

**SUPREME COURT OF NIGERIA**  
2ND APRIL, 1996. SC. 302/1989  
**CORAM:- A. B. WALI, I. L. KUTIGI, E. O. OGWUEGBU,**  
**Y. O. ADIO, A. I. IGUH, JJSC.**

1. CHIEF F. S. YESUFU ..... DEFENDANTS/APPELLANTS  
2. KUPPER CONSTRUCTION (NIG) LTD

AND  
KUPPER INTERNATIONAL N.V. .... PLAINTIFF/RESPONDENT  
(Suing by David Omoregie, its lawful Attorney)

---

**AGENCY** - Companies - Undertaking given by Chairman/director of a company Where a partnership relationship was in existence - Whether the also binds the director personally.

**APPEALS** - Evaluation of evidence - Where the trial court failed to properly evaluate the evidence - Whether appellate court should intervene.

**APPEALS** - Issue - Consideration of an issue - Where no useful purposes will be served - A merely academic issue will not be considered.

**CLAIMS** - Basis of claim - Plaintiff's claim succeeded on the partnership agreement - And not merely on the undertaking given by the 1st appellant.

**JUDGMENTS** - Alternative claim - Where judgment was given for the main claim m- Judgment need not be given for the alternative claim.

**PARTNERSHIP** - Incurring expenses - Where a partnership agreement is in existence - There is no need for either partner to issue a written demand - Before expenses could be incurred by the other partner.

**PARTNERSHIP** - Debts - Accruing from the partnership to one of the partners - Cannot be defeated - Where it is found to be legitimate and just.

**PARTNERSHIP** - Payments and liabilities - Incurred by a partner - Whether entitled to be indemnified by the partnership.

**PARTNERSHIP** - Liability of the partners - For the debts and liability of the partnership - Is jointly and severally.

**FACTS**

The plaintiff/respondent a foreign company, was awarded contracts by the government of the defunct Bendel State. Terms of the contract led to, partnership business relationship between the plaintiff and the 1st defendant/appellant, and the subsequent incorporation of the 2nd defendant/appellant. In the handling of the said government projects, the plaintiff provided some inputs bringing its total expenses to the sum of N685,750.00. Along the line, a disagreement between the parties led to a dissolution the partnership. The minutes of the meeting that encompassed the dissolution (Exhibit 14) showed that the 1st defendant undertook to settle all genuine claims submitted by the plaintiff. But when the claims were now submitted, the 1st defendant refused to settle same, saying that they were authorized by the defendants.

The plaintiff then instituted this action before the High Court claiming the said sum of N685,750.00. There was an alternative claim by the plaintiff for an account of all money received by the defendants in respect of the said government projects. The trial Court non-suited the plaintiff. I sides being dissatisfied appealed to the Court of Appeal which allowed the, plaintiffs appeal by awarding the amount claimed. The defendants have further appealed to the Supreme Court raising five issues.

**ISSUES FOR DETERMINATION**

*“(i) Whether the claim in quasi-contract for money paid or expenses incurred on behalf of the Appellants at their own request was properly allowed by the Court of Appeal (vacating the order of non-suit) having regard to the primary finding of fact by the trial Court against which there was no appeal.*

*(v) Whether if the 1st Appellant be the agent of the 2nd Appellant as its Managing Director or alter ego as found by the Court of Appeal, whether the 1st Appellant is still liable or jointly with the 2nd Appellant as a disclosed principal.” Etc, see p. 606*

**HELD** (Unanimous dismissing the appeal per lead judgment of **KUTIGI JSC**)

**Partnership - Incurring expenses**

1. So before the Statement or finding complained about, the learned trial judge had recognized that there was a partnership agreement (loose or tight), between the 2nd Appellant and the Respondent. The question of a demand by the Appellants for the Respondent to do any work or incur expenses did not therefore arise. The learned trial judge also clearly recog

nized that the parties had come together in order to execute the contracts together and that question of one employing the other to do the job. This also ruled out the issue of any written demand by one from the other before expenses could be incurred. (p. 608 F)

***Debts - Accruing from the partnership***

2. I think having so properly found that the parties were in partnership the demand by the Appellants from the Respondents of a prior “Request”, “authorization” or “approval”, was merely an after-thought and a mere ploy to avoid payment of legitimate and just debts and to defeat the justice of the case. It was never the Appellants’ case in the lower courts that they did not know of the services rendered nor that they did not benefit from such services. (p. 609 A)

***Appeals - Evaluation of evidence***

3. I agree with the Court of Appeal that the learned trial judge having correctly found as above, failed to properly evaluate the evidence which exhibits 7 to 10 constituted. These Exhibits were neither challenged nor contradicted by the Appellants at the trial. The Court of Appeal in my view, rightly evaluated the documentary Exhibits and gave judgment for respondent. (p. 609 B)

***Partnership - Payments and liabilities***

4. A partner is entitled to be indemnified by the partnership in respect of made and liabilities incurred in the ordinary and proper business of the partnership. That was the case here. It has been clearly demonstrated above that want of prior authority of approval on the part of the Respondent was never the case of the Appellants even on their pleadings and that there were other findings by the same High Court to the contrary. (p. 609 C)

***Judgments - Alternative claim***

5. The Court of Appeal was right in holding that para. 24 was an admission of pain 34 especially when it is remembered that the entire claim of the Respondent is just a little over half a million naira, and not N3 million or more. That conclusion, however, has nothing to do with whether or not the Respondent’s alternative claim for account succeeded. In fact, the Court of Appeals having given judgment for the Respondent for the main claim had no business giving it judgment in the alternative for account. (p. 610 A)

***Appeals - Issue***

6. The Court of Appeal did not give judgment for the Respondent in respect of that claim having already and properly too, given judgment in respect of the main claim, for the sum of N685,750.00 representing expenses incurred and services rendered by the Respondent to the Appellants. In my opinion therefore no useful purpose will be served in trying to deal with the issue of whether or not the action for account was properly constituted. That issue is now largely academic. I will therefore decline to answer it. (p. 610 C)

***Basis of claim***

7. But it has to be stated clearly again that the principal claim did not succeed merely on the undertaking given by the 1st Appellant in Exhibit 14, but rather the claim succeeded on the acceptance of evidence on record by both the High Court and the Court of Appeal, that there was a partnership agreement between the parties in the suit herein. And that the partnership having been dissolved, the Respondent (and any partner for that matter) was entitled to be indemnified by the partnership for expenses or liabilities incurred in the ordinary and proper business of the partnership. The undertaking in Exhibit 14 only went to strengthen the Respondent's case that it had incurred the expenses which the Appellants had recognized and had even promised to settle. The Respondent cannot therefore correctly be said to have sued on the undertaking given by the 1st Appellant to settle genuine claims. (p. 611 C)

***Undertaking given by Chairman/director of a company***

8. I have no doubt in my mind at all that as Chairman/Director of the 2nd Appellant, the 1st Appellant was in the eyes of the law an agent of the company for which he acted and the general principles of the law of principal and agent would generally have applied. Thus where a director enters into a contract in the name of or purporting to bind the company, it is the company - the principal - which is liable on it, not the director. The director is not personally liable unless it appears that he undertook personal liability. Even where a director contracts in his own name but really on behalf of the company, the other party to the contract can generally on discovering that the company is the real principal, sue the company as undisclosed principal on the contract. But the issue here is not that the 1st Appellant did sign or make any contact as agent of the 2nd Appellant. It is about the giving of an undertaking. I have made it clear above that the Respondent's claim succeeded not on the undertaking to pay given by 1st Appellant in Exhibit 14, but rather on the existence of the partnership between and which was I

ater dissolved. Therefore obviously the by the 1st Appellant both for him-  
self and as agent of (p. 611 F)

***Liability of the partners***

9. It is doubtless that the 1st Appellant was the directing mind and will of B  
the 2<sup>nd</sup> Appellant as demonstrated above. That apart, this being a partner-  
ship case, each of the partners is in law jointly and severally liable with his  
co-partner for the debts and liabilities of the partnership. The Respondent's  
claim was brought against the two Appellants jointly and severally as per  
para. 35 of Statement of Claim. And the court of Appeal rightly in my view C  
found them in the circumstances liable. (p. 612 D)

**NOTABLE POINTS OF INTEREST**

**KUTIGI JSC**

***1. Appellant not to appeal on every type of finding***

I say straightaway that an appellant does not have to appeal on a finding D  
made by the trial court which has no bearing on the final order made by  
that (p. 608 B)

***2. A partner's entitlement to indemnity***

Where a partnership is dissolved whether mutually, or by a court decree, a E  
is entitled to be indemnified for expenses incurred by him genuinely on  
behalf of the partnership in the ordinary and proper course of its business  
or necessarily incurred for its preservation. (p. 613 E)

**OGWUEGBU JSC**

***3. Right of a partner to determine the partnership***

The legal position is that any member of a partnership, the duration of F  
which is undefined as in the present case, is at liberty subject to any agree-  
ment between the partners, to determine die whole partnership at any  
moment he pleases. The right must, of course, be exercised bonafide, and G  
not for the purpose of an undue advantage from the state of the partnership's  
engagements. No question of that kind arises here. (p. 615 E)

**REPRESENTATION**

Appellants absent not represented  
Chief C. O. Okpiaghele for Respondent

H

**CASES REFERRED TO**

- Omoregbe v. Lawani (1980) 3 - 4 SC. 108  
Adegoke v. Adibi (1992) 5 NWLR (Pt. 242) 410  
Basma v. Weeks (1950) 2 All ER 146  
Ogida v. Oliha (1986) 1 NWLR (Pt. 19) 786  
B Neilson v. Mossend Iron Company (1886) 1 A.C. 298  
Scott v. Scott (1943) 1 ALL E.R. 583  
Leonards Carrying Co. Ltd. v. Asiatic Petroleum Col. Ltd. (1915) A. C. 705  
at 713 - 714  
Odulaja v. Haddad (1973) 11 S.C. 35  
C Nigerian Maritime Services Ltd. v. Alhaji Bello Afolabi (1978) 2 S.C.  
Boshali v. Allied Commercial Exporters Ltd. (1961) All N.L.R. 917

**STATUTE REFERRED TO**

Partnership Law of Bendel State 1976 s. 33(l)(c)

**D BOOKS REFERRED TO**

Lindley On Partnership 14th Ed. pp. 556-558  
Charlesworth: Mercantile Law, 13th Ed. p. 219 para. 8

**E LEAD JUDGMENT BY KUTIGI JSC**

The plaintiff's claim against the defendants jointly and severally as contained in paragraph 35 of the Statement of Claim was for the sum of N685,750.00 representing the expenses incurred and services rendered for and on behalf of the defendants at the defendants' request at Benin City in  
F respect of the Ikpoba Dam Hotel and Afuze-Urha-Otu and Ekperi-fugar Roads during the period January 1977 to May 1979.

There was an alternative claim which was for an account of all money received by the defendants in respect of the two projects and payment to the plaintiff of any amount found due to it after such account.

G Pleadings were duly filed and exchanged by the parties. The case then proceeded to trial. At the trial five witnesses testified on behalf of the plaintiff while only the 1st defendant testified for himself and on behalf of the 2nd defendant.

H Briefly stated the facts of the case are that the plaintiff, a foreign company, was awarded two contracts by the government of the defunct Bendel State in 1977 for the construction of Ikpoba Dam Hotel, Benin City, and Afuze-Urha-Otuo Road respectively. The plaintiff, in compliance with the government's directive invited the 1st defendant to join him in the execution of the two contracts. The 1st defendant agreed and their busi

ness relationship culminated in the formation of a partnership and the subsequent incorporation of the 2nd defendant by the plaintiff and the 1st defendant. The technical designs, civil engineers, land surveyors, survey equipments and some personnel for the projects were among the inputs provided by the plaintiff. The Ikpoba Dam Hotel Company Ltd was also incorporated by the Government to finance the Ikpoba Dam Hotel project. The execution of the projects seriously and progressively got underway when a serious disagreement developed between the partners which necessitated a meeting with the government. The minutes of that meeting Exhibit 14, showed that the partnership between the parties was mutually dissolved, because while the 1st defendant first gave an indication of the dissolution the plaintiff was agreeable to same. Exhibit 14 also showed that the 1st defendant at the meeting undertook to settle all genuine claims submitted by the plaintiff. When the plaintiff submitted its claims to the defendants, the 1st defendant refused to settle same, saying that they were not authorised by the defendants and the plaintiff then instituted this action. B C D

In his judgment the learned trial Judge non-suited the plaintiff when he concluded on page 97 of the record as follows:-

*"To dismiss the action is to deny the plaintiff's any other opportunity to have a redress in a court of law, and having been convinced that they actually incurred expenses they should not be shut out of the court. I hereby order a non-suit in the case and there will be no order as to costs."* E

Both sides were dissatisfied with the judgment of the High Court and both appealed against same to the Court of Appeal. The plaintiff contended that judgment should have been entered for it while the defendant urged the Court of Appeal to set aside the order of non-suit and enter one of dismissal of plaintiff's claim. F

At the hearing of the two appeals it was discovered that the defendants who were absent and not represented neither filed a brief of argument in respect of their own appeal nor filed one in reply to the plaintiff's appeal. Having satisfied itself that the defendants had notice of hearing of the appeals, the Court of Appeal proceeded to dismiss defendants appeal as having been abandoned. It then heard plaintiff's counsel on the plaintiff's appeal and reserved judgment thereafter. G

The Court of Appeal in its judgment unanimously allowed the plaintiff's appeal. It set aside the order of non-suit made by the learned trial Judge and entered judgment for the plaintiff in the sum of N685,750.00 with costs. H

Aggrieved by the decision of the Court of Appeal the defendants,

hereinafter referred to as the appellants, have now appealed to this court. The plaintiff will be referred to as the respondent from now on.

The parties filed and exchanged briefs of argument in accordance with the rules of court. Dr. Enemeri, learned counsel for the appellants in his brief submitted the following issues for determination in the appeal:

- B *“(i) Whether the claim in quasi-contract for money paid or expenses incurred on behalf of the appellants at their own request was properly allowed by the Court of Appeal (vacating the order of non-suit) having regard to the primary finding of fact by the trial court against which there was no appeal.*
- C *“(ii) Whether the Court of Appeal without giving the respondent judgment for the alternative claim in accounts rightly related to paragraph 24 of the Statement of Defence as an admission probative of paragraph 34 of the Statement of Claim or the substantive claim in accounts.*
- D *“(iii) Whether an action for accounts or any (sic) between partners is properly constituted without a dissolution or a claim for dissolution of the partnership and incidental to this, whether the partnership between the 1st appellant and the respondent in this case had been dissolved without a winding up of the firm which is the 2nd appellant.*
- E *“(iv) Whether the declaration of intent in Exhibit 14 by the 1st appellant that he is willing to refund to the respondent proved and authorised expenses incurred on behalf of the firm, is enforceable by action against him or the firm or both and outside of the quasi-contract action for money paid.*
- F *“(v) Whether if the 1st appellant be the agent of the 2nd appellant as its Managing Director or alter ego as found by the Court of Appeal, whether the 1st appellant is still liable or jointly with the 2nd appellant as a disclosed principal.”*

G Arguing issues (i) and (ii) together it was submitted that the learned trial Judge had found on page 94 lines 9 - 15 of his judgment that the expenses incurred by the respondent on behalf of the appellants were not incurred at the request of the appellants. That since the respondent did not appeal against the finding, the Court of Appeal was wrong to have given judgment for the respondent. Any amount of money spent by the respondent without appellants request was in law a voluntary payment which was not recoverable. Also no man can by a voluntary payment of another man's debt make himself that man's creditor. The cases of *Sleigh v. Sleigh* (1843-60) All E.R. (Reprint) 428 and *Leigh v. Dickson* (1884) 15 Q.B.D. 60 were cited in support. It was also submitted that the Court of Appeal was wrong to have held that para 24 of the Statement of Defence admitted para. 34 of the Statement of Claim. That Para 24 was not an admission

H

that the appellants received “more than N3 million” from the Government as stated in para. 34. He said para 24 of the Statement of Defence properly understood and properly construed was a plea to the effect that the appellants were not accountable to the respondent for any money received.

Responding, Chief Okpiaghele, learned counsel for the respondent submitted in his brief that two of the respondents Ground of Appeal in the court below alleged misdirection in law and fact on the part of the learned trial Judge. It was therefore not true that the respondent did not challenge the finding by the trial court that the expenses were not incurred at the request of the appellants. In addition, he said Exhibits 7 to 10 which were proofs of the services rendered and expenses incurred by the respondent were never challenged at the trial by the appellants who had the opportunity to do so. The Exhibits were therefore properly evaluated and acted upon by the Court of Appeal as unchallenged and uncontradicted documentary evidence which the trial court apparently ignored in its judgment. It was also submitted that the issue of request or prim approval or authorisation, being canvassed by the appellant was clearly an after-thought which was not born out by Exhibit 14. It was a ploy to defeat the justice of the case since the appellants were not denying that they knew of and benefited from the respondent’s services and expenses. He said the appellants adduced no evidence to show that there was a provision for such request, approval or authorisation. That a partner is entitled to be indemnified by the partnership in respect of payment made and liabilities incurred in the ordinary and proper business of the partnership and anything necessarily done for the preservation of the business or property of the partnership.

He referred to Chalesworth’s *Mercantile Law* 13th Edition, Chapter 14 page 219, Para. 8. *Isaac Omoregbe v. Lawani* (1980) 3 - 4 Sc. 108; *Adegoke v. Adibi* (1992) 5 NWLR (Pt.242) 410.

It was contended that the Court of Appeal was right when it held that para. 24 of the Statement of Defence was an admission of para. 34 of the Statement of Claim that the appellants were in receipt of some money “totalling or less than N3 million, and that further proof of the averment was unnecessary. That the admission was properly related to unchallenged Exhibits 7 to 10 which added together was less than N3 million. He said the Court of Appeal properly related para. 24 and para.34 respectively without necessarily upholding the claim for account by the respondent. That the respondents main claim having succeeded, there was no need for the Court of Appeal to consider giving judgment for the respondent in the alternative claim of accounts.

Now, there is no doubt that the learned trial Judge said in his judgment page 94 lines 15-19 thus -

B *“Whatever expenses were incurred by the plaintiff companies had (sic) undertaken to do and there was no document or evidence produced in court to demonstrate that there was any demand by the defendants company for such expenses to be incurred.”*

C Above is the finding which the learned counsel for the appellants said had knocked the bottom out of the respondent’s main claim. I say straightaway that an appellant does not have to appeal on a finding made by the trial court which has no bearing on the final order made by that court. The High Court non-suited the plaintiffs after coming to the conclusion that they had incurred great expenses on behalf of the partnership which contradicts the finding above. The Court of Appeal set aside the non-suit order and allowed plaintiffs claim. It is interesting that immediately before the above finding and on the same page, lines 3 - 14, the D learned trial Judge had said -

E *“The impression which seems to be given by this claim is that the defendants had employed the services of the plaintiff for the execution of these projects but the evidence does not reveal those facts. On the contrary, there appears to be a loose partnership arrangement between both companies..... They came together for the purpose of executing those contracts and it was not an issue of one employing the other to do any particular job especially after reading Exhibit “11” which is the Memorandum and Articles of Association of Kupper Construction (Nigeria) Ltd who is the 2nd defendant in this case.”*

F So before the Statement or finding complained about, the learned trial judge had recognised that there was a partnership agreement (loose or tight), between the 2nd appellant and the respondent. The question of a demand by the appellants for the respondent to do any work or incur expenses did not therefore arise. The learned trial Judge also clearly recognised G that the parties had come together in order to execute the contracts together and that there was no question of one employing the other to do the job. This observation also ruled out the issue of any written demand by one from the other before expenses could be incurred.

Again the learned trial Judge had also found on page 94 lines 19 - 26 as follows -

H *“I have no doubt in my mind that the plaintiff company was put into great expenses in providing the services and supplying the equipments but these were done under a sort of loose arrangement between the American company and its counterpart formed in Nigeria for the purpose of*

*promoting the business, which in this case, was the construction of the Ikpoba Dam Hotel and the Road Project at Otuo.”*

I think having so properly found that the parties were in partnership the demand by the appellants from the respondents of a prior “request”, “authorisation” or “approval”, was merely an after-thought and a mere ploy to avoid payment of legitimate and just debts and to defeat the justice of the case. It was never the appellants’ case in the lower courts that they did not know of the services rendered nor that they did not benefit from such services. I agree with the Court of Appeal that the learned trial Judge having correctly found as above, failed to properly evaluate the evidence which Exhibits 7 to 10 constituted. These Exhibits were neither challenged nor contradicted by the appellants at the trial. The Court of Appeal in my view, rightly evaluated the documentary Exhibits and gave judgment for the respondent. A partner is entitled to be indemnified by the partnership in respect of payments made and liabilities incurred in the ordinary and proper business of the partnership. That was the case here. It has been clearly demonstrated above that want of prior authority or approval on the part of the respondent was never the case of the appellants even on their pleadings and that there were other findings by the same High Court to the contrary.

I will now consider paras. 34 & 24 of the Statement of Claim and the Statement of Defence respectively. The plaintiff/respondent pleaded as follows -

*“34. As at now the defendants have been paid a total of over Three million Naira in respect of the projects by the Bendel State Government. At the hearing of this suit evidence of these payments shall be given.”*

The defendants/appellants on the other hand replied thus -

*“24. The 2nd defendant admits receiving some money from the Ikpoba Dam Hotel for works executed by it in reply to para. 34 of the plaintiff’s Statement of Claim”*

The Court of Appeal (per Omo J.C.A. who read the lead judgment) said on page 188 of the record thus -

*“when therefore the learned trial Judge stated that there was “no averment in the Statement of Claim” with regard to payments made by the Government of Bendel State to the 1st respondent or at all, he was the 1st respondent or at all, he was obviously mistaken .....*

*Here again para. 24 of the Statement of Defence whilst not admitting that N3 million was received by the respondents admits that “some money” had been received. This is definitely a clear admission that a sum of money totalling more or less than the sum of N3 million had been received from the Bendel State Government. This is sufficient admission of para. 34 of*

*the Statement of Claim and I agree with appellant's counsel that in accordance with the principles of pleadings and decided authorities no further oral evidence in proof of this issue need be addressed"*

I agree with the above. The Court of Appeal was right in holding that para. 24 was an admission of para. 34 especially when it is remembered that the entire claim of the respondent is just a little over half a million Naira, and not N3 million or more. That conclusion, however, has nothing to do with whether or not the respondent's alternative claim for account succeeded. In fact, the Court of Appeal having given judgment for the respondent for the main claim had no business giving it judgment in the alternative for account.

Issues (i) & (ii) are therefore resolved against the appellants.

Issue (iii) was argued next. This issue relates to the respondent's alternative claim for account. Suffice it to say that the Court of Appeal did not give judgment for the respondent in respect of that claim having already and properly too, given judgment in respect of the main claim, for the sum of N685,750.00. representing expenses incurred and services rendered by the respondent to the appellants. In my opinion therefore no useful purpose will be served in trying to deal with the issue of whether or not the action for account was properly constituted. That issue is now largely academic. I will therefore decline to answer it.

Issues (iv) and (v) were next treated together. Dr. Enemeru submitted that the undertaking given by the 1st appellant to make reimbursement of expenses properly incurred by the respondent in connection with the business of the partnership was merely conditional and was not made by the 1st appellant as an agent of the 2nd appellant and that even if it was given as such agent, it was not actionable against any of the appellants. That the undertaking was a mere declaration of intent which created no independent or legally binding obligation to pay. He said the Court of Appeal was in error in holding that Exhibits 7 to 10 proved the quantum of the said expenses when the 1st appellant in his testimony denied the respondent incurred any expenses. It was also submitted that if the 2nd appellant gave the undertaking to pay the expenses as an agent of the 2nd appellant as stated by the Court of Appeal, then the 1st appellant could not be held liable along with the 2nd appellant who was a disclosed principal. He cited *Basma v. Weeks* (1950, 2 All E.R. 146 and *Ogida v. Oliha* (1986) 1 NWLR (Pt.19) 786. The court was urged to allow the appeal and restore the judgment of the trial High Court.

Responding, Chief Okpiaghele said that the 1st appellant being

the Chairman/Director of the 2nd appellant, the undertaking he gave in Exhibit 14 was not a mere declaration of intent. He was the directing mind and will of the 2nd appellant who had the competence to give the undertaking. He said the 1st appellant was not just a servant or an agent of a disclosed principal who could escape liability on disclosing his principal because on the facts of this case, he was the very corpus and the think-tank of the 2nd appellant. That there was no question of disclosure of principal here because the 2nd appellant was at any given time I known and the 1st appellant was its Chairman/Chief Executive. The Court of Appeal was therefore right when it found both appellants liable. We were asked to dismiss the appeal. B

I think enough has been said already about the promise or undertaking by the 1st appellant to settle all genuine claims submitted by the respondent vide Exhibit 14 in the consideration of issues (i) and (ii) above. I do not need to repeat myself. But it has to be stated clearly again that the principal claim did not succeed merely on the undertaking given by the 1st appellant in Exhibit 14, but rather the claim succeeded on the acceptance of evidence on record by both the High Court and the Court of Appeal, that there was a partnership agreement between the parties in the suit herein. And that the partnership having been dissolved, the respondent (and any partner for that matter) was entitled to be indemnified by the partnership for expenses or liabilities incurred in the ordinary and proper business of the partnership. The undertaking in Exhibit 14 only went to strengthen the respondent's case that it had incurred the expenses which the appellants had recognised and had even promised to settle. The respondent cannot therefore correctly be said to have sued on the undertaking given by the 1st appellant to settle genuine claims. C D E F

This then brings me to the question of whether or not the 1st appellant merely acted as an agent of the 2nd appellant and if so whether he was thereby absolved from liability. I have no doubt in my mind at all that as Chairman/Director of the 2nd appellant, the 1st appellant was in the eyes of the law an agent of the company for which he acted and the general principles of the law of principal and agent would generally have applied. Thus where a director enters into a contract in the name of, or purporting to bind the company, it is the company the principal which is liable on it, not the director. The director is not personally liable unless it appears that he undertook personal liability. Even where a director contracts in his own name but really on behalf of the company, the other party to the contract can generally on discovering that the company is the real principal, sue the company as undisclosed principal on the contract. But the issue here is not that the 1st appellant did sign or make any contract as G H

agent of the 2nd appellant. It is about the giving of an undertaking. I have made it clear above that the respondent's claim, succeeded not on the undertaking to pay given by 1st appellant in Exhibit 14, but rather on the  
 B existence of the partnership between the parties and which was later dissolved. Therefore obviously the undertaking was given by the 1st appellant both for himself and as agent of the 2nd appellant.

The evidence before the trial court was clearly, and as submitted by Chief Okpiaghele, that the 1st appellant was the very corpus and the  
 C ting-tank of the 2nd appellant. The Court of Appeal was equally positive on page 197 of the record when after making reference to some decided authorities it stated thus -

*"What is more, the 1st respondent from all the evidence before the trial judge was the alter ego of the company from its inception and there is  
 D no provision in the Memorandum and Articles of Association (Exhibit 18) which provides that a resolution by the company is required before its debt can be settled. No special resolution of the company is therefore required to dissolve the partnership."*

I agree entirely. It is doubtless that the 1st appellant was the directing mind and will of the 2nd appellant as demonstrated above. That apart,  
 E this being a partnership case, each of the partners is in law jointly and severally liable with his co-partners for the debts and liabilities of the partnership. The respondent's claim was brought against the two appellants jointly and severally as per para. 35 of the Statement of Claim. And the Court of Appeal rightly in my view found them in the circumstances liable  
 F when it said on page 199 of the record that -

*"It is quite obvious that they (meaning defendants) used the services and benefited therefrom. They cannot therefore be heard to seek to excuse themselves from paying for these services. Not having challenged the detailed documentation of services/expenses incurred, the conclusion must be  
 G that the appellants (meaning plaintiff) claim has been established, and judgment should have been entered for it."*

Issues (iv) and (v) therefore fail.

All the issues having been resolved against the appellants, their appeal must fail. It is accordingly dismissed with N1,000.00 costs to the respondent.  
 H

---

### WALI JSC

I am privileged to have a preview in advance of the lead judgment

of my learned brother Kutigi, J.S.C. and I entirely agree with the reasons given therein by him for dismissing the appeal.

The finding made by the Court of Appeal that the appellants were liable to the respondent for the amount claimed was based on Exhibits 7 - 10 which were not considered by the trial court.

On the mutual dissolution of the partnership which was clearly supported by Exhibit 14, the Court of Appeal rightly concluded as follows after considering the evidence adduced.

*"I agree with the appellant's counsel that what happened was indeed a case of a mutual as distinct from a unilateral termination of the contract. Exhibit 14 shows that whilst 1st respondent first gave an indication of the "dissolution", the appellant was agreeable to same; and was infact the first to pronounce "dissolution" when it stated through its legal adviser that since it appeared that Chief Yusufu no longer required their services and cooperation he did not need for any further association..... The quarrel between the parties, the expressed intention of no further cooperation/association, the exclusion of the appellant from working on the projects culminating in Exhibit 14, is sufficient notice of dissolution to satisfy the requirements of S. 33(1) (c) of the Partnership Law of Bendel State, 1976."*

A court decree for the dissolution of the partnership was therefore not necessary.

Where a partnership is dissolved whether mutually, or by a court decree, a partner is entitled to be indemnified for expenses incurred by him genuinely on behalf of the partnership in the ordinary and proper course of its business or necessarily incurred for its preservation. See Charlesworth: Mercantile Law, 13th Edition, P.219 paragraph 8.

For this and the fuller reasons given by my learned brother Kutigi J.S.C. and which I have already endorsed, I also hereby dismiss the appeal for want of merit and affirm the judgment of the Court of Appeal. I also subscribe to the consequential orders contained in the lead judgment.

### OGWUEGBU JSC

I agree with the lead judgment just delivered by my learned brother Kutigi, J.S.C. and I will dismiss the appeal.

I will however add the following comments of mine in respect of the submission of the learned appellants counsel that the court below was in error in misconstruing Exhibit 14 as tantamount to a notice of dissolution when infact it is a notice of intention to withdraw from the partnership. He

argued that Exhibit 14 is incapable of determining the partnership in this case.

The learned trial Judge found as a fact that there was a partnership arrangement between the plaintiff/respondent and the 2nd defendant/appellant herein and that the mutual trust which had existed initially between them had broken down. He proceeded to hold that the first thing the plaintiff/respondent could have done was to ask for the dissolution of the partnership and followed by a demand for an account. He further held as follows:

*"Until that is done there can be no specific claim between the two parties whose transactions or dealings have not been effectively or legally terminated."*

The learned trial Judge later in the same judgment held as follows:

*"Although the parties could at any time dissolve the partnership by mutual consent, that would not be in exercise of any rights given by the partnership contract. The contract was for an indefinite period and had to be properly terminated before either party could ask for an account. Although the 1st defendant would appear to have unilaterally terminated their contract at a meeting held with Government Officials, this he could not do, as there had to be a resolution to that effect by the 2nd defendant company, especially when it is realised that Mr. Fragoman was also a Director of the Company."*

(The underlining is for emphasis only).

The court below cited with approval the view expressed in Lindley On Partnership 14th edition P.556 - 558 which reads:

*"The old rule, therefore, that a decree for an account between partners will not be made save with a view to the final determination of all questions and cross-claims between them, and to the dissolution of the partnership, must be regarded as considerably relaxed, although it is still applicable where there is no sufficient reasons for departing from it.....Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner or to drive him to a dissolution."*

The court below then held:

*"The present case on appeal comes under this umbrella. The partnership between the parties is for an indefinite term of years, and the respondents have undoubtedly not expressed an intention to, but have in fact excluded the appellant from the operations of the 2nd respondent company. The obvious course to which it is thus being forced is a dissolution of the partnership. The answer to the first question raised must therefore be answered in the negative i.e. that the appellant can bring an action for*

*account in the circumstances of this case without first seeking a dissolution of the partnership between the parties.” (Underlining is for emphasis only.)*

Both the trial court and the court below agreed that the partnership is for undefined time. Section 33 (1) (c) of the Partnership Law of the Bendel State of Nigeria, 1976 applicable in Edo State provides that the dissolution of partnership, subject to any agreement between the partners, takes place;

*“33(1)(c) if entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.”*

In Exhibit 14 which is the minutes of the meeting of the partners with officials of the then Bendel State Government held on 7:5:79 in Benin City, the 1st appellant who is the Managing Director of the second appellant was recorded as saying that he no longer needed the services of the respondent because *“it lacked the technical know how which he earlier thought they were in a position to contribute”* and that there was no longer any room for co-operation between them.

As a result of this firm decision taken by the 1st appellant which was accepted by the respondent, the latter formally withdrew from the partnership. The court below held that what happened here was a case of a mutual, as distinct from a unilateral termination of the partnership.

The legal position is that any member of a partnership, the duration of which is undefined as in the present case; is at liberty subject to any agreement between the partners, to determine the whole partnership at any moment he pleases. The right must, of course, be exercised bona fide, and not for the purpose of an undue advantage from the state of the partnership's engagements. No question of that kind arises here. See *Neilson v. Mossend Iron company & Ors. (1986) 1 A.C. 298.*

From the facts of the case, the 1st appellant had excluded and driven the respondent to a dissolution of the partnership. In my view, the termination of the partnership satisfied the requirement of section 33(1)(c) of the Partnership Law of Bendel State, 1976. A decree of dissolution by a court of competent jurisdiction was unnecessary in the circumstances of the case.

The 1st appellant was competent to give the respondent notice of the dissolution of the partnership being the Managing Director of the 2nd appellant as well as its directing mind and will. See *Scott v. Scott (1943) 1 All E.R. 582* and *Lennards Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. (1915) A.C. 705 at 713 - 714.*

Besides, there is no provision in the memorandum and articles of

association of the 2nd defendant/appellant (Exhibit 18) which provides that a resolution by the company is required to dissolve the partnership. The action of the 1st appellant at the meeting giving rise to Exhibit 14 which forced the respondent to withdraw from the partnership was effective in law to entitle the respondent to terminate the partnership.

For these reasons and for the more detailed reasons set down by my learned brother, Kutigi, J.S.C., I too will dismiss the appeal. I abide by my learned brother's order for costs.

C

### **ADIO JSC**

I have had the opportunity of reading in draft, the judgment just delivered by my learned brother, Kutigi, J.S.C., and I agree with his reasoning and conclusion which I adopt as mine. The appeal fails. I too dismiss it and I abide by the order for costs.

D

### **IGUH JSC**

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Kutigi, J.S.C. and I agree entirely that this appeal is without merit and should be dismissed.

The respondent, as plaintiff, had claimed the sum of N685,750.00 being expenses incurred and services rendered for the defendants, now appellants, at their request in respect of two projects which the appellants were executing for the then Bendel State Government. In the alternative, the plaintiff company claimed for an account of the transaction between it and the defendants.

Exhibits 7 to 10 tendered by the plaintiff company clearly show the precise expenses incurred and services rendered by the said plaintiff. The veracity and accuracy of these exhibits were neither put in issue nor discredited by the defendants throughout the trial. It is trite that where evidence tendered by a party to any proceedings was not challenged or put in issue by the other party who had the opportunity to do so, it is always open to the court seised of the matter to act on such unchallenged evidence before it. See Isaac Omoregbee v. Daniel Lawani (1980) 3-4 S.C. 108 at 117; Odulaja v. Haddad (1973) II S.C. 357; Nigerian Maritime Services Ltd. v. Alhaji Bello Afolabi (1978) 2 S.C. 79 at 81; Adel Boshali v. Allied Commercial Exporters Ltd. (196 J) All NLR 917; (J 961) 2 SCNLR 322.

I am therefore in complete agreement with the court below when, in connection with Exhibits 7 to 10, it observed thus -

*"It is quite obvious that they (meaning the defendants) used the services and benefited therefrom. They cannot therefore be led to seek to excuse themselves from paying for these services. Not having challenged the detailed documentation of services/expenses (meaning Exhibits 7 to 10) incurred, the conclusion must be that the appellant's claim has been established and judgment should have been entered for it"* B

(Words in brackets supplied)

As was rightly pointed out by the Court of Appeal, the case for the appellants would appear to begin and end with *"lack of prior authorisation."* They contended that they were not liable as claimed or at all as the plaintiff company did not incur the expenses for services rendered to the defendants with their prior approval or authorisation. C

A close study of the relevant minutes of the meeting between the parties, Exhibit 14, does however reveal that the defendants unequivocally undertook to pay the plaintiff company all genuine claims submitted to it. It was not any term of such payment that the expenses must have received the prior authorisation and approval of the defendants. The material term was whether or not the expenses were incurred or the services rendered by the plaintiff and whether or not the claims or expenses were genuine. D

As I have already observed, Exhibits 7 to 10 are detailed documentation of the service/expenses incurred by the plaintiff company for and on behalf of the defendants. It was not suggested that they were neither genuine nor correct and they were not cross-examined upon at the trial. I fully endorse the finding of the court below that the plaintiff is entitled to judgment in the sum claimed. E

It is for the above and the more elaborate reasons contained in the judgment of my learned brother Kutigi, J.S.C. that I, too, dismiss this appeal with N1,000.00 costs to the respondent. F

G

H