

SUPREME COURT OF NIGERIA

9TH MARCH, 2001. SC. 203/1994

**CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE, A. I. IGUH,
A. I. KATSINA-ALU, E. O. AYOOOLA, JJSC**

ALERUCHI ETCHESON NSIRIM .

(Trading under the name and style of

Etcheson and Sons Block Moulding APPELLANT
Industry (Nigeria) Ltd.)

AND

ONUMA CONSTRUCTION RESPONDENT
COMPANY (Nigeria) Ltd.

COMPANY LAW - Accounts - Ownership of business - Where clear evidence abound - Ownership of the block making business belongs to the respondent - And appellatant must render account of the business.

COMPANY LAW - Meetings of the company - Minutes thereof - Absence of minutes - Does not render the meeting void - It only attracts a penalty.

COURTS - Non suit - Civil proceedings - Balance of probabilities as basis for judgment - Overwhelming evidence - Makes order of non suit improper.

PLEADINGS - Absence of pleading - Company meeting minutes - As the issue was not pleaded - But merely arose in cross examination - It goes to no issue.

PLEADINGS - Purpose of - Is to avoid surprise to the other party - And all the facts relied upon - Must be pleaded.

FACTS

Before the High Court of Rivers State, the plaintiff/respondent

filed an action against the defendant/appellant claiming inter alia, an order for an account of the net profits accruing from the running of a block moulding industry. In the alternative, plaintiff claimed the sum of one million naira as damages for breach of the oral agreement between the plaintiff and the defendant. The defendant being a Director of the plaintiff agreed orally with 3 other directors of same family to set up a block moulding industry for the plaintiff company. It was agreed that the defendant should manage the said moulding industry. In furtherance of the parties oral agreement two cheques were issued in favour of a company that was to supply machines needed for the block moulding business. Respondent also made a piece of land available for the moulding business. Appellant did set up the block moulding industry but was managing it as his own personal business.

Respondent discovered that the receipts for the purchased machines were issued in the name of appellant's business name. All monies accruing to the block industry were paid into appellant's private account. Respondent then filed this action claiming as aforesaid. Appellant denied the claim and sought to establish that the moulding industry was his own private business and that respondent paid him for all his past services by the cheques. This dispute according to appellant was out of personal/family dispute between him and Respondent's managing director who is his uncle. Appellant sought to rely on the fact that there were not minutes of the company meeting in proof of the alleged agreement between him and the respondent. The trial court held that the two parties never proved their cases and thus non-suited plaintiff/respondent. On appeal to the Court of Appeal, respondent's claims were granted. Being aggrieved, appellant has appealed to the Supreme Court raising 4 issues.

ISSUES FOR DETERMINATION

“(a) Whether on the evidence before the Court, the Court of Appeal was right in holding that the block moulding equipment employed by the Appellant was the property of Respondent (GROUNDS 1 and 2).

(b) If the answer to (1) is in the affirmative, whether this was Sufficient to also make the entire block-making business the property of the Respondent.

(c) *Whether on the evidence before the Court, the Court of Appeal was right in directing the appellant to account to the Respondent the net profits accruing from the Moulding industry and to pay over to the Respondent*

(d) *Whether the Respondent succeeded in proving that the block-moulding business was being operated by the Appellant in fraud of the Respondent."*

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

Meetings of the Company - Minutes thereof

1. I have quoted the relevant part of S.138 of Companies Act 1968 and nothing in it renders a meeting without its minutes being made illegal or void, it only attracts a penalty as provided in subsection (4) thereof. At any rate the rendering of the minutes or failure to render one should not be a big issue as the pleadings of the parties never adverted to this and should have been ignored by the trial Court. (p. 866 E)

Courts - Non Suit

2. The trial High Court heard the case on its merits but though it reviewed the evidence copiously it however came to a wrong conclusion of non-suiting the case. In civil cases the trial court gives judgment to the plaintiff on balance of probabilities, and in some instances the weakness of defendant's case can fortify the plaintiff's case. This is what has really happened in this case. The block-making machines were paid for by respondent, the electric generator of the factory was provided by the respondent, the land upon which the factory was erected was provided by the respondent. The only rebuttal provided by the appellant of all these is that the resolution to set up the industry was not backed by minutes or that the meeting where the alleged resolution was passed never took place. The evidence on the part of the plaintiff was overwhelming enough in the face of the weak defence. Certainly it was not a matter for non-suit, neither was it a matter for dismissal as in the cases of Olayioye v Oso (1969) 1 ALL NLR 281; 481. (p. 866 F)

Pleadings - Absence of

3. What the trial Court misconstrued is the issue of the minutes of the meeting of company's directors and its importance. Curiously enough neither party pleaded this issue, it only arose casually in cross-examination. Parties are bound by their pleadings, because the pleadings form their battleground. Whatever is not pleaded is not an issue and any skirmishes on unpleaded issue is a mere waste of time and if admitted erroneously in evidence it should be discountenanced as it is a nullity. The aim of pleadings is to bring to the fore the very dispute between the parties so that in the course of trial each party has put his adversary on notice as to what he is meeting (Salami v Oke (1987) 4 NWLR (Pt 63) 1; Therefore, whatever is not pleaded will not go to any issue between the parties however much it is attenuated in cross-examination; to do otherwise will give free for all opportunity to deviate from the real issue in contention and each party will have the opportunity to ambush the other. (p. 867 B)

Pleadings - Purpose of

4. Our notion of justice administration by procedure of pleadings in civil matters is to prepare each party for what he is to meet at trial, giving no opportunity for surprise or ambush. It is for this requirement for certainty as to what case parties are to meet at trial that pleadings are required to contain all the facts, facts only, that they rely upon. (Obijuru v Ozim (1985) 2 NWLR (Pt 6) 167. The answer to issue 1 of the appellant is in the negative. (p. 867 F)

Accounts - Ownership of business

5. As a result of the resolution of issue 1 against the appellant, there is no doubt the block making business in issue is the property of the respondent. Also, on all evidence before the Court it is certain the appellant is not the owner of the block-making business, the business belongs to the respondent company and the appellant must render account of the business to the respondent as claimed at the trial Court. (p. 867 H)

NOTABLE POINTS OF INTEREST**AYOOLA JSC***1. Presumption of ownership of goods - How raised*

The reasoning of Edozie, J.C.A., in the leading judgment of the court below cannot be faulted. That a person provides the money for the purchase of goods raises a presumption of the ownership of the goods by that person. Such presumption of ownership is consistent with human conduct. The court may presume existence of the fact of ownership by virtue of section 149 of the Evidence Act. That is what the court below rightly did in this case. (p. 871 A) B
C

2. Minutes of resolution of a company - Is not exclusive evidence

On this appeal by the defendant an attempt was made to raise once again the question of the admissibility of oral evidence of the resolution of the plaintiff's Board of Directors. Reliance was placed on section 138 of the Companies Act, 1968. However, that question has been correctly dealt with by the trial judge who held that the minutes of resolutions of a company are not exclusive evidence. Nothing in section 138 makes the minutes of resolution of a company exclusive evidence. It only makes the minutes admissible evidence of the proceedings. Parol evidence of such resolutions is also admissible. It was decided in Re Fire-proof Doors Ltd. (1916 – 1917) ALL ER (Rep) 931, 936 that decisions of directors need not necessarily appear in the minutes book if the court is satisfied that the resolutions were passed. (p. 871 C) D
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3. Defendant need not be fraudulent for plaintiff to succeed G

The defendant took exception to the description of his conduct as fraudulent. In my view there appears to be justification for holding the view that there was, at least, constructive fraud which, as defined in Black's Law Dictionary (6th Edition), includes:- H

“Any breach of duty which without an actually fraudulent intent, gains an advantage to the person in fault.”

Be that as it may, the conduct of the defendant needed not to be fraudulent

to entitle the plaintiff to the reliefs it claimed. An agent does not need to be fraudulent for the principal to be entitled to call upon him for accounts of the agency. (p. 871 H)

B REPRESENTATION

M. O. Abudu Esq., for the Appellant
Worgu Boms Esq., for the Respondent.

CASES REFERRED TO

- C** Bornu Holding Co. Ltd. Vs Bogoco (1971) 1 All NLR 325
Woluchom V Goodhead (1981) 5 SC
Olayioye V Oso (1969) 1 ALL NLR 281
Green V Green (1987) 3 NWLR (pt 61) 481
D Enoch V Onochie (1988) 1 NWLR (pt 70) 370
Ezewani V Onwordi (1986) 4 NWLR (pt 33) 27
Salami V Oke (1987) 4 NWLR (pt 63) 1
Sodipo V Lemminkainen OY (1985) 2 NWLR (pt 8) 547
E Owoade V Omitola (1988) 2 NWLR (pt 77) 413
Okedoyin V Arowolo (1989) 4 NWLR (pt 114) 172
Obijuru V Ozim (1985) 2 NWLR (pt 6) 167

F STATUTES REFERRED TO

Companies Act 1968 ss. 138, 127 - 139
Company and Allied Matters Act 1990 s.242(1)

BOOK REFERRED TO

- G** Phipson on Evidence II Ed p.60 para. 126 - 131

LEAD JUDGMENT BY BELGORE JSC

- The respondent was the plaintiff at the trial High Court of Rivers State.
H The appellant was the defendant. At the Court of Appeal holden at Port Harcourt the present appellant was appellant cross-respondent while the present respondent was the appellant. The appellant was, at the material time to the suit leading to this appeal, a director of the respondents.

According to its statement of claim, in paragraph 3 thereof, four directors of the Company met sometime in March 1980 and resolved to set up a block making industry. The four directors, namely Chief Omunakwe Nyeche Nsirim, Aleruchi Etcheson Nsirim and Nyeche Nsirim, agreed to set up a concrete block making industry and that the appellant should B manage it. Apparently the four directors of the respondent were acting not only as directors but to an extent as a family involved in business. They resolved as follows as per the plaintiff's statement of claim:

"(a) That as a Construction Company, the Company should go into the C Business of Block Making industry which is capable of being conveniently carried on in connection with the objects of the Company and which may render more profitable any of the Company's Business to wit: Building of Houses, Offices and Road Construction.

(b) That the Defendant should be put in charge of the Business. D

© That the Company should purchase Block Making Machine from Wiedemann & Walters (Nig) Limited.

(d) That the Company should also purchase and/or make available for use one of the generating plants of the Plaintiff's company to supply E Electricity since there is no Electricity supply in the area where the business is to be carried out.

(e) That the business should be located at Mile 4, Chief Omunakwe Nsirim Road, Port Harcourt. F

(f) That the Defendant should pay into the Plaintiff's account or any other account opened for the said business all monies received from the said Business.

(g) That the Defendant should keep proper Account Books and receipts G of all sales and/or purchases from the business."

Also that respondent, being a Construction Company, would benefit from the block making business both in its own contracts and from sales to the public. The whole of the resolution was said to be oral and it seems that they never expected any deviation from this agreement. On 17th day of H April, 1980, in furtherance of the purported resolution, a cheque for N49,000.00 was issued in favour of Weideman & Walters (Nigeria) Ltd. as part deposit for the purchase of concrete making machine of ZENITH

make. On the 1st day of June 1980, another cheque for N49,000.00 was issued in favour of the same Weideman & Walters (Nigeria) Ltd., to complete the purchase price of the block-making machine. The two cheques aforementioned were handed over to the appellant as manager of the block-making business for onward transmission to Weideman and Walters (Nig) Ltd. The cheques were duly paid to the Company and machines involved were duly supplied to the appellant who set up the factory. It is to be pointed out, that in furtherance of the agreement, the respondent company released to the appellant an electricity generating plant for the block-making factory. While the factory was being set up, the managing director of the respondent, Chief Onumakwe Nyeche Nsirim, was out of the country on business trip when the two cheques aforementioned were issued by the respondent company. Also made available for the concrete (block) industry by the respondent is a piece of land lying and being along Onumakwe Nsirim Road, Mile 4 Port Harcourt.

The appellant, in accordance with the resolution, put the block-making industry into operation and among its customers was the respondent. The equipment purchased from Weideman and Walters (Nig.) Ltd., apart from Zenith block-making machine, were Teva Mixer and Concrete Loader. However, by February, 1982 the auditors to the respondents saw the stumps of the two cheques issued to Weideman and Walters Ltd. and demanded the receipts for them. The appellant refused to hand over the receipts. The drawee, i.e Weideman & Walters Ltd., then on inquiry, indicated the receipt were not issued in the respondent's name but in the name of Etcheson & Sons, a trade name of the appellant; copies of the receipt were then given to the respondent company. This development led the respondent to demand full account from the defendant on the operation of the block-making industry. It was discovered that all monies accruing to the block-making industry were being paid into personal account of the appellant. Thus this suit by respondent as plaintiff claiming from appellant as defendant the following reliefs:

“And the Plaintiff claims are as follows:-

(i) Declaration that the Zenith Concrete Block Making Machine, Teva Mixer, equipment and other assets now being employed by the Defendant

in the Block Moulding Industry now being carried on by the Defendant at Onumakwe Nzirim Road, Mile 4, Port Harcourt under the Name and style of ETCHESON & SONS is (sic) the Bona Fide and Beneficial Property of the Plaintiff.

(ii) *A Declaration that the aforesaid Block Moulding business now being carried on by the Defendant at Mile 4, Port Harcourt under the Name and Style of Etcheson & Sons is being carried on in fraud of the Plaintiff.*

(iii) *An Order for an account of all sales and of the Monies had and received by the Defendant in the running of the moulding Industry from December, 1980 up to date of judgment.*

(iv) *An order for an Account of the Net Profits accruing from running the Moulding Industry and how the same are made.*

(v) *An order for the payment by the Defendant to the Plaintiff of all monies found to be due to her on the taking of such Accounts.*

(vi) *An Injunction to restrain the Defendant by himself, His Servants or Agents or howsoever otherwise from paying the proceeds of the said Business into any other Account opened by the Plaintiff for the said Business.*

(vii) *In the alternative the Plaintiff claims the sum of N1,000,000.00 (One Million Naira) as Damages for breach of the oral agreement made between the Plaintiff and the Defendant sometimes in March, 1980 at Port Harcourt.*

(i) *Purchase Price of Zenith Machine Teva Mixer and Concrete Loader and Generating Machine.*

N145,000.00

(ii) *Loss of Profit and use of the Machines mentioned in Item (1) above from July 1980 – April, 1982 at the rate of N26.00 (Twenty-six Naira per month.*

N572,000.00

(iii) *General Damages*

N283,000.00

TOTAL

N1,000,000.00

Apart from admitting the existence of the respondent and that he

was trading as Etcheson & Sons Block-Moulding Industry the appellant virtually denied every claim of the respondents. According to him, it was his ambition for a long time to set up a concrete block making business. But more revealing was paragraph 6 of appellant's statement of defence wherein he contended:-

B *“(a) that the monies paid by respondent’s cheques to Weideman & Walters Ltd. represented appellant’s allowances that had accrued.*

(a) that as the appellant was the one that negotiated the purchase of the block-making equipment on behalf of Etcheson & Sons, the
C *receipt for the payment were issued in that company’s name.*

(b) that he had spent most of his active years in the service of the respondent and that he “laboured so much in the development of the company”

D *(c) that Chief Omunakwe Nyeche Nsirim had all along run the plaintiff/respondent as his private concern;*

(d) that the said Chief Omunakwe Nyeche Nsirim had utilised respondent’s assets in setting up other companies as well as converting
E *houses, motor vehicles etc. of the respondent as his personal property. It was on account of all these that appellant put pressure on the respondent to be recognised as co-director and thus the two cheques were issued by respondent to Weideman & Walters Ltd.”*

F The appellant further contended, that in setting up the factory in question, he spent his personal money over what the two cheques amounted to. In short what the appellant seemed to contend is either; the respondent paid him for all his past services by the two cheques or the appellant had to get what he deserved from the respondent as the chairman/managing
G director, Chief Omunakwe Nyeche Nsirim had virtually converted the respondent to his personal property and the only way was to start his own company.

H This dispute, according to the appellant, was out of personal dispute, family dispute, between him and Chief Nsirim who he admitted to be his uncle. The foregoing is what the trial High Court was faced with. Added to this is the issue of Companies Act 1968, especially section 138 thereof. The appellant referred generally to sections 127 – 139,

i.e. General Provisions as to meetings and votes. The appellant's contention is that no meeting took place much less decided on setting up a block-making industry. The Companies Act, 1968 provides in section 138 as follows:-

138-(1) Every company shall cause minutes of all proceedings of general meetings, all proceedings at meetings of its directors and, where there are managers, all proceedings at meetings of its managers to be entered in books kept for that purpose B

(2) Any such minutes if purporting to be signed by the Chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings. C

(3)

(4) If a company fails to comply with subsection (1) of this section, the company and every officer of the company who is in default shall be liable to a fine of one hundred naira." D

Thus, the best record of a meeting according to the appellant as defendant is the Minutes of that meeting. Ratchiffe v. Evans (1891 – 94) All ER (Report) and Phipson on Evidence II Ed. P. 60 para. 126 – 131 were cited in support. The appellant wanted the trial Court to regard the resolution to set up a block-making industry as a contract between the parties to this suit now on appeal, and cited Bornu Holding Co. Ltd vs Bogoco (1971) 1 All NLR 325 and Woluchom v Goodhead (1981) 5 SC. E

Trial Judge Ungbuku J. (as he then was) held inter alia that the two parties never proved their cases. He was not satisfied that the respondent held any meeting where the resolution to establish the block-making industry was taken, though he was satisfied the two cheques issued to Weideman & Walters Ltd. were for that Industry. But because the respondent company was purchasing products from the same industry managed by appellant, the trial Court was not fully satisfied as to the true nature of the transaction. At any rate, since section 138 of Companies Act 1968 was not complied with, and as the defendant/appellant also never proved his assertions that the two cheques represented his entitlements, it non-suited the plaintiff/respondent company. Thus an appeal was lodged to Court of Appeal, Port Harcourt Division. But it must be clearly stated that the trial F
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court disbelieved the entire defence of the appellant whilst believing some pertinent parts of respondents case i.e. – cheques issued to Weidman & Walters Ltd., the appellant receiving receipts for payment in his name etc, and the defendant/appellant refusing to submit the said receipt. He none-the-less held that as both parties “*never came with clean hands*” and as plaintiff never proved beyond preponderance of doubt it was only right, in the circumstance of failure of the appellant to prove his own case because of contradictions in the first part-heard matter and defects in his pleadings, to enter a verdict of non suit

On the grounds of appeal filed in the Court of Appeal, The defendant as appellant, filed a brief of argument and on being served with the brief of argument of the plaintiff/respondent, filed a Reply brief. The following issues for determination were formulated for the appellant:-

“The issues for determination at the Court of Appeal are:

(i) Whether having found as a fact that the Plaintiff (respondent) has not proved its case, the trial Court was entitled to discuss the weakness of the Defendant (Appellant’s) case and go on to Order a non suit.

(ii) Whether based on the facts and findings of the trial Court an Order dismissing the suit rather than non-suiting would not have been appropriate.”

The respondent in its own brief formulated the following issues:-

“3.01 Whether the learned trial judge was right in ordering a non-suit having regard to the evidence on record.

3.02 Whether the learned trial judge has used the weakness of the Defendant’s case in arriving at a decision.

3.03 Whether the learned trial judge was right when he Held that the Plaintiff has not discharged the onus of prove that the cheques for N98,000 issued to Wieldemann and walters was for the purchase Block Moulding Machines for the use of the Plaintiff.

3.04 Whether the Defendant is an Accounting Party having regard to the circumstances of this case.

3.05 Whether the Respondent has discharged the burden of proof under S. 137 of the Evidence Act that the Appellant has committed fraud on the Respondent.”

The court of Appeal after hearing oral argument from counsel for both sides, came to conclusion on the issues that it was after the appellant took delivery of the block-making equipment that PW3, Chief Omunakwe Nyeche Nsirim, travelled out of the country. This fact is supported by evidence before trial Court but that Court never adverted to it. The evidence was glaringly before the trial Court that the respondent paid N98,000.00 for the equipment by two cheques issued in the name of Weideman & Walters Ltd. and not in the appellant's name and that the explanation of the appellant on this never even satisfied the trial judge as reliable. It was when the PW3 returned from his overseas business trip that he not only discovered the block-making industry was already functioning but that the appellant had put up a signboard on it in his business name *Etcheson & Sons Block Moulding Industry*". Court of Appeal therefore found that had the trial Court adverted to all the evidence before it especially the additional fact that the land upon which the industry stood belonged to or was in the charge of PW3, the judgment ought to be entered in favour of the plaintiff/respondent company. Before the trial Court was the evidence of the appellant concerning the same subject matter when it was part-heard previously before another judge, i.e. Exhibits X ad Y which were materially different from the posture he had now taken in this suit. The Court of Appeal was therefore satisfied that the trial court's evaluation of the whole evidence by the trial Court seemed to follow clearly the line of evidence but its conclusion to enter non-suit fell short of all facts before it. It (Court of Appeal) therefore dismissed the appeal of present appellant who prayed that the trial Court ought to have dismissed respondent's case, and granted the respondent's cross-appeal that its case was clearly proved.

Against the judgment of the Court of Appeal, this appeal came to this Court. The defendant/appellant formulated the following issues for determination:

- "(a) Whether on the evidence before the Court, the Court of Appeal was right in holding that the block moulding equipment employed by the Appellant was the property of Respondent (GROUNDS 1 and 2).
 (b) If the answer to (1) is in the affirmative, whether this was Sufficient

to also make the entire block-making business the property of the Respondent.

(c) Whether on the evidence before the Court, the Court of Appeal was right in directing the appellant to account to the Respondent the net profits accruing from the Moulding industry and to pay over to the Respondent

(d) Whether the Respondent succeeded in proving that the block-moulding business was being operated by the Appellant in fraud of the Respondent."

The clear evidence that remains uncontroverted is that the respondent paid for the block-making machines by the two cheques for N49,000.00 each. The explanation of the appellant is that the two cheques were for his entitlements as a director or for his services to the respondent. Throughout the trial he never gave details of how the entitlements accrued. Without stating that it was his alternative defence, he asserted that the meeting at which decision to set up the block making industry arose never took place, and if it took place at all, there was no minutes of the meeting and therefore the provisions of Companies Act 1968 were contravened and the alleged meeting was illegal. **I have quoted the relevant part of S.138 of Companies Act 1968 and nothing in it renders a meeting without its minutes being made illegal or void, it only attracts a penalty as provided in subsection (4) thereof. At any rate the rendering of the minutes or failure to render one should not be a big issue as the pleadings of the parties never adverted to this and should have been ignored by the trial Court.**

The trial High Court heard the case on its merits but though it reviewed the evidence copiously it however came to a wrong conclusion of non-suiting the case. In civil cases the trial court gives judgment to the plaintiff on balance of probabilities, and in some instances the weakness of defendant's case can fortify the plaintiff's case. This is what has really happened in this case. The block-making machines were paid for by respondent, the electric generator of the factory was provided by the respondent, the land upon which the factory was erected was provided by the respondent. The only re-

buttal provided by the appellant of all these is that the resolution to set up the industry was not backed by minutes or that the meeting where the alleged resolution was passed never took place. The evidence on the part of the plaintiff was overwhelming enough in the face of the weak defence. Certainly it was not a matter for non-suit, neither was it a matter for dismissal as in the cases of Olayioye v Oso (1969) 1 ALL NLR 281; Enoch v Onochie (1988) 1 NWLR (Pt 70) 370. What the trial Court misconstrued is the issue of the minutes of the meeting of company's directors and its importance. Curiously enough neither party pleaded this issue, it only arose casually in cross-examination. Parties are bound by their pleadings, because the pleadings form their battleground. Whatever is not pleaded is not an issue and any skirmishes on unpleaded issue is a mere waste of time and if admitted erroneously in evidence it should be discounted as it is a nullity. The aim of pleadings is to bring to the fore the very dispute between the parties so that in the course of trial each party has put his adversary on notice as to what he is meeting (Salami v Oke (1987) 4 NWLR (Pt 63) 1; Ezewani v Onwordi (1986) 4 NWLR (Pt 33) 27; Sodipo v Lemminkainen OY (1985) 2 NWLR (Pt 8) 547. Therefore, whatever is not pleaded will not go to any issue between the parties however much it is attenuated in cross-examination; to do otherwise will give free for all opportunity to deviate from the real issue in contention and each party will have the opportunity to ambush the other. Our notion of justice administration by procedure of pleadings in civil matters is to prepare each party for what he is to meet at trial, giving no opportunity for surprise or ambush. (Owoade v Omitola (1988) 2 NWLR (Pt 77) 413; Okedoyin v Arowolo (1989) 4 NWLR (Pt 114) 172. It is for this requirement for certainty as to what case parties are to meet at trial that pleadings are required to contain all the facts, facts only, that they rely upon. (Obijuru v Ozim (1985) 2 NWLR (Pt 6) 167. The answer to issue 1 of the appellant is in the negative.

As a result of the resolution of issue 1 against the appellant, there is no doubt the block making business in issue is the prop-

erty of the respondent. Also, on all evidence before the Court it is certain the appellant is not the owner of the block-making business, the business belongs to the respondent company and the appellant must render account of the business to the respondent as claimed at the trial Court.

As for issue 4, I will not use the word “*fraud*”, it is somewhat too strong. But the appellant by his act wanted to claim the block-making industry as his personal enterprise; in this he has failed.

The Companies and Allied Matters Decree Act 1990 in S. 242 (1) widens to a certain extent S. 138 of Companies Act 1968, prompted by the decision in International Agricultural Industries (Nigeria) Ltd. v Chika Brothers Ltd. (1990) 1 NWLR 70, but that relates to the format of the minutes only. In the present appeal, absence of the Company’s minutes on resolution to set up a block-making industry was not an issue but that the trial court made it, as it was not pleaded.

For the foregoing reasons I find no merit in this appeal and I dismiss it. I award against the appellant N10,000.00 as costs in favour of the respondent.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Belgore, J.S.C. I entirely agree with the judgment.

Accordingly, I too hereby dismiss the appeal and adopt the order as to costs as contained in the said judgment.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Belgore, JSC and I entirely agree that this appeal is without substance and ought to be dismissed.

Accordingly, I, too, dismiss it with costs as assessed in the leading judgment.

KATSINA-ALU JSC

I have had the privilege of reading in advance the judgment delivered by my learned brother, Belgore, JSC in this appeal. I am in total agreement that the appeal lacks merit. For reasons which he has given, I too would dismiss the appeal with costs of N10,000.00 to the plaintiff. B

AYOOLA JSC

I have had the privilege of reading in advance the judgment delivered by my learned brother, Belgore, J.S.C. I agree with him that this appeal should be dismissed. C

The appeal arose from the judgment of the Court of Appeal whereby that court allowed the appeal of the present respondent (which will hereafter be referred to as "*the plaintiff*") and entered judgment for the plaintiff against the present appellant (who will be referred to in this judgment as "*the defendant*") in terms of the plaintiff's claim in the High Court of the Rivers State ("*the High Court*"). D

In the High Court the action concerned a concrete block making machine and some other equipment and assets which the plaintiff claimed ownership of and which it alleged the defendant had employed in a block moulding industry without rendering account of the business to it. The plaintiff claimed a declaration of ownership of the machine and equipment, accounts and injunction. The High Court being of the view that neither of the parties has proved it or his case non-suited the plaintiff. The present appeal was brought about, as earlier said, because the Court of Appeal set aside that decision and gave judgment for the plaintiff. E F

The facts can be briefly stated. The plaintiff is a limited liability company incorporated in Nigeria in 1969. Its directors who were five, included its founder Chief Nsirim, Mrs, Nsirim, his wife and the defendant, his nephew. The defendant was also employed as a plant manager of the respondent company on a monthly salary of N500. The dispute arose when the defendant was found to be carrying on a block moulding business under a firm name of "*Etcheson and Sons Block Moulding Industry*." G H

In the action by the plaintiff the nub of the plaintiff's case is that the equipment was bought with the plaintiff's money on an arrangement that it would be used in the block-making industry to be set up and managed by the defendant on its behalf. The plaintiff pleaded among other things the fact that the equipment was bought with its funds and that there was a company resolution to back up the arrangement. The defendant admitted the former but denied the latter. The defence was that the money paid to the company which supplied the equipment, Widemann & Walter Nigeria Ltd., represented accrued allowances due to him and that he had spent his money in installation of the equipment and had built a warehouse and erected a concrete slab for the purpose of the block moulding business.

The trial judge, Ungbuku, J., rejected the defence. He was of the view that the defendant did not state how the alleged allowance he claimed was made up or give any evidence that the other directors had any such allowances. He disbelieved the evidence that the sum of N98,000 paid for the equipment was defendant's accrued allowance. However, the learned judge also held that notwithstanding that the plaintiff cannot produce the minutes of the meeting where the resolution or decision to purchase the equipment was made, he could prove the same by parol evidence. He concluded, however, that "*both the plaintiff and the defendant have not put before the Court the true facts of their business transaction.*" In the event, he non-suited the plaintiff.

The Court of Appeal (Onu, JCA (as then was), Ndoma-Egba and Edozie, JJ.C.A.,) allowed the plaintiff's appeal from the decision of the High Court, set aside the judgment and gave judgment granting all the reliefs claimed by the plaintiff. The leading judgment of the court below was delivered by Edozie, J.C.A., who decided the case on the inference to be drawn from facts which not being in contention must be deemed to be established. It is trite that the power of an appellate court to draw inferences from facts which are established is not a usurpation of the province of the trial judge.

In this case the court below reasoned from the established fact that the plaintiff paid for the equipment, that a rebuttable presumption that it was the owner of the equipment was raised. That presumption shifted

the burden on the defendant to prove that the equipment belonged to him and not to the plaintiff which paid for it. The rejection of the defendant's case showed that that burden had not been discharged.

The reasoning of Edozie, J.C.A., in the leading judgment of the court below cannot be faulted. That a person provides the money for the purchase of goods raises a presumption of the ownership of the goods by that person. Such presumption of ownership is consistent with human conduct. The court may presume existence of the fact of ownership by virtue of section 149 of the Evidence Act. That is what the court below rightly did in this case.

On this appeal by the defendant an attempt was made to raise once again the question of the admissibility of oral evidence of the resolution of the plaintiff's Board of Directors. Reliance was placed on section 138 of the Companies Act, 1968. however, that question has been correctly dealt with by the trial judge who held that the minutes of resolutions of a company are not exclusive evidence. Nothing in section 138 makes the minutes of resolution of a company exclusive evidence. It only makes the minutes admissible evidence of the proceedings. Parol evidence of such resolutions is also admissible. It was decided in Re Fire-proof Doors Ltd. (1916 – 1917) ALL ER (Rep) 931, 936 that decisions of directors need not necessarily appear in the minutes book if the court is satisfied that the resolutions were passed.

Furthermore, it is the defendant who should have proved that when the plaintiff used its own money to purchase the equipment the intention was that it should belong to him and not to the plaintiff.

The consequence that should rightly follow the rejection of the defendant's case is that he had failed to rebut the presumption of ownership of the equipment. The plaintiff's case thus became more probable. The court below so rightly held when Edozie, J.C.A., expressed the view that the rejection of the defendant's version left the plaintiff's version uncontradicted.

The defendant took exception to the description of his conduct as fraudulent. In my view there appears to be justification for holding the view that there was, at least, constructive fraud which, as defined in

Black's Law Dictionary (6th Edition), includes:-

“Any breach of duty which without an actually fraudulent intent, gains an advantage to the person in fault.”

The facts established in this case, that the equipment was paid for with the plaintiff's money for it to be used for the plaintiff's benefit under the management of the defendant, that the defendant proceeded to obtain a receipt in his own name and to use it for his own benefit claiming ownership thereof, to put it mildly was constructively fraudulent if not outrightly fraudulent.

Be that as it may, the conduct of the defendant needed not to be fraudulent to entitle the plaintiff to the reliefs it claimed. An agent does not need to be fraudulent for the principal to be entitled to call upon him for accounts of the agency.

For these reasons and the fuller reasons in the judgment of my learned brother, Belgore, JSC, I too would dismiss the appeal with costs of N10,000 to the plaintiff, which is respondent in this appeal.

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