants did not deny that they were allowed to withdraw N661,000.00 on the very day the two cheques for N330,000.00 and N348,000.00 were paid in, and since the defendants have admitted that the two cheques were never presented to their Co-operative Bank of Eastern Nigeria, Aba Branch for payment, it seems to me that the material averments in the plaintiffs' pleading had all been admitted.

In paragraph 9 of the Amended Statement of Claim, the plaintiff pleaded that the account of the defendants became overdrawn in the sum of N771,848.03 and that this amount included compound interest at the rate of ten percent. The defendants expressly admitted this in paragraph 2 of the Amended Statement of Defence.”

Going by the pleadings as quoted above by me, there is some force in the observation of Oguntade, J.C.A. The learned Justice of the Court of Appeal, however, did not advert his mind to the inconsistency in the pleadings of the appellants in respect of paragraph 10 of the respondent's Amended Statement of Claim. In paragraph 2 of the Amended Statement of Defence the appellants admitted paragraph 10 but in paragraph 12 of the same defence, they denied it. It however, did not set up any facts to countermand the averments in the respondent's paragraph 10. The factual situation is that although the respondent might not have been given judgment on the state of the pleadings, it however, called witnesses in support of its case. On the other hand, the appellants did not adduce any evidence. It is right to say, therefore, that the evidence for the respondent stood unchallenged and as such evidence supported respondent's case judgment ought to have been entered by the learned trial Judge in his favour. Whatever misdirection (if any) there might be in the judgment of the court below such misdirection, however, did not occasion any miscarriage of justice. I would, therefore, not disturb the judgment of the court below on the issues under consideration.

In view of what I have said above, I do not think any useful purpose would be served by pronouncing on issue (iii). The view expressed by the Court below, per Oguntade, J.C.A. to the effect that the respondent was entitled to judgment on the pleadings "*without further ado*" is at best an obiter. The fact remains that evidence was called by the respondent in support of its case. Having regard to the concession made in the appellants' brief on issue (iv) that the error complained therein in no way directly affected the judgment of the Court below, I need not say more on this issue either. On the state of the pleadings and the uncontradicted evidence adduced in support of the respondent's case the Court below was perfectly justified in arriving at the conclusion entering judgment for the respondent. I see no merit in this appeal and, like my learned brother Adio, J.S.C. I too dismiss it with N 1,000.00 costs to the respondent.

#### IGUHJSC

I have had the advantage of a preview of the lead judgment just delivered by my learned brother, Adio, J.S.C.

I agree entirely with him and have nothing more to add.

The appeal accordingly fails and it is dismissed with costs as assessed in the lead judgment.