

SUPREME COURT OF NIGERIA

4TH JULY, 1997. SC. 9/1991

**CORAM:- M. L. UWAISS CJN, A. B. WALI, M. E. OGUNDARE,
S. U. ONU, Y. O. ADIO, JJSC.**

S. O. ILODIBIA PLAINTIFF/APPELLANT
AND
NIGERIA CEMENT COMPANY LTD. DEFENDANT/RESPONDENT

ACTIONS - *Master and servant - Relief for general damages - Was wrongfully abandoned.*

CONTRACTS - *Dismissal - At common law - Where dismissal is in breach of the terms of the contract - The servant may consider the contract determined and sue for redress.*

MASTER & SERVANT - *Dismissal - Wrongful dismissal - Where a master dismisses his servant contrary to laid down procedure in the contract - The servants remedy is an action in damages.*

PLEADINGS - *Reliefs not claimed - Where no appropriate relief was claimed - The trial court cannot make any award.*

PRACTICE & PROCEDURE - *Appeals - Estoppel - Where a party has adopted a procedure by consent - He will not be heard to say that the procedure was prejudicial to him.*

PRACTICE & PROCEDURE - *Non-suit order - Where a party has failed to claim a relief relevant to his case - Court of Appeal will not substitute an order of non-suit for that of dismissal.*

FACTS

By a Writ of Summons issued in the Abakiliki High Court of former Anambra State, the Plaintiff sued the defendant seeking a declaration that his dismissal was wrongful and therefore null and void. The plaintiff was a General Manager of the 2nd defendant a public liability company as at 1st December 1977 having risen to that position from being a Chemical Engineer when he was employed in 1960. In 1980, the plaintiff by a letter written to him by the 1st defendant was instructed to proceed on an indefinite leave. By another letter he was requested to vacate the company's quarters, suspended from duty and

put on half salary, hence the institution of the action leading to this appeal.

The plaintiff lost both at the trial court and the Court of Appeal. He has further appealed to the Supreme court against the decision of the Court of Appeal raising two issues.

ISSUES FOR DETERMINATION

"(a) Was the Court of Appeal right to have dismissed the plaintiff-appellant's appeal against the judgment of the High Court having regard to the primary issue in the case and the only relief before the High Court for determination?"

(b) In the alternative to (a) above, was the Court of appeal right in refusing to Order a non-suit in the case?

HELD (Unanimously dismissing the appeal per lead judgment of **WALI JSC**)
Dismissal - At common law

1. Under the common law, a master possess the right to dismiss his servant from his employment with or without notice. Where the dismissal is in accordance with the terms of the contract, the servant has no complaint. Where it is in breach of the terms of the contract the servant may consider the contract at an end seek or sue for redress. And where there has been a purported termination of contract of service, as in this case, a declaration that the contract of service is subsisting will rarely be made. (p. 1329 A)

Dismissal - Wrongful dismissal

2. Where the master has purported to dismiss the servant, even though not in accordance with the laid down procedure in the contract, the servant cannot treat the contract as still subsisting but must proceed as if he has been wrongfully dismissed. A wrongful dismissal in complete disregard of the terms of the contract of service is obviously a repudiation by the master and the servant's remedy is an action in damages only. Whether any particular breach by a party to the contract amounts to a repudiation of such contract is a question depending entirely upon the particular facts and circumstances of the breach and of the conduct of the party. (p. 1329 H)

Appeals - Estoppel

3. Where a party has adopted a procedure by consent, he will not be heard on appeal that the procedure he adopted is prejudicial to him. The procedure adopted by learned counsel is covered by the second arm of Order 47 rule 1 of the Eastern Nigeria High Court Rules. (p. 1332 D)

Actions-Master and Servant

4. The learned trial Judge after reviewing the evidence arrived at the correct conclusion that the appellant fought the case on the basis that the relationship between him and the respondent was that of master and servant and that the appellant had elected to pursue his remedy for wrongful dismissal. It would therefore be inconsistent for the appellant to seek for a declaration for reinstatement. The abandonment of the alternative relief for the award of general damages by the appellant's counsel put an end to his case. As rightly pointed out by both the trial court and the Court of Appeal learned counsel was in serious error to abandon the relief for the award of general damages in a case of a wrongful dismissal by the respondent of the appellant where the relationship was that of master and servant. (p. 1332 H)

Pleadings - Relief not claimed

5. The trial court could not make any award for the appellant as there was no appropriate relief claimed under which the award could be made. See Isamotu Otanioku v. Lawal Mustafa Alli (1977) 11 - 12 SC 9 at 13 where this court held that where no relief is claimed in the statement of claim, neither the trial court nor the appellate court can grant it. (p. 1333 B)

Non-suit order

6. Where a party had failed to claim a relief relevant to his case in his pleadings, the Court of Appeal would not substitute an order of non-suit for that of dismissal to enable him have a second bite at the Cherry. (p. 1333 H)

NOTABLE POINTS OF INTEREST

OGUNDARE.JSC

1. Pleadings - Where amended

Where pleadings are amended, what stood before the amendment was no longer material to determine the issues between the parties; the amendment speaks from the date the original pleading was filed. (p. 1340 E)

2. When specific performance will not be ordered

From the pleadings, evidence and findings of the learned trial Judge, Plaintiff was wrongfully terminated from his employment as General Manager of the Defendant Company. What then was his remedy? The relationship between the parties was that of master and servant. It is the law that ordinarily the court will not order specific performance of a contract of personal service unless it is one with statutory flavour - see: Olaniyan & Ors. v. University of Lagos (1985) ANLR 363; Vine v. National Dock Labour Board (1956) 3 ALLER

939; (1957) 2 WLR 160; (1957) AC 488 at p. 507. (p. 1340 H)

3. Termination of employment - When declaratory relief will be refused

By the declaratory relief claimed the Plaintiff would in effect want the Court to declare the termination of his employment null and void. The court will not grant such a declaration in an ordinary contract of personal service unless special circumstances are shown. That claim was therefore rightly refused by the trial court and the Court below was equally right in affirming the decision of the trial court. (p. 1341 B)

ONUJSC

4. Action for wrongful dismissal - Implies termination by the servant

It is now an established principle of law that if one is suing for wrongful dismissal it implies that he himself has put an end to the contract of service. Assuming that one is wrongfully dismissed, all he would be entitled to are damages up to the time of one's action (not up till the time of judgment). The two courts below, in my respectful opinion, are correct in the view they took on the question of election by the appellant to treat the contract itself as fundamentally breached and all over. This issue is settled the very point in time the appellant filed his writ of summons in which he asked for general damages for wrongful dismissal. (p. 1345 H)

REPRESENTATION

No appearance for the appellant

Dr. J.O. Ibik ,SAN with Mrs. I. G. Ibik for the respondent

CASES REFERRED TO

Odutola v. Kayode (1994) 3 KLR 1

Warner v. Sampson (1959) 1 QB 297 at 321 and 322

Anukwua v. Obia (1986) 5 NWLR (Pt. 40) 150

Craig v. Craig (1966) 1 ALL NLR 173

Anyaoke v. Adi (1986) 6 S.C. 75

Amobi v. Texaco Nigeria Ltd. (1972) 3 S.C. 104

Francis v. Municipal Councillors of Kuala Lumpur (1962) 1 WLR 1411

Otanioku v. Alli (1977) 11 - 12 SC 9 at 13

Kale v. Coker (1982) 12 SC 252

Rotimi v. MacGregor (1974) 11 SC 133, 152

Vine v. National Dock Labour Board (1956) 3 ALL ER 939

England v. Palmer 14 WACA 659 at 661

Magnusson v. Koiki (1994) 1 KLR 172

RULES REFERRED TO

High Court Rules former Eastern Nigeria order iv Rule 5 (1), Order 47 (1)

LEAD JUDGMENT BY WALI JSC

The plaintiff's claim in the High Court of Enugu Judicial Division of
B Anambra State contained in paragraph 27 of this Further amended Statement
of Claim is as follows:-

"(a) A declaration that the 1st defendant's letter dated 11th March,
1980 sending the plaintiff on compulsory indefinite leave is ultra vires, wrong-
ful, null and void and of the effect and was in breach of the principles of
C natural justice and of his Conditions of service.

(b) A declaration that the purported indefinite suspension of the
plaintiff on half-pay as contained in the letter of 15th May, 1980 was not an
act of the 2nd defendant and was in breach of the principles of natural
justice and of his Conditions of Service and therefore is wrongful, illegal
D invalid null and void and of no effect whatsoever.

(c) A declaration that the plaintiff is still the General Manager of
the 2nd defendant Company and is entitled to his full salary all benefits,
allowances, privileges and emoluments attaching to his Office as General
Manager.

E (d) N30,000.00 being special damages for expenses incurred by
the plaintiff as a result of deprivation of some of his entitlements and privi-
leges.

(e) N100,000.00 General Damages.

OR

F In the alternative N500,000.00 general and special damages for
wrongful dismissal."

The action was originally filed before the Abakaliki High Court but
later transferred to Enugu for hearing before P. K. Nwokedi J (as he then was).
Pleadings were filed and exchanged, with the leave of the court, they were
G amended and further amended.

The plaintiff gave evidence during the trial in the course of which a
number of documents were put in evidence. At the conclusion of the plaintiff's
testimony, his case was closed. The defendants did not call any witness and
rested their case on that of the plaintiff.

H Both learned Senior Advocate, Mr. P. Umeadi and Mr. J.C. Njelita
presented their final addresses for the plaintiff and the defendants respec-
tively. At the tail end of his address Mr. Umeadi SAN, applied for and was
granted leave to drop the alternative claim and limit the plaintiff's claim to
paragraph 27(c) of the Further Amended Statement of Claim.

The learned trial Judge after a painstaking review of the evidence and the submissions of learned counsel on both issues on law and fact, concluded thus in his judgment:-

"The second consideration that bedevils the plaintiff's predicament is his reaction to Ex. 4, which suspended him from duty indefinitely, and on half pay. He waited for about six weeks and not hearing from defendants, he instituted this action, claiming among other reliefs, general damages for wrongful dismissal. This amounted to an acceptance of the Company's repudiation of his contract of service by way of constructive dismissal, as above stated. The Learned Senior Advocate having accepted that the relationship between the parties was one of master and servant, and having accepted in his address, that the Ex. 4 "amounts to wrongful termination of the plaintiff's employment before his retiring age" it seems contradictory that the court should be required to declare that the plaintiff is still in the employ of the Company. The withdrawal of the claim for wrongful dismissal four years after the action had been filed, and after the conclusion of evidence does not in my view alter the position. The defendants must be deemed to have fought the action on the basis of the claims before the Court and all legal consequences arising therefrom. That being the case, both parties having treated the contract as at an end, the plaintiff's only recourse is to damages for wrongful dismissal. This he cannot now do, since this arm of the action has been discontinued at the instance of his counsel. Five years have elapsed since the plaintiff was forced out of the services of the defendant. Although there is no evidence before me that his post has been taken over by someone else, yet it is too long a time to force him back on the company even if such a course were possible. The delay in hearing this case has not been occasioned by the plaintiff, but none-the-less the delay has in fact occurred. In concluding this judgment, it is pertinent to observe that a plaintiff enters the courts area for battle with his Counsel as the commander in charge of his army. His success or failure depends, by and large, on the strategies and tactics of his commanding officer. Obviously some of the amendments to the reliefs claimed by the plaintiff were made in the heat of argument and hence not carefully considered. In my opinion the relief for general damages for wrongful dismissal should not have been discontinued at the tail end of the case. This maneuver deprived the plaintiff of the opportunity of falling back on damages for wrongful dismissal should he fail in his claim to be reinstated in office."

Aggrieved by the trial court's decision, the plaintiff appealed against it to the Court of Appeal, Enugu Division. In its well considered judgment prepared and delivered by Uwai for JCA, with which Katsina-Alu and Macaulay

JJCA agreed, he dismissed the appeal in the following words:

"As I have pointed out, the plaintiff/appellant elected by his conduct to treat his contract of service as wrongfully repudiated by communicating his election to the defendant/respondent when he claimed damages for wrongful dismissal as one of his reliefs. The other reliefs he had claimed, were inconsistent with the relief for wrongful dismissal, made no difference to the legal consequences of the election. Thereafter he took a tragic decision to abandon the other reliefs including damages for wrongful dismissal and to insist on an order that he was still the General Manager. That was a relief the court could not entertain in the circumstances since the election was final and binding, and the learned trial judge was right to so hold. The result was that the plaintiff/appellant had no relief to press home in his favour.

The question of non-suit cannot arise in a situation like this: See Amobi v. Texaco Africa Ltd. (1972) 3 S.C. 104; Anachuna Anyaoke v. Dr. Felix Adi (1986) 6 S.C. 75. A non-suit is inappropriate when a plaintiff has completely failed in his case as formulated."

It is worth mentioning at this stage that in the course of writing his judgment the learned trial judge considered the locus standi of the 1st defendant and concluded as follows:

"The very fact that he (1st defendant) did not defend does not necessarily saddle him with liability where no liability is attached to his action by the law. The action against him, being misconceived is hereby dismissed."

Before the issues raised and canvassed in this appeal I deem it pertinent to give a resume of the facts involved and which are as hereunder stated:

By a writ of summons issued in the Abakaliki High Court of Anambra State, the plaintiff claimed various reliefs against the 1st and 2nd defendants. The case was transferred to High Court, Enugu, Anambra State for hearing by P.K. Nwokedi, J.,

The plaintiff was working as a General Manager of the 2nd defendant which is a public liability Company as at 1st December, 1977, having risen to that position gradually from being a Chemical engineer when he was first employed by the 2nd defendant in 1960. In March, 1980 the plaintiff in a letter written and addressed to him by 1st defendant, was instructed to proceed on an indefinite leave. In April, 1980 he was requested to vacate the Company's quarters. In May, 1980 he was suspended from duty indefinitely and put on half salary. As a result of these actions taken against him, the plaintiff filed the present suit against the 1st and 2nd defendants on 1st July, 1980. He lost both in the trial court and the Court of Appeal.

The plaintiff has now further appealed to this court. Both parties

filed and exchanged briefs of argument.

In the brief filed by the plaintiff and related to his grounds of appeal, the following two issues were raised:

"(a) Was the Court of Appeal right to have dismissed the plaintiff-appellant's appeal against the judgment of the High Court having regard to the primary issue in the case and the only relief before the High Court for B determination?"

(b) In the alternative to (a) above, was the Court of appeal right in refusing to Order a non-suit in the case?

The defendant also formulated 3 issues in his brief as hereunder reproduced:-

"(a) Whether the withdrawal of the reliefs sought in paragraph 27 C of the further Amended Statement of Claim and the restoration of the relief in sub-paragraph (c) thereof is tantamount to an amendment of pleadings?

(b) Whether the lower courts were justified in determining the fate of the appellant's case per the sole relief in paragraph 27 (c) of the further Amended Statement of Claim upon the footing of all the relevant issues D joined and formulated by the parties on their respective pleadings and the accepted evidence adduced at the trial and counsel's submissions thereon?

(c) Whether the court below is justified in refusing to order a Non-Suit in the circumstances?"

I shall henceforth refer to the plaintiff and the defendant in this judgment as E the appellant and the respondent respectively.

There was no appearance by the appellant or his counsel on the day the appeal came up for hearing. Since both parties have filed and exchanged briefs, the appeal was deemed argued by the appellant on the brief filed on his behalf. See Order 6 rule 8(6) of the Supreme Court rules, 1985 and Odutola v. F Kayode (1994) 2 NWLR (pt 324) 1.

The issues filed by the appellant have adequately covered the respondent's three issues; I shall therefore base my judgment on the appellant's two issues.

Issue (a) It was the contention of learned senior Advocate that the G claim for N500,000.00 general damages for wrongful dismissal was in the alternative to the other claims in paragraph 27(a), (b), (c), (d) and (e) of the Further Amended Statement of Claim and which were inconsistent with the alternative claim and therefore there was no election in law by the appellant. He submitted that with the amendment granted to him by the learned trial judge on 22nd H February, 1984, the only relief being claimed by the appellant is paragraph 27(c) of the Further Amended Statement of Claim since there is no appeal against the amendment. He argued that both the Court of appeal and the trial court were precluded by virtue of the amendment from referring to and relying

on the claims which stood before the amendment and were therefore wrong in dismissing the appellant's claim. Learned Counsel referred to some paragraphs of his pleading as well as Exhibits 4 and 9 on this issue and concluded:-

"It is to be pointed out that despite the institution of the above Suit, the defendant respondent continued to pay to the plaintiff/appellant his salary on half pay basis up to at least the end of October, 1980: See Exhibit 6. But assuming (which is not conceded) that by including the claim for damages for wrongful dismissal in the reliefs in the case the plaintiff-appellant thereby brought his employment to an end yet he was in justice at least entitled to a limited declaration that he was the General Manager of the defendant-respondent up to the date of the institution of the above suit and that he was also entitled to his full salary, all benefits, allowances, privileges and emoluments attaching to his office as general Manager up to the date of the institution of the suit. The limited declaration indicated hereinabove is within the ambit of the sole claim or relief in the above case."

D The following cases were cited and relied on in support of the submissions above: Warner v. Sampson & anor. (1959) 1 QB 297 at 321 and 322; Col. Olu Rotimi & Ors v. Mrs. F. O. Macgregor (1974) 11 SC 133 at 152; Agbino Obioma & Ors. v. Lawrence Emeye Olomu & Ors. (1978) 3 SC 1 and Enoch Anukwua & Ors. v. Peter Obia & Ors. (1986) 5 NWLR (Pt. 40) 150.

E Issue (b) Under this issue it was submitted that since both the trial court and the Court of appeal made a finding in favour that the appellant was the General Manager of the respondent and that he served the respondent for 17 (seventeen) years, the two lower courts were wrong in dismissing his case instead of non-suiting him to enable him pursue the losses he had suffered within the ambit of his claim in another litigation as he had not totally failed in his present claim: Reliance in support of the submissions above was put on the following cases- Airoe Construction and Civil Engineering Company Limited v. The University of Benin (1985) 1 N.W.L.R. (Pt. 2) 287; Craig v. Craig (1966) 1 ALL NLR 173; Obed Okpala & Anor. v. Richard Ibeme & Ors. (1989) 2 F NWLR (Pt. 102) 208 and David Oye Olagbemiro v. Oba Oladunni Ajagunbada 111 & Anor. (1990) 3 N.W.L.R. (Pt. 136) 37 at 62, 63.

In reply to the arguments presented in support of the appellant's case, it was the submission of Dr. Ibik, SAN learned Senior Counsel for the respondent that the argument presented in support of Issue (a) of the H appellant's brief is ill-conceived when viewed against the true background and the pleadings in the case. He contended that abandonment or withdrawal of part of the claims or relief is not an amendment to the appellant's pleading and that the situation is amply covered by order 47(1) of the High Court rules of Eastern Nigeria, 1956 (Cap 61) Laws of Eastern Nigeria, 1963, applicable in

The suspension imposed by Ex. 8 was indefinite. The placing of the plaintiff on behalf his salary was a punitive action. Ex. 4 failed to inform the plaintiff of the charges against him as required by Clause 17(i) of Ex. 8. Clause 17(1) of Ex. 8, clearly imports the rule of natural justice audi alteram partem. Failure to supply the plaintiff with particulars of his wrong doing, before commencing punitive action against him, and giving an opportunity to defend himself, offends the rule of natural justice."

XX
There are fundamental breaches of the plaintiff's contract of employment. A unilateral change by the Company in the plaintiff's salary is a breach of a fundamental term of the contract to say the least. To place the plaintiff on an indefinite suspension from his duties without complying with Clause 17 (1) of Ex. 8 as above pointed out is another fundamental breach of his contract of employment. There is no evidence before this court, that there has been an established practice within the Company, of sending employees on suspension indefinitely without reason.

XX
I am satisfied and find that Exhibit 4 constituted a fundamental breach of the plaintiff's contract of employment and can amount to a constructive dismissal of the plaintiff.

E XXX
It seems to me that Exhibit 4 having been adopted or approved by the Board of Directors, the act of sending the plaintiff on indefinite suspension on half pay becomes an act of the company. Any liability arising therefrom becomes that of the principal that is the Company and not of the agent that is the first defendant."

So the narrow issues for termination in this appeal are three fold, to wit:-

- (a) Whether, the appellant by suing the respondent in the alternative for N500,000 general damages, he had elected to treat the contract of employment at an end between him and the respondent.
- G (b) If the above is answered in affirmative, whether the appellant, by his amendments of the reliefs claimed in paragraph 27 of the Further Amended Statement of Claim, there was left any relief to which the claim of N500,000 general damages could be hinged.

(c) Whether in the circumstances of the case with particular reference to the findings of the learned trial judge which was affirmed by the Court of Appeal that the appellant was wrongfully dismissed by the respondent from its employment, this is a proper case for order of non-suit.

It is to be borne in mind that both the appellant and the respondent agreed that the relationship between the appellant and the respondent was

one of master and servant and therefore governed by the common law rule. **Under the common law, a master possess the right to dismiss his servant from his employment with or without notice. Where the dismissal is in accordance with the terms of the contract, the servant has no complaint. Where it is in breach of the terms of the contract the servant may consider the contract at an end seek or sue for redress. And where there has been a purported termination of contract of service, as in this case, a declaration that the contract of service is subsisting will rarely be made.** See Francis v. Municipal Councillors of Kuala Lumpur (1962) 1 WLR 1411 particularly at 1417 where it was held:-

"When there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the Court."

The learned trial judge had rightly made a finding that the indefinite suspension of the appellant from duty as per Exhibit 4 by the respondent amounted to constructive dismissal from service. This was affirmed by the Court of Appeal where Uwaifo JCA in the lead judgment stated:

"If therefore, suspension was irregularly done, as it seems in the present case, there being no reason, given to show it was a step in disciplinary proceedings, and the plaintiff/appellant was given no hearing before he was put on half pay, then, he was entitled to acquiesce in it, or seek to have the suspension set aside, or take such steps to show that he was not prepared to regard the contract as still subsisting."

Although the appellant originally sought for declarations (a) (b) and (c) in paragraph 27 of the further Amended Statements of Claim with claims for special damages and general damages in (d) and (e) respectively and an alternative claim of N500,000 general damages for wrongful dismissal, in my view his proper remedy would be in the alternative claim, since both parties accepted that the relationship between the appellant and respondent is one of master and servant. The learned trial judge correctly stated the law as follows:-

"If the plaintiffs are generally well advised as to what the law is on quantum of damages in cases of wrongful dismissal, the courts may be saved from several fanciful claim for wrongful dismissal in cases involving master and servant."

Where the master has purported to dismiss the servant, even though not in accordance with the laid down procedure in the contract, the servant cannot

- treat the contract as still subsisting but must proceed as if he has been wrongfully dismissed. A wrongful dismissal in complete disregard of the terms of the contract of service is obviously a repudiation by the master and the servant's remedy is an action in damages only. See Vidyodaya University Council v. Silva (1965) 1 WLR 77 at 90. Whether any particular breach by a**
- B party to the contract amounts to a repudiation of such contract is a question depending entirely upon the particular facts and circumstances of the breach and of the conduct of the party. See Freeth v. Burr (1874) 9 CP. Unfortunately for the appellant in this case his case was muddled up by his counsel in conducting the case. While learned Senior Advocate was making his final**
- C address in support of the case he presented for the appellant, the learned trial judge put the following questions to him and to which he replied:**
- "Court to Counsel - Are all these based on general or special damages and if the later where are they pleaded? They do not seem to come within the original claim.*
- D Umeadi - We are going on the alternative claim. What we are saying is that what is due to the servant by virtue of his contract of service should ensure (sic) to him. The issue is not damages or wages this distinction is immaterial. We drop all the reliefs in 29(a), (b), (c), (d), (e). We are basing our case on the alternative claim.**
- E Counsel continues his argument - Refers to Maine & Macgregor 12th Edition paragraphs 608 and 609 at pages 522 to 523. I do not intend to put the issue of the plaintiff wrong until he has attained the age of 60 years. This may sound speculative. I urge the court to give judgment for the plaintiff.**
- Court to Mr. Umeadi - If you are suing for wrongful dismissal it implies that*
- F you yourself have put an end to the contract of service. Assuming that you were wrongfully dismissed, you could be entitled to damages up to the time of your action. Now then can the court award you damages up to the date of judgment?**
- Umeadi - I refer to paragraph 27(c) of the further amended statement of*
- G claim. I wish to make an amendment under order 34 of the H.C.R. We want to restore paragraph 27 c of the amended statement of claim i.e. debito justitia. We now wish to drop the alternative claim. We are now claiming under 27 (c) a sum of N186,610.00 as representing what we should get under paragraph 27(c) of the further amended statement of claim.**
- H Njelita - This application is a new development. It arises from counsel's address. We oppose the application. It is belated and goes to the root of the subject matter of the action. The counsel can not approbate and reprobate as he likes. When a claim is dropped it is deemed to have been dropped and deemed struck out. To revive it is prejudicial to our case.**

Umeadi - *I concede that the error is on our side. But I rely on Order 34 of the H.C.R. the defence is not prejudiced in any way because the evidence has not been altered. I urge the court to exercise its discretion to allow the amendment as debito justitia. Court to Umeadi: Do you concede that if I disallow this amendment that there is no claim before the court since you have now abandoned the alternative claim.*

B

Umeadi - *I concede that and hence I have asked the court to exercise its discretion ex debito justitia." (sic)*

In a considered ruling delivered by the learned trial judge, the application by learned counsel to amend paragraph 27 of the Further Amended Statement of Claim was granted and was accordingly amended as follows:

C

"The plaintiff is hereby granted leave to restore the relief sought for in paragraph 27(c) of the Amended Statement of Claim. Leave is hereby granted to the plaintiff to discontinue or withdraw all the other reliefs set out in paragraph 27 of the amended statement of claim. To tidy matters up, the reliefs outlined in paragraph 27 sub-paragraphs (a), (b), (d) and (e) of the amended statement of claim are hereby struck out. The alternative claim for special and general damages for wrongful dismissal is also struck out. What is therefore left before this court is the solitary relief outlined in paragraph 27, sub-paragraph (c) of the amended statement of claim."

D

Before this amendment, the appellant by his answer to a question put to him when he was being cross-examined to wit.

E

"Q. You are not entitled to N500.00 as general damages because you have not been dismissed/

A. I do not agree with your suggestion."

and the statement by his counsel that "We claim only N500,000 as general damages" was clear indication that the appellant had elected to treat the contract of service between him and the respondent at an end. The learned trial judge found as follows:-

"an employer, who purports to exercise a right of suspension, not provided in the contract of service, can be guilty of repudiating the contract. If the employee elects to accept, the repudiation, the employer's action may amount to a dismissal. It appears to me by this suit the plaintiff had accepted the repudiation which effectively determines the contract."

G

This finding was affirmed by the Court of Appeal in its judgment wherein it stated:-

H

I think also that the necessary conclusion justifying the view in the present case that there had been election by the plaintiff to treat the employment as wrongful terminated - by repudiation on the part of the defendant/respondent owing the flagrant disregard of the conditions of service - can be drawn

from the following passage in Gorse v. Durham County Council (1971) 2 ALL ER. 666 at 671 in which Cusack J said:

"The contracts into which the plaintiffs had entered were contracts of employment to which the general rule of master and servant applied. If an employee by wilful disobedience to a lawful and reasonable order shows a determination to disregard an essential term of his contract then this may amount to a repudiation of the contract entitling the employer to elect to treat the contract as at an end. On the other hand, the employer may elect, if he so desires, to treat the contract as continuing and to take action, if necessary, in respect of a breach of that contract. The type of conduct which can amount to repudiation must necessarily depend on the circumstances of each individual case. It is a matter of fact and matter of degree. It must be related to the situation at the time and the particular situation of those personalities involved."

I entirely agree with this view and have no reservation that it applies too in the converse, where it is the employer who has done an act which the employee regards as amounting to a breach and the employee decides to treat the contract as at an end."

Where a party has adopted a procedure by consent, he will not be heard on appeal that the procedure he adopted is prejudicial to him. See Akhiwu v. Principal Lothries Officer, Mid-West State (1972) 1 ALL NLR 229.

The procedure adopted by learned counsel is covered by the second arm of Order 47 rule 1 of the Eastern Nigeria High Court Rules, (Cap 61) Laws of Eastern Nigeria, 1963, vol. IV, applicable in Anambra State, which provides:

"If in any other case the plaintiff desires to discontinue a suit or to withdraw any part of the Claim, or if a defendant desires to discontinue his counter-claim, or withdraw any part thereof such discontinuance or withdrawal may be allowed on such terms as to costs, and as to any subsequent suit and otherwise as the Court may seem just."

Learned counsel for the appellant made the application to abandon all the reliefs in paragraph 27 of the Further Amended Statement of Claim except subparagraph (c) of paragraph 27.

This sub-paragraph reads:-

"A declaration that the plaintiff is still the General Manager of the 2nd defendant company and is entitled to his full salary all benefits allowances, privileges and emoluments attaching to his office as General Manager."

The learned trial judge after reviewing the evidence arrived at the correct conclusion that the appellant fought the case on the basis that the relation-

ship between him and the respondent was that of master and servant and that the appellant had elected to pursue his remedy for wrongful dismissal. It would therefore be inconsistent for the appellant to seek for a declaration for reinstatement. The abandonment of the alternative relief for the award of general damages by the appellant's counsel put an end to his case. As rightly pointed out by both the trial court and the Court of Appeal learned counsel B was in serious error to abandon the relief for the award of general damages in a case of a wrongful dismissal by the respondent of the appellant where the relationship was that of master and servant. The trial court could not make any award for the appellant as there was no appropriate relief claimed under which the award could be made. See Isamotu Otanioku v. Lawal Mustafa Alli C (1977) 11 - 12 SC 9 at 13 where this court held that where no relief is claimed in the statement of claim, neither the trial court nor the appellate court can grant it.

The appellant claimed that the Court of Appeal was wrong to refuse to make an order of non-suit in place of that of an out right dismissal by the D High court, having regard to the evidence and the circumstances in this case.

The learned trial judge in his judgment concluded:-

"Much as one would sympathize with the plaintiff in his plight and the shabby treatment meted to him, this is a Court of law, where judgments are delivered on the facts before the Court and the law applicable to the said E facts. In the final analysis, I find myself unable to grant the declaration sought by the plaintiff. This suit is hereby dismissed."

The Court of Appeal, after reviewing the arguments advanced for the order of non suit, concluded thus:-

"The question of non-suit cannot arise in a situation like this: See F Amobi v. Texaco Africa Ltd. (1972) 3 S.C. 104; Anachuna Anyaoke v. Dr. Felix Adi (1986) 6 S.C. 75. A non-suit is inappropriate when a plaintiff has completely failed in his case as formulated. If at the close of the case there is nothing that has saved or can save any aspect of the relief or reliefs for a plaintiff, which he can better pursue in a subsequent attempt in the interest G of justice, a non-suit will not be ordered. The action must be dismissed. In this particular case even if there had been grounds for ordering a non-suit, to do so would be of no use because the plaintiff could never get round the disability created by the Limitation of Action."

I entirely subscribe to the above conclusion. **Where a party had H failed to claim a relief relevant to his case in his pleadings, the Court of appeal would not substitute an order of non-suit for that of dismissal to enable him have a second bite at the Cherry.** See Anyaoke v. Adi (1986) 6 SC 75 and Amobi v. Texaco Nig. Ltd. (1972) 3 SC 104 Enaig & Anor. v. Ekanem & Ors.

(1962) ALL NLR 530; The facts involved in the cases cited by the appellant to buttress his arguments for the order of non-suit are completely no similar to the facts in the present case and these authorities are not therefore apposite.

I see no reason to interfere with the concurrent findings of facts reached by the trial court and affirmed by the Court of appeal in this case. See B Ukpe Ibodo & Ors. v. Enarofia & Ors. (1980) 5 -7 SC 42; Kale v. Coker (1982) 12 SC 252 and Akeredolu v. Akinremi (1989) 3 NWLR (Pt. 108) 164.

The appeal fails and it is dismissed. The judgments of the lower court and the court below are further affirmed with N1,000.00 costs to the respondent.

C

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Wail, JSC. I agree that the appeal lacks merit.

D The Appellant's case could not succeed in the High Court since he failed to prove what was left of his claim after amendment. To order a non-suit would have amounted to granting to the Appellant another chance to improve his case. This is what the authorities on the point are against.

I hereby dismiss the appeal with N1,000.00 costs to the Respondent.

E

OGUNDARE JSC

In his Writ of summons issued on 1/7/80, Plaintiff (now appellant) had claimed from the Defendants -

F *"(a) A declaration that the 1st defendant's letter dated 11th March 1980 sending the plaintiff on a compulsory indefinite leave is irregular, unlawful, null and void and/or is in breach of the principles of natural justice.*

G *(b) A declaration that the purported indefinite suspension of the plaintiff on half pay as contained in the 2nd defendant's letter of 15th May 1980 is irregular, wrongful and/or is in breach of the principles of natural justice.*

H *(c) A declaration that the plaintiff is entitled to his full salary and all benefits and allowances and privileges attaching to his office of General Manager of the 2nd defendant Company at all times material to this case including the period from 15th May 1980.*

(d) OR IN THE ALTERNATIVE N500,000.00 general and special damages for wrongful dismissal against the 2nd defendant."

In paragraph 24 of his statement of claim, filed on 2/10/80, he claimed thus:

"(a) A declaration that the 1st defendant's letter dated 11th March 1980 sending the plaintiff on a compulsory indefinite leave is *ultra vires*, wrongful, null and void and of no effect and was in breach of the principles of natural justice and of his Conditions of Service.

(b) A declaration that the purported indefinite suspension of the plaintiff on a half-pay as contained in the 2nd defendant's letter of 15th May 1980 was in breach of principles of natural justice and of his Conditions of Service and is wrongful, illegal null and void and of no effect whatsoever.

(c) A declaration that the plaintiff is still the General Manager of the 2nd defendant Company and is entitled to his full salary all benefits and allowances and privileges emoluments attaching to his office as General Manager.

(d) N15,000.00 being special damages for expenses incurred by the plaintiff as a result of deprivation of some of his entitlements and privileges.

(e) N100,000.00 general damages.

D

OR

In the alternative N500,000.00 general and special damages for wrongful dismissal."

In October 1981 he filed, with leave of court, an amended statement of claim paragraph 24 of which was the same as before. The statement of claim was again amended in April 1983. Paragraph 27 of the further amended statement of claim reads:

"27. Whereof, by reason of the premise, the plaintiff claim against the defendants jointly and severally as follows:

(a) A declaration that the 1st defendant's letter dated 11th March, 1980 sending the plaintiff on a compulsory indefinite leave is *ultra vires*, wrongful, null and void and of the (sic) effect and was in breach of the principles of natural justice and of his Conditions of Service.

(b) A declaration that the purported indefinite suspension of the plaintiff on half-pay as contained in the letter of 15th May, 1980 was not an act of the 2nd defendant and was in breach of the principles of natural justice and of his Conditions of Service and therefore is wrongful, illegal, invalid, null and void and of no effect whatsoever.

(c) A declaration that the plaintiff is still the General Manager of the 2nd defendant Company and is entitled to his full salary all benefits, allowances, privileges and emoluments attaching to his Office as General Manager.

(d) N30,000.00 being special damages for expenses incurred by the plaintiff as a result of deprivation of some of his entitlements and privi-

leges.

(e) N100,000.00 General Damages.

OR

In the alternative N500,000.00 general and special damages for wrongful dismissal."

B The action went to trial. In the course of his final address, Mr. Umeadi for the plaintiff dropped some of the reliefs claimed. For the proper understanding of what happened in court, I quote herebelow from the record:

"On the question of damages I refer to Lawreck v. Woods of Colchester (1967) 1 Q.B. 278. All entitlements to the benefit of the servant C contained in the contract of employment should be amended. See also Halsbury Vo. 25 3rd Edition, page 523; English and Empire Digest Vol. 34 Page 129 paragraph 873 and also paragraph 13, paragraph 883 and paragraph 884. Refer to Manabers v. Lyons (1919) iK.B 208. In keeping with Exhibit 5 and 6, the plaintiff is entitled to his unpaid half salary for 15 May D 1980 on N20,323.00 from June 1980 to December 1980 he is entitled to his full salary would be N11858.053. If half of May salary is added to old wages for 1980 would be N12701.82 from 31st October 1980 salary increased to N22354.00. So two months to the total in 1980 on the increased scale. The grand total for 1980 would be N12701.87 plus N388.5 which equals E N13040.37. From 1981 to 1983 we were not paid at the rate of N22354.00 per annum. This gives a total of N67062.00. If this should be added what is left to the date of judgment. From 15th May 1980 to December 1983 total wages would be N80,102.37.

On his perquisites payment to cook for May 1980 to December F 1983 would be N6880.00. Steward would be N6120.00. Driver would be N8600.00 security guard would be N5160.00. Electricity would be N2580.00. Exhibit 12 is N500.00, gardener for the same period is N1900.00. Parts, Exhibit 8 100.11 would be N36666.6. Total damages so far is N148,508.97. Retirement benefit under Exhibit 8 we are entitled to 170% of G our salary which is N3800.08. Our entire claim would be N186,610.00

Court to Counsel - Are all these based on general or special damages and if the later where are they pleaded? They do not seem to come within the original claim.

Umeadi: We are going on the alternative claim. What we are saying is that H what is due to the servant by virtue of his contract of service should ensure to him. The issue is not damages or wages, this distinction is immaterial. We drop all the reliefs in 29(a), (b), (c), (d) and (e). We are basing our case on the alternative claim.

Counsel continues his argument: - Refers to Maine & Macgregor 12th Edi-

tion paragraphs 608 and 609 at pages 522 to 523. I do not intend to put the issue of the plaintiff wrong until he has attained the age of 60 years. This may sound speculative. I urge the court to give judgment for the plaintiff. Court to Mr. Umeadi: If you are suing for wrongful dismissal it implies that you yourself have put an end to the contract of service. Assuming that you were wrongfully dismissed, you could be entitled to damages up to the time B of your action. Now then can the court award you damages up to the date of judgment?

Umeadi: I refer to paragraph 27(a) of the further amended statement of claim. I wish to make an amendment under order 34 of the H.C.R. We want to restore paragraph 27c of the amended statement of claim i.e. debito justitia. We now wish to drop the alternative claim. We are now claiming under 27(c) a sum of N186,610.00 as representing what we should get under paragraph 27(c) of the further amended statement of claim. C

Njelita: This application is a new development. It arises from counsel's address. We oppose the application. It is belated and goes to the root of the subject of the action. The counsel can not approbate and reprobate as he likes. When a claim is dropped it is deemed to have been dropped and deemed struck out. To revive it is prejudicial to our case. D

Umeadi: I concede that the error is on our side. But I rely on Order 34 of the H.C.R. the defence is not prejudiced in any way because the evidence has not been altered. I urge the court to exercise its discretion to allow the amendment as debito justitia. E

Court to Umeadi: Do you concede that if I disallow this amendment that there is no claim before the court since you have now abandoned the alternative claim. F

Umeadi: I concede that and hence I have asked the court to exercise its discretion ex debito justitia.

Court: I will take time to consider my ruling. Adjourned to 22nd February, 1984 for hearing to continue."

At the resumed hearing, the court read its ruling and granted the application. Relief 27(c) thus became the only relief before the court. G

At the conclusion of addresses of learned counsel for the parties, the learned trial Judge in a reserved judgment, remarked:

"In the course of the final address the plaintiff discontinued all the above reliefs except 27(c). This will be dealt with further in this judgment." H Late in the judgment, the learned Judge observed:

"On a question from the court in the course of his address, to explain whether all the calculations were based on general or special damages, the learned Senior Advocate answered that he was relying only on the

alternative claim for wrongful dismissal. He then prayed for leave to abandon all the reliefs in paragraphs 27(a), (b), (c), (d) and (e) of the final statement of claim, leaving only the alternative claim. The learned counsel further indicated that he did not intend to pursue the question of the plaintiff working until he attained the age of 60 years as that would sound speculative. He then urged the court to give judgment for the plaintiff on his claim. Following this application to abandon the above reliefs, the Court asked the learned Senior Advocate to explain why the plaintiff should be paid up til the date of judgment as submitted, seeing that by suing for wrongful dismissal the plaintiff in effect put an end to the contract of service. The learned Senior Advocate then prayed for leave to further amend the reliefs claimed by the plaintiff *ex debito justitiae*. He prayed for leave to discontinue the alternative claim, and to restore to relief in paragraph 29(e) of the further amended statement of claim being one of the reliefs he had earlier indicated he was discontinuing. I have already given a considered ruling on this maneuver. The amendment was duly granted, with the result that, at the end of the address of the learned Senior Advocate of the plaintiff, the only relief before the court, for which the plaintiff was asking for judgment, happened to be relief in paragraph 27(c) of the further amended statement of claim. For purposes of clarity and by way of emphases the said relief is hereunder repeated, a declaration that the plaintiff is still the general Manager of the defendant company and is entitled to his full salary benefits, privileges and allowances attaching to his office as General Manager."

He made the following findings of fact:

1. "I am satisfied that the plaintiff was the general manager of the company and that his appointment was duly and regularly made by the Board of directors of the defendant Company."

2. There are fundamental breaches of the plaintiff's contract of employment which amount to a constructive dismissal of the plaintiff.

3. "It appears to me that by this suit, the plaintiff had accepted the repudiation which effectively determines the contract. From his Writ of Summons, his final Statement of Claim, his evidence in Court, all show that the plaintiff is contending that his employment had been wrongfully determined. I am satisfied and find as a fact that the plaintiff accepted the constructive dismissal."

4. "..... the first defendant has no locus in this action."

5. "The defendants must be deemed to have fought the action on the basis of the claims before the Court and all legal consequences arising therefrom. That being the case, both parties having treated the contract as at an end, the plaintiff's only recourse is to damages for wrongful dismissal.

This he cannot now do, since this arm of the action has been discontinued at the instance of his counsel."

On these findings, the learned trial Judge concluded:

"Much as one would sympathize with the plaintiff in his plight and the shabby treatment meted to him, this is a Court of Law, where judgment (sic) are delivered on the facts before the Court and the law applicable to the said facts. In the final analysis, I find myself unable to grant the declaration sought by the plaintiff. This suit is hereby dismissed."

Being aggrieved with this decision, the Plaintiff appealed unsuccessfully to the Court of Appeal. He has now further appealed to this Court.

In his brief of argument Plaintiff raised two questions as arising for determination, to wit:

"(a) Was the court of Appeal right to have dismissed the plaintiff-appellant's appeal against the judgment of the High Court having regard to the primary issue in the case and the only relief before the High Court for determination?"

(b) In the alternative to (a) above, was the Court of Appeal right in refusing to Order a non-suit in the case?"

The 2nd Defendant in its own brief posed the following 3 questions:

"(a) Whether the withdrawal of the reliefs sought in paragraph 27 of the further Amended Statement of Claim and the restoration of the relief in subparagraph (c) thereof is tantamount to an amendment of pleadings?"

(b) Whether the lower courts were justified in determining the fate of the appellant's case per the sole relief in paragraph 27(c) of the further Amended Statement of Claim upon the footing of all the relevant issues joined and formulated by the parties on their respective pleadings and the accepted evidence adduced at the trial and counsel's submissions thereon?"

(c) Whether the court below is justified in refusing to order a non suit in the circumstances?"

Plaintiff was absent and was not represented by counsel at the oral hearing of the appeal. Pursuant to the rules of Court, the appeal was taken as argued on his brief. Dr. Ibike, SAN who appeared for the 2nd Defendant adopted and relied on his brief, he urged the Court to dismiss the appeal.

It is conceded in the Plaintiff's brief that the only relief before the trial court was the declaration sought in paragraph 27(c) of the further amended statement of claim. It is, however, argued that by the amendment whereby the other reliefs were not proceeded with, what stood before that final amendment was no longer material before the court and no longer defined the issues to be tried as the amended claim related back to the institution of the action. It is submitted that the courts below were, therefore, in error in dismissing Plaintiff's

claim on the basis that he included a claim for damages for wrongful dismissal as one of his reliefs and thereby accepted his dismissal. It is further submitted that on the findings of the trial court and the evidence, the Plaintiff ought to have been granted the limited declaration he claimed.

On the second question raised in Plaintiff's brief, it is submitted that B as the Plaintiff succeeded on the primary issue that he was appointed the General Manager of the defendant - Company and that he served for 17 years without blemish and on the finding that he was shabbily treated, he, no doubt, suffered damage as a result of the actions of the Defendant, this case should not have been dismissed but rather non-suited. This would enable him pursue the losses he had suffered "within the ambit of his claim before the Court as he had not totally failed in the said claim".

It is submitted, for the Defendant, that the Courts below rightly found that by suing, inter alia, for damages for wrongful dismissal, the Plaintiff had unequivocally and irreversibly elected to regard his contract of employment D as General Manager as wrongfully terminated by the fundamental breach committed by the defendant. It is further submitted that on the pleadings and evidence, the Courts below were justified in the conclusions reached by them and that as the Plaintiff failed to establish the one and only relief before the trial court, the court below was right in refusing to non-suit him.

E I agree with the Plaintiff that where pleadings are amended, what stood before the amendment was no longer material to determine the issues between the parties; the amendment speaks from the date the original pleading was filed - Warner v. Sampson & Anor. (1959) 1 QB 297, 321; Rotimi v. MacGregor (1974) 11 SC 133, 152. But the issue here is not one of amendment F of pleadings but abandonment of reliefs claimed. What Chief Umeadi, SAN, learned counsel for the Plaintiff did in his address was to abandon all Plaintiff's claims except the declaration claimed in paragraph 27(c) of the further amended statement of claim. The facts pleaded remained intact. Plaintiff, in evidence, admitted that his appointment was terminated. He said:

G *"No complaint (sic) have ever been made against me before my appointment was terminated."*

He sued claiming, inter alia, damages for wrongful dismissal. He thereby elected, quite rightly in my view, to accept the factual situation and claim damages. But this claim he withdrew at the trial. The withdrawal of that claim H would not, in my view, affect what had been done.

From the pleadings, evidence and findings of the learned trial Judge, Plaintiff was wrongfully terminated from his employment as General Manager of the Defendant Company. What then was his remedy? The relationship between the parties was that of master and servant. It is the law that ordinarily

the court will not order specific performance of a contract of personal service unless it is one with statutory flavour - see: Olanayan & Ors. v. University of Lagos (1985) ANLR 363; Vine v. National Dock Labour Board (1956) 3 ALL ER 939; (1957) 2 WLR 160; (1957) AC 488 at p. 507 where Lord Keith opined:

"Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages."

By the declaratory relief claimed the Plaintiff would in effect want the Court to declare the termination of his employment null and void. The court will not grant such a declaration in an ordinary contract of personal service unless special circumstances are shown - see: Francis v. Municipal Councillors of Kuala Lumpur (1962) 3 ALL ER 633; Iwuchukwu v. Nwizu (1994) 7 NWLR 379. That claim was therefore rightly refused by the trial court and the Court below was equally right in affirming the decision of the trial court.

Plaintiffs remedy lay in a claim for damages. This claim he withdrew at the trial. Having failed in the only relief he left with the trial court, he was not entitled to a non-suit. His claim was rightly dismissed.

For the reasons stated herein and the other reasons in the judgment of my learned brother Wali, JSC. I too find no substance in this appeal and dismiss it with N1,000.00 costs to the 2nd Defendant/Respondent.

ONU JSC

I had the privilege before now to read the judgment just delivered by my learned brother Wali, JSC and I am in entire agreement with his reasoning and conclusion. I wish by way of expatiation to add a few words of mine.

This is an appeal against the decision of the Court of Appeal, Enugu Division dated the 18th day of April, 1989 wherein that court dismissed the appeal of the Plaintiff, herein appellant, from the judgment of P.K. Nwokedi, J. (as he then was) sitting at the Enugu High Court of the former Anambra State after the suit had earlier been transferred thereto from Abakaliki.

In the appellant's suit against the respondent which ultimately ended in being dismissed, he was seeking to declare the respondent's act of sending him, inter alia, on compulsory indefinite leave, placing him on indefinite suspension on half pay as null and void; a declaration that he was still the General Manager of the 2nd defendant (hereinafter referred to as the respondent), N15,000 special damages, N100,000 general damages or in the alternative, N500,000.00 general and special damages for wrongful dismissal.

There were two applications brought by two interveners who wanted

to be joined as defendants in the suit pursuant to Order IV rules 5(1) of the High Court Rules Cap. 61 of former Eastern Nigeria (applicable to Anambra State) as then constituted), which application was duly considered, refused and accordingly dismissed. The learned trial Judge had in the ruling held that R.B.K. Okafor as 1st defendant, and also the Chairman of the respondent and B sued in that capacity, had no locus standi in the matter. His name was correctly accordingly struck out.

However, by an amendment (which I would strictly regard as a withdrawal or an abandonment of part of his claims as originally constituted) the appellant on 22nd February, 1984 sought by the application of his Counsel for C leave to withdraw and all of which was granted except one paragraph (paragraph 27 (c) in his Further Amended Statement of Claim) to wit:

"A declaration that the Plaintiff is still the General Manager of the 2nd defendant company and is entitled to his full salary, all benefits, allowances, privileges and emoluments attaching to his office as General Manager."

At the end of the trial, the High Court dismissed the appellant's case. He appealed to the Court of Appeal sitting at Enugu as hereinbefore alluded to and lost. It is from this decision that he has further appealed to this court premised on two grounds of appeal with the third ground being in the alternative. Two questions were formulated as arising on appellant's behalf for our determination, namely -

(a) *Was the Court of Appeal right to have dismissed the plaintiff - appellant's appeal against the judgment of the High Court having regard to the primary issue in the case and the only relief before the High Court for F determination?*

(b) *In the alternative to (a) above, was the Court of appeal right in refusing to order a non-suit in the case?*

In considering both issues together, I take the firm view that the misfortune that befell the appellant's case which became doomed through the G admissions of his learned leading Counsel can be demonstrated briefly as follows:-

In the first place, the appellant's argument that the two courts below erred in "relying on the claims which stood before the amendment" appears clear to me to be misconceived. That this is so is best illustrated by the H following dialogue the learned Senior Advocate for the appellant, who, oblivious of the stand he had earlier on taken in his abandonment of all but paragraph 27(c) of his Further Amended Statement of Claim, still insisted on reliance on all the issues and evidence adduced at the trial to urge that judgment be entered for him. The case herein is therefore one where an employee

dismissed or terminated in breach of his contract of employment cannot choose to treat the contract as subsisting by suing for accounts of profits which he would have earned to the end of this contractual period; he must sue for damages for wrongful dismissal and must of course mitigate those damages as far as he reasonably can. See Oshinjinrin & Ors. v. Elias & ors. (1970) 1 ALL NLR 153 at pages 156-157; A.G. Anambra State v. G.N. Onuselogu (1987) 4 B NWLR (Part 66) 547 at pages 558-559. The case in hand, is in my view, a clear case of withdrawal or abandonment and not one of amendment. See England v. Palmer 14 WACA 659 at 661. Taiwo v. Migliore (1979) 11 S.C. 138 at 152 and Otto Hamman v. Yusuf & ors. (1961) ALL NLR (Part 2) 355 for the proposition that amendment to determine the issues in a case ought to be allowed. And on abandonment, I had the occasion to opine in Broadline Enterprises v. Monterey Corporation (1996) 1 RMLR (part 1) (1996) 9 NWLR (Part 417) 1 ; as follows:

"I take the firm view that a party may abandon any head of his several heads of claim in an action without prejudice to the remaining heads. In the circumstances of the instant case, I am of the opinion that abandoning claim is not the same-thing nor can it be equated to abandoning evidence led in the case. As I had examined elsewhere in this judgment, where in the present case the Appellants had abandoned their claim in contract on Exhibits B1 - B10, these having been received in evidence, they can be relied on for deciding the rights of the parties thereto"

Indeed, where as in the instant case which is distinguishable, averments in pleadings (or grounds of appeal) are not pursued, they are deemed to be abandoned. See Alhaji Baba & Ors. v. Mrs. Bankole (1986) 3 NWLR (Part 27) 141; B. V. Magnusson v. V.K. Koiki (1993) 12 SCNJ 114 at 124; (1991) 4 NWLR (Part 183) 119. Putting the record legally and procedurally straight, the learned trial Judge asked and received the following answers from the learned Senior Advocate -

"Court to counsel - Are all these based on general or special damages and if the latter where are they pleaded? They do not seem to come within the original claim.

Umeadi. We are going on the alternative claim. What we are saying is that what is due to the servant by virtue of his contract of service should ensure to him. The issue is not damages or wages this distinction is immaterial. We drop all the reliefs in 29(a), (b), (d), (e). We are basing our case on the alternative claim. Counsel continues his argument - Refers to Maine & Macgregor 12th Edition paragraphs 608 and 609 at pages 522-523. I do not intend to put the issue of the plaintiff wrong until he has attained the age of 60 years. This may sound speculative. I Urge the Court to give Judgment for the plaintiff.

Court to Mr. Umeadi. If you are suing for wrongful dismissal it implies that you yourself have put an end to the contract of service. Assuming that you are wrongfully dismissed, you could be entitled to damages up to the time of your action. Now then can the court award you damages up to the date of judgment?

B Umeadi. I refer to paragraph 27(c) of the Further amended Statement of Claim. I wish to make an amendment under Order 34 of the H.C.R. We want to restore paragraph 27(c) of the amended statement of claim i.e. debito justitia. We now wish to drop the alternative claim.

Njelita. This application is a new development. It arises from counsel's address. We oppose the application. It is belated and goes to the root of the subject matter of the action. The counsel cannot approbate and reprobate as he likes. When a claim is dropped it is deemed (sic) and to have been dropped and deemed struck out. To revive it is prejudicial to our case.

Umeadi. I concede that the error is on our side. But I rely on Order 34 of the D H.C.R. The defence is not prejudiced in any way because the evidence has not been altered. I urge the court to exercise its discretion to allow the amendment as (sic) debito justitia.

Court to Umeadi. Do you concede that if I disallow this amendment that there is no claim before the court since you now abandoned the alternative E claim?

Umeadi. I concede that and hence I have asked the court to exercise its discretion ex debito justitia.

Court. I will take time to consider my ruling. Adjourned to 22nd February, 1984 for hearing to continue."

F The Ruling was duly delivered as hereinbefore pointed out upholding paragraph 27(c) of the Further Amended Statement of Claim as the only claim left in appellant's hand. From the foregoing, the following points emerged.

Firstly, that the paramountcy of the application relates to abandonment or withdrawal of part of the claims or reliefs sought by the appellant and G not amendment per se. The situation is amply provided for in Order 47(1) of the High Court Rules (ibid) and about which the learned trial Judge observed in his Ruling referred to above thus:-

"Under Order 47 Rule 1 of the High Court Rules, a plaintiff can discontinue or withdraw his action by filing a notice of discontinuance H before the hearing date, if otherwise he has to obtain leave of Court to do so. As this Court had not ruled on the expressed intention to discontinue or withdraw the said reliefs, I do not find any difficulty in regarding the reliefs as still before the court. Under the circumstances the volte face of the learned Senior Advocate can still be accommodated without injustice to the defen-

dants."

The above view was endorsed as correctly stated by the court below which went on to spell out the second arm of Order 47 as follows:-

"If in any other case the plaintiff desires to discontinue the suit or to withdraw any part of his claim or if the defendant desires to discontinue his counter-claim, or withdraw any part thereof such discontinuance or withdrawal may be allowed on such terms as to costs, and as to any subsequent suit as to the court may seem just."

Now, both in his pleading and evidence the appellant insisted on his alternative pleading wherein he asked "In the alternative, N500,000 general and special damages for wrongful dismissal." By this alternative pleading and evidence proffered in support thereof, there was in law an election by the appellant to treat his employment by the respondent as terminated and as at an end. That being so, it became unnecessary for the trial court to decide whether the appellant was appointed the General Manager of the respondent: both courts below having decided this very important point in favour of the appellant. It is thus abundantly clear that the lower court which confirmed the trial court's decision fully and correctly appreciated that the Court of first instance as well as the parties themselves grappled with the case on the footing of the issues joined in their pleadings by which they are all bound. See Ajayi v. Texaco Nigeria Ltd. (1987) 3 NWLR (Part 62) 579 at pages 592 and 593. See also Adeniji v. Adeniyi (1972) ALL NLR 298 and Egonu v. Egonu (1978) 11 and 12 S.C. 111 at page 133, 135-136 save that sequel to the ruling aforementioned, the only relief or remedy asked for by the appellant is and was, at all material times, the relief set out in paragraph 27(c) of the Further Amended Statement of Claim. In this wise, the authorities of Obioma & ors. v. Olomu & ors. (1978) 3 S.C. 1 and Anukwua & ors. v. Ohia & ors. (1986) 5 NWLR (Part 40) 150 cited for the proposition that where a plaintiff in a case establishes his right or title to part of his claim, that much, at least, be awarded to him are, in my view, not apposite.

The trial court found and rightly, in my view, that the appellant discharged the preliminary onus that he was appointed the General Manager of the respondent and so a master and servant relationship without statutory colouration, was created. See U.N.T.H.M.B. V. Nnoli (1994) 8 NWLR (Part 363) 376. The essence of the relief in paragraph 27(c) of the Further Amended Statement of Claim, in my opinion, is not whether the appellant was or had ever been General Manager; rather it is whether the appellant still is or has continued to be General Manager entitled to full salary, all benefits, allowances, privileges and emoluments attaching to his office as General Manager. It is now an established principle of law that if one is suing for wrongful

dismissal it implies that he himself has put an end to the contract of service. Assuming that one is wrongfully dismissed, all he would be entitled to are damages up to the time of one's action (not up till the time of judgment). The two courts below, in my respectful opinion, are correct in the view they took on the question of election by the appellant to treat the contract itself as fundamentally breached and all over. This issue is settled the very point in time the appellant filed his writ of summons in which he asked for general damages for wrongful dismissal. It therefore follows, irrespective of whether or not the alternative claim for damages for wrongful dismissal was struck out by virtue of amendment or abandonment that the lower Courts were entitled to take into consideration the said act of election by the appellant in arriving at the conclusion that the declaratory relief in paragraph 27(c) aforementioned no longer avails him.

If the relief in paragraph 27(c) aforementioned was not legally available to the appellant, to wit: that he had no claim before the trial court from which he was being debarred through a technical hitch which the adverse party ought not, in the interest of justice to take undue advantage of, non-suit is not an appropriate order to make in the circumstances. His case stands dismissed.

For these reasons and the more elaborate ones contained in the lead judgment of my learned brother Wali, JSC I too dismiss this appeal and make the same consequential orders inclusive of costs as there made:

ADIO JSC

I have had a preview of the judgment just read by my learned brother, Wali, J.S.C., and I agree that this appeal fails. I too dismiss it.

A party who is a plaintiff should make up his mind about the reliefs which he wants to claim. In the same way he should give very careful and due consideration to the question whether or not he should withdraw any part of his claim because having withdrawn any part of his claim he may find that, at the end of the day, there is no relief which the court can grant to him on the basis of those aspects of his claim that are left. A court has no power to award to a party what he has not claimed. See Ekpegong v. Nyong, (1975) 2 S.C. 71 at p. 80. The situation is the same where a party has earlier claimed a relief and, as in this case, he has withdrawn it. What is material is the case of the plaintiff, as presented, that is before the court. One is, therefore, not surprised by the following statement of the learned trial Judge endorsed by the court below:-

"Much as one would sympathize with the plaintiff in his plight and the shabby treatment meted to him, this is a Court of law, where judgments

are delivered on the facts before the Court and the law applicable to the said facts. In the final analysis, I find myself unable to grant the declaration sought by the plaintiff. This suit is hereby dismissed."

And order of non-suit could not save the situation because, in any case, it is not a proper case for such an order. An order of non-suit will not be made or granted merely to enable a party to prove what he was previously B unable to prove. See Elias v. Disu, (1962) 1 ALL N.L.R. 214.

Further, there are findings of fact which the court below affirmed. This court does not interfere with such findings except where there is a miscarriage of justice. See Mbele v. The State, (1990) 4 N.W.L.R. (pt. 145) 484. The attitude of this court to concurrent findings of fact of two lower courts is that C it will not interfere with the findings of fact except the appellant can show special circumstances either there is a miscarriage of justice or a serious violation of some principles of law or procedure or that the findings are erroneous. See Are v. Ipaye, (1990) 2 N.W.L.R., (Pt. 132) 298. In this case, there are no special circumstances that would justify interference with the concurrent find- D ings of the two lower courts.

It is for the foregoing reasons and for the fuller reasons in the lead judgment of my learned brother, Wali, J.S.C., that I agree that this appeal fails. I too dismiss it and abide by the consequential orders, including the order for E costs.

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