

SUPREME COURT OF NIGERIA
4TH OCTOBER, 1996. SC. 122/1990
CORAM:-I.L. KUTIGI, M.E. OGUNDARE,
U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC.

1. TSOKWA MOTORS NIG LTD 1ST PLAINTIFF/APPELLANT
2. E. D. TSOKWA & SONS CO. LTD. 2ND PLAINTIFF
AND
UNION BANK OF NIGERIA LTD. DEFENDANT/RESPONDENT

***APPEALS** - Parties to a proceeding - One that is not a party to a counter claim - Has no right of appeal - Save where he secures leave of court.*

***APPEALS** - Finding of fact - Made by the trial court - Whether property set aside by the Court of Appeal.*

***CONTRACTS** - Parties - Transaction that was commenced and concluded before 1st Plaintiff came into existence - Whether the defendant was liable*

FACTS

The plaintiffs sued the defendant/respondent in the Benue State High Court Gboku. 1st plaintiff claimed N1,873,830.82 as special damages while 2nd plaintiff claimed for the return of certain documents including Certificate of Occupancy No.GS/133, and N50,000.00 general damages. The defendant filed a counter claim for the sum of N837.405.55 being the balance remaining unpaid by the 2nd Plaintiff to the defendant and interest calculated at the current bank rate until judgment is given. Mr. E.D. Tsokwa who has been a customer of the defendant since 1973 secured an import licence in 1979 to import 250 Peugeot Pick-Up vehicles which he processed through the defendant/bank. Mr. Tsokwa failed to provide funds in his account which led to the expiration of the licence, and its subsequent replacement in 1980.

The 1st plaintiff/appellant was incorporated in 1981. It now sued in respect of losses accruing from failure to import the Pick-Up vehicles. The defendant denied ever having transaction with the 1st plaintiff in respect of the import licences. The trial court found in favour of the plaintiffs though it dismissed the claim for special damages. Defendant's appeal to the Court of Appeal was allowed. Being dissatisfied, 1st plaintiff has now appealed to the Supreme Court raising 2 issues one of which is incompetent.

ISSUE FOR DETERMINATION

“(i) Whether the court below was correct in reversing the finding of the High Court that there was an agreement between the defendant Bank and the plaintiffs relating to the importation of 250 light Peugeot Pick-Up vehicles.

HELD (Unanimously dismissing the appeal per lead judgment of **OGUNDARE JSC**)

Appeals - Parties to a proceeding

1. The counter-claim of the Defendant/Respondent was against the 2nd Plaintiff only and the judgment entered by the Court of Appeal in favour of the Defendant on that counter-claim could only have been against the 2nd plaintiff only. The 1st Plaintiff not being a party to the counter-claim, would have no right of appeal to this Court against that judgment. Section 213(5) of the Constitution which confers right of appeal from the Court of Appeal to this Court only confers such a right on a party to the proceedings. The 1st Plaintiff has not sought leave of either the Court of Appeal or of this Court to appeal as a person interested in the matter of the counter-claim and not being the party thereto, it would not have any right to appeal to this Court. Consequently grounds 1, 2 & 3 of the grounds of appeal contained in the Notice of Appeal are hereby struck out. (p. 1820 D)

Findings of fact

2. Having perused the evidence and judgment of the trial court in this case I am satisfied that the court below was fully justified in setting aside the findings of fact made by the trial court. (P. 1823 E)

Transaction that was concluded before plaintiff came into existence

3. The finding that the Defendant/Bank was liable to the 1st Plaintiff on a transaction that was commenced and concluded before the 1st Plaintiff came into existence could not but be perverse. I do not subscribe to the argument in the Appellant’s Brief that the learned trial Judge made a careful review of the pleadings and the evidence and came to the correct decision on the facts. Nor do subscribe to the view expressed in the Brief that the 1st Plaintiffs version was consistent with the documentary evidence adduced at the trial. I am satisfied that the Court below came to the correct decision on the facts and I have no hesitation whatsoever in dismissing this appeal which is completely devoid of any merit. (p. 1823 F)

NOTABLE POINTS OF INTEREST

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1. Banking - When customer has to provide the necessary funds

To me to have enabled the Bank to import the vehicles, the Plaintiffs needed not only to have procured the relevant import licence for the purpose, but they ought to have also provided the Bank with the necessary funds to that effect. At the High Court there was a total black-out both in the pleadings and evidence as to how the purchase money or fund was to be sourced. The Court below was therefore in my view right to have found as it did.

(p. 1824 H)

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2. Misjoinder of parties - Action ought to have been struck out

Besides, as the alleged transaction upon which the whole case was predicated has been demonstrated, rightly in my view, by the court below not to have been between the appellant and the defendant either in writing or orally, the appeal herein is entirely misconceived and ought to have been struck out from inception for misjoinder of parties and as incompetent. I so declare it.

(p. 1831 C)

IGUHJSC

3. Contracts - Failure to establish enforceable agreement

It is trite that for a contract to come into existence, there must be a clear and precise offer and unconditional acceptance of the terms. It is clear to me in the present case that there was no consensus ad idem between the parties in respect of the more fundamental and vital term of the agreement for a legal contract to mature. This relates to the provision of adequate funds to the defendant by the plaintiffs with which the actual placement of the order may be executed. I therefore endorse the view of the court below that an enforceable agreement between the parties for the importation of the said cars was not established. (p. 1831 H)

4. When onus of proof shifts to the appellant

It is clear to me that the provision of funds by the 1st plaintiff/appellant to cover the importation of the cars must be regarded as vital and fundamental to the execution of the alleged contract between the parties. It also seems to me that the respondent, having specifically pleaded and led evidence that no such funds were made available to it, the onus shifted to the appellant to contradict this basic and materials issue of fact. This, the appellant failed to do. In my view, the burden was on the appellant to establish the provision of

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sufficient funds to the defendant to cover the importation of cars in issue before the question of the respondent's liability in damages, whether in tort or breach of contract, can conceivably arise. (p. 1832 C)

REPRESENTATION

- B No appearance for the Appellant
T. A. Olatunji for the Respondent

CASES REFERRED TO

- Lawal v. Dawodu (1972) 8 & 9 S.C. 83 at 114-117
C Fashanu v. Adekoya (1974) 6 S.C. 83 at 91
Igbodin v. Obianke (1976) 9 & 10 S.C. 179
Torti v. Ukpabi (1984) 1 S.C. 370 AT 392 - 393
Coghlan v. Cumberland (1898) 1 Ch. 704
Olofosoye v. Olorunfenii (1989) 1 NWLR (Part 95) 26 at 37
D Incar Nigeria Ltd. v. Adegboye (1985) 2 NWLR (Part 8) 453
Atanda v. Ajani (1989) 4 NWLR (Part 1 10) 51 1 at 539

STATUTE & RULES REFERRED TO

- Supreme Court Rules 0.6 r 8(6)
E Constitution of the Federal Republic of Nigeria 1979 8.213(5)

LEAD JUDGMENT BY OGUNDARE JSC

The plaintiffs sued the defendant/Bank in the High Court of Benue State holden at Gboko claiming as hereunder:

- F “(a) *1st Plaintiff Claims*
N1,873,830.82k (One million Eight hundred and seventy three thousand eight hundred and thirty naira eighty two Kobo) as
Special Damages.
 (b) *2nd Plaintiff claims:*
G (a) *Certificate of Occupancy No. 05/133*
 (b) *Import Licence No. 79-0003797*
 (c) *Certificate of Occupancy NO. 05/544*
 (d) *Import Licence No. 80-H000852*
 (e) *Exchange Control Form ‘M’ of 29/1180*
H (f) *Proforma Invoice (2 in number)*
 (g) *Statement of Account for the year 1979*
 (h) *Articles and Memo of Association for 1st plaintiff.*
 (c) *General Damages ..N50,000.00”*

Pleadings were ordered, filed and exchanged, with leave of Court. The defen-

dant filed an amended statement of defence and counterclaim. The plaintiffs also filed a defence to the counterclaim. In the counter-claim the defendant/Bank claimed the sum of N837,405,55 “being the balance remaining unpaid by the 2nd Plaintiffs to the defendant” and interest calculated at the current bank rate until judgment is given. The action proceeded to trial at the end of which, and after addresses by learned counsel for the parties, the learned trial Judge found for the plaintiffs and entered judgment in their favour in the sum of N50,000.00 “being general damages for negligence”. He dismissed the claim for N1,873,830.00 special damages. He ordered that the various items listed in the 2nd plaintiffs claims be returned by the defendant to the plaintiffs. He found against the defendant on the counter claim and dismissed that claim.

Against this judgment the defendant appealed to the Court of Appeal (Jos Division) which Court after a consideration of all the issues canvassed before it, allowed the appeal, set aside the judgment of the learned trial Judge and in its place, it entered an order dismissing the plaintiff’s claim; it also entered judgment for the defendant on its counter claim in the sum of N790,282.03.

The 1st plaintiff was unhappy with the judgment of the Court of Appeal and has now appealed to this Court upon the following grounds:

“1. Their Lordships of the Court of Appeal erred in law in entering judgment in favour of the respondent on its counter-claim.

Particulars

(i) Exhibits 01-023 were plainly dubious cheques, the imprints thereon being the names of three different companies.

(ii) The drawers of the cheques was (sic) not proved to be the appellant company.

(iii) The entries on Exhibits ‘N1’ to ‘N8’ were not proved to the hilt.

2. Their Lordships of the Court of Appeal erred in law in reversing the finding of the learned trial Judge that Exhibits 01-023 were forged when Section 91 of the Evidence Act permitted the learned trial judge to so hold,

3. Their Lordships of the Court of Appeal erred in law in entering judgment in favour of the respondent on the value of Exhibits 01-023 when that was not the claim presented by the respondent at the trial Court or on the Appeal.

4. Their Lordships of the Court of Appeal erred in law in dismissing the plaintiffs/appellants claims for general damages when the contract on the basis of which the sum of N50,000.00 was awarded was proven by the

plaintiff as being partly written and oral.

5. Judgment is against the weight of evidence”.

The 2nd plaintiff did not appeal against the judgment of the Court of Appeal. In this Court, the parties filed and exchanged their Briefs of argument. At the oral hearing of the appeal before us, the plaintiff/appellant was absent and was not represented by counsel. The defendant/respondent was however represented by counsel. Pursuant to Order 6 rule 8(6) of the Rules of this Court the appeal was taken as argued on the appellant’s brief of argument filed on 24/3/92. The respondent’s counsel was called upon to address the Court Mr T.A. Olatunji in a brief address adopted and relied on the respondent’s brief. He drew the Court’s attention to the preliminary objection contained in the brief to the effect that as the judgment of the Court of Appeal was not against the appellant grounds 1, 2, & 3 contained in the Notice of Appeal were not available to it and should be struck out.

I think the preliminary objection is well taken. Notwithstanding that notice of this objection was given in the respondent’s brief and arguments advanced, the appellant did not consider it worth its while to file a reply brief as enjoined by the rules of Court. **The counter-claim of the defendant/respondent was against the 2nd plaintiff only and the judgment entered by the Court of Appeal in favour of the defendants on that counter-claim could only have been against the 2nd plaintiff only. The 1st plaintiff, not being a party to the counter-claim, would have no right of appeal to this Court against that judgment. Section 213(5) of the Constitution which confers right of appeal from the Court of Appeal to this Court only confers such a right on a party to the proceedings. Sub-section (5) of S.213 provides:**

“Any right of appeal to the Supreme Court from the decisions of the Federal Court of Appeal conferred by this section shall be exercisable in the case of civil proceedings at the instance of a party thereto or, with the leave of the Federal Court of Appeal or the Supreme Court at the instance of any other person having an interest in the matter,”

The 1st plaintiff has not sought leave of either the Court of Appeal or of this Court to appeal as a person interested in the matter of the counter-claim and not being the party thereto, it would not have any right to appeal to this Court. Consequently grounds 1, 2, & 3 of the grounds of appeal contained in the Notice of Appeal are hereby Struck out.

Two questions have been set down in the appellants brief as calling for determination in this appeal. They are:

“(i) Whether the court below was correct in reversing the finding of

the High Court that there was an agreement between the defendant Bank and the plaintiffs relating to the importation of 250 light Peugeot Pick-up vehicles.

(ii) Whether the court below was correct in reversing the finding of the High Court that the defendant has not proved that the 2nd plaintiff was indebted to it in the sum claimed by the Bank.”

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As Question (ii) is predicated on grounds 1, 2 & 3, it is equally incompetent and it is hereby struck out. I am now left with Question (i).

Mr. E. D. Tsokwa has been a customer of the defendant/Bank since 1973. There was evidence at the trial, which evidence was accepted by the learned trial Judge, that Mr. E. D. Tsokwa was also doing business under the name and style of Tsokwa Motors. He is also the proprietor of E. D. Tsokwa & Sons Company Limited, that is, the 2nd plaintiff. Mr. Tsokwa in the course of his business obtained in 1979 an import licence to import 250 Peugeot Pick -Up vehicles from France; the licence was dated 15/10/79. He processed the import licence through the defendant/Bank but because action was not taken in good time the licence expired, notwithstanding that approval had been given by the Central Bank in January 1980 for the purchase of foreign currency. A replacement licence was again issued to Mr. Tsokwa on 13/5/80 and this was again given to the defendant/Bank to process. The 2nd licence also expired in November of 1980 because it was equally not processed in time. The 1st plaintiff (who is now appellant) was incorporated in 1981. It now sued the defendant/bank for damages in respect of losses allegedly incurred for failure to import the Pick-Up vehicles. The defence of the defendant Bank was that Mr. Tsokwa did not provide funds in his accounts with which to utilise the import licence. The bank denied ever having any transaction with the 1st plaintiff in respect of the licences.

The learned trial Judge in his judgment summarised the submissions of learned counsel for the defence in these words:

“He submitted very impressively that the case for the plaintiffs was based on Exhibit ‘C’ i.e. Import Licence issued to Tsokwa Motors. That Tsokwa Motors was not a limited liability Company and there was no resolution to prove that Tsokwa Motors was inherited by the 1st plaintiff. That Exhibit ‘C’ was issued before the first plaintiff was incorporated.”

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He then observed:

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“It is true that Tsokwa Motors is not a Limited Liability Company but it was registered under the Registration of Business Names Act 1961. It was not in dispute that P.W.1 was the Sole Director. Exhibits ‘C’ and ‘K’ were issued to Tsokwa Motors.”

On this ground alone, one would have thought the learned trial Judge would have dismissed the claim of the 1st plaintiff. The witness who testified for the defendant stated in his evidence that the 1st plaintiff “is not a customer of the defendant”. The trial Judge nevertheless in the face of all the evidence found:

B *“I am satisfied from the above and the contents of Exhibit ‘R’ that the defendants cannot honestly say with conviction that they had no dealing with the plaintiff over the importation of 250 Pick-Up Vans.”*

He again found:

C *(1) I am satisfied that there was an oral agreement between the plaintiffs and the defendant about the importation of 250 Pick-Up Vans by the defendant for the Plaintiffs.”*

D *(2) “That the first plaintiff on incorporation in 1981, inherited the assets of Tsokwa Motors and that the defendant cannot pretend to be ignorant of this fact for in Exhibits ‘Q’ and ‘R’ the defendants manifested knowledge of this.”*

E *(3) “I am however satisfied from evidence that the negligent conduct of the defendant company in allowing Exhibits ‘C’ and ‘K’ to lapse without good cause has caused the plaintiffs to suffer heavy financial loss and the plaintiffs are entitled to be indemnified for the losses. I therefore award the plaintiffs N50,000.00 (Fifty thousand Naira) being general damages for negligence.”*

The Court below set aside the above findings of the learned trial Judge. Mukhtar J.C.A. in the lead judgment with which the other Justices agreed, said, after a review of the facts:

F *“It does not for all intent and purpose appear to me that there was such offer and acceptance as stipulated above by the parties in the instant case.”*

Later in the judgment the learned Justice added:

G *“I agree that the words ‘Tsokwa Motors’ is written on Exhibit ‘R’, but that is not to say that the mere appearance of those words does in itself signify that the defendants were doing business with Tsokwa Motors and that they were their customers. After all ‘E.D. Tsokwa Motors’ also appeared therein. It does not in itself also establish an agreement between the parties. The crucial question is, is Exhibit ‘R’ an agreement? If that is the case, then it is intriguing to conjecture how a contract or agreement could exist between the 1st plaintiff and the defendantsSuch finding of negligence or breach will arise only if an agreement or contract binding the parties was in existence. In this case, there was none, and it is my belief that the defendants did not owe the*

plaintiffs any obligation nor undertook any responsibility on the importation. “

Adio JCA (as he then was) in his own judgment had this to say:

“For the importation of the motor vehicles, the plaintiff/respondent needed or required not only an import licence but also the fund to be remitted to the Peugeot Automobile firm in France as the purchase price of the motor vehicles. The onus was, therefore, on the respondent to prove that it made the relevant papers, including the import licence, available to the appellant for processing in connection with the importation of the motor vehicles and also provided the appellant with the fund that would be used to pay the purchase price of the motor vehicles to the French firm or that there was a firm agreement between it (respondent) and the appellant as to how such money was to be paid to the French firm. There was no averment in the respondent’s pleading and there was no evidence led by the respondent throughout the proceedings before the learned trial Judge on the question whether the respondent made available to the appellant the purchase price of the motor vehicles which ought to have been remitted to the French firm or that there was a firm and satisfactory agreement between the appellant and the respondent on the question of how the aforesaid money was to be paid and/or the source of such money.”

The attitude of the appellate court to findings of fact of the trial Court is so well known now that I need not cite a host of authorities. It is sufficient to say that a court of appeal will be slow indeed to interfere with the findings of fact by a trial court and will only do so if such findings are not supported by the weight of evidence or are perverse. **Having perused the evidence and judgment of the trial court in this case I am satisfied that the court below was fully justified in setting aside the findings of fact made by the trial court. The finding that the defendant/bank was liable to the 1st plaintiff on a transaction that was commenced and concluded before the 1st plaintiff came into existence could not but be perverse. I do not subscribe to the argument in the appellant’s brief that the learned trial Judge made a careful review of the pleadings and the evidence and came to the correct decision on the facts. Nor do I subscribe to the view expressed in the brief that the 1st plaintiffs version was consistent with the documentary evidence adduced at the trial. I am satisfied that the Court below came to the correct decision on the facts and I have no hesitation whatsoever in dismissing this appeal which is completely devoid of any merit.**

The appeal is dismissed and the judgment of the Court below is affirmed. I award to the defendant/respondent a sum of N1,000.00 as costs of

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At Gboko High Court the plaintiffs sued the defendant bank for the sum of N1,873,830.82 being special damages for failure to utilize plaintiffs import licence, the return of some documents property of plaintiffs in the custody of the bank and N50,000.00 as general damages.

The Bank counter-claimed against the 2nd plaintiff only, for the sum of N837,405.55 being the balance and interest remaining unpaid to the bank on a loan/overdraft facility granted to the 2nd plaintiff at its request.

In his judgment, the learned trial judge dismissed plaintiffs' claim for special damages and also dismissed the bank's counter-claim. He ordered the return of a number of specified documents and awarded a sum of N50,000.00 as general damages to the plaintiff.

The Bank appealed against the judgment to the Court of Appeal. In a reserved judgment, the Court of Appeal reversed the judgment of the trial High Court and gave judgment for the bank in the sum of N790,282.03 against the 2nd plaintiffs only.

The 1st plaintiff has now appealed against the judgment of the Court of Appeal. Five Grounds of Appeal were filed. The 2nd plaintiff has not appealed. Mr Olatunji, learned counsel for the bank was therefore right when he said that Grounds 1,2 & 3 of the Grounds of Appeal pertaining to the bank's judgment against the 2nd plaintiff were incompetent and should be struck out on the ground that the 1st plaintiff is not an aggrieved party and the bank's claim was not made against the 1st plaintiff either. Clearly, the 1st plaintiff was not a party to the counter-claim and so it could not have appealed against it And even if it was an interested party in the counter-claim (which may be true), it had not sought for nor obtained leave of court to do so (see Section 213(5) of the Constitution). Grounds 1, 2 & 3 being incompetent are therefore hereby struck Out. Issue (ii) on page 2 of 1st plaintiffs brief based on these three grounds is also incompetent and is struck out as well.

Issue (i) which is whether the Court of Appeal was right in finding that there was no agreement between the plaintiffs and the bank relating to the importation of 250 Peugeot Pick-Up vehicles is essentially a question of fact. To me to have enabled the bank to import the vehicles, the plaintiffs needed not only to have procured the relevant import licence for the purpose, but they ought to have also provided the bank with the necessary funds to that effect At the High Court there was a total black-out both in the

pleadings and evidence as to how the purchase money or fund was to be sourced. The court below was therefore in my view right to have found as it did.

It is for the above reasons and those stated in the lead judgment of my learned brother Ogundare J.S.C. which I read before now, that I also dismiss the appeal with costs as assessed.

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MOHAMMED JSC

I agree that this appeal is devoid of any merit and for the reasons given by my learned brother, Ogundare, J.S.C. in the lead judgment. the draft of which I have had the privilege to read in advance, the appeal is dismissed with N1,000.00 costs in favour of the respondent.

ONU JSC

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Having been privileged to read before now the judgment of my learned brother Ogundare, J.S.C. just delivered, I agree with him that this appeal lacks merit and ought to fail.

In adding a few words of mine I wish to comment by way of expatiation as follows:-

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The facts giving rise to the appeal herein have been so eloquently stated in the leading judgment to need any restatement. Suffice it to say, that sequel to the decision of the Court of Appeal sitting in Jos (hereinafter referred to shortly as the court below) and dated 7th February, 1990, reversing the decision of the trial court, two issues were formulated as calling for our determination on behalf of the 1st plaintiff thus:

“(i) Whether the court below was correct in reversing an agreement between the defendant bank and the plaintiffs relating to the importation of 250 light Peugeot Pick-Up vehicles.

“(ii) Whether the court below was correct in reversing the finding of the High Court that the defendant has not proved that the 2nd plaintiff was indebted to it in the sum claimed by the bank.”

Both in the defendant/respondent’s brief of argument dated and filed on 20th December, 1994 as well as in the oral submission of T.A. Olatunji Esq., of counsel before us on 8th July, 1996, a preliminary objection was taken that grounds 1, 2 and 3 of the 1st plaintiff/appellant’s grounds of appeal relating to the twenty-three cheques and the eight ledger cards tendered by the defendant/respondent pursuant to its counter -claim vide Exhibits 01-023 and N-N8 respectively, are incompetent and that upon the re-evaluation of the evidence

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adduced thereon the court below sitting on appeal reversed the trial Court's decision by allowing the respondent's counter-claim and awarding it N790,282.03, being the amount on the cheques (Exhibits 01 - 023) plus interest thereon. As issue (ii) set out above relates to and clearly overlaps grounds 1, 2 and 3 of the 1st plaintiff/appellant's five appeal grounds, which bereft of B their particulars state that-

"1. Their Lordships of the Court of Appeal erred in law in entering judgment in favour of the respondent on its counter-claim.

2. Their Lordships of the Court of Appeal erred in law in reversing the finding of the learned trial Judge that Exhibits 01-023 were forged C when Section 91 of the Evidence Act permitted the learned trial Judge to so hold.

3. Their Lordships of the Court of Appeal erred in law in entering judgment in favour of the respondent on the value of Exhibits 01-023 when D that was not the claim presented by the respondent at the trial court or on the appeal."

and judging by the fact that 2nd plaintiff is neither joined in the appeal (it is in fact an appeal in which 1st plaintiff is the appellant) nor was leave sought and obtained to join it in the appeal as an aggrieved party pursuant to Section 213(5) of the Constitution of the Federal Republic of Nigeria, E 1979, grounds 1, 2 and 3 are declared incompetent; a fortiori, Issue (ii) is accordingly struck out.

In relation to Issue (i) predicated on grounds 4 and 5 wherein the complaints are that

"4. Their Lordships of the Court of Appeal erred in law in dismissing F ing the plaintiffs / appellants claims for general damages when the contract on the basis of which the sum N50,000.00 was awarded was proven by the plaintiff as being partly written and oral.

5. Judgment against the weight of evidence."

the relevant paragraphs in the plaintiffs' statement of claim are paragraphs 7 - 19 and 22. In none of them can one decipher an agreement strictly so-called relating to the importation of the 250 light Peugeot Pick-Up vehicles. Except in paragraphs 10, 18 and 19 where the defendant admitted the averments in the Statement of Claim, it denied in paragraphs 7-9, 11-17 and 20-24 Statement of Defence any such agreement to import the said vehicles, adding H that documents presented by the plaintiffs for such importation were mere photocopies and that they paid no funds to meet the importation. Of utmost significance is the counterclaim by the defendant/respondent in its paragraphs 2, 3 and 4 wherein it pleaded:

"2. The 2nd plaintiffs by their letter dated the 16th day of March,

1981, applied for overdraft facilities from the defendants for a total sum of N500,000.00 and a loan of N250,000.00.’

3. In furtherance of the lending facilities granted by the defendants to the 2nd plaintiff, the defendants ,granted overdrafts to the 2nd plaintiff from time to time until sometime in 1983 when the 2nd plaintiff abandoned their account and left it dormant

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4. The defendants hereby give notice that at the hearing of this suit the defendants will rely on the following documents:-

At the said hearing, the plaintiffs called one witness, Emmanuel Danjuma Tsokwa, who is the Managing Director of the plaintiffs. He testified in line with their pleadings. The lone witness for the defence, Anthony C Omosigbo Kani, bank manager of the defendant at Gboko, testified in consonance with the pleadings proffered. He said under cross-examination inter alia as follows:-

“..... I cannot say whether the original import licences were given to our bank or not. The Manager at the time might have tempered (sic) with the records about this transaction. The Manager of the bank at the material time is still alive. The customer requested us to specially print Exhibits 01-023. The request was in writing. I have not got the record with me right now. The Central Bank printed Exhibits 01-023 for us. They were first sent to us before we gave them to the plaintiffs. The name of the Company in Exhibits 01-023 is not the same as the name in the Exhibits N1-N8. The word Company was missing in Exhibits 01-023. This I consider to be a printing error. The second plaintiff was authorised to draw on the Exhibits 01-023. I do not know whether the amount represented a loan or an overdraft. I now say that the sum of N837,405 55 represented an overdraft. There was an application for this overdraft. I say there was an approval because the customer was allowed to draw on his account. The loan was secured with his landed property. There are records to support this transaction. I deny that there was an application or any security and no money was drawn by the second plaintiff.”

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(Underlining is mine for comments).

The learned trial Judge after reviewing some paragraphs of the Statement of Claim, particularly paragraph 18 thereof said:

“Arising from the above pleadings, three issues were raised for my determination. Firstly, were the documents forwarded to the defendants as securities originals or duplicate copies? Secondly, were the securities to facilitate the importation of 250 Pick-up cars or documents to secure an overdraft or loan? Thirdly, were documents mentioned in paragraph 18 of the statement of claim necessary to secure an overdraft or a loan?”

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To the third arm of the questions posed by the learned trial Judge above, he proffered the following answer among others thus:

“Exhibit ‘M’ was dated 16th March, 1981. It is to be noted that the renewed import licence Exhibit ‘K’ expired in November, 1980. Obviously Exhibit ‘M’ has nothing to do with the importation of 250 Pick-up cars. The purpose of the overdraft was clearly stated in paragraphs 2 and 3 of Exhibit ‘M’. Apart from this, how can a reasonable person believe that a copy of Daily Times of 29th December, 1979 or a copy of Memorandum and Articles of Association or Exchange Control Form would be used to secure a loan or an overdraft. I have no doubt in my mind that Exhibit ‘G’ was to aid in the importation of (250) Peugeot unit cars.”

The learned trial Judge continued:

“The twenty- three receipts were tendered in evidence and as the plaintiffs counsel did not oppose their admissibility, they were admitted and marked Exhibits 01-023. Under cross-examination the D.W.I denied any knowledge of any transaction between the second plaintiff and the defendants with regard to the importation of Pick-Up vans. Two letters dated 30th April, 1980 and 20th May, 1980 from the Kakawa Branch of the defendants company to the Gboko Branch were tendered in evidence through D.W.I and were admitted in evidence and marked Exhibits ‘P’ and ‘Q’. A third letter dated 27th May, 1980 from Gboko Branch of the defendant company to their Kakawa Branch was admitted in evidence and marked Exhibit ‘R’. D.W.I admitted that he did not see copies of these letters in their office before he gave evidence in chief. He further said that from the contents of Exhibits ‘P’, ‘Q’ and ‘R’ he conceded that there was an arrangement between the defendants and the plaintiffs about importation of Pick-Up vans”

In reversing the trial court’s decision, the court below (coram: Ndoma- Egba, Mukhtar, JJ.CA and Adio, JCA, as he then was, after a careful review of the record of proceedings held inter alia, that:

“..... In fact, the defendants in paragraph 7 of their amended statement of defence above, denied that specific request was made by the 1st plaintiff to assist it purchase the said 250 vehicles. Neither the plaintiffs witness, nor that of the defendant proved or established such contractor agreement as asserted in the pleadings. In fact, P.W.I the only plaintiffs witness evidence was vague in as far as the alleged agreement is concerned. All he said in examination in chief was that the import licence to import 250 light brown Pick-Up vans was given to the defendant to help them process all the necessary documents and import 404 Pick-up vans. He however added under cross-examination that he approached the defendant and requested

whether they could import the vehicles for him and they agreed. There is nothing in writing to signify or confirm an agreement between the parties to undertake or execute any such transaction and in fact, when cross-examined, on the existence of a written agreement, P.W.1 admitted that there was no written agreement. “

The court below (per Mukhtar, J.C.A.) further observed:

“Whether agreement (if at all there was one) on importation of vehicles cannot be construed as written or oral even if the above said Exhibits are read together with Exhibits ‘G’, ‘M’ and ‘N’. In fact Exhibit ‘M’ has nothing to do with the issue of importation of vehicles which is the subject-matter of this case”

Continuing, the court further held:

“In view of the foregoing, I will say that the learned trial Judge did err when he observed as follows in his judgment on page 63 of the record of proceedings -

“I am satisfied from the above and the contents of Exhibit ‘R’ that the defendants cannot honestly say with conviction that they had no dealing with the plaintiffs over the importation of 250 Pick-Up vans.

I agree that the words “Tsokwa Motors” is written on Exhibit ‘R’, but that is not to say that the mere appearance of those words in itself signify that the defendants were doing business with Tsokwa Motors and that they were their customers. After all “E. D. Tsokwa Motors” also appear therein. It does not in itself also establish an agreement between the parties. The crucial question is, is Exhibit ‘R’ an agreement. If that is the case, then it is intriguing to conjecture how a contract or agreement could exist between the 1st plaintiff and the defendants.

Having found and concluded that no contract was proved to exist between the plaintiff (not even the 2nd) with the defendants the need to discuss the defendant’s negligence or otherwise as regards the purported breach of the agreement; and failure of the transaction obviated. Such finding of negligence or breach will arise only if an agreement or contract binding the parties was in existence. In this case there was none, and it is my belief that the defendants did not owe the plaintiffs any obligation nor undertook any responsibility on the importation. The defendants were therefore not guilty of any negligence that may have resulted in the lapse of Exhibits ‘C’ and ‘K’ and cause financial loss to the plaintiffs “

In his contribution Adio, J.C.A. as he then was, observed as follows:-

“For the importation of the motor vehicles, the plaintiff respondent needed or required not only an import licence but also the fund to be remit-

ted to Peugeot Automobile firm in France as the purchase price of the motor vehicles. Thus the duty was, therefore, on the respondent to prove that it made the relevant papers, including import licence, available to the appellant for processing in connection with the importation of the motor vehicles and also provided the appellant with the fund that would be used to pay the purchase price of the motor vehicles to the French firm or that there was a form of agreement between it (respondent) and the appellant as to how such money was to be paid to the French firm. There was no such averment in the respondents pleading and there was no evidence led by the respondent throughout the proceedings before the learned trial Judge on the question whether the respondent made available to the appellant the purchase price of the motor vehicles which ought to have been remitted to the French firm or that there was a firm and satisfactory agreement between the appellant and the respondent on the question of how the aforesaid money was to be paid and/or the source of such money."

D Before concluding, the learned Justice further held that-
"..... As there was no evidence that there was an agreement on that aspect of the matter, the question of awarding general and/or special damages to the respondent as a result of the alleged failure of the appellant to import the motor vehicles could not arise."

E and finally, the learned Justice held inter alia that-
".....The allegation was that the respondent was issued with an import licence in 1979 and it expired six months after it was issued.

The second import licence was issued in 1980 and it expired before the end of that year. The respondent was aware of the time when each of the import licences expired. For that reason, a letter written on 16th March, 1981, could certainly not have been in relation to import licences deposited with the appellant."

The court below then proceeded to allow the appeal; set aside the decision of the trial court and gave judgment to the defendant in the terms of its counterclaim. I am of the firm view that in doing so, the court below is amply justified in that in exercising its appellate jurisdiction, where a trial court as in the instant case, fails to evaluate the evidence on record, or erroneously does so or the conclusion reached is not supported by the evidence on record, then the Court of Appeal, in the interest of justice, must exercise its own powers of reviewing those facts and drawing the appropriate inferences from the proved facts. See Lawal v. Dawodu (1972) 8 & 9 S.C. 83 at 114-117; Fashanu v. Adekoya (1974) 6S.C. 83 at 91; Chief Igbodim & Ors. v. Chief Ogbede Obianke & Ors. (1976)9 & 10 S.C. 179 and Dr. Torti Ufere Torti v. Chief Ukpabi & Ors. (1984) 1 SCNLR 214; (1984) 1 S.C.370 at

392-393, to mention but a few. See also *Coghlan v. Cumberland* (1898) Ch.704 where it was held *inter alia* as follows:

Even where the appeal turns on a question of fact, the court has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge, with such other materials as it may have decided to admit. The court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking from overruling it if on full consideration it comes to the conclusion that it is wrong."

See further the recent decisions of this court in *Olufosoye v. Olorunfemi* (1989) 1 NWLR (part. 95) 26 at 37; *Incar Nigeria Ltd. v. Adegboye* C (1985) 2 NWLR (part 8) 453 and *Atanda v. Ajani* (1989) 3 NWLR (part. 111) 511 at 539. In the result, the judgment of the court below surely is not and cannot be against the weight of evidence.

Besides, as the alleged transaction upon which the whole case was predicated has been demonstrated, rightly in my view, by the court below not to have been between the appellant and the defendant either in writing or orally, the appeal herein is entirely misconceived and ought to have been struck out from inception for misjoinder of parties and as incompetent. I so declare it.

For these reasons and the fuller ones set out in the lead judgment of my learned brother Ogundare, J.S.C. I too dismiss this appeal as lacking in merit and make the same consequential orders inclusive of costs as assessed.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogundare, J.S.C. and I entirely agree with the reasoning and conclusions therein.

It is common ground that there was no written agreement between the parties for the importation of the 250 cars in issue. The learned trial Judge, however, was of the view that there was an oral agreement between the plaintiffs and the defendant in respect of the said importation of cars. The Court of Appeal, for its own part, was unable to accept that any agreement between the parties was established by the plaintiffs. I seem to agree with the Court of Appeal that no such agreement was reached by the parties.

It is trite that for a contract to come into existence, there must be a clear and precise offer and unconditional acceptance of the terms. It is clear to me in the present case that there was no consensus ad idem between the parties in respect of the more fundamental and vital term of the agreement for

a legal contract to mature. This relates to the provision of adequate funds to the defendant by the plaintiffs with which the actual placement of the order may be executed. I therefore endorse the view of the court below that an enforceable agreement between the parties for the importation of the said cars was not established.

B Even if such a contract was established, and I do not so hold, the defendant by paragraphs 10, 15 and 18 of its Statement of Defence averred in no uncertain terms that the 1st plaintiff/appellant provided no funds to cover the amount approved for the importation or for the utilization of its import licence or, indeed, for the placement, by the defendant, of an order in respect
C of even one single car for the appellant. The appellant's reply to this averment was a complete silence. It led no evidence whatsoever to the effect that it made any funds available to the defendant/respondent for the purchase of the vehicles in issue.

It is clear to me that the provision of funds by the 1st plaintiff/appel-
D lant to cover the importation of the cars must be regarded as vital and fundamental to the execution of the alleged contract between the parties. It also seems to me that the respondent, having specifically pleaded and led evidence that no such funds were made available to it, the onus shifted to the appellant to contradict this basic and material issue of fact. This, the appellant
E failed to do. In my view, the burden was on the appellant to establish the provision of sufficient funds to the defendant to cover the importation of cars in issue before the question of the respondent's liability in damages, whether in tort or breach of contract, can conceivably arise.

The 2nd Issue concerns the defendant's counter-claim against
F the 2nd plaintiff and with which the appellant is not concerned. I therefore uphold the respondent's preliminary objection that grounds 1, 2 and 3 of the Notice of Appeal upon which the 2nd issue is predicated are incompetent. The said grounds of appeal with the 2nd issue are accordingly struck out.

G It is for the above and the more detailed reasons contained in the judgment of my learned brother, Ogundare, J.S.C. that I, too, dismiss this appeal. I abide by the order for costs therein made.

H