

**SUPREME COURT OF NIGERIA**  
14TH DECEMBER, 2001. SC. 96/1995  
**CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE,**  
**S. U. ONU, S. O. UWAIFO, A. O. EJIWUNMI, JJSC.**

UNION BANK OF NIGERIA PLC DEFENDANT/APPELLANT  
AND  
E.D. EMOLE ..... PLAINTIFF/RESPONDENT

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**APPEAL**- *Evaluation of evidence - As the evidence was not properly evaluated by the courts below - They are perverse and will be set aside*

**BANKING** - *Devaluation - Effect of devaluation of foreign currency on transaction - Onus of proof - Is on the bank to show the effect of such devaluation - And that the bank is entitled to charge the customer with the devaluation*

**COURTS** - *Discretion - The trial judge did not properly exercise his judicial discretion - As he made his order in the absence of any evidence - To support his order*

**DAMAGES** - *Double compensation - General damages awarded to the plaintiff who had been adequately compensated - Constitutes double compensation*

**NEGLIGENCE** - *Particulars of negligence - Damages - As the plaintiff filed to prove the particulars of negligence - The claim for damages for negligence - Ought to have been dismissed*

**FACTS**

The Plaintiff/Respondent was a customer of the Defendant/Applicant Bank and maintained a current account at the Aba branch of the defendant Bank. In November 1984, he requested the Bank to open

some letters of credit in favour of his overseas suppliers of goods. The

letter of credit was for the sum of ninety-two thousand, three hundred and ninety one pounds seventy eight pence (#92,391.78). He deposited a sum of N99, 793.15 (ninety nine thousand, seven hundred and ninety three Naira, fifteen kobo) as the full cover for the said letter of credit based on the exchange rate prevalent on 6th November 1984. The letter of credit was duly opened. When in April 1985 the plaintiff went to the Bank to collect the shipping documents relating to the letter of credit, he was informed that due to foreign exchange fluctuation at the time, he had to pay an extra amount of NI6,224.29 (Sixteen thousand two hundred and twenty four Naira, twenty nine Kobo) before he could collect the shipping documents. The plaintiff paid the said sum, cleared the goods and sold them in 1985. Subsequently on 11/12/86, 31/12/86 and 21/7/88, the defendant Bank debited the plaintiffs account with certain sums which they claimed were foreign exchange fluctuations arising from the letter of credit. The plaintiff protested against these debits.

In 1985, the Bank granted the plaintiff an overdraft facility of NI40,000. In addition to a further sum of N200,000.00 facility to cover documentary credits. The plaintiff executed a deed of mortgage in favour of the Bank over his property. Plaintiff complained that the Bank took advantage of the mortgage to inundate his account with arbitrary debits resulting in the account being paralysed. His business consequently suffered and the plaintiff therefore instituted this action seeking many reliefs. At the end of the trial the learned trial judge found for the plaintiff and awarded the reliefs sought by him. The Bank appealed to the Court of Appeal which dismissed the appeal and affirmed the judgment of the trial court, including all the consequential orders. The Bank has further appealed to the Supreme Court, with leave of the Court of Appeal.

#### **ISSUES FOR DETERMINATION**

*“(1) Whether, having found that the respondent did not prove the particulars of Negligence by the trial court, learned Justices of the Court of Appeal were right in confirming the decision of the trial court that the appellant was liable in negligence.*

*(ii) Whether in fact the respondent was not owing the*

*appellant as at 5/12/90 the date of the judgment of the trial Court.*

*(iii) Whether the order on the appellant to release the title deed of respondent was right.”*

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

***Negligence - Particulars of negligence***

1. I have carefully considered the arguments advanced in the briefs of arguments of both parties and the oral submissions made at the hearing of the appeal before us. I think the learned trial Judge acted on a wrong principle of law in awarding the sum of N200,000.00 general damages in favour of the plaintiff. Having failed to prove the particulars of negligence pleaded by him, Plaintiff's claim for damages for negligence on a tort ought to have been dismissed. It was not for the trial Judge to find reasons, other than those pleaded, to find for the Plaintiff in the tort of negligence. He could not make a case for a party different from that party's case - see *Aemarchi v. Aic. Ltd.* (1986) NWLR 443; at p. 449. The Court below ought not to have affirmed that award of N200,000.00 of N200,000.00 special damages for negligence. (p. 3572 A)

***Banking - Effects of devaluation of foreign currency***

2. The law is clear on this point. In a banker/customer relationship, the onus of proving how devaluation of foreign currency affected transaction between the banker and the customer, and that the banker is entitled to charge the customer with such devaluation lies on the banker as such fact is specially within his knowledge - see *FS. Yesufu v. African Continental Bank* (1981) NSCC (Vol. 12) 36; (1981) ANLR 293. (p.1572 F)

***Damages - Double compensation***

Having failed to discharge that onus in this case, the learned trial Judge was right in finding in Plaintiff's favour in respect of those two sums. And having so found, it would amount to double compensation to yet award the sum of N200,000.00 as general damages in respect of the

same misdeed - AGABA V. OTUBUSIN (1961) All NLR 299. (p. 3573 E)

***Appeals - Evaluation of evidence***

- B 4. And had their Lordships of the Court below properly evaluated the evidence on record they would not have affirmed the finding of the trial Judge to the effect that the Plaintiff was not owing the Defendant Bank. That finding is perverse and must be set aside. (p. 3576 E)

***C Courts - Discretion***

- D 5. In any event, the order that Plaintiff's title deed be returned to him cannot be a proper exercise of judicial discretion. The mortgage deed was not in evidence. How did the learned trial Judge come to know that Plaintiff had fulfilled all his obligations to entitle him to a return of his title deed? In the light of the finding that Plaintiff was still owing some amount, the order that his title deed be returned to him cannot stand. (p. 3576 F)

**E REPRESENTATION**

E. T. O. Njoku, Esq. for the Appellant.  
Chief T. Nwogu (E. O. Awa Esq. with him) for the Respondent.

**CASES REFERRED TO**

- F Admiralty Commissioners v. Susque Hannah (Owners) (1926) AC 655  
Aemarchi v. Aic. Ltd. (1986) NWLR 443 at p. 449  
FS. Yesufu v. African Continental Bank (1981) NSCC (vol.12) 36; (1981) ANLR293
- G Agaba v. Otubusin (1961) All NLR 299  
LCC v. Unachukwu (1978) 3 SC 199; (1978) ANLR 92  
Ekpe v. Fagbemi (1978) 3 SC 209; (1978) ANLR 107  
Ezeani v. Ejidike (1964) I All NLR 402 at p.405  
Onaga & Ors. v. Micho & CO. (1961) All NLR 324
- H Shell B.P. v. Abadi (1974) All NLR (pt.1) I at page 16

**LEAD JUDGMENT BY OGUNDARE JSC**

The Plaintiff/respondent was at all times relevant to this appeal a customer of the Defendant/Appellant Bank. He maintained a current account at the Factory Road, Aba branch of the Defendant Bank. Sometime in November, 1984, he requested the Bank to open some letters of credit in favour of his overseas suppliers of goods. One of such letters was LC No. 72/84 for 'a392,391.78 (Ninety-Two Thousand, Three Hundred and Ninety-One Pounds, Seventy'97Eight Pence). At the request of the Bank Plaintiff deposited a sum of N99, 793.15 (Ninety-Nine Thousand, Seven Hundred and Ninety-Three Naira Fifteen Kobo) as the full cover for the said letter of credit, based on the exchanged rate prevalent on 6th November, 1984. The letter of credit was opened by the Bank. In April 1985 Plaintiff went to the Aba branch office of the defendant Bank to collect the shipping documents relating to the letter of credit. There he was told that due to foreign exchange fluctuations at the time the defendant Bank's correspondent bank cabled instructions that the supplier had been paid he had to pay an extra amount of N16,224. 29 (Sixteen Thousand Two Hundred and Twenty'97Four Naira Twenty'97Nine kobo) before he could collect the shipping documents. Plaintiff paid the said sum, cleared the goods and sold them in 1985. That could have been the end of the matter. But it was not. On 11/12/86, 31/12/86 and 21/7/88, the Defendant Bank debited Plaintiff's account with the sums of N77,578.18; N25,727. 19 and N42,138.98 respectively which the Defendant claimed were foreign exchange fluctuations arising from the letter of credit transaction in respect of the LC No. 72/84. The Plaintiff protested to the Defendant against these debits.

Sometime in 1985 the Defendant Bank granted the Plaintiff an overdraft facility of N140,000.00 in addition to a further sum of N200,000.00 facility granted to cover documentary credits. The Plaintiff executed a deed of mortgage in favour of the Defendant Bank over his property situate at 15C Chief Paul Nkoro Avenue, Aba, as security for the facilities granted him.

It was Plaintiff's complaint that the Defendant Bank took advantage of the mortgage to inundate his account with arbitrary debits resulting in the account being paralysed. As it was the only business

account he had with any bank, his business suffered. In consequence, Plaintiff on 15/3/89 instituted the action leading to this appeal claiming, as per paragraph 17 of his statement of claim-

B “(a) A declaration that the Plaintiff had in 1984 fully and effectively settled all his obligations to the defendant arising under letter of credit 72/84 for ‘a392,391.78 pounds

(b) A declaration that the sums of N77,578. 18, N25, 727. 19 debited to the Plaintiff’s account by the Defendant on the 11th and 31st day of December, 1986, and all other such sums of money also C debited to the Plaintiff’s account by the Defendant were wrongly debited.

(c) an order of the Honourable Court compelling the Defendant to pay back to the Plaintiffs’ account all such sums of money D irregularly debited to it including the interest earned by the Defendant on the sums irregularly debited to the Plaintiff’s account.

(d) A declaration of the Honourable Court that whatever indebtedness, if any, existing after allowance is completely made of the several sums irregularly and unlawfully debited to the Plaintiff’s account with the Defendant, was not the type of indebtedness contemplated by the parties which the Plaintiff entered into a Deed of mortgage in respect of his property known as No. 15C Chief Paul Nkoro Avenue, Aba with the Defendant, which property was registered as No. 79 at page 79 in Volume 155 of the Lands Registry, in the Office at F Owerri.

(e) An order of injunction restraining the Defendant by itself or through its servants and/or agents from taking steps, including advertisement, to sell or otherwise or dispose of the said property.

G (f) An order of the Honourable Court compelling the Defendant to return the title deeds respecting the property to the Plaintiff.

(g) the Plaintiff claims against the Defendant the sum of N500,000.00 (Five Hundred Thousand Naira) as general damages for the Defendant’s negligence.”

H In its Statement of defence, the Defendant Bank pleaded, inter alia as follows:

“3. *The defendant denies the averment in paragraph 5 of the Statement of Claim.; The defendant states that the plaintiff*

*paid the sum of N99, 783. 15 (Ninety-Nine Thousand Seven Hundred and Eighty Three Naira Fifteen Kobo) which amount includes deposit and the Bank charges for the establishment of letters of credit. The defendant denies that the said amount covered the full amount payable by the plaintiff for the transaction.*

4. *In further answer to the said paragraph of the statement of claim the defendant states that owing to the fluctuation in exchange rates it is not possible for the defendant to determine before hand the exact amount to be paid by the plaintiff for the establishment of the letters of credit until the transaction comes to an end, that is to say, until the goods for which the letters of credit were opened had arrived and the plaintiff had taken delivery and the Central Bank of Nigeria paid the suppliers of the goods.*

5. *The defendant admits paragraph 6 of the Statement of Claim to the extent that at the time the plaintiff collected the shipping documents from the defendant to clear his goods from the Port he paid a total sum of N116, 017.44 including the initial deposit paid by the Plaintiff at the time the letters of credit were being opened.*

6. *the said sum of N116,017. 44 was not all that the defendant was to pay to bring the transaction to a close. The practice in the establishment of letters of credit for a customer is that after a customer had collected or taken delivery of the goods he forwards the customs exchange control documents to the Bank which documents the Bank in turn forwards to the Central Bank of Nigeria. Armed with the exchange control documents the Central Bank makes available the foreign currency value of the goods to the suppliers overseas, while the Bank pays to the Central Bank of Nigeria the equivalent in local currency. Until the Central Bank releases the foreign currency to the overseas suppliers it cannot be determined before hand the amount in local currency a customer is entitled to pay for the establishment of letters of credit. This was the case in the transaction that gave rise to this action.*

8. *The defendant denies that the sums referred to in paragraph 8 of the Statement of Claim were unilaterally, negligently or unjustifiably debited against the account of the plaintiff. The sums*

were arrived at after the release of the foreign currency by the Central Bank of Nigeria to the Overseas suppliers in accordance with the process explained in paragraph 6 of this statement of Defence. The defendant in turn paid the said sums to the Central Bank. The defendant further states that the plaintiff before the establishment of the letters of credit signed undertaking to pay revaluations of the foreign currency amount as advised by the Central Bank of Nigeria. The Defendant will at the trial found on the undertaking. The defendant denies the averment in paragraph 8 (a) of the Statement of Claim and will at the trial put the plaintiff to the strictest proof thereof.

The Defendant further states that if there was delay in the processing of the letters of credit it was due to the fault of the plaintiff for:

(a) The letters of credit were established in November, 1984. The goods were shipped on 28/2/85. In April, 1985, the defendant received the shipping documents and handed them to the plaintiff while the goods arrived in the same April, 1985.

(b) In between the establishment of the letters of credit and the arrival of the goods there was an amendment of the terms of shipment between the plaintiff and the suppliers. The goods were originally to be airfreighted but they eventually were sent by sea.

(c) In the whole transaction the defendant acted as an agent to the Plaintiff and the defendant duly discharged its obligations by carrying out the plaintiff's instructions promptly."

At the trial of the action, the Defendant Bank led no evidence in proof of the above averments contained in its statement of defence. Its lone witness, M. O. Okorie only testified as to the transaction relating to the letter of credit, the subject matter of the action but could not produce the Central Bank's directive that authorised the Bank to make deductions from Plaintiff's account.

At the conclusion of trial and after addresses by learned counsel for the parties, the learned trial Judge found for the Plaintiff and adjudged -

"On these premises, the judgment of this Court in these proceedings is as follows:-



(i) *It is hereby declared that with the payment of the total sum of N116,017.44 paid by plaintiff to defendant between 6th April, 1984 and in or about April, 1985, the plaintiff fully and effectually settled all his obligation to the defendant arising under the letter of credit 72/84 for 'a392,391.78 pounds.*

(ii) *It is hereby declared that the sums of N77, 578. 18 and N25, 727. 19 debited to plaintiff's account by the defendant, and all other sums of money debited to plaintiff's account pursuant to the transaction connected with the said letters of credit 72/84 were wrongly debited.*

(iii) *It is hereby ordered that the sums wrongly debited in plaintiff's account be reversed and paid back into his account, including the sums of N77, 578. 18, N25, 727. 19 and N42, 138. 98. The sum of N116, 017. 44 is not affected by this order.*

(iv) *It is hereby ordered that defendant, having failed to prove plaintiff's indebtedness to it, is hereby given up to and including the 14th day of December, 1990 to release to the plaintiff his title deed registered as No. 79 at Page 79 in Volume 155 of the Lands Office Registry at Owerri, connecting and concerning his property known as and called No. 15C Chief Paul Nkoro Avenue, Aba.*

(v) *The relief seeking a declaration that whatever indebtedness, if any, existing after allowance is completely made of the several sums irregularly and unlawfully debited to the plaintiff's account with the defendant, was not the type of indebtedness contemplated by the parties when the plaintiff entered into a Deed of mortgage in respect of his property known as No. 15C Chief Paul Nkoro Avenue, Aba with the defendant, which property was registered as No. 79 at Page 79 in Volume 155 of the Lands Registry in the office of Owerri is hereby dismissed. This item of the claim is vague. The indebtedness not proven for any meaningful order.*

(vi) *The defendant will pay to plaintiff N200,000 general damages.*

(vii) *The defendant will pay to plaintiff costs fixed at N1,500 (One Thousand Five Hundred Naira)."*

The Defendant Bank appealed against this judgment to the Court

of Appeal, Port Harcourt Division. The Court of Appeal dismissed the appeal and affirmed the judgment of the trial court, including all the consequential orders made therein. And being dissatisfied with the judgment of the Court of Appeal, the Defendant Bank has now, with leave of the Court of Appeal, appealed to this Court upon five grounds of appeal.

Pursuant to the rules of this Court, the parties filed and exchanged their respective briefs of argument. In the Appellant's brief the Defendant formulated three issues as calling for determination in this appeal, to wit:

*"(i) Whether, having found that the respondent did not prove the particulars of Negligence by the trial court, learned Justices of the Court of Appeal were right in confirming the decision of the trial court that the appellant was liable in negligence.*

*(ii) Whether in fact the respondent was not owing the appellant as at 5/12/90 the date of the judgment of the trial Court.*

*(iii) Whether the Order on the appellant to release the title deed of the respondent was right."*

The Plaintiff reframed the issues thus:

*"1. Whether, from the pleadings and evidence before the trial Court, the learned Justices of the Court of Appeal were wrong in affirming the findings of fact of the trial Court that the appellant was rightly found liable in negligence.*

*2. Whether from the state of pleadings the Respondent needed to tender the Debit Note for same to prove that the Appellant debited his account with N42, 138. 98 as pleaded.*

*3. Whether the Justices of the Court of Appeal were right in confirming the order to release the Respondent's title Deed made by the trial High Court."*

Both sets of issues raise substantially the same questions. I shall, however, adopt defendant's issues in the determination of the appeal.

Issue 1:

Plaintiff had pleaded in paragraph 8 of his statement of claim thus:

*"8. The Defendant later without any justification, on the 11th day of December, 1986, 31st day of December, 1986 and 21st day of July, 1988, unilaterally and negligently debited the*

*plaintiff's account with the sums of N77,578.18, N25,727.19 and N42,138.98 respectively. The Defendant at other times also debited the plaintiff's account in the name of foreign exchange fluctuation arising from the same LC.*

**PARTICULARS OF NEGLIGENCE**

*(a) The Defendant in breach of its duty to the plaintiff did not expeditiously process the plaintiff's letter of credit in line with the Central Bank of Nigeria directives.*

*(b) The Defendant's failure as disclosed above resulted in the Plaintiff's letter of credit to remain outstanding when other C letters of credit opened at the same time were settled before 1986 or 1987. At the trial, the plaintiff shall rely on the relevant circular issued by the Central Bank of Nigeria to Banks or authorised dealers. Also pleaded hereby is the Defendant's letter dated 5th February, 1987, justifying its actions. The said circular is hereby D specifically pleaded.*

*(c) Another letter of credit which the Defendant also opened for the plaintiff on the same date for the sum of \$187,750.00 did not attract any fluctuation because it was processed and sent E to the Central Bank of Nigeria within the stipulated period."*

In his judgment the learned trial Judge observed:

*"Plaintiff pleaded the negligence alleged against the defendant as follows:....."*

The learned Judge then set out paragraph 8 of the statement F of claim and went on to find -

*"From the evidence before me, I do not find that the plaintiff proved items (a), (b) and (c) above."*

There has been no appeal against this finding. The learned G trial Judge went on to say:

*'The question which now arises is - Does the debiting of the sums of N77, 578.18; N25,727.19 and N42,138.98 by defendant against the plaintiff amount to negligence? In its letter dated 5th February, 1987, (Plaintiff's Exhibit No. 3), the defendant stated H as follows:-*

*".....As Bankers our customers are our assets and we always endeavour to protect their interests but not, however, to violate the*

*monetary policy/authority of the Nation. The true position is not that we are interested in debiting our customers with rate differences in order to get more interests on over drawn accounts as pointed out in your letter but, rather that we have Central Bank of Nigeria instructions - to revalue outstanding bills/letters of Credit as specified rates. The several debits on the particular L/C is as a result of application of wrong rates initially which later has to be corrected.'*

*In my view, I find that where a bank debits the account of its customer, as in this case, with amounts arising from wrong calculations committed by the Bank, it would be inferred that the bank had acted in breach of the duty it owed the customer to keep proper and accurate account for the customer. As the case may be this breach may result in violation of the contractual relationship between the Bank and the customer or in violation of the duty of care which the Bank owed the customer. The Bank, in plaintiff's Exhibit No. 3, admitted a violation."*

D He considered the issue of damages and concluded:

*"The defendant was negligent when it wrongly believed that plaintiff was indebted to it in respect of the letters of credit and proceeded, under that error, to debit his account with unwarranted amounts. The sums so debited in my opinion constituted part of the monetary value of the ultimate damage done to plaintiff. I do not have evidence to show that defendant actually paid the amounts to the Central Bank as alleged in paragraph 8 of its statement of defence pursuant to the letters of credit transaction in question. Defendant acted in error to block the account of plaintiff and thereby prevented him from having access to the sum of N50,000.00 he deposited in it. Defendant did not offer any evidence to justify the action. General damages are such as the Court can give based on an assessment of the judgment and opinion of a reasonable man in the matter.*

*I am not in doubt that the plaintiff is entitled to general damages from the defendant, as well as a reversal of the debit entry made in error in plaintiff's account."*

H He awarded N200,000.00 general damages

The Court of Appeal affirmed the award. On the complaint of

the Defendant that the trial Judge made contradictory findings on the issue of negligence pleaded by the Plaintiff, the Court of Appeal, per Rowland, JCA, observed:

*“It seems to me that the appraisal given to the above findings of the court below in appellant’s brief of argument is misconceived. There is nothing contradictory or overreach in the above findings by the trial court.”* B

On damages, the learned Justice of the Court of Appeal who delivered the lead judgment of that Court with which Edozie and Onalaja, JJ.CA agreed, had this to say: C

*“As to the award of N200,000.00 general damages by the court below in favour of the respondent against the appellant, I am of the firm view that the award was properly made by the trial court. A Judge should award damages so far as money can compensate that will give the injured party a reparation for the wrongful act.”* D

The learned Justice referred to Admiralty Commissioners v. Susque Hannah (Owners) (1926) AC 655 where the following passage appears:

*“An appellate court will only interfere with an award of damages by a lower court where it is convinced either that the Judge of the lower court acted upon some wrong principle of law, or that the amount awarded was extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”* E F

The Defendant Bank, in the appeal before us, has questioned the award of N200,000.00 damages against it for negligence. It is contended that as the Plaintiff failed to prove the particulars of negligence pleaded by him, his action failed. It is further contended that the trial Judge was in error to find for the Plaintiff on issues not pleaded. Learned counsel for the Defendant Bank, in the brief of argument, criticised the use made of Exhibit 3, Defendant’s letter to the Plaintiff in reply to the latter’s earlier letter, Exhibit 2. It is submitted that the Court of Appeal was in error to affirm the judgment of the trial court. H G

For the Plaintiff, it is contended that the finding of the learned trial Judge that negligence as particularised was not proved, did not, in

the circumstances of the case, mean the end of Plaintiff’s case. This

was so, it is contended, as Exhibit 2 and 3 (Exchange of letters between the parties) established the negligence pleaded.

**I have carefully considered the arguments advanced in the briefs of arguments of both parties and the oral submissions made at the hearing of appeal before us. I think the learned trial Judge acted on a wrong principle of law in awarding the sum of N200,000.00 general damages in favour of the Plaintiff. Having failed to prove the particulars of negligence pleaded by him, Plaintiff's claim for damages for negligence on a tort ought to have been dismissed. It was not for the trial Judge to find reasons, other than those pleaded, to find for the Plaintiff in the tort of negligence. He could not make a case for a party different from that party's case - See Aemarchi v. AIC Ltd. (1986) NWLR 443 at P. 449. The Court below ought not to have affirmed that award of N200,000.00 special damages for negligence.**

This, however, is not the end of the matter. Plaintiff's claim (b) relates specifically to the two sums of N77,578.18 and N25,727.19 debited by the Defendant Bank to the Plaintiff's account in respect of the Letter of Credit No. 72/84. It was Plaintiff's case that these sums of money ought not to have been debited to his account two years after the transaction. Defendant pleaded, but led no evidence in support, that the debits arose as a result of the directives of the Central Bank.

**The law is clear on this point. In a banker/customer relationship, the onus of proving how devaluation of foreign currency affected transactions between the banker and the customer, and that the banker is entitled to charge the customer with such devaluation lies on the banker as such facts are specially within his knowledge - See: F.S. Yesufu v. African Continental Bank (1981) NSCC (Vol. 12) 36; (1981) ANLR 293. The learned trial Judge is, therefore, right when he said:**

*"The evidence of the defendant in court fell far short of offering any effective defence to the positive claim of the plaintiff. Defendant admitted plaintiff paid N116,017.44 but failed to give evidence of any additional sums payable by (him) to justify the*

*debits made by defendant against the plaintiff. The evidence is necessary because in defendant's Exhibit No. 1, the undertaking, the various items and heads constituting the sum of N116,017.44 were expressly spelt out. Before defendant could debit any amount against the plaintiff pursuant to the undertaking, (Defendant's Exhibit No. 1) it is necessary as a condition precedent that the defendant should first of all show that such amount had become due and payable after the payment of N116, 017.44 as a result of any exchange variations between the time of calculating the Naira deposit payable (in this case the N116,107.44 paid) and the time defendant purchased the required foreign exchange. At paragraph 8 of the Statement of Defence, the defendant stated it paid the sums debited to the account of the plaintiff to the Central Bank. It failed to pursue this line of its defence in its oral testimony in Court. Having admitted it debited the disputed amounts against the plaintiff, the onus to show good and reasonable cause for the debit lay on the defendant. Defendant failed to discharge the onus. There was no evidence that any payments were made to the Central Bank."*

**Having failed to discharge that onus in this case, the learned trial Judge was right in finding in Plaintiff's favour in respect of those two sums. And having so found, it would amount to double compensation to yet award the sum of N200,000.00 as general damages in respect of the same misdeed - Agaba v. Otubusin (1961) All NLR 299; LCC v. Unachukwu (1978) 3 SC 199; (1978) anlr 92; Ekpe v. Fagbemi (1978) 3 SC 209; (1978) ANLR 107; Armel's Transportation v. Transco (Nig.) Ltd. (1974) 11 SC 237; (1974) ANLR 863; Ezeani v. Ejidike (1964) 1 All NLR 402 at p. 405; (1964) ANLR 395; Onaga & Ors. v. Micho & Co. (1961) All NLR 324;**

The net result of all I have said above is that I find for the Defendant Bank on Issue 1 and set aside the award of N200,000.00 general damages made against the Defendant.

Issues 2 & 3:

As the answer to Question 3 is dependent on the resolution of question 2, I think it is appropriate to take them together. The resolu

tion of question 2 depends on whether the learned trial Judge was right in taking into account the sum of N42,138.98 and other sums which the Plaintiff claimed were wrongly debited to his account.

I have given careful consideration to the arguments advanced on behalf of both parties. In paragraph 8 of his statement of claim the Plaintiff specifically mentioned the figure of N42, 138.98 among other sums claimed by him as having been wrongly debited to his account. In his claim (b) in paragraph 17 this figure was not specifically mentioned. At the trial, Plaintiff's attempt to prove that this sum of N42,138.98 was debited to his account failed as he withdrew the debit note (photocopy) he sought to tender in proof thereof. His statement of account was never tendered in evidence. It is significant to observe that this figure was never mentioned in his letter Exhibit 2 written to the Defendant on 30 Jan., 1987, whereas the other two sums he pleaded in paragraph 8 were specifically mentioned in that letter. The result is that there was no proof that the sum of N42, 138.98 was ever debited by the Defendant to the Plaintiff's account.

In his judgment, the learned trial Judge found:

"With regard to plaintiff's indebtedness, if any, to defendant, reference must be made of plaintiff's Exhibit No. 2 which, though pleaded as a letter of protest, contained facts from which the overall financial relationship between the plaintiff and the defendant could easily be determined as at the date of the letter namely, 30th January, 1987. The amount which plaintiff admitted he owed the defendant therein was N180,713.28. The sums which plaintiff claimed were creditable to his account were N103, 305.37; N720.00; N4,898.37; N4,665.11; N4,804.61; N150.08; N4,575.82 and N50,000.00 totaling N173,119.36. Added to this must be the sum of N42, 138.98 referred to at paragraph 8 of the statement of claim bringing the total claim to N215, 258.34. In effect, plaintiff admitted by the said letter it owed the defendant the sum of N7,593.92."

By a strange twist, the learned trial Judge found:

"From these calculations which arose from the evidence before me, I do not find that the Plaintiff is indebted to the defendant of any amount at all."



I need observe that, apart from the sum of N103,305.37 (the sum total of the sums N77,578.18 and N25, 727.19), Plaintiff did not prove that the other sums were ever debited to his account. Debit notes covering those sums were never tendered nor Plaintiff's statement of account, which would have been binding on the Defendant Bank. Exhibit 2, Plaintiff's letter to Defendant, could not have been legal proof that his account was debited by the Defendant in these sums. At best, Exhibit 2 is an admission by the Plaintiff that he was still owing some amount to the Defendant Bank which he put, according to the trial Judge's calculation, at N7,593.92.

Having found in one breath that, on Plaintiff's showing in Exhibit 2, he was still owing the Defendant Bank the sum of N7,593. 92, the learned trial Judge in another breath found that Plaintiff was not owing the Bank any amount. The learned Judge tried to rationalise this rather contradictory finding by saying:

*"At paragraphs 12 and 13 of the Statement of Claim, plaintiff pleaded that the present purported indebtedness existing against the plaintiff arose from the combined effect of the wrong debits and the alleged fluctuation in foreign exchange. At paragraph 11 of the statement of claim the plaintiff pleaded defendant wrongly debited more than N230,000.00 to the plaintiff's account. At paragraph 10 of the statement of defence the defendant merely denied the Plaintiff's averment. The denial was not sufficient. This mode of denial in law is tantamount to an admission by the defendant of the plaintiff's case on the issue. The legal principle on this is that any claim or defence pleaded which is not canvassed during the trial is deemed to have been abandoned - See: Shell B.P. v. Abadi (1974) All NLR (Part 1) 1 at page 16; Chief Adedepo Adekeye & Anor. v. Chief O.B. Akin-Olugbade (1987) 6 SC. 268 at 294. Any matter not specifically denied or stated not to be admitted should be regarded as established - See Ahmed Debs & Anor. v. Chieco (Nig.) Ltd. (1986) 6 SC. 179 at 182."*

He, however, failed to advert his mind to paragraphs 10 and 11 of the Statement of defence where the Defendant pleaded:

*"10. Except to admit that there was a legal mortgage executed between the plaintiff and the defendant by which the prop-*

erty of the plaintiff at 15C Chief Paul Nkoro Avenue, Aba, was secured the defendant denies the averments in paragraphs 10, 11, 12, 13, 14, 15, 16 of the Statement of Claim. The defendant further states that the said deed of legal mortgage covers all indebtedness on the plaintiff's account and all other debts owing to the Defendant by the plaintiff.

The defendant further states that the rate of interest charged at any time was in keeping with the Central Bank of Nigeria guidelines which all commercial Banks including the defendant must comply with.

11. The defendant states that the defendant is entitled to sell the property of the plaintiff situate at 15C Chief Paul Nkoro Avenue, Aba, covered or secured by the deed of legal mortgage dated the 2nd day of December, 1980, and registered as No. 53 at page 53 in Volume 235 of the Register of Deeds kept at Owerri, the plaintiff having failed to pay his indebtedness to the defendant."

With profound respect to the learned Judge, with the state of the pleadings it would be wrong to say that the Defendant admitted that it debited the Plaintiff's account with "more than N230,000.00" - an indefinite amount.

**And had their Lordships of the Court below properly evaluated the evidence on record they would not have affirmed the finding of the trial Judge to the effect that the Plaintiff was not owing the Defendant Bank. That finding is perverse and must be set aside.**

**In any event, the order that Plaintiff's title deed be returned to him cannot be a proper exercise of judicial discretion. The mortgage deed was not in evidence. How did the learned trial Judge come to know that Plaintiff had fulfilled all his obligations to entitle him to a return of his title deed? In the light of the finding that Plaintiff was still owing some amount, the order that his title deed be returned to him cannot stand.**

In conclusion, I allow this appeal and set aside the judgments of the two Courts below. In their stead, I enter judgment for the Plaintiff against the Defendant Bank in the following terms:

(1) It is declared that the sums of N77, 578.18 and N25,725.19 debited to Plaintiff's account by the Defendant pursuant to the transaction connected with the Letter of Credit No. 72/84 for 'a392, 391.78, were wrongly debited.

(2) It is ordered that the said sums of N77,578.18 and N25,727.19 be reversed and paid back into the Plaintiff's account. B

(3) All other claims of the Plaintiff are dismissed.

(4) Plaintiff is entitled to costs of the trial assessed at N750.00

The Defendant Bank is awarded N10,000.00 costs of this appeal and N1,500.00 costs in the Court of Appeal. C

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### **KARIBI-WHYTE JSC**

I have had the opportunity of reading, before now, the leading judgment of my learned brother Ogundare, JSC, in this appeal. D

I agree with his reasoning and the conclusion allowing the appeal. I will also allow, and hereby allow the appeal of the Appellant.

I abide by the costs awarded in the leading judgment. E

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### **ONU JSC**

I had a preview of the judgment of my learned brother, Ogundare, JSC, just delivered. I so agree with his reasoning and conclusion that I adopt the same as mine. F

I have nothing further to add thereto.

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### **UWAIFO JSC**

I read in advance the judgment of my learned brother Ogundare, JSC. I agree with it for the reasons he has given. I too allow the appeal in the terms stated, including the order for costs. G

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### **EJIWUNMI JSC**

H

I have had the advantage of reading before now the judgment just delivered by my learned brother, Ogundare JSC. In that judgment, the facts and the issues raised thereon have been carefully set down and considered. As I agree with the reasoning that preceded the conclusions reached allowing the appeal of the Appellant, the judgment is adopted as my own. Accordingly, I also allow the appeal, and abide with all the orders made in the said judgment.

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