

SUPREME COURT OF NIGERIA
 5TH DECEMBER, 1997. SC. 128/1991
CORAM:- S. M. A. BELGORE, A. B. WALL, M. E. OGUNDARE,
E. O. OGWUEGBU, A. I. IGUH, JJSC

G. S. PASCUTTO PLAINTIFF/APPELLANT
 (TRADING AS COM-EST)
 AND
 ADECENTRO NIGERIA LIMITED DEFENDANT/RESPONDENT

APPEALS - *Concurrent findings - That are perverse and erroneous - Will be set aside.*

CLAIMS - *Interest on contract sum - That was not established - And was not included in the parties' contract - Will not be granted.*

CONTRACTS - *Execution - Where the content and form of execution is not qualified - Appellant executed the contract as principal - And not as agent of any 3rd party.*

CONTRACTS - *Agency - Creation of agency - Cannot be by a private letter to respondent referring to the appellant as his agent.*

CONTRACTS - *Accord and satisfaction - Where established by unchallenged evidence - Appellant's claim will succeed.*

EVIDENCE - *Document - Where there is no averment connecting Exhibit A with H - Exhibit H has no significance.*

EVIDENCE - *Cross-examination - Where appellant was not cross-examined on two documents he was not a party to - Such document cannot ground the finding of agency.*

EVIDENCE - *Unchallenged evidence - Where appellants' evidence was not challenged - Judgment should have been entered for him.*

PLEADINGS - *Evidence which is at variance with pleadings - Goes to no issue - As parties are bound by their pleadings.*

PLEADINGS - *Defence of agency - Sought to be relied upon by the respondent - Was not pleaded and cannot be relied upon.*

FACTS

Before the High Court Ibadan, the plaintiff/appellant filed an action against the defendant/respondent claiming N612,563.70k equivalent of US \$ 294,762.00 and interest thereon for 5 and half years, being the balance of the total sum of money due pursuant to a written good accord and satisfaction executed by the parties. Both parties testified and tendered some Exhibits. The accord and satisfaction agreement is evidenced by Exhibit A which was executed by the parties as principals. The respondent denied the appellant's claim and denied the existence of Exhibit A. It contended that even if Exhibit A existed, it was in consequence of the letter Exhibit H which was cancelled by another letter Exhibit O. In other words, respondent relied on Exhibits H and O in seeking to establish that appellant executed Exhibit A as agent and that his agency was subsequently terminated. This defence of agency was not raised in the respondent's pleadings. Appellant was never cross-examined as to the contents of Exhibits H and O which he was not a party to and which seemed to be in respect of another transaction.

The trial court dismissed the Appellant's claim in its entirety on ground of the agency issue. Appellant's appeal to the Court of Appeal was dismissed whilst the claim was struck out by a majority judgment of two against one. He has further appealed to the Supreme Court raising 2 issues.

ISSUES FOR DETERMINATION

- "1. Whether the lower courts affirmation of the trial court's conclusion or finding that the plaintiff entered into Exhibit A as an agent was justified having regard to the pleading and evidence of the parties before the court.*
- 2. Whether the lower court was right in affirming the facts of the case as found by the trial court and concurring in its judgment, having regard to the trial court's approach to, and evaluation of the evidence and pleading of the parties before it."*

HELD (Unanimously allowing the appeal per lead judgment of **IGUH JSC**)
Evidence which is at variance with pleadings

1. In this regard, it is an elementary and fundamental principle of law that, parties are bound by their pleadings and that evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the court. See Emegokwe v. Okadigbo (1973) 4 S.C. 113, Ekpenyong and others v. Chief Ayi (1973) 3 E.C.S.L.R. 411. So, too evidence in respect of material facts which are not pleaded goes to no issue at the trial and should be disregarded by the court. Even when such evidence has been wrongly admitted, the trial court should disregard it as irrelevant to the issues properly

raised by the pleadings as it is not open to a party to depart from his pleadings and put up an entirely new case at the hearing. (p. 1943 G)

Pleadings - Defence of agency

2. A close examination of the respondent's amended Statement of Defence makes it crystal clear that no where therein was agency or facts in establishment of agency pleaded as a defence to the appellant's claims. There was no suggestion by the respondent in its pleadings, no matter how remotely, of the defence of agency, that is to say, that the appellant executed Exhibit A as an agent of a third party and could not therefore maintain his action. The respondent in the present case, if it intended to rely on agency as a defence, ought to have specifically so averred or, alternatively, plead material facts which clearly set out such a defence. This it failed to do. In my view, paragraph 7 of the respondent's amended Statement of Defence relied upon by the respondent neither pleaded agency specifically nor did it raise any issue of agency as a defence to the appellant's suit. That the appellant acted at all material times as agent of a third party was at no time suggested to him all through the prosecution of his case. Agency was thus not put in issue by the parties at the trial of the suit. It emerged for the first time in the course of the final address of the respondent's learned counsel before the trial court. It is clear that the judgment of the learned trial Judge which was affirmed by the court below was based entirely on agency, a material fact which was neither pleaded nor testified upon by either of the parties. Such a judgment, with respect, cannot in law be allowed to stand. This is simply because parties, as I have already stated, are bound by their pleadings and judgment must also be confined to the issues raised by the parties. It is incompetent for a court to make a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties before him. (pp. 1944 G, 1945 E & 1949 D)

Contracts - Execution

3. It is clear that the content and form of execution of Exhibit A by the appellant were without qualification. They indicated in very clear terms that the document was entered into and was executed by the appellant on his personal behalf and not as an agent of any third party. In my view, to hold that the appellant who appears on the face of Exhibit A to be personally a contracting party, is not now such, would be to contradict the written agreement without any justification whatever. In the same vein, where a person executes a contract in his own name and without qualification, he shall be taken to be contracting personally unless there are words used in the contract which suggest

otherwise. Se Alli v. Ikusebiala (1985) 1 N.W.L.R. (Part 4) 630. In the present case, the appellant executed Exhibit A in his own name and without qualification. There are no words therein used which suggest otherwise than that he signed the instrument as a principal. I entertain no doubt that the appellant executed Exhibit A personally on his own behalf and not as an agent of any third party. (p. 1946 H)

Document - No averment connecting Exhibit A with H

4. Put differently, the letter Exhibit H, only talked about payment relevant to the Bills of Lading therein listed and no more. I agree entirely with the dissenting judgment of Omololu Thomas, J.C.A. in the court below to the effect that in the absence of any averment in the respondent's amended Statement of Defence connecting the amount claimed per Exhibit A with the sum due under the Bills of Lading listed in Exhibit H, nothing significant may be read into the said Exhibit H particularly as there was no evidence that the appellant was a party or privy thereto. (p. 1948 D)

Where appellant was not cross-examined

5. I think it ought to be pointed out additionally that the appellant was never cross-examined on either Exhibit H or O and neither of the documents shows that the appellant was aware of their existence or contents. Not even the makers of the two Exhibits testified before the trial court to identify the claims they related to. In my view, both court below were, with respect, in definite error by holding that by Exhibit H, the appellant was appointed or became the agent of the third party, EXPO FILM SRL for the collection of money due to it from the respondent. (p. 1948 F)

Creation of agency

6. Agency is not created or established simply because a third party writes a private letter to one of the parties to a suit referring to the other party in that suit as his agent. Apart from the constitution of agency by operation of law under the doctrine of agency of necessity and agency by estoppel, the relationship of principal and agent may and is often constituted by agreement. There is no evidence before the court that any such agreement between the appellant and EXPO FILM SRL existed in this case. It is clear to me that both courts below are, with respect, in error to have distilled agency from Exhibit H in all circumstances of the case. The appellant not having been appointed agent by Exhibit H, Exhibit O which purports to revoke the alleged agency must be treated as irrelevant and of no consequence. It is also clear to me that the finding of the trial court to the effect that Exhibit A came into existence as

a result of Exhibit H is unsupported by any averment in the pleadings or any evidence before the court and must be regarded as perverse and erroneous in point of law. (p. 1948 G)

Concurrent findings

B 7. Without doubt, this court will not interfere with the concurrent findings of fact made by both the trial court and the Court of Appeal where there is sufficient evidence in support of such findings and where there is no substantial error apparent on the record of proceedings, such as some miscarriage of justice or a violation of some principle of law or procedure. Where, however, C such findings are shown to be perverse or patently erroneous and that a miscarriage of justice will thus result if they are allowed to remain, as in the present case, this court will not hesitate to intervene and to set such findings aside. In the present case, it is plain that the trial court did not properly evaluate the evidence before it, that it made a wrong approach to the evidence, D having regard to the issues raised in the pleadings and that there is established a miscarriage of and a violation of some principles of law and procedure as above indicated. In these circumstances, I entertain no doubt that the court below, with respect, was in gross error in affirming the said findings of the trial court as a result of which it dismissed the appeal before it. Issue 2 is E accordingly answered in the negative. (p. 1950 B)

Unchallenged evidence - Accord and satisfaction

8. It is trite law that where evidence given by a party to any proceedings was not challenged by the other party who had the opportunity to do so, it is F always open to the court seised of the matter to act on such unchallenged evidence before it. It therefore seems to me clear that in the face of the unchallenged evidence of the appellant, the learned trial Judge would appear to have had no option that to enter judgment for the appellant as claimed. The court below, with respect, was also in error by striking out the appellant's claims G when the question of agency upon which it founded its judgment was neither pleaded nor testified upon and when the appellant was not cross-examined in respect of all the material facts in support of his claim. In the final result this appeal succeeds and it is hereby allowed. The judgment and orders of both courts below are hereby set aside and, in substitution thereof, judgment is H hereby entered for the appellant in the sum of N243,806.45 being the balance of the total sum of money which the respondent agreed to pay to the appellant pursuant to the accord and satisfaction, Exhibit A. (p. 1951 D)

Interest on contract sum

9. The appellant's claim in respect of N368,757.25 interest on the outstanding balance was not established. Exhibit A upon which the appellant's action is founded made no provision for the payment of interest to the appellant by the respondent. Although the appellant in his evidence claimed interest on the said balance, the details thereof and the period covered were also not adduced in evidence before the court. Consequently this arm of the appellant's claim is hereby dismissed. (p. 1951 H) B

NOTABLE POINTS OF INTEREST

IGUHJSC

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1. Functions of pleadings

It cannot be over-emphasized that some of the more important objects or functions of pleadings are :-

1. To define with clarity and precision the issues or questions which are in dispute between the parties for the determination of the court. D
2. To require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial.
3. To project to the court the precise matters in issue between the parties which alone the court may determine, since they set the limits of the action which may not be extended without due amendment. (p. 1945 C) E

BELGOREJSC

2. Relevance of cross-examination in civil procedure

As civil matters in our High Courts are based on pleadings and evidence in support, parties must be up to the task in cross-examination on issues arising in examination-in-chief. Whereas in criminal matters, defence may refuse to cross-examine but may come with devastating evidence to discredit the prosecution's case, it is different in civil matters because of the procedural differences. (p. 1952 D) F G

Accord and satisfaction - Extra claim not to be built therein

3. There cannot be built into accord and satisfaction what it does not contain as parties are bound by their agreement only. Thus the claim for N368,757.25 has no basis and I also dismiss it. (p. 1952 G) H

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4. Failure to raise a plea of confession and avoidance

The defendant did not plead agency and paragraph 7 of the amended state-

1938 Pascutto v. Adecentro Nig. Ltd. (1997) 12 KLR Iguh JSC

ment of defence did not raise that issue. The said paragraph did not raise a plea of "confession and avoidance". The defendant did not confess or admit the facts alleged in the statement of claim and avoid their effect by introducing the facts alleged in Exhibit "H" in order to deny or destroy the effect of Exhibit "A". Having not admitted the material facts averred in the statement of claim, B he cannot seek to avoid them by introducing exhibits "H" and "O". (p. 1955 H)

REPRESENTATION

Dr. A. N. Onejeme for the appellant

B. A. Aiku, Esq., SAN, with Messrs B. Aiku and A. Olanipekun for the respondent
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CASES REFERRED TO

Sobell Industries Ltd. v. Cory Brothers and Co. Ltd (1955)

Alli v. Ikusebiala (1985) 1 N.W.L.R. (Part 4) 630

D Emegokwue v. Okadigbo (1973) 4 S.C. 113

Ekpenyong v. Chief Ayi (1973) 3 E.C.S.L.R. 411

Odumosu v. A.C.B. (1976) 11 S.C. 261 at 264

Njoku v. Eme (1973) 5 S.C. 293

Metalimpex v. A.G. Leventis & Co. Ltd (1976) 2 SC 91

E Ochonma v. Unosi (1965) N.M.L.R. 321

Adeniji v. Adeniji (1972) 1 ALL N.L.R. (Part 1) 275

Chikwendu v. Mbamali (1980) 3 - 4 S.C. 31 at 75

Odulaja v. Haddad (1973) 11 S.C. 35

F LEAD JUDGMENT BY IGUH JSC

By a writ of summons issued on the 7th day of august, 1985 in the Ibadan Judicial Division of the High Court of Justice, Oyo State, the plaintiff instituted an action against the defendant claiming as follows:

"The plaintiff's claim is for N612,563.70k, equivalent of US \$294,762.00 and interest thereon for 5 years and 6 months, being the balance of the total sum of money which the defendant agreed to pay to the plaintiff pursuant to a good accord and satisfaction made in writing between the plaintiff and the defendant dated 3rd August, 1979. The defendant has refused to pay this balance despite repeated demands.

H Particulars

1. Total sum owing to the plaintiff - N448, 304.38k (US \$542,000).
2. Total sum paid to the plaintiff on 15/10/79 - US \$247,238.00
3. Outstanding balance - N2243,806.45 (US \$294,762.00)
4. Interest on outstanding balance from 3/10/79 - 33/5/85 at 27.5%

per annum - N368,757.25".

Pleadings were ordered in the suit and were duly settled, filed and exchanged.

At the subsequent trial, both parties testified on their own behalf and tendered some Exhibits.

Essentially, the plaintiff's case against the defendant is for the sum of B N612,563.70, then equivalent to US \$294,762.00 and interest thereon for 5 years 6 months being balance of the total amount owed by the defendant to the plaintiff in respect of building material supplied and services rendered to the defendant by the said plaintiff as evidenced by an accord and satisfaction, Exhibit A. Exhibit A ex facie shows that a dispute having arisen between the C plaintiff and the defendant in 1979 as to the amount due and payable by the defendant to plaintiff in respect of the said material and services supplied by the plaintiff to the defendant, both parties reached an agreement in the sum of US \$542,000.00 being the precise balance payable by the said defendant to the plaintiff. D

The defence was a total denial of the plaintiff's claim. It denied that the plaintiff supplied the defendant with any materials or services as alleged or at all. It asserted that the defendant at all material times dealt with the company, Expo Film SRL which company supplied building materials and services to the defendant. It claimed that these were fully paid for by the defendant. It denied the existence of Exhibit A but added that even if it existed, it was in consequence of the letter Exhibit H which was cancelled by another letter, Exhibit O. E

At the conclusion of hearing, the learned trial Judge, Adekola, J. after a review of the evidence on the 29th September, 1986 dismissed the plaintiff's F action in its entirety. He held, in the main, that the document, Exhibit H, appointed the plaintiff as their agent to collect the amount due to them from the defendant for materials supplied and other services rendered, that the relationship between the plaintiff and the defendant was that of an agent and a third party and that even the said Exhibit H was subsequently terminated by G Exhibit O. Dissatisfied with this decision of the trial court,

Dissatisfied with this decision of the trial court, the plaintiff lodged and appeal against the same to the Court of Appeal, Ibadan Division, which court on the 13th day of April, 1989, in a split decision in which Omololu - Thomas, J.C.A dissented, dismissed the appeal but struck out the plaintiff's H action. It confirmed the trial court's finding that the plaintiff being at all material times a mere agent whose agency had been duly terminated had no locus standi to institute the action.

Aggrieved by this decision of the Court of Appeal, the plaintiff has

further appealed to this court. I shall hereinafter refer to the plaintiff and the defendant in this judgment as the appellant and the respondent respectively.

Pursuant to the Rules of this Court, the parties, through their respective counsel, filed and exchanged their written briefs of argument. In the appellant's brief, the following two issues are identified as arising for determination in this appeal, namely:-

"1. Whether the lower courts affirmation of the trial court's conclusion or finding that the plaintiff entered into Exhibit A as an agent was justified having regard to the pleading and evidence of the parties before the court.

2. Whether the lower court was right in affirming the facts of the case as found by the trial court and concurring in its judgment, having regard to the trial court's approach to, and evaluation of the evidence and pleading of the parties before it."

The respondent, for its own part, also submitted two issues in its brief of argument as arising for the determination of this court. These are:

"1. Whether Exhibit H was properly received in evidence and acted upon by the lower courts.

2. Whether the plaintiff executed exhibit 'A' as agent of a third party."

I have closely examined the two sets of issues identified in the respective briefs of the parties and it is clear to me that the two issues raised in the respondent's brief are adequately covered by those set out in the appellant's brief which I consider sufficiently comprehensive for the determination of this appeal. I shall therefore adopt in this judgment the set of issues formulated in the appellant's brief for my determination of this appeal.

At the oral hearing of the appeal, both learned counsel for the parties adopted their respective briefs of argument and proffered additional submissions in amplification thereof.

The main contention of learned appellant's counsel, Dr. A.N. Onejeme centered on the issue of whether the appellant executed Exhibit A by virtue of Exhibit H and as agent of a third party, Expo-Film SRL, or whether it was executed by the appellant personally on his own behalf and as agent of no one. He submitted that it is obvious on the face of Exhibit A that the appellant did not execute the document as an agent of any one. He argued at all events, that the respondent nowhere in his Statement of Defence pleaded agency as a defence to the appellant's action. He referred to paragraph 7 of the Statement of Defence and submitted that the same is evasive and misleading. Referring to the decisions in Sobell Industries Ltd v. Cory Brothers and Co. Ltd. (1955) Lloyd's Law Reports vol. 2 at 81 and Alli v. Ikusebiala (1985) 1 N.W.L.R.

(Part 4) 630, learned counsel submitted that where a person executed a contract in his own name and without qualification, he shall be taken to be contracting personally unless there are words used in the contract which suggest otherwise. He contended that nothing in Exhibit A suggests otherwise than that the appellant signed it personally and as a principal. He stressed that the parties cannot go outside the accord and satisfaction, Exhibit A, by which they agreed on a number of facts which cannot now be in issue. He pointed out that the appellant's case was based entirely on Exhibit A. He also stressed that there is nothing in the said Exhibit A to suggest that it was signed by way of agency. He urged the court to allow this appeal and enter judgment for the appellant as claimed. C

Learned Counsel for the respondent, Mr. B.A. Aiku, S.A.N. in his reply submitted that Exhibit H which constituted the appellant an agent of the third party and Exhibit O which terminated the agency were duly pleaded. He argued that once Exhibit H which constituted the appellant an agent was duly pleaded, the contention of the appellant that agency was not part of the respondent's case must be regarded as misconceived. He submitted that although the appellant gave evidence that he supplied goods to the respondent, the latter on the other hand tendered oral and documentary evidence that the goods were not supplied by the appellant by Expo Film SRL. This defence case was accepted by both courts below and being concurrent findings of facts may not now be interfered with by this court unless special circumstances are established. He submitted that the two courts below did not err in their evaluation of the evidence adduced by the parties and he therefore urged the court to dismiss this appeal. D E

The first issue for determination is whether the affirmation by court below of the trial court's finding to the effect that the appellant entered into Exhibit A as an agent was justified, having regard to the pleadings and evidence of the parties before the court. In this regard, it seems to me necessary for a better appreciation of the issue to set out the material paragraphs of the appellant's Statement of Claim which averred as follows: F G

"3. A dispute having arisen between the plaintiff and the defendant in 1979 regarding the amount due and payable to the plaintiff in respect of materials and services supplied by the plaintiff to the defendant, the plaintiff and the defendant reached a good accord and satisfaction in writing dated 3rd August, 1979 by which they resolved the dispute. H

4. Under clause 1 of the said agreement, the defendant promised and agreed to pay to the plaintiff the sum of US \$542,000.00 (N448,304.38k) and the plaintiff agreed to accept the same in final settlement and payment for the said goods and services.

5. Under clause 2 of the agreement the defendant was to pay the above sum in unspecified instalments, the first within two weeks of the availability of the documents permitting remittance of the amount to the plaintiff, the second and the third within 6 weeks after the first instalment.

6. Under clause 4 of the said agreement, the defendant was to be B discharged from all further liabilities and claims in respect of the goods and services supplied by the plaintiff on payment of the agreed amount.

7. By a separate written authority dated 3rd August, 1979 and signed by the plaintiff, the plaintiff instructed the defendant to pay all the stated instalments to the plaintiff through a designated Account No. 541235 C ref. Expo-film, c/o Societe de Banques Sussie, Chiaso, Switzerland.

8. In accordance with the said authority and instruction, the defendant, on or about 15th October, 1979 remitted the first instalment of \$247,238.00 to the plaintiff, thus leaving a balance of US \$294,762.00.

9. The defendant has refused or neglected to pay this balance or D any part of it despite repeated demands:.

It suffices to state that the respondent while specifically denying the said paragraphs 3,4,5,6,7 and 8 averred in paragraph 3 of its amended Statement of Defence that the appellant did not at any time supply the respondent with any building materials and/or services as alleged or at all. It went on-

E "4. The defendant at all material times had direct dealings with Expo Film S.R.L. which company supplied materials and services to the defendant and not the plaintiff's herein.

4(a) The defendant at all material times had no agreement with the plaintiff for the supply of building materials and services to the defendant. F All orders were with Expo Film S.R.L.

4(b) Expo film S.R.L. invoices were used for the clearing of all goods ordered and processing payments in respect thereof through the Nigerian Banks. The defendant pleads all relevant invoices and shipping documents.

G 5. The said Expo Film S.R.L. gave written directives as to when and how payments should be made.

6. The defendant settled all monetary transactions with Expo Film S.R.L. by an agreement dated 22nd May, 1980.

H 7. If there was any agreement to pay any sum of money to the plaintiff, which is denied, such was in consequence of a directive contained in a letter dated 12th March, 1979 which was cancelled by another letter dated 2nd June, 1980 both addressed to the defendant by Expo Film S.R.L."

The learned trial judge after a review of the evidence adduced by the parties was in no doubt, and quite rightly so, that the appellant's action against

the respondent was based entirely on Exhibit A said he:-

The present action brought against the defendant by the plaintiff was based on exhibit A. The next point to be considered is whether the plaintiff is entitled to sum of 294,762 dollars inclusive of interest due for 5 years 6 months from the defendant.

My answer to this will be in the negative."

B

He advanced his reasons for disallowing the appellant's claims. These, in the main, are that the appellant executed Exhibit A as agent of Expo Film SRL, that Exhibit H appointed the appellant such agent and that, at all events, Exhibit O revoked the said appointment of the appellant.

The court below per the majority decision of Kutigi, J.C.A., as he then was, with which Akanbi, J.C.A., as he then was, concurred, in affirming the said findings of the trial court stated as follows :-

"I think there is ample evidence before the court to support the above findings of facts and conclusion arrived at by the learned trial judge."

The court went on:-

D

"It follows therefore that the appellant would not have been in any position to institute this action against the respondent Company in 1985 once the authority given to him by EXPO FILM SRL by virtue of Exhibit H had been revoked in 1980 by Exhibit O. Clearly the appellant had no locus standi nor capacity to sue as his authority to collect payment had been revoked by the foreign firm EXPO FILM SRL".

It then concluded:-

"The appeal therefore fails and it is hereby dismissed. But since the finding of the learned trial Judge was that the appellant had neither the capacity nor locus standi to sue, the proper order which he ought to have made was that striking out the case only and not dismissing it in its entirety as he had done. An order striking out the case is therefore hereby ordered and entered in place of the one of dismissal. And this shall be the order of the High Court."

The sole question for resolution under issue 1 is whether having regard to the pleadings and evidence before the court, both courts below were justified in their conclusion that the appellant executed Exhibit a as an agent of a third party by virtue of Exhibit H. It seems to me convenient at this stage to consider the pleadings filed by the parties in the suit.

In this regard, it is an elementary and fundamental principle of law that, parties are bound by their pleadings and that evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the court. See Emegokwe v. Okadigbo (1973) 4 S.C. 113, Ekenyong and others v. Chief Ayi (1973) 3 E.C.S., L.R. 411. So, too evidence in respect of material facts which are not pleaded goes to no issue at the trial

and should be disregarded by the court. Even when such evidence has been wrongly admitted, the trial court should disregard it as irrelevant to the issues properly raised by the pleadings as it is not open to a party to depart from his pleadings and put up an entirely new case at the hearing. See too Odumosu v. A.C.B. (1976) 11 S.C 261 at 264, Kalu Njoku and others v. Ukwu B Eme and others (1973) 5 S.C. 293, National Investment and Properties Co. Ltd v. Thompson Organization Ltd and others (1969) N.M.L.R 99 at 104 etc.

The rationale behind this rigid rule of pleadings and evidence has been clearly stated and restated times without number by this court. In George and others v. Dominion Flour Mills Ltd (1963) 1 All N.L.R 71 at 77, this court C explained the principle as follows:-

"The fairness of a trial can be tested by the maxim audi alteram partem. Either party must be given an opportunity of being heard; but a party cannot be expected to prepare for the unknown; and the aim of pleadings is to give notice of the case to be met, which enables either party to D prepare his evidence and arguments upon the issues raised by the pleadings, and saves either side from being taken by surprise. Incidentally, it makes for economy. The plaintiff will, and indeed must, confine his evidence to those issues; but the cardinal point is the avoidance of surprise".

Accordingly, evidence must be directed and confined to the proof or disproof E of the issues as settled by the pleadings. It is not open to a party to rely on material facts which he should have but had not pleaded at the trial because the opposing side would have, owing to their absence from their pleadings, lost the opportunity of calling evidence to controvert them. See Esso Petroleum Co. Ltd. v. Southport Corporation (1956) A.C. 218, J.O. Idahosa and F Another v. D.N. Oronsaye (1959) 4 F.S.C. 166, Alhaji Ogunlowo v. Prince Ogundare (1993) 7 NWLR (part 307) 610 at 624, Metalimpex v. A.G Leventis and Co. Ltd. (1976) 2 SC 91 etc. The crucial question now must be whether the respondent pleaded in its amended Statement of Defence that the appellant executed Exhibit A as an agent of any third party.

G **A close examination of the respondent's amended Statement of Defence makes it crystal clear that no where therein was agency or facts in establishment of agency pleaded as a defence to the appellant's claims.** The respondent's case, as pleaded and as testified to before the trial court, was as follows:-

H (i) That the appellant at no time entered into any contract with the respondent in 1978 or at any other time for the supply of building other time for the supply of building materials or services to the respondent.

(ii) That the appellant did not supply any building materials to the respondent in 1978 or 1979 as alleged by the appellant or at all.

(iii) That the respondent at all material times received supplies of building materials and services from EXPO FILM SRL

(iv) That all goods supplied by the said EXPO FILM SRL to the respondent were fully paid for by the respondent.

(v) That all payments in respect of the goods supplied were made by the respondent to Expo Film SRL. B

(vi) That if there was any agreement to pay any sum of money to the appellant, which is denied, such was in consequence of Exhibit H which was revoked by Exhibit O.

There was no suggestion by the respondent in its pleadings, no matter how remotely, of the defence of agency, that is to say, that the appellant executed Exhibit A as an agent of a third party and could not therefore maintain his action. C

It cannot be over-emphasized that some of the more important objects or functions of pleadings are :-

1. To define with clarity and precision the issues or questions which are in dispute between the parties for the determination of the court. D

2. To require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial.

3. To project to the court the precise matters in issue between the parties which alone the court may determine, since they set the limits of the action which may not be extended without due amendment. E

The respondent in the present case, if it intended to rely on agency as a defence, ought to have specifically so averred or, alternatively, plead material facts which clearly set out such a defence. This it failed to do. In my view, paragraph 7 of the respondent's amended Statement of Defence relied upon by the respondent neither pleaded agency specifically nor did it raise any issue of agency as a defence to the appellant's suit. F

Turning now to the capacity in which the appellant executed Exhibit A, it will be necessary to set out the document for ease of reference. It goes thus:- G

"TERMS OF SETTLEMENT

1. *WHEREAS there is a dispute between Messrs. COM-EST (G. S PASCUTTO of via A CAPANINI 4 - 20124 MILANO ITALY of the one hand AND MESSRS. ADECENTRO (NIGERIA) LTD. of Samonda, Oyo Road, P.M.B. H 5549, Ibadan, Oyo State of the other hand as to the amount due and payable under two contracts,*

(1) the contract on the supply of building materials and

(2) the contract under which COM-EST provided the services of ex-

patriate plumbers.

WHEREAS both parties are anxious and willing to settle the dispute peaceably and amicably.

NOW IT IS HEREBY mutually agreed:-

1. That MESSRS. ADECENTRO NIGERIA LTD. shall pay the sum of \$542,000 (Five Hundred and forty -two Thousand Dollars) (hereafter called the agreed sum to Messrs (COM-EST) who shall accept same in final payment for the said supply of building materials and for the services of the expatriate plumbers provided by Messrs COM-EST.

2. That ADECENTRO (NIGERIA) LTD. shall remit the amount stated above in three instalments, the first within two weeks of the availability of the documents permitting remittance, the second and the third within six weeks after the first payment.

3. The remittance shall be made by Messrs. ADECENTRO (NIGERIA) LTD. to a banker nominated in writing by a separate written instruction of Messrs COM-EST.

4. On the remittance of the agreed sum by Messrs ADECENTRO (NIGERIA) LTD. it shall be discharged from all liabilities and claims in respect of same.

5. Messrs ADECENTRO (NIGERIA) LTD. shall deduct and indemnify itself for any money or monies which it pays on the commencement of THIS AGREEMENT on the written instruction of Messrs COM-EST.

As witness the hands of the parties this day of 3rd August, 1979.

(SGD) (CHIEF A.O. ADEGOKE), (SGD) (G.S. PASCUTTO, for and on behalf of Messrs.

ADECENTRO (NIGERIA) LTD.

of Messrs.

In the presence of

COM-EST (G.S

(Sgd.) (NICOLA MARFE) AND

PASCUTTO).

Before me

(SGD.) (ENZO

CAGLLABDI).

G (SGD.) (CHIEF AFE BABALOLA). (SOLICITORS)."

There can be no doubt that the parties to Exhibit a are the appellant and the respondent herein and that neither of them *ex facie* purported to have executed the contract as agent of a third party. Indeed learned counsel for the respondent in his address before the trial court did concede that:-

"the plaintiff entered into Exhibit A in his own personal capacity, not as an agent".

It is clear that the content and form of execution of Exhibit A by the appellant were without qualification. They indicated in very clear terms that the document was entered into and was executed by the appellant on his personal

behalf and not as an agent of any third party. In my view, to hold that the appellant who appears on the face of Exhibit A to be personally a contracting party, is not now such, would be to contradict the written agreement without any justification whatever.

In the same vein, where a person executes a contract in his own name and without qualification, he shall be taken to be contracting personally unless there are words used in the contract which suggest otherwise. See Alli v. Ikusebiala (1985) 1 N.W.L.R. (part 4) 630. In the present case, the appellant executed Exhibit A in his own name and without qualification. There are no words therein used which suggest otherwise than that he signed the instrument as a principal. I entertain no doubt that the appellant executed Exhibit A personally on his own behalf and not as an agent of any third party.

The trial court in holding that the appellant executed Exhibit A as an agent reasoned thus:-

".....that the documents Exhibits A and B, came into existence after EXPO Film SRL had, by exhibit H, appointed the plaintiff as their agent to collect the amount due to them from the defendant for materials supplied and other services rendered."

The Court of Appeal for its own part in affirming the above finding of the trial court observed thus :-

" I have already stated above that the findings of the learned trial Judge that Exhibit A and B came into existence only after EXPO FILM SRL had by Exhibit H appointed the appellant as their agent to collect the amount due to them from the respondent was valid and proper."

With the greatest respect to both courts below, exhibit H is a mere letter written by a third party, EXPO FILM SRL, to the respondent notifying the said respondent that payment in respect of certain listed Bills of Lading should be made according to instructions the said respondent would receive from the agent of the third party, Messrs Comest of G.S. Pascutto. The said letter reads thus :-

"Messrs. Adecentro Nigeria Limited, 12th March, 1979.
Private Mail Bag 5549,
Ibadan, Nigeria.

Dear sir,

We wish to notify you that relative to the underlisted Bills of Lading, payment should be carried out according to instructions that you will receive from our Agent, Messrs COMEST of G.S. Pascutto. There are :-

Traghatto Espresso Sardegna B/L No. 1002 del. 10/11/78

"	"	"	"	"	1003	"	"
"	"	"	"	"	3021	"	"

" " " " " 3022 " "
 " " " " " 3024 " "
 " Espresso Sililia " " 3011 " 30/11/78
 " " " " " 1004 " 6/12/78
 " " " " " 1012 " 21/12/78

B *This notice will remain in force until duly rescinded and notice hereof in writing be given to you by the Managing Director of this Company. We shall appreciate confirmation of receipt of this letter. We remain.*

C *Yours faithfully,
 EXPOFILM s.r.l.
 (Sgd.) Francesco Di Geronimo
 MANAGING DIRECTOR."*

It is plain to me that Exhibit H ex facie cannot by any stretch of the imagination be said to have created any agency or appointed the appellant an agent for the collection of the amount in issue as erroneously conjectured by the two courts below. Exhibit H only concerned certain Bills of Lading listed in the letter and it was neither pleaded nor was it established that the relevant Bills of Lading were in any way connected with the appellant's claims as evidenced in Exhibit A. **Put differently, the letter Exhibit H, only talked about payment relevant to the Bills of Lading therein listed and no more. I agree entirely with the dissenting judgment of Omololu Thomas, J.C.A. in the court below to the effect that in the absence of any averment in the respondent's amended Statement of Defence connecting the amount claimed per Exhibit A with the sum due under the Bills of Lading listed in Exhibit H, nothing significant may be read into the said Exhibit H particularly as there was no evidence that the appellant was a party or privy thereto.**

I think it ought to be pointed out additionally that the appellant was never cross-examined on either Exhibit H or O and neither of the two documents shows that the appellant was aware of their existence or contents. Not even the makers of the two Exhibits testified before the trial court to identify the claims they related to. In my view, both court below were, with respect, in definite error by holding that by Exhibit H, the appellant was appointed or became the agent of the third party, EXPO FILM SRL for the collection of money due to it from the respondent. Agency is not created or established simply because a third party writes a private letter to one of the parties to a suit referring to the other party in that suit as his agent. Apart from the constitution of agency by operation of law under the doctrine of agency of necessity and agency by estoppel, the relationship of principal and agent may and is often constituted by agreement. There is no evidence before the court

that any such agreement between the appellant and EXPO FILM SRL existed in this case. It is clear to me that both courts below are, with respect, in error to have distilled agency from Exhibit H in all circumstances of the case. The appellant not having been appointed agent by Exhibit H, Exhibit O which purports to revoke the alleged agency must be treated as irrelevant and of no consequence. It is also clear to me that the finding of the trial court to the effect that Exhibit A came into existence as a result of Exhibit H is unsupported by any averment in the pleadings or any evidence before the court and must be regarded as perverse and erroneous in point of law. B

Finally, on this issue of agency, I have already observed that the same was not specifically or expressly pleaded. I have also stated that the appellant was not cross-examined in any manner by the respondent with regard to Exhibit H which was stated to have constituted the agency or Exhibit O which purported to cancel Exhibit H. More significantly is the fact that although the appellant gave copious and lucid evidence on how he supplied the building materials in issue to the respondent, how the respondent made part payment of the amount of money involved to him, how he entered into Exhibit A with the respondent with regard to the liquidation of the outstanding balance, the said appellant was again not cross-examined on any of these issues by the respondent. **That the appellant acted at all material times as agent of a third party was at no time suggested to him all through the prosecution of his case. Agency was thus not put in issue by the parties at the trial of the suit. It emerged for the first time in the course of the final address of the respondent's learned counsel before the trial court. It is clear that the judgment of the learned trial Judge which was affirmed by the court below was based entirely on agency, a material fact which was neither pleaded nor testified upon by either of the parties. Such a judgment, with respect, cannot in law be allowed to stand. See Ochonma v. Unosi (1965) N.M.L.R. 321, Florence Olusanya v. Olufemi Olusanya (1983) 3 S.C. 41 AT 56 - 57 etc. This is simply because parties, as I have already stated, are bound by their pleadings and judgment must also be confined to the issues raised by the parties. It is incompetent for a court to make a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties before him. See Commissioner For Works Benue State and Another v. Devcon Development Consultants Ltd (1988) 3 N.W.L.R. (Part 83) 407, Nigeria Housing Development Society Ltd and Another v. Yaya Mumuni (1972) 2 S.C. 57, Adeniji and Others v. Adeniji and Others (1972) 1 All N.L.R. (Part 1) 275 etc.** In the circumstances issue 1 is hereby resolved in favour of the appellant. F G

Issue 2 questions whether the court below was right in affirming the

facts of the case as found by the trial court, having regard to the pleadings and evidence of the parties. The arguments on this issue have to a large extent been covered in my treatment of issue 1 above. It suffices to state that the main facts found by the trial court and affirmed by the court below and upon which the appellant's claim was struck out revolved entirely on the B purported appointment of the appellant by Exhibit H as agent of the third party, Expo film S.R.L. in the collection of the sum of money in issue in this case. **Without doubt, this court will not interfere with the concurrent findings of fact made by both the trial court and the Court of Appeal where there is sufficient evidence in support of such findings and where there is no C substantial error apparent on the record of proceedings, such as some miscarriage of justice or a violation of some principle of law or procedure. Where, however, such findings are shown to be perverse or patently erroneous and that a miscarriage of justice will thus result if they are allowed to remain, as in the present case, this court will not hesitate to intervene and to set such D findings aside.** See Chikwendu v. Mbamali (1980) 3 - 4 S.C. 31 at 75, Lamai v. Orbin (1980) 5 - 7 S.C. 28, Woluchem v. Gudi (1981) 5 S.C 291 at 326, Ibrahim v. Shagari (1983) 2 S.C.N.L.R. 176, Igwega v. Ezeugo (1992) 6 N.W.L.R (Part 249) 561 at 585 etc.

In the present case, it is plain that the trial court did not properly E evaluate the evidence before it, that it made a wrong approach to the evidence, having regard to the issues raised in the pleadings and that there is established a miscarriage of Justice and a violation of some principles of law and procedure as above indicated. In these circumstances, I entertain no doubt that the court below, with respect, was in gross error in affirming the said F findings of the trial court as a result of which it dismissed the appeal before it. Issue 2 is accordingly answered in the negative.

The appellant in his Notice of Appeal urged the reversal of the decision of the court below and the entry of judgment in his favour in terms of his claims. And I ask myself whether this is an appropriate case in which this G court may accede to this relief sought by the appellant. In this regard the material averments pleaded in the appellant's Statement of Claim have been reproduced earlier on in this judgment. Evidence in respect thereof was also fully adduced before the trial court.

The simple facts of the appellant's case are that the appellant, an H Italian National, at all material times carried on his business under the name and style of COM-EST (G.S Pascutto). Between November and December, 1978 he supplied building materials and provided the services of expatriate plumbers to the respondent. The respondent made part payment to the appellant of the cost of these supplies made to it by the appellant. In 1979 a dispute

arose between the appellant and the respondent with regard to the outstanding balance payable to the appellant by the respondent in respect of the said supplies. By a dully executed written agreement, Exhibit A dated the 3rd day of August, 1979, both parties arrived at and agreed on the sum of US \$542,000.00 as the actual balance then payable by the respondent to the appellant in respect of the said supplies. Pursuant to the said Exhibit A, the respondent B duly paid the sum of US \$247,238.00 to the appellant. This thus left an outstanding balance of US \$294,762.00 said to be equivalent at all material times to the sum of N243,806.45 still due and payable by the respondent to the appellant in respect of the supplies. The respondent had failed and or neglected to pay this balance to the appellant despite repeated demands hence C this action.

It is of importance to observe that the appellant was not cross-examined by the respondent's learned counsel in respect of any of the above vital facts pleaded and testified upon by the appellant. The one and only question put to the appellant in his cross-examination was as to the name of his company to which he answered thus - D

"The name of my company is COM-EST (Digs - Pascutto)".

It is trite law that where evidence given by a party to any proceedings was not challenged 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 E evidence before it. See Isaac Omoregbee v. Daniel Lawani (1980) 3 -4 S.C. 108 at 117, Odulaja v. Haddad (1973) 11 S.C. 35, Nigerian Maritime Services Ltd v. Alhaji Bello Afolabi (1978) 2 S.C. 79 at 81, Adet Bashali v. Allied Commercial Exporters Ltd. (1961) 1 All N.L.R. 917 etc. **It therefore seems to me clear that in the face of the unchallenged evidence of the appellant, the learned trial F Judge would appear to have had no option that to enter judgment for the appellant as claimed. The court below, with respect, was also in error by striking out the appellant's claims when the question of agency upon which it founded its judgment was neither pleaded nor testified upon and when the appellant was not cross-examined in respect of all the material facts in support of his claim. G**

In the final result this appeal succeeds and it is hereby allowed. The judgment and orders of both courts below are hereby set aside and, in substitution thereof, judgment is hereby entered for the appellant in the sum of N243,806.45 being the balance of the total sum of money which the respondent agreed to pay to the appellant pursuant to the accord and satisfaction, Exhibit A. The appellant's claim in respect of N368,757.25 interest on the outstanding balance was not established. Exhibit A upon which the appellant's action is founded made no provision for the payment of interest to the appel- H

lant by the respondent. Although the appellant in his evidence claimed interest on the said balance, the details thereof and the period covered were also not adduced in evidence before the court. Consequently this arm of the appellant's claim is hereby dismissed.

There will be costs to the appellant against the respondent in the sum of N10,000.00 in this court, N250.00 in the court below and N250.00 in the trial court. The costs of N250.00 against the appellant in both the court below and trial court respectively in favour of the respondent, if already paid, shall forthwith be refunded.

C

BELGORE JSC

In any civil proceedings where a party's evidence is not challenged by cross-examination, that evidence, unless there are compelling legal or procedural reasons for rejection, must be admitted as the truth. The respondent's evidence as plaintiff, entirely based on his averments in the statement of claim, was not challenged in cross-examination. As civil matters in our High Courts are based on pleadings and evidence in support, parties must be up to the task in cross-examination on issues arising in examination-in-chief. Whereas in criminal matters, defence may refuse to cross-examine but may come with devastating evidence to discredit the prosecution's case, it is different in civil matters because of the procedural differences. (Odulaja v. Daniel Lawani (1980) 3-4 SC. 108, 117; Boshali v. Allied Commercial Exporters Ltd. (1961) 1 ALL NLR 917).

The case before the trial Court was not whether money was owed on the contract or not, or whether there was performance or failure to perform; rather it was based on accord and satisfaction. The evidence of the plaintiff is very clear and satisfactory. Had there been full and proper cross-examination of the plaintiff on the documents forming the basis of the accord and satisfaction, the result probably would have been different; but this is mere conjecture. On the printed record the plaintiff's case was proved and remains unchallenged.

I agree with Iguh, J.S.C. that Exhibit A, the accord and satisfaction, has no provision for interest on the sum to be paid. There cannot be built into accord and satisfaction what it does not contain as parties are bound by their agreement only. Thus the claim for N368,757.25 has no basis and I also dismiss it. I therefore also hold as held by Iguh, J.S.C. in his judgment which I had the opportunity of having read in advance that the two lower Courts erred in their decision and I hereby enter judgment for the plaintiff in the sum of N243,806.45 as claimed.

I make the same consequential orders as to costs as made by Iguh, J.S.C.

WALI JSC

I have read before now the lead judgment of my learned brother Iguh, JSC and I entirely agree with his reasoning and conclusion for allowing the B appeal.

From the pleadings filed by the parties, the question of plaintiff/appellant's agency was not pleaded and therefore a non-issue. It was the learned trial judge who suo motu introduced it in his judgment wherein he said:-

"Having regard to the facts as enumerated in paragraphs (a) - (n) above, there is no doubt in my mind that the plaintiff had no direct contractual relationship with the defendant in this case. Their relationship was brought about by exhibit H by which he was appointed an agent to collect payments due to Expo Film SRL from the defendant. The present action D brought against the defendant by the plaintiff was based on Exhibit A. The next point to be considered is whether the plaintiff is entitled to sum of 294,762 dollars inclusive of interest due for 51/2 years from the defendant.

My answer to this will be in the negative. The agreement, exhibit A and the attachment to exhibit A which was tendered as exhibit B cannot be E dealt with in isolation. Exhibit A and B must be considered together with exhibits H, C, and O.

It is crystal clear having regard to the evidence before the court and all the exhibits tendered by the parties that the documents exhibits A and B, came into existence after Expo Film SRL had, by exhibit H, appointed the plaintiff F as their agent to collect the amount due to them from the defendant for materials supplied and other services rendered."

It is clear from the evidence adduced in this case at the trial that the appellant and the respondent executed Exhibit A in their own respective capacities and not as agents of a third party. It was a misdirection on the part of the learned G trial judge [who was subsequently affirmed by the Court of Appeal] to hold that the appellant was agent of EXPO FILM SR by virtue of Exhibit "H". Exhibit "H" speaks for itself, its contents showing that EXPO FILM SR wrote it to the respondent containing a list of Bills of Lading and the manner they were to be settled. There is nothing on it or in the pleadings showing that the H relevant bills of lading relating to the case in hand were part of those listed in Exhibit H. Exhibit H cannot be construed even impliedly as creating an agency and appointing the appellant as agent of EXPO FILM SR which is a third party.

Parties are bound by their pleadings and evidence introduced at the

trial which is not supported by the pleadings goes to no issue and should be expunged or ignored at any stage of the case even on appeal. See Emegokwue v. Okadigbo (1974) 4 SC 113 and George & Ors. v. Dominion Flour Mills Ltd. (1963) 1 ALL NLR 71. The dissenting judgment of Omololu-Thomas JCA wherein he opined that:

B *"The directive addressed to the respondent only in Exhibit H, in my humble opinion, did not create any agency in law so as to bind the appellant as the third party's agent or to show that Exhibit A came into existence because of Exhibit H. The finding goes to no issue. Exhibit H seems to be talking about a different contract covered by Bills of Lading listed thereunder."*

xx

"In all, I am satisfied that the action was competent and in my humble opinion the appellant had locus standi to institute the action. The appellant's complaint if is (sic) in the grounds of appeal are fully justified. D The respondent failed to alter the effect of Exhibit A as pleaded even if the respondent has successfully pleaded confession and avoidance which I do not concede. Judgment ought to have been entered in favour of the appellant. This appeal succeeds and is allowed."
is fully justified and I agree with it.

E It is for this and the more elaborate reasons contained in the lead judgment that I also allow this appeal and adopt the consequential orders in the said judgment.

F **OGUNDARE JSC**

I have had the advantage of a preview of the judgment of my learned brother Iguh JSC just delivered. I agree entirely with him that there is merit in this appeal and for the reasons given by him I too allow this appeal and set aside the judgments of the Court below. I enter judgment for the Plaintiff/
G Appellant as pronounced by my learned brother Iguh JSC and I abide by the order for costs made by him.

H **OGWUEGBU JSC**

The judgment just read by my learned brother Iguh, J.S.C was made available to me in draft. I also agree that for the reasons given in the said judgment, this appeal should be allowed and I hereby allow it. I will however like to make a few comments of my own on the issue of agency.
The entire case of the plaintiff was based on Exhibit "A" and the

main issue for determination in this appeal is whether the plaintiff executed Exhibit "A" as agent of a third party (Expo Film SLR).

My learned brother Iguh, J.S.C. has fully set out the facts from which the above issue has arisen for determination and it is enough that I consider this main issue on the basis of those facts. It will not be necessary for me to repeat the facts except where I consider them necessary.

The plaintiff claimed from the defendant the sum of N612,563.70 equivalent of \$294,762.00 and interest there-on for 51/2 years being the balance of the total sum of money which the defendant agreed to pay to the plaintiff pursuant to a good accord and satisfaction made in writing between them on 3rd August, 1979 (Exhibit "A").

The plaintiff severally and expressly pleaded the contents of Exhibit "A". The defendant specifically denied paragraphs 3,4,5,6,7 and 8 of the statement of claim in paragraph 2 of the amended statement of defence. The learned trial judge held that Exhibit "A" came into existence as a result of Exhibit "H" by which the plaintiff was appointed the agent of a third party (Expo Film SLR) and that the agency was revoked by Exhibit "O".

The learned trial judge found as follows:

"Exhibit H was the power or authority which gave the plaintiff the right to enter into Exhibit "A" with the defendant. It is apparent on the fact (sic) of exhibit H that it is revocable by a written notice communicated to the defendant by Expo Film SLR. It is my view that once the authority given to the plaintiff by exhibit H has been revoked by a letter exhibit O written by Expo Film SLR to the defendant, all powers or authority conferred on the plaintiff by virtue of exhibit H became extinct. The plaintiff cannot continue to act on exhibit A which was brought about by exhibit H, once exhibit H has been revoked. The relationship between the plaintiff and the defendant was that of an agent of a third party."

The Court of Appeal by a majority of two (Akanbi, J.C.A. (as he then was) and Kutigi, J.C.A. (as he then was), Omololu-Thomas, J.C.A., dissenting) affirmed the above findings when it held:

"I have already stated above that the findings of the learned trial judge that Exh. (sic) A and B came into existence only after EXPO FILM SLR had by Exhibit H appointed the appellant as their agent to collect the amount due to them from the respondent was valid and proper Clearly, the appellant had no locus standi nor capacity to sue as his authority to collect payment had been revoked by the foreign firm EXPO FILM SLR."

The defendant did not plead agency and paragraph 7 of the amended statement of defence did not raise that issue. The said paragraph did not raise a plea of "confession and avoidance". The defendant did not confess or

admit the facts alleged in the statement of claim and avoid their effect by introducing the facts alleged in Exhibit "H" in order to deny or destroy the effect of Exhibit "A". Having not admitted the material facts averred in the statement of claim, he cannot seek to avoid them by introducing exhibits "H" and "O".

B The said paragraph 7 of the amended statement of defence which the courts below relied on in holding that agency was created by Exhibit "H", was evasive and in the nature of evidence to be relied upon instead of the material facts which should have been pleaded. See N.W. Salt & Co. Ltd. v. Electronlytic Alkali Co. Ltd. (1913) 3 K.B. 425 and Okagbue v. Romaine (1982) 5 SC. 13. It is an elementary rule of pleading that, when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegation. See Williams v. Wilcox (1838) 112 E.R. 857. The defendant not having pleaded Exhibits "H" and "O" ought not have been allowed to give evidence at the trial, to prove agency which is not contained in its pleadings. Since parties are bound by their pleadings, the defendant was bound by his pleadings and having set up a defence different from that pleaded, the court should have rejected that evidence as it went to no issue. See Edem Ekpenyong & Ors. v. Akiba Etok Ayi & Or. (1973) 1 N.M.L.R. 372, Emegokwue v. Okadigbo (1973) 8 N.S.C.C. 220 and George & Ors. v. Dominion Flour Mills Ltd. (1963) ALL N.L.R. 70 at 76.

Exhibits "A" and "H" were talking of two different things. The former opened with a recital thus:

1. *"Whereas there is a dispute between MESSRS COM-EST (G.S. PASCUTTO) of on the one hand AND MESSRS. ADECENTRO (NIGERIA) Ltd of of the other hand as to the amount due and payable under two contracts:*

- (1) *the contract on the supply of building materials and*
- (2) *The contract under which COMEST provided the services of expatriate plumbers.*

G 2. *Whereas both parties are anxious and willing to settle the dispute peaceably and amicably.*
NOW IT IS HEREBY mutually agreed:" (the underlining is for emphasis only)
 Exhibit "H" reads in part:

H *"We wish to notify you that relative to the under listed Bills of Lading payment should be carried out according to instructions that you will receive from our Agent, Messrs. COMEST of G.S. Pascutto. These are:"* The underlining is for emphasis only)

Eight bills of lading were listed with their numbers, dates and name of Vessel Written against each bill of lading. Exhibit "A" was executed between the

parties to the proceedings leading to this appeal, thus:

<i>"As witness the hands of the parties this day of 3 August, 1979.</i>	
<i>(SGD) (Chief A. O. Adegoke)</i>	<i>(SGD) (G. S. PASCUTTO)</i>
<i>For and on behalf of</i>	<i>for and on behalf of</i>
<i>Messrs. ADECENTR</i>	<i>Messrs COM-EST</i>
<i>(NIGERIA) LTD.</i>	<i>(G.S. PASCUTTO)"</i>

B

A close reading of Exhibit "A" will show that the plaintiff executed Exhibit "A" in his own right and as a principal. Agency cannot be inferred from its contents and the fact of agency was also not put to the plaintiff under cross-examination. There is no way the courts below could have come to the conclusion that Exhibit "H" which is foreign to Exhibit "A" created agency C between the plaintiff and a third party. Exhibit "H" is extraneous to Exhibit "A". Whereas Exhibit "A" talked about two distinct contracts between the parties from which a dispute arose as to the amount due and payable and which dispute was amicably resolved in Exhibit A, Exhibit "H" was concerned with collection of payment for eight bills of lading involving the defendant D and a third party.

The relationship of principal and agent may arise by express appointment, by virtue of the doctrine of estoppel, by subsequent ratification by the principal of a contract made on his behalf without any authorization from him, by implication of law in cases where it is urgently necessary that a person E should act on behalf of another and by presumption of law in the case of cohabitation. The defendant did not bring its defence within any of the above recognized ways of forming agency.

The trial court and the court below were with utmost respect, in error when they based their findings on Exhibit "H" which had no nexus with Exhibit "A". Exhibit "H" did not appoint the plaintiff an agent of Expo Film S.R.L. F If Exhibit "H" had any legal effect which is not conceded, it created an agency by estoppel which the defendant could invoke against a third party. See Trenco Ltd. African Real Estate And Investment Co. Ltd. (1978) 4 SC. 9.

Since the parties did not join issues on Exhibit "H" at the close of G pleadings, the courts below had no business to raise it for the parties and base their judgment on it. It is not competent for a court to make out for a party to a suit, a case totally different from that which such a party put forward before the court. See Adeniji & Ors. v. Adeniyi (1972) 4 S.C. 10 at 17, African Continental Seaways Ltd. v. Nigerian Roads & General Corkers Ltd. (1977) 5 S.C. 235 H at 248, Shitta-Bey v. F.P.S.C. (1981) 1 S.C. 40 at 49 and Adebanjo v. Brown (1990) 3 N.W.L.R. (Pt. 141) 661.

I therefore agree with the dissenting judgment of Omololu-Thomas, J.C.A. that the action was competent and that the plaintiff had locus standi to

institute the action.

With the reasons given above and the fuller reasons contained in the judgment of my learned brother Iguh, J.S.C. with which I am in full agreement, I agree that this appeal be allowed. I endorse all the consequential orders including the order as to costs contained in the said judgment of my learned
B brother Iguh, J.S.C.

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