

SUPREME COURT OF NIGERIA9TH JULY, 1996. SC. 30/1990

**CORAM:- S. M. A. BELGORE, A. B. WALI,
E. O. OGWUEGBU, S. U. ONU, A. I. IGUH, JJSC.**

ADESOYE OLANLEGE APPELLANT

AND

AFRO CONTINENTAL
NIGERIA LIMITED RESPONDENT

CONTRACTS - *Making of a contract - Contract may be made orally - Or partly oral and partly in writing - Whether the present contract of employment is oral.*

CONTRACTS - *Employment - Retiring age of 60 years - Whether agreed upon by the parties.*

CONTRACTS - *Parol evidence - Where the parties contract is written - Whether parol evidence will be admitted to vary it.*

CONTRACTS - *Unilateral fixture - Of a definite age of retirement - Cannot be made by the appellant - Where the parties contract left it indefinite.*

EVIDENCE - *Cross-examination - When found to have established an issue.*

EVIDENCE - *Burden of proof - Principal issue submitted by the plaintiff - Where not proved by him - Whether his case was rightly dismissed.*

FACTS

The plaintiff/appellant was employed by the defendant/respondent as chief accountant. The parties contract of employment is embodied in exhibits A, B, C. Whereas the exhibits reveal that the plaintiffs employment was to be secured up to retirement age, no where was any age stated to be the retirement age. Plaintiff's employment was subsequently terminated by the defendants upon payment of 3 months salary in lieu of notice

Plaintiff then filed an action before the High Court of Lagos State claiming the total sum of N1, 353,878.00 being damages for breach of contract to provide employment for him up to the retirement age of 60 years. Plaintiffs claim was dismissed by both the High Court and Court of

Appeal. Being dissatisfied, plaintiff has further appealed to the Supreme Court raising 5 issues.

ISSUES FOR DETERMINATION

“(i) Whether or not there was a contradiction between Exhibits “B” and “C”

“(ii) Whether or not the relationship between the plaintiff and the Defendant was governed by a written agreement, the lacuna in which could be not be filled (sic) by oral evidence except as permissible under section 131 of the Evidence Act. Etc., see P. 1422

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

Making of a contract

1. In my view, at the stage of Exhibit “C”, the contract between the parties had been concluded. In this case, the extent of the agreement is in dispute and as a general rule no formality is needed. A contract may be made by word of mouth, or partly by word of mouth and partly in writing. The court below held that the agreement between the parties is in writing and this agreement is contained in Exhibits “A” “B” and “C” and they constitute the appellant’s contract of employment. I refuse to accept the contention on of Chief Ajayi, S.A.N. that Exhibits “B” and “C” were tendered not as documents which governed the relationship between the parties, but to corroborate the case of the appellant that the basis of their relationship was the oral agreement of 8th September 1977. (p. 1427 C)

Retiring age of 60 years

2. It is not the case of the appellant that the oral agreement had been misstated in Exhibit “C”. He did not raise the question of the retiring age of 60 years again after Exhibit “C”. He too did not state in Exhibit “B” that they agreed on 60 years or any age at all. The only inference is that no particular age was agreed upon by the parties. I am also of the firm view that Exhibits “A”, “B” and “C” constitute the agreement of employment between the parties to the proceedings. (p. 1427 E)

Parol evidence - Where the contract is written

3. It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a written instrument such as Exhibits “A” “B” and “C” put together as constituting the contract. Accordingly parol evidence will not be admitted to prove that some particular term which had been verbally agreed upon had been omitted (by design or otherwise)

from a written agreement constituting a valid and operative contract between the parties. (p. 1427 F)

Contracts - Unilateral fixture

4. The appellant does not contend that the alleged agreement on 60 years was separate or subsequent to the other terms agreed upon. He did not also show that in the defendant/respondent's company, the custom or usage was retirement at the age of 60 years. The view I take is that the plaintiff fixed the retiring age unilaterally. In the result what the appellant got from Exhibit "A" "B" and "C" was an indefinite term until he attained an indefinite retiring age. (p. 1428 D)

Cross-examination

5. Surely, if any specific age was agreed upon that age should not have been left out by the appellant in Exhibit "B" and his answer to cross-examination to the effect that after Exhibit "B" he had no cause to draw defendant's attention to any other misstatement confirms the fact that no age was agreed upon by the parties. Therefore a specific age of retirement was not one of the agreed terms of the contract otherwise Exhibits "B" and "C" should not have been silent on it. (p. 1429 E)

Burden of proof

6. The plaintiff failed to prove the principal issue submitted to the learned trial judge for determination namely whether the agreement guaranteed him long tenure of office up to the retirement age of 60 years. His oral evidence on it was rejected by the learned trial judge as not being credible having regard to the contents of Exhibits "B" and "C". The court below affirmed this conclusion. There was therefore no evidence to support the plaintiffs claim to an employment which is guaranteed to last till 1998 when he will attain age of sixty years. The burden of proof was on the plaintiff and this he failed to discharge and his claim based on the retirement age of 60 years was rightly dismissed. (1429 F)

NOTABLE POINTS OF INTEREST

ONU JSC

1. Wrongful termination - Plaintiff to prove terms of the agreement

In an action for wrongful termination of appointment such as the one in hand, the onus is on the plaintiff to prove the terms of the agreement allegedly breached. In the instant case, the appellant having failed to discharge that onus, the termination of his appointment based on the letter of

termination (Exhibit 3.) Which stated its terms to be forthwith coupled with the Board of the Respondent granting him 3 months salary in lieu of notice is unquestionably valid. (p. 1433 F)

IGUH JSC

2. Consensus ad idem - Fundamental to law of contract

One of the fundamental principles of the law of contract is that the parties must reach a consensus ad idem in respect of the terms thereof otherwise the contract cannot be regarded as legally binding and enforceable. The burden of proof of the existence of a term of an agreement squarely rests on the party asserting such a term. It is clearly a matter of evidence which has to be established by the party who asserts it. Failure to establish a vital term of a contract, where its existence is a *conditio sine qua non* towards the successful prosecution of a suit upon which the contract is founded, renders such suit subject to dismissal. (p. 1435 E)

3. Court not to make new contract for the parties

A study of the said Exhibits A, B and C discloses that none of them talked of 60 years as the retiring age. Although retiring age was mentioned in them, no specific number of years, whether 50, 55, 60, 65 years or whatever was therein agreed upon. They were all silent on this vital issue. To that extent, that term of the contract is, without doubt, vague and uncertain. I agree with the court below that it is not open to the appellant to fix the retiring age mentioned in the said Exhibits unilaterally. In my view a specific age of retirement was not one of the agreed terms of the contract. To hold that the retirement age in the present case must be 60 years, no more no less, will be entirely speculative and tantamounts to the court making a new contract for the parties. This, the court is not permitted to do. (p. 1436 B)

REPRESENTATION

Chief G. O. K. Ajayi. S.A.N., with Mrs. Ayo Obe and F. O. Desalu, (Miss) for the appellant
O. N. Sagay Esq. for the respondent

CASES REFERRED TO

George Onobruchere & anor. v. Iwromoebo Esegine & anor. (1986) 1 NWLR (Part 19) 799
Jacobs v. Batavia and General Plantations Trust (1924) 1 Ch. 287 at 295
Enang v. Adu (1981) 11-12 S.C. 25 at 42
Okagbue v. Romaine (1982) 5 S.C. 133 at 170-171

Ejike v. Nwankwoala (1984)12 S.C. 301 at 325

Evans v. Batian (1937)A.C. 473

Ibodo v. Enarofia (1980) 5 - 7 S.C. 42

Chinwendu v. Mbamali (1980) 3 - 4 S.C. 31

Amodu v. Amode (1990)5 NWLR (Part 150) 356

B

STATUTE REFERRED TO

Evidence Acts. 132 (1)(b)

LEAD JUDGMENT BY OGWUEGBU JSC

C The plaintiff who is the appellant in this court brought an action in the High Court of Lagos State against the respondent in this court claiming the sum of N1,353,878.00 being damages for breach of contract to provide employment for him up to retirement age of sixty years. The basis of the claim is the plaintiff's assumption that his contract of employment guaranteed him security of tenure up to retiring age of sixty years.
D The amount claimed covered salary, allowances and other benefits for the next ten years from the date of his termination until he attained the age of sixty years.

E The learned trial Judge Olusola Thomas, J. dismissed the plaintiff's claim for damages for breach of contract to be provided employment up to the age of sixty years. His appeal to the Court of Appeal, Lagos Division also failed and he has further appealed to this court.

F Before I go into the issues for determination in the appeal, it is better I state the facts of the case. According to the plaintiff, the Chairman/Chief Executive of the defendant's company (Mr. Gaon) agreed with him orally on the conditions of his employment as Chief Accountant of the defendant/company. He later received a letter from the Managing Director of the defendant embodying the oral agreement - (Exhibit "A"). The plaintiff wrote a qualified letter of acceptance to the Managing Director of the defendant in reply to Exhibit "A". The said reply was admitted in evidence as Exhibit
G "B". It was endorsed to Mr. Gaon (Chairman of the defendant/company). The plaintiff in Exhibit "B" raised three points which were part of the oral agreement but were not contained in Exhibit "A". He said that Mr. Gaon confirmed the three points and promised to reduce them to writing but the Managing Director at the time never did so before he left the country on 13:11:77.

H He further testified that on 13:2:78 Mr. Gaon wrote an internal memo to Mr. Ventura the new Managing Director confirming the three points raised in Exhibit "B" and asked Mr. Ventura to regularise the situation. The memo, which was endorsed to him was admitted in evidence as Exhibit "C". The

plaintiff was later seconded to Niger Cafe and the letter to that effect addressed to the Board of Directors of Niger Cafe was also endorsed to him - Exhibit "D". By Exhibit "E", the plaintiff was recalled to the defendant's company.

On his return to the defendant/company, his post had been offered to someone else. He complained to the Chairman who told him to wait until December 1980, when he hoped a new Shipping Company would be commenced. The plaintiff said he was given a small office, not given any work but his salaries and allowances were paid regularly. This situation according to the plaintiff continued until he left the defendant's company. There were exchanges of correspondence between the plaintiff and Mr. Gaon between 1:4:81 and 9:9:81 when he received a letter of termination Exhibit "J".

The plaintiff's reply to Exhibit "J" is Exhibit "K" and this was followed by Exhibit "K" to "Q". The plaintiff testified that he was born on 6:11:38 and would be sixty years on 6:11:98. He tendered a Statutory Declaration of Age - Exhibit "L".

Mr. Gaon testified as D.W.1. He stated that he proposed to the plaintiff the conditions of employment as financial manager and that the conditions were spelt out in a letter written to the plaintiff offering him the appointment Exhibit "A" and that the plaintiff took up the post. The witness could not recall having seen Exhibit "B" as it was addressed to the Managing Director of the defendant's company and that the latter must have received it. He testified that the plaintiff wrote Exhibit "C" and asked him to sign it and give it to the Managing Director for implementation. This letter was given to him just before his departure from Nigeria. He read it hurriedly, signed it and told the plaintiff to give it to the Managing Director. According to the witness:

"No action was taken by the Managing Director because since then and immediately thereafter, the Managing Director reported to me that Mr. Olanlege is an agitator; that he does not get along with the staff whether Nigerian or expatriate and that it was a question of removing him completely from the company."

He further testified that even though he read and signed Exhibit "C" in a hurry, he did not see anything in it that varied from the normal terms of engagement of staff and it did not bring innovation to the normal conditions. He dismissed the claim of the plaintiff that their discussion on his conditions of service was for employment up to the age of sixty years and for payment of salary up to that age as ridiculous. He admitted that Exhibit "C" was an internal memo and was not implemented by the Managing

Director.

The D.W.1 ended his examination-in-chief by saying:

B *"I have already said that we dispensed with the plaintiff's employment because he was agitating in the company even though I sent him to Nigercafe with a higher post to manage the company, the Nigercafe Board of Directors felt they could not keep him because he was not productive."*

In answer to cross-examination, the witness concluded:

C *"During the tenure of the plaintiff's employment, there was no written conditions of service for our employees. It was the practice. The plaintiff was appointed Chief Accountant in the first place."*

Even though the issues for determination in this appeal are within a very narrow compass, the statement of the facts is important for a better appreciation of those issues and their resolution.

D As I stated earlier in the judgment, the plaintiff lost both in the trial court and the court below and has further appealed to this court being dissatisfied with the decision of the Court of Appeal, Lagos Division.

The issues arising for determination in the appeal which were set out in the plaintiff/appellant's brief of argument are as follows:

"(i) Whether or not there was a contradiction between Exhibits "B" and "C".

E *(ii) Whether or not the relationship between the plaintiff and the defendant was governed by a written agreement, the lacuna in which could be not be filed (sic) by oral evidence except as permissible under section 131 of the Evidence Act.*

F *(iii) Whether or not the plaintiff was bound to cross-examine D.W.1 on his claim for payment till he attains the age of 60 years before the Court could accept his evidence.*

(iv) Whether it had been the defendant's case that there had been no agreement as to what was meant by "retirement age."

G *(v) Whether or not the plaintiff proved the issues submitted to the learned trial Judge for determination".*

The following questions were set out in the defendant/respondent's brief:

"(1) Whether the contract of employment between the appellant and the respondent was oral or in writing and if in writing whether section 131 of the Evidence Act applies to exclude appellant's oral evidence.

H *(2) Whether the appellant proved by credible and or admissible evidence, that he was entitled to be employed until he attains the age of 60 years".*

I am of the view that the questions submitted by the respondent sum

maries the five issues identified by the appellant. However, which ever set of issues are determined herein will take into account all the other issues. The principal documentary exhibits which are of vital importance and the keys in the resolution of the above issues are Exhibits "A", "B" and "C". Their relevant portions are reproduced hereunder:

Exhibit "A"

"AFRO CONTINENTAL NIGERIA LTD

xxxxxxxxxxxxxxxxxxxxxxxxxxxx

Date: September 9th, 1977

*Mr. Olanlege Adesoye,
17, Olusesan Adetula Street,
Surulere, Lagos.*

Dear Sir,

Following your interview with Mr. Gaon yesterday, we have been asked to offer you the appointment of Chief Accountant in Afro Continental Nigeria Limited. We would prefer to keep the title of the post as agreed. The appointment will be on a probationary basis for six calendar months. If reports on your work are satisfactory, you will be confirmed in the appointment after completion of the probationary period.

The basic salary for this appointment will be at the rate of N18,000.00 (eighteen thousand naira) per annum.

During the probationary period, one month's notice may be given by either party of this (sic) wish to terminate this agreement without ascribing any reason, and once the appointment has been confirmed, two month's notice will be required by either party. The company may elect to pay the wages in lieu of notice

You will be required to obey the lawful orders of Officers of the Company and any failure to do so unreasonably may lead to notice of dismissal by the Company. You will abide by the Company's regulations for the time being in force. The Company reserves the right to invoke instant dismissal, without notice, in any case of proven gross misconduct.

.....

Yours faithfully,

For: Afro Continental Nigeria Limited

Sgd. P.L. Gregor Macgregor

Managing Director

.....

Exhibit "B" reads:

*"Adesoye Olanlege Esq.,
17, Olusesan Adetula-Street
Surulere.*

26th September, 1977

Attention: *PL. Gregor Macgregor*
The Managing Director,
Afro Continental Nigeria Ltd.,
Unity House,
37, Marina Lagos. By Hand

B *Dear Sir,*
Qualified Acceptance of Offer of Appointment as Chief Account-
tant

Thank you for your letter reference PLGM/te dated 9th September, 1977 in which you offered me position of Chief Accountant in your Company. I accept the offer subject to the following additional terms which
 C *you appear to have omitted from my draft agreement with Mr. Gaon.*

1. My agreement with Mr. Gaon includes a guaranteed minimum increase in my annual basic salary of ten percent (10%)

2. The agreement also guaranteed long tenure of office up to retirement age and good prospect subject only to my being found guilty of
 D *stealing the Company's money.*

3. The agreed period of notice of termination of employment is three months and not two months as contained in your letter; and in the case of the Company this is subject to qualification (2) above. Please refer to the sheet of paper handed to you by Mr. Gaon in respect of these points
 E

Consequently, I accept your offer of appointment as Chief Accountant subject to the addition of the three fundamental terms mentioned above being read along with your offer.

F *Yours faithfully,*
Sgd. Adesoye Olanlege
cc: Mr. N.D. Gaon -
Chairman. Afro Continental Nigeria Ltd."
Exhibit "C" reads:

G *"Afro Continental Nigeria Limited,*
Internal Memorandum

From Chairman

To Mr. R. Ventura

Subject: Condition of Service

Date 13th Dec. 1978.

The letter of appointment given to Mr. Olanlege when he joined this Company last year November, did not incorporate fully my agreement
 H *with him.*

The omissions are:

(a) That he would in addition to his duties as Chief Accountant for both Afro Continental (Nig) Limited and Afrofin Engineering Construction Company (Nig) Limited also supervise the administrative function (sic) of

both companies;

(b) That he would earn a minimum of 10% annual increment on his annual basic salary;

(c) That the period of notice is three months;

(d) That he would enjoy a secured tenure of office up to retirement age if he did not steal or commit any fraud.

The above conditions also apply in respect of Nigercafe (W.A.) Ltd.

Please bear this in mind and regularise his position.

Sgd. N.D. Gaon

Chairman

cc: Mr. A. Olanlege

(the underlinings are for emphasis).

About four years later, the employment of the appellant was terminated by the defendant/company. Relying on his secured tenure of office up to retirement age, the appellant sued for breach of contract, claiming that the retiring age agreed upon was 60 years. The claim for N1,353.874 covered salary, allowances and other benefits due to him for the next ten years after termination when he would be 60 years.

In his amended statement of claim, the plaintiff averred in paragraph 3(iii) as follows:

“3(iii) That the plaintiff was guaranteed long tenure of office in the defendant Company up to retirement age of sixty years”.

The above averment was denied by the defendant company in paragraph 3 of its statement of defence thus:

“3 The defendant denies that the plaintiff was guaranteed a long tenure of office up to retirement age of 60 years and avers that the plaintiff’s appointment was not for any fixed duration and was accordingly subject to termination by three months notice from either side.”

The case was fought mainly on this issue of fixed age of sixty years. During the trial the plaintiff adduced oral evidence to this effect. That evidence appeared unchallenged in the sense that the respondent/company did not suggest to the plaintiff what the retiring age was supposed to be or what was the retiring age for the employers of the respondent/company generally. However, the case of the respondent/company was that what was agreed upon was retiring age, but not a particular age. Exhibit “A” was the offer of appointment made to the plaintiff. He made a qualified acceptance of the offer in Exhibit “B” and raised the issue of an oral agreement of security of tenure up to the retiring age” and did not himself spell out what retiring age was fixed by the parties. In Exhibit “C” Mr. Gaon (Chairman of the respondent/company) confirmed the contention of the plaintiff

of the agreement on “security of tenure up to retiring age” without stating the retiring age.

The question arises whether or not oral evidence even if unchallenged can be led to show that 60 years was the retiring age agreed upon. On this point the court below held as follows:

“In the instant case, however, the documentary evidence does not support the oral evidence; rather the oral evidence sought to supply the lacuna in the documentary evidence. Mrs. Obe for the appellant has contended that the agreement was essentially oral, as no single document contained the full details hence the appellant was entitled to supply the missing link in oral evidence. With respect, I do not agree. If the respondent had not called D.W.1, with whom the oral agreement was reached one might have been tempted to fall for the submission. D.W.1 said in evidence that the claim of the plaintiff to be paid until he was 60 years was ridiculous, and it was not put to him in cross-examination that 60 years was orally agreed upon.

In view of this evidence disagreeing that 60 years was agreed upon, oral evidence cannot be let in to fill the lacuna in the written agreement. The only situation in which this is permissible in law is under section 131 of the Evidence Act.....”

Chief Ajayi S.A.N. for the appellant submitted that the above conclusion that the relationship between the parties was governed by written agreement was arrived at because of the misconception of the purpose for which Exhibits “B” and “C” were tendered. It was his contention that the exhibits were tendered not as documents which governed the relationship between the parties, but to corroborate the case of the appellant that the basis of their relationship was the oral agreement of 8th September, 1977 between appellant and D.W.1 and not Exhibit “A”.

Mr. Sagay O.M. for the respondent in his written and oral argument, contended that the above quoted conclusion of the court below postulated that the agreement between the parties was a written agreement and that that court did not give the appellant’s failure to cross-examine D.W. 1 as its reason for applying section 131 of the Evidence Act to the appellant’s oral evidence. He submitted that the primary finding of fact upon which the decision of the court below proceeded was that the agreement between the parties is a written agreement and that this informed the courts’ application of section 131 of the Evidence Act to exclude the appellant’s oral evidence and not the failure of the appellant to cross-examine D.W.1 on his assertion that the appellant’s claim for payment until the age of 60 years was ridiculous. I fully agree with this submission.

In this case, the respondent company made an offer embodying its oral

agreement with the appellant in Exhibit "A". While purporting to accept the offer as a whole, the appellant wrote Exhibit "B" that he accepted the offer subject to three additional terms which appear omitted from the draft agreement with Mr. Gaon. The second and that touching on the issue on hand is that the agreement also guaranteed long tenure in office up to retirement age". Exhibit "C" written by the Chairman of the respondent company agreed that Exhibit "A" did not incorporate fully his agreement with the respondent. In paragraph (d) of Exhibit "C", the Chairman agreed with the appellant in Exhibit "B" that the appellant was "to enjoy a secured tenure of office up to retirement age" and no more. There was no further objection from the appellant after Exhibit "C". In my view, at the stage of Exhibit "C", the contract between the parties had been concluded. In this case, the extent of the agreement is in dispute and as a general rule, no formality is needed. A contract may be made by word of mouth, or partly by word of mouth and partly in writing.

The court below held that the agreement between the parties is in writing and this agreement is contained in Exhibits "A" "B" and "C" and they constitute the appellant's contract of employment. I refuse to accept the contention of Chief Ajayi, S.A.N that Exhibits "B" and "C" were tendered not as documents which governed the relationship between the parties, but to corroborate the case of the appellant that the basis of their relationship was the oral agreement of 8th September, 1977.

It is not the case of the appellant that the oral agreement had been misstated in Exhibit "C". He did not raise the question of the retiring age of 60 years again after Exhibit "C". He too did not state in Exhibit "B" that they agreed on 60 years or any age at all. The only inference is that no particular age was agreed upon by the parties. I am also of the firm view that Exhibits "A", "B" and "C" constitute the agreement of employment between the parties to the proceedings.

It is firmly established as a rule of law that parole evidence cannot be admitted to add, to vary or contradict a written instrument such as Exhibits "A", "B" and "C" but together as constituting the contract. Accordingly, parole evidence will not be admitted to prove that some particular term which had been verbally agreed upon had been omitted (by design or otherwise) from a written agreement constituting a valid and operative contract between the parties. See *Jacobs v. Batayia and General Plantations Trust* (1924) 1 Ch. 287 at 295.

The only situation when oral evidence is permissible in law is under section 131 now section 132(1)(b) of the Evidence Act Cap 112 Laws of the Federation of Nigeria 1990 which provides:

- "132(1) When any judgment of any court or any other judicial or official proceedings or any contract or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings or of the terms of such contract, grant or disposition of property except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained; nor may the contents of any such document be contradicted altered added to or varied by oral evidence, provided that any of the following matters may be proved*
- (b) The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them."*

Paragraphs (c) (d) and (e) of sub-section 132(1) do not also apply. The appellant does not contend that the alleged agreement on 60 years was separate or subsequent to the other terms agreed upon. He did not also show that in the defendant/respondent's company, the custom or usage was retirement at the age of 60 years. The view I take is that the plaintiff fixed the retiring age unilaterally.

In the result what the appellant got from Exhibits "A" "B" and "C" was an indefinite term until he attained an indefinite retiring age. The learned trial Judge was therefore right when he held:

True, the plaintiff gave oral evidence as to what he alleged was agreed upon between himself and Mr. Gaon, but the further evidence which he himself adduced namely the contents of Exhibits "B" and "C" contradicted his oral evidence. It would therefore have been immaterial that Mr. Gaon did not give his own version in rebuttal. The plaintiff's oral evidence, though on oath is not uncontradicted as to leave the court with no choice but to accept it. Following my finding above, I reject the oral evidence in preference to the credible evidence that the plaintiff was guaranteed a long tenure of office till retirement age and this without an agreement as to what that retirement age should be."

The appellant cannot be heard to argue that the agreement was oral which was corroborated by Exhibits "B" and "C". There was a contract which was reduced to writing and embodied in Exhibits "A" "B" and "C". The three exhibits taken together constitute the appellant's contract of employment. As said earlier, in the circumstances of this case, oral evi-

dence cannot be allowed to vary and/or subtract from the three exhibits

under any of the exceptions to section 132 of the Evidence Act. Exhibits “A” “B” and “C” speak for themselves and do not support the appellant’s contention that he was guaranteed employment till he attains the age of sixty years. Both the trial court and the court below were right in holding that the contract was written and admits none of the exceptions to section 132 of the Evidence Act. B

Dealing further with this narrow issue of this guaranteed long tenure of office up to retirement age the plaintiff in Exhibit “B” wrote as follows:

“I accept the offer subject to the following additional terms which you appear to have omitted from my draft agreement with Mr. Gaon. C

“1.

2. The agreement also guaranteed long tenure of office up to retirement age and good prospects subject only to my being found guilty of stealing the Company’s money. D

3.

Consequently, I accept your offer of appointment subject to the addition of the three fundamental terms mentioned above being read along with your offer.”

The plaintiff under cross examination repeated the above three fundamental additions stated in Exhibit “B” and went further: E

“After I wrote Exhibit “B”, I had no cause to draw the defendant’s attention to any other mis-statement or misrepresentation on Exhibit “A”. ”

Surely, if any specific age was agreed upon that age should not have been left out by the appellant in Exhibit “B” and his answer in cross-examination to the effect that after Exhibit “B” he had no cause to draw defendant’s attention to any other misstatement confirms that fact that no age was agreed upon by the parties. Therefore a specific age of retirement was not one of the agreed terms of the contract otherwise Exhibits “B” and “C” should not have been silent on it. F

The plaintiff failed to prove the principal issue submitted to the learned trial Judge for determination namely whether the agreement guaranteed him long tenure of office up to the retirement age of 60 years. His oral evidence on it was rejected by the learned trial Judge as not being credible having regard to the contents of Exhibits “B” and “C”. The court below affirmed this conclusion. There was therefore no evidence to support the plaintiff’s claim to an employment which is guaranteed to last till 1998 when he will attain the age of sixty years. The burden of proof was on the plaintiff and this he failed to discharge and his claim based on the retirement age of 60 years was rightly dismissed. G H

The appellant has appealed against the concurrent judgment of

the High Court and the Court of Appeal. This court will not lightly disturb or upset such concurrent findings unless there is compelling reason and those grounds are based on long established principles. See the cases of Kofi v. Kofi 1 WACA 284. Enang & Ors v. Adu & ors (1981) 11-12 SC 25 at 42. Okagbue v. Romaine (1982) 5 SC. 133 at 170-171, Ejike v. Nwankwoala & ors (1984) 12 SC. 301 at 325 and Evans v. Bartlam (1937) AC. 473.

In the result, this appeal cannot succeed and it accordingly fails. The appeal is dismissed. The judgment of the Court of Appeal dated 7th December 1988 is hereby affirmed. The respondent company is entitled to costs against the appellant which I assess at N1,000.00

BELGORE JSC

I am in full agreement with the judgment of my learned brother Ogwuegbu, J.S.C. that this appeal has no merit, especially when it is virtually against concurrent decisions of the Courts below on facts. I, for the reasons in the judgment of Ogwuegbu, J.S.C., which I adopt as mine, also dismiss this appeal with N1,000.00 costs to the respondent against the appellant.

WALI JSC

I have had the privilege of reading in advance the lead judgment of my learned brother Ogwuegbu, J.S.C. and I endorse the reasons he gave for dismissing the appeal.

For these same reasons, I also hereby dismiss the appeal with N1,000.00 costs to the respondent.

The judgment of the Court of Appeal is hereby affirmed.

ONU JSC

I have had the privilege of a preview of the judgment of my learned brother Ogwuegbu, J.S.C and with it I entirely agree.

I wish to make the following points in expatiation of the judgment of my learned brother, facts of which having been lucidly set out therein, I do not feel the necessity to repeat them here. Suffice it to say, that the case being one of unlawful dismissal, a resolution of all five issues, which together revolve around the retirement age being alleged to be 60 years will, in my view, amply dispose of the appeal herein. The five issues that call for our determination as set out in the plaintiff/appellant's Brief are as follows:-

(i) Whether or not there was a contradiction between the oral evidence of the plaintiff and Exhibits “B” and “C”.

(ii) Whether or not the relationship between the plaintiff and the defendant was governed by a written agreement, the lacuna in which could not be filled by oral evidence except as permissible under section 131 of the Evidence Act.

(iii) Whether or not the plaintiff was bound to cross-examine D.W.1 on his claim for payment till he attains the age of 60 years before the court could accept his evidence.

(iv) Whether it had been the defendant’s case that there had been no agreement as to what was meant by “retirement age.”

(v) Whether or not the plaintiff proved the issues submitted to the learned trial Judge for determination.

In considering all five issues together, I wish to say firstly, that in response to paragraph 26 of the appellant’s Amended Statement of Claim wherein he averred that:

“26. Whereupon the plaintiff claims N1,353,878.00 being damages for breach of contract to provide employment up to retirement age”

(underlining is mine)

The respondent in its Amended Statement of defence denied same.

Secondly, to what appellant pleaded in paragraphs 4 and 5 of his Statement of Claim as showing the terms of an oral offer of appointment of him as Chief Accountant by the Chairman of the respondent, Mr. Nessim D. Gaon, which when subsequently reduced into writing on 9th September, 1977 (Exhibit A), contained in paragraph 6 “did not reflect correctly all those terms with the defendant’s Chairman.” In Exhibit A therefore the appellant gave a conditional acceptance of the offer of employment.

Thirdly, the appellant “Thereupon wrote a letter dated the 26th of September, 1977 to the defendant company headed “Qualified letter of Acceptance” setting out those terms which had been omitted or mis-stated in the defendant company’s letter and stating that he would only accept the appointment if the defendant company would abide by the agreed terms thus stated” vide Exhibit ‘B’. That in Exhibit ‘B’, all that appellant said in his “Qualified Acceptance of offer of appointment” respecting retirement age etc. can be found in qualifications 2 and 3 and no more as follows:

“2. The agreement also guaranteed long tenure of office up

to retirement age and good prospect subject only to my being found guilty of stealing the Company's money.

3. *The agreed period of notice of termination of employment is three months and not two months as contained in your letter; and in the case of the company, this is subject to qualification (2) above.*"

B Exhibit B, it must be noted, gave the full acceptance of the offer of employment.

Fourthly, the matter does not end there because by an internal memorandum dated 13th December, 1978 issuing from the respondent's Chairman (Mr. Gaon) to Mr. Ventura (Managing Director thereof) which, for its shortness and clarity vide Exhibit "C" is set out hereunder thus:

C *"The letter of appointment given to Mr. Olanlege when he joined this company last year November, did not incorporate fully my agreement with him.*

The omissions are:

D (a) *That he would in addition to his duties as Chief Accountant for both Afro Continental (Nig.) Limited and Aprofim Engineering Construction Company (Nig.) Limited also supervise the administrative function of both companies;*

(b) *That he would earn a minimum of 10% annual increase on his annual basic salary;*

E (c) *That the period of notice is three months;*

(d) *That he would enjoy a secured tenure of office up to retirement age if he did not steal or commit any fraud.*" (underlining mine).

F In essence therefore, Exhibit "C" finally spelt out the additional terms omitted from Exhibit "A".

Fifthly, the underlined portions of Exhibits A, B and C, by and large therefore, provided the sum total of anything to do or say about the retirement age of the appellant. Indeed, the appellant laid the gravamen of his complaint about what retirement age was all about as set up in Exhibit "A", "B" and even "C" or its ghost to rest when under cross-examination he consciously admitted as follows:-

G *".....I accepted the offer in Exhibit A subject to the fundamental points I listed in Exhibit "B" as I stated in Exhibit "B" read to me. After I wrote Exhibit "B" I had no cause to draw the defendant's attention to any other mis-statement or misrepresentation on Exhibit "A,"* (underlining is mine for emphasis).

H In the light of the above, the burden of proof that lay on appellant to prove his case especially as to his assertion that his employment persisted until he reached retirement age of 60 years had not been discharged. Similarly, quite apart from his failure to establish this vital piece of evidence

about his retirement age, his oral evidence in court contradicted Exhibits 'B' and 'C'. Even though DW.1 (Mr. Gaon) had testified that appellant was employed until retirement age, he never admitted that age to be 60 years. When cross-examined about this aspect of the appellant's conditions of service the witness said the following:

"The claim of Mr. Olanlege that their discussion was against the conditions of service and he ought to be paid till he is 60 years of age is ridiculous. The company is a Nigerian company enacted under the law (sic) of Nigeria with 60% Nigerian interest and there are well defined laws in Nigeria for compensation of staff if dispensed with. In my opinion, that is what he would be entitled to"

Besides, when the appellant became aware of the contents of Exhibit "C", he raised no objection to them as he did with those of Exhibit "A", to wit: that it did not contain 60 years as retirement age. As Exhibits "A", "B" and "C", therefore, constituted the contract between the appellant and the respondent he was bound by their contents. As the court below, as did the trial court, came to the conclusion that Exhibit "A", "B" and "C" could not be derogated from, the decisions of the two courts below constitute concurrent findings of fact. In the absence of any errors both of law and procedure, the attitude of this Court to concurrent findings of the two lower courts is that it will not interfere with those findings of facts except the appellant can show special circumstances either that there was miscarriage of justice or a serious violation of some principles of law or procedure that such findings are erroneous i.e. error in substantive or procedural law.

See *Ukpe Ibodo v. Eguase Enarofia* (1980) 5-7 SC 42, *Mogo Chinwendu v. Nwanegbo Mbamali* (1980) 3-4 SC 31; *Enang v. Adu* (1981) 11-12 SC 25 at 42; *Ojomu v. Ajao* (1983) 2 SCNLR 156 and *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) 718 to mention but a few.

In an action for wrongful termination of appointment such as the one in hand, the onus, is on the plaintiff to prove the terms of the agreement allegedly breached. See *Amodu v. Amode* (1990) 5 NWLR (Pt. 150) 356. In the instant case, the appellant having failed to discharge that onus, the termination of his appointment based on the letter of termination (Exhibit 3.) which stated its terms to be forthwith coupled with the Board of the respondent granting him 3 months salary in lieu of notice is unquestionably valid.

For these unimpeachable reasons and the more elaborate ones contained in the lead judgment of my learned brother Ogwuegbu, J.S.C. I dismiss the appeal. I subscribe to the same consequential orders inclusive of those as to costs as contained therein.

IGUH JSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Ogwuegbu, J.S.C. and I entirely agree that there is no substance in this appeal.

It seems to me clear that the main issue for determination in this appeal is whether the parties had agreed on a contract of employment, whether oral or in writing, which was guaranteed to last to a retirement age of 60 years. The appellant's case is that he was guaranteed service until the retirement age of 60 years by the respondent and that he could not therefore be terminated by the respondent before that agreed age of 60 years.

The respondent, for its own part, denied that the appellant was guaranteed a tenure of employment up to a retirement age of 60 years. It described such a condition of service which would make it impossible for the company to terminate the appellant's appointment even for a good case before he attains the age of 60 years as ridiculous. It averred that the appellant's appointment was not for any fixed duration and was accordingly subject to termination by three months notice from either side as provided for in the contract of employment, Exhibit A.

By paragraphs 4 and 5 of his amended Statement of Claim, the appellant pleaded an oral contract of employment between himself and the respondent's chairman. Of relevance to this appeal is paragraph 5(iii) of the said Statement of Claim which avers that one of the agreed conditions of the said oral contract runs thus -

"That the plaintiff was guaranteed long tenure of office in the defendant Company up to retirement age of 60 years."

Paragraph 6 averred that the respondent's chairman promised to reduce the terms orally agreed upon by the parties in writing. This writing is Exhibit A.

The appellant, by Exhibit B, complained that some terms had been omitted or mis-stated by the respondent in Exhibit A. He then proceeded to set out the terms of the oral contract it omitted or mis-stated in Exhibit A. These, the appellant spelt out in his letter to the respondent, Exhibit B, as follows -

"1. My agreement with Mr. Gaon include a guaranteed minimum increase in my annual basic salary of ten per cent (10%)."

2. The agreement also guaranteed long tenure of office up to retirement age and good prospect subject only to my being found guilty of stealing the Company's money.

3. The agreed period of notice of termination of employment is

three months and not two months as contained in your letter; and in the case of the Company this is subject to qualification (2) above."

I think it should be noted that at the insistence of the appellant, the chairman of the respondent company, by Exhibit, ratified the appellant's contention as embodied in Exhibit B. By his letter, Exhibit C, which he wrote to the respondent from Geneva he stated as follows -

"The letter of appointment given to Mr. Olanlege when he joined this company last year November, did not incorporate fully my agreement with him. The omissions are -

(a) That he would in addition to his duties as Chief Accountant for both Afro Continental (Nig.) Limited and Aprofim Engineering Construction Company (Nig.) Limited also supervise the administrative function of both companies;

(b) That he would earn a minimum of 10% annual increase on his annual basic salary;

(c) That the period of notice is three months;

(d) That he would enjoy a secured tenure of office up to retirement age if he did not steal or commit any fraud.

The above conditions also apply in respect of Nigercafe (W.A.) Ltd.

Please bear this in mind and regularise his position.

(Sgd) N.D. Gaon

Chairman."

It cannot be disputed that issue was joined by the parties on the question of whether the parties were ad idem on the retiring age of 60 years. One of the fundamental principles of the law of contract is that the parties must reach a consensus ad idem in respect of the terms thereof otherwise the contract cannot be regarded as legally binding and enforceable. The burden of proof of the existence of a term of an agreement squarely rests on the party asserting such a term. It is clearly a matter of evidence which has to be established by the party who asserts it. Failure to establish a vital term of a contract, where its existence is a *conditio sine qua non* towards the successful prosecution of a suit upon which the contract is founded, renders such suit subject to dismissal.

In the present case, the parties from the evidence before the court are ad idem that all the terms of the appellant's employment had been reduced into writing and embodied in Exhibits A, B and C. Indeed the appellant concluded Exhibit B as follows -

"Consequently, I accept your offer of appointment as the Chief Accountant subject to the addition of the three fundamental terms mentioned above being read along with your offer, (i.e. Exhibit A)." (Words in

bracket supplied for clarity)

He also stated under cross-examination as follows –

"I wrote Exhibit B. I wrote Exhibit B to show that these were the terms and if they were not acceptable, I would not resign that appointment."

In my view, it is beyond dispute both from the pleadings and the evidence before the court that Exhibits A, B and C constitute the contract of employment between the parties.

A study of the said Exhibits A, B and C discloses that none of them talked of 60 years as the retiring age. Although retiring age was mentioned in them, no specific number of years, whether 50, 55, 60, 65 years or whatever was therein agreed upon. They were all silent on this vital issue. To that extent, that term of the contract is, without doubt, vague and uncertain. I agree with the court below that it is not open to the appellant to fix the retiring age mentioned in the said Exhibits unilaterally. In my view a specific age of retirement was not one of the agreed terms of the contract. To hold that the retirement age in the present case must be 60 years, no more no less, will be entirely speculative and tantamount to the court making a new contract for the parties. This, the court is not permitted to do. See *Fakorede and others v. Attorney-General of Western State* (1972) 1 All NLR (Pt.1) 178 at 189, *George Ikenye and Another v. Akpala Ofune and others* (1985) 2 NWLR (Pt.5) 1 etc.

In conclusion, it is my view that the appellant failed to establish his claim to entitlement to his salaries and other emoluments from 1982 until he attains the age of 60 years. The exercise by the respondent of its power to terminate the appellant's contract of employment by payment of two months salary in lieu of notice was proper and in accordance with the terms of his contract.

This appeal is without merit and it is for the above and the more detailed reasons contained in the leading judgment that I, too, dismiss this appeal. I abide by the order for costs therein contained.

H