

SUPREME COURT OF NIGERIA
FRIDAY 25TH JANUARY, 2002. SC. 15/1994
CORAM:- M. E. OGUNDARE, E. O. OGWUEGBU, S. ONU,
A. O. EJIWUNMI, E. O. AYOOLA, JJSC

ARJANDAS HIRANAND MELWANI APPELLANT
(SUING THROUGH HIS ATTORNEY
LATEPH AKINGBADE ADENIJI)
AND
FIVE STAR INDUSTRIES LIMITEDRESPONDENT

POWER OF ATTORNEY - Admissibility - Commonwealth regions -
Evidence Act s.117 - Since the document is admissible in Hong Kong
- It is equally admissible in Nigeria (H1)

POWER OF ATTORNEY - Right to sue - Restriction of - Rightful
complainant - Where power of attorney does not empower donee
to sue - It is the donor who should complain (H2)

POWER OF ATTORNEY - Authority to act - A proper construction
of exhibit B - Empowers the attorney to take legal action to protect
plaintiff's shareholding in the company (H3)

ACTIONS - Institution of - By proxy - Competence - Since the agent
sued in his principal's name - The Action is deemed properly consti-
tuted (H4)

APPEALS - Retrial order - When irrelevant - Where there is no ap-
peal against failure of Court of Appeal to pronounce on issues raised
- Supreme Court will not order retrial (H5)

FACTS

The Board of Directors of Five Star Industries Ltd i.e. defen-
dant/respondent unilaterally passed a resolution transferring plaintiff's/
appellant's shareholding in the company to another company. Be-
ing dissatisfied, appellant instituted this action against respondent
through his attorney at the Federal High Court, Lagos seeking for a
declaration nullifying the resolution and for an order compelling re-

spondent to account for dividends due to appellant.

Respondent contended that appellant in conjunction with his brothers, had agreed to the transfer of the shares. At the trial, appellant's attorney testified. No evidence was led by the defence. At the end of trial, the learned trial judge entered judgment for appellant as per his claim. Respondent was aggrieved and it filed appeal at the Court of Appeal, Lagos Division. The court allowed the appeal and set aside the judgment of the trial court. Aggrieved, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

“(1) Was the Court of Appeal right in holding that Exhibit B is not a valid power of attorney as it was neither executed before nor authenticated before a Notary Public pursuant to the provisions of Section 117 of the Evidence Act?”

(2) Was the Court of Appeal also right when it held that Exhibit B as drafted does not give the donee the right to sue?

(3) Assuming that the Court of Appeal was right on issues 1 and 2 above, was the Court right in holding that the action is incompetent and/or that there was no capacity to sue?”

HELD (Unanimously allowing the appeal per **OGUNDARE JSC**)

Power of Attorney - Admissibility - Commonwealth regions

1. Exhibit B was made in Hong Kong, and not in Nigeria; there is no evidence that Exhibit B does not comply with the law of Hong Kong, a part of the Commonwealth at the time exhibit B was executed. By the virtue of section 117 of the Evidence Act (formerly section 116), the document was admissible for the same purpose for which it would be admissible in the United Kingdom. Section 118 (formerly section 117) which the Court below relied on and which counsel in their briefs have relied on too, will not, in my respectful view, apply in this case as that section deals with a power of attorney executed in Nigeria or before a consul or representative of Nigeria or of the President.

The conclusion I reach on Exhibit B is that if that docu-

ment is admissible in Hong Kong (where it was made) - and there is no evidence to the contrary - as a power of attorney, it is equally admissible in this country as such - Section 118 of the Evidence Act refers. (p. 110 E)

POWER OF ATTORNEY - Actions - Restriction

2. It is argued in the Respondent's brief that there was nothing in Exhibit B authorizing the donee of the power of attorney to sue on behalf of the donor. Bryant, Powis & Bryant v. La Banque Du Peuple (1893) AC 170, 177 is cited in support of this submission that a power of attorney is to be construed strictly. If Exhibit B did not empower Mr. Adeniji to sue on behalf of the Plaintiff, I think it is for the Plaintiff to complain and not the Company. (p. 111 D)

POWER OF ATTORNEY - Actions - Authority to act

3. Be that as it may, on a fair construction of Exhibit B, I think Mr. Adeniji had the power to sue on behalf of the Plaintiff in respect of the latter's shares in the Company. The authority given by Exhibit B was "to act as my attorney and as such to act for and on my behalf in all matters relating to my shareholding in Five Star Industries Ltd Lagos." This authority must necessarily include taking all steps, legal action inclusive, that were necessary to protect Plaintiff's shareholding in the Company. (p. 111 E)

ACTIONS - Institution of - By proxy - Competence

4. This case, on the issues under consideration, is on all fours with the Vulcan Gases Ltd. Case. And on the authority of that case I hold that the action here was competently constituted. The agent, Mr. Adeniji, unlike the agent, Mr. Nahma in United Nigeria Company Ltd v. Joseph Nahman & Ors. (2000) 9 NWLR 177, sued in the name of his principal, Arjandas Hiranand Melwani. It is interesting to observe that Mr. Olojo, in oral argument, concedes it that the action as revealed by the caption is between A. H. Melwani and Five Star Industries Ltd. With this concession, it is difficult to argue that the action as constituted is incompetent. The Court of Appeal was in

error when it held that the action was incompetently constituted. The appeal, therefore, succeeds and it is hereby allowed by me. (p. 112 B)

APPEALS - Retrial order - When irrelevant

B 5. Mr. Olojo, learned counsel for the Company has argued in the respondent's brief that as the issue placed before the Court of Appeal by the Company were not decided, this case, in the event of the appeal being allowed, should be remitted to the Court below for it to pronounce on the other issues raised in the appeal before that Court. I regret I cannot accede to this request. The Company has not appealed to this Court against the failure of the Court below to pronounce on all the issues it placed before it. That Court took up only one of the issues and decided the appeal on it in favour of the Company. The latter took a chance by being content with what that Court did and thus did not complain about the latter's failure to pronounce on the other issues. The appeal against the judgment of the Court of Appeal on the only issue pronounced upon by it having succeeded, the judgment of the Court is set aside. (p. 112 E)

NOTABLE POINTS OF INTEREST

F OGUNDARE JSC

1. How an agent can institute action on behalf of his principal

G How an agent is to institute an action on behalf of his principal has just been considered by this Court in a recent case of *Vulcan Gases Ltd. v. G.F Ind. Gasverwertung A.G.* (2001) 9 NWLR 610. In the case, this Court reviewed the ways an agency may arise. It was decided in that case that generally there is no statutory requirement in Nigeria that a power of attorney for an agent to sue or defend on behalf of his principal should be by deed. It was also decided that in the circumstances of that case, the lawful attorney of the plaintiff properly took out the action under common law and that the action was competently constituted. In that case, as in the instant case, the agent took out the action in the name of his principal. (p. 111 H)

AYOOLA JSC***2. Non compliance with s.118 Evidence Act – Does not invalidate Power of Attorney***

Compliance with the provisions of section 117 (which as I have said is now section 118) is one of the ways of proving the execution and authentication of a power of attorney, but on no reading of that section can it be said that it is the only way. Presumption of due execution and authentication raised by section 117 dispenses with the need to prove these facts but it does not exclude other means of proof. The court below put the position too high and, I dare say, inaccurately when it held, per Sulu-Gambari, JCA., that by reason of non-compliance with section 117, the document purporting to be a power of attorney, exhibit B, “cannot by any stretch of imagination be construed to be adequate and create a power of attorney in favour of the donee.” Section 117 deals with proof of facts of execution and authentication and not with the validity of the document. That execution and authentication of a document which purports to be power of attorney cannot be presumed in terms of section 117 does not mean that the power of attorney is invalid. (p. 122 E)

3. Presumption of law – Satisfaction of condition precedent

When the law presumes a fact on the satisfaction of certain conditions, a party who seeks to take advantage of such presumption must satisfy the conditions. It is by no means a technicality to insist that such conditions must first be satisfied. You cannot take the presumption and ignore the conditions. Rather, the only way of giving effect to the provisions of the statute is to abide by their conditions. What may amount to technicality is to insist on a particular form of proof of the authenticity of a document when all the surrounding circumstances point to its authenticity as the act of the maker. That is the position in this case. I do not think it is necessary to resort to the presumption in section 117 to do justice in the matter. (p. 123 B)

4. Protection of a defendant where an action is brought in the name of the plaintiff without his authority

Where an action is brought in the name of a plaintiff without his authority and he subsequently repudiates the action, defendants in the action, may obtain an order for payment of their costs by the

solicitors who issued the writ. The interest of the respondent being thus well and adequately protected, it seems to me to be a mere technicality and somewhat an injustice to permit the action to be defeated at the threshold by such point as was upheld by the court below. It is perhaps expedient to distinguish the case of Ayiwoh v. Hadji Akorede (supra) in that in that case the purported attorney sued in his name for recovery of possession of the property of a person claimed to be the principal. (p. 123 F)

REPRESENTATION

O. T. Adekoya (Mrs.), for the Appellant.
Chief T. Olojo (A. J. Owonikoko with him), for the Respondent.

CASES REFERRED TO

- D Ayeni v Dada (1978) 3 SC 35
- United Nig Co Ltd v. Nahman (2000) 9 NWLR 177
- Vulcan Gases Ltd. v. G.F Ind. Gasverwertung A.G. (2001) 9 NWLR 610
- Ayiwoh v. Hadji Akorede 20 NLR 4
- E Gelingier v. Gibbs (1987) 1 Ch 479
- Bryant v. La Banque Du Peuple (1893) AC 170

STATUTE REFERRED TO

- F Evidence Act, LFN 1990, ss. 117 & 118

LEAD JUDGMENT BY OGUNDARE JSC

- G The Plaintiff was a shareholder and director in the Defendant Company (hereinafter is referred to as the company). The Board of Directors of the Company, by a resolution, on 21st February 1986 transferred his shares to Edict Ltd. As the Plaintiff did not request for such a transfer, and he was not a party to the resolution, he instituted an action against the Company claiming-

- H *“1. A declaration that the resolution of the Board of Directors of the Defendant passed on the 21st day of February, 1986 transferring all the Shares held by the Plaintiff in the company to EDICT LIMITED is irregular, illegal, null and void and of no effect.*

2. An order for an account to be rendered by the Defendant to the Plaintiff in respect of all dividends bonus shares and other

rights and benefits due to the Plaintiff in respect of shares held by him in the Defendant Company and for the payment of all such benefits to the Plaintiff. ”

The action was captioned:

“ARJANDAS HIRANAND MELWANI PLAINTIFF

(Suing through His Attorney

LATEPHAKINGBADE ADENIJI)

AND

FIVE STAR INDUSTRIES LIMITED DEFENDANT”

In his rather brief statement of claim, Plaintiff averred as hereunder:-

“1. The Plaintiff is a business man Shareholder and Director of the Defendant Company.

2. The plaintiff avers that he authorized Mr. Lateph Akingbade Adeniji to prosecute this action on his behalf and the Plaintiff will rely on the Power of Attorney dated the 18th day of April, 1988.

3. The Defendant is a limited liability Company incorporated under the Companies Decree 1968 with its registered office at Block E, plot 1, Ilupeju Extension 2, Isolo Road, Oshodi Scheme, Lagos.

4. The Plaintiff avers that by a resolution of the Board of Directors of the Defendant passed on the 21 of day February 1986, it was resolved by the Board to transfer all the shares held by the Melwani family (which shares include that of the Plaintiff) in the Defendant Company to a Company called EDICT LIMITED.

5. The Plaintiff avers that the said resolution is irregular, illegal, null and void in that he never gave any instructions or mandated the Defendant or any person to transfer his shares in the Defendant Company to EDICT LIMITED or to any other person.

6. The Plaintiff avers that he is the second largest foreign shareholder in the Defendant Company and that his shares were paid for both in Naira and foreign currency. The Plaintiff will at the trial rely on the books of account and other corporate documents of the Defendant in proof of same.

7. The Plaintiff avers that as shareholder in the Defendant Company, he is entitled to the payment of dividends and all other benefits and privileges paid out or given by the Defendant to its shareholders.

8. The plaintiff avers that he has been denied of dividends and other benefits due to him by virtue of his shareholding in the Defen-

dant Company even though dividends have been declared by the Defendant. The Plaintiff will at the trial rely on the audited accounts of the Defendant.

9. Whereof the plaintiff claims as per his Writ of Summons”

The Company, for its part averred, inter alia, thus:-

B *“1. The Defendant denies paragraph 1 of the Statement of Claim in so far as the status of the Plaintiff as a Shareholder and Director is concerned, the Defendant puts the Plaintiff to the strictest proof thereof.*

C *2. The Defendant denies paragraph 2 of the Statement of Claim and puts the plaintiff to the strictest proof thereof.*

3. The Defendant admits paragraph 3 of the Statement of Claim.

D *4. Save that the Defendant held a Board meeting on 21st day of February, 1986, at which corporate matter, (including the passing of a resolution) were attended to, the Defendant puts the Plaintiff to the strictest proof of paragraph 4 of the Statement of Claim.*

E *5. The Defendant denies paragraph 5 of the Statement of Claim and pleads that the Plaintiff and his four (4) other brothers/relations, Messrs. Ramchand, Deepak, Vinod and Laskhi held series of meetings in December, 1985, at which a Separation Arrangement was reached to the effect, among others, that all the shares of the five (5) brothers/relations including the Plaintiff’s, should be transferred to EDICT LIMITED.*

F *6. The Defendant further pleads that subsequent to the Separation Agreement referred to in paragraph 5 hereof, all the parties to the agreement, upon realizing that the Plaintiff did not honour his own obligation under the Separation Agreement, decided to submit to a Sole Arbitrator in person of Mr. Damodar Kelwaran Chanrai, an Indian National and Chairman of Afriprint Nigeria Limited.*

7. The Defendant further avers that the Sole Arbitrator’s award of 3rd day of April, 1987, confirmed the Separation Agreement referred to in paragraph 5 hereof.

H *8. The Defendant further pleads, that at the instance of the Plaintiff during the Arbitration, all Arbitral parties appeared in the names of their registered Nominee Companies with the Plaintiff using his Company known as ‘Sharington S.A.’ as his nominee at the Arbitration, while one of the parties, Mr. Ramehand Haranand*

Melwani, nominated EDICT LIMITED, Messrs. Deepak, Vinod, Lakhi Melwani nominated 'Wimberg Limited' 'Traders Investors Limited' and 'Mantilla S.A.' as their Nominee Companies respectively. The Defendant shall rely on oral and documentary evidence including a letter dated 30th day of March, 1987, written to the Arbitrator by the Plaintiff, a copy of which was given all Arbitral parties and the Arbitration award itself. The Defendant pleads that plaintiff is a beneficiary of and in fact one of the three Managers of a 'Pool' into which the global settlement arrangements were to crystallize.

9. *The Defendant pleads that the plaintiff as a beneficiary of the awards has continued and still continues to enjoy benefits of the said awards while ignoring and/or refusing to implement his obligations to other beneficiaries both under the Separation Agreement and the Arbitration award. The Defendant shall rely on all equitable remedies available to it.*

10. *The Defendant also pleads that the resultant shares held by EDICT LIMITED from whatever source(s) are valid and legal as approval have been sought and obtained from them.*

11. *The Defendant denies paragraph 6 of the Statement of Claim and puts the plaintiff to the strictest proof of it. The Defendant pleads, that it is not aware of any ministerial approval(s) given or legal sanction to the Plaintiff's alleged Company. The Defendant puts the Plaintiff to the strictest proof of the quantum of the relative or different currencies with which the alleged shares were paid and pleads that any such purchase (if any or at all which it denies) was and is illegal and unenforceable as against the defendant.*

12. *The Defendant pleads paragraph 1 hereof in reply to paragraph 7 of the Statement of Claim and puts the Plaintiff to the strictest proof thereof.*

13. *The Defendant denies paragraph 8 of the Statement of Claim and repeats paragraph 1 and 7 hereof.*

WHEREOF the defendant states that the Plaintiff's action is frivolous, speculative and unsustainable in law and equity and should be dismissed with substantial costs."

The action proceeded to trial at which one Lateph Akingbade Adeniji, Plaintiff's attorney, testified and was cross-examined by counsel for the defence. No evidence was led for the defence. In his judgment subsequently delivered, the learned trial Judge found:

1. *"As far as I can see the power of attorney must be presumed to have been given on 18th April 1998 which is the date of attestation by the Notary Public who clearly describes it as 'Power of Attorney' even though the effective power itself bearing the donor's signature is headed 'TO WHOM IT MAY CONCERN'. The style adopted*
 B *may be unfamiliar to us but it does not make it inadmissible since the intent is quite manifest on the attestation."*

2. *"..... the register of member (Ex.A) was tendered without objection. The plaintiff's name is entered therein as the holder of*
 C *1, 129, 170 shares, at any rate up to 21 February 1986. By Virtue of section 26(2) of the Companies Act 1968 he is deemed to be a member of the defendant company to the extent of his shareholding."*

3. *"The defendant company did not really deny that the self-same shares were recorded in favour of the company known as Edict*
 D *Limited at page 159 of Ex. A."*

4. *"Once it has been established that the plaintiff was deprived of his shares in a manner contrary to section 75 of the Companies Act 1968 it follows that such a transfer must be illegal."*

5. *"Even though the defendant alleged in their statement of*
 E *defence that some oral and written separation agreements were reached between the parties no evidence of this was placed before me."*

The learned Judge, in the light of the above findings, entered judgment for the Plaintiff *"as claimed in his writ of summons."*
 F

The Company, being dissatisfied, appealed to the Court of Appeal which Court allowed the appeal and set aside the judgment of the trial High Court *"for reason of being incompetent."* The Court of Appeal found that the power of attorney, Exhibit B *"particularly*
 G *the pages headed "TO WHOM IT MAY CONCERN" cannot by any stretch of imagination be construed to be adequate and create a power of attorney in favour of the donee."* Sulu-Gambari, JCA who delivered the lead judgment of the Court of Appeal (and with which Kalgo JCA, as he then was, and Tobi JCA agreed) further found:

H *"I am at one with the submission of the learned counsel for the appellant that a fair construction of the whole of Exhibit B reveals that the donee has not had it couched in sufficient terms the authority to institute any action on behalf of the donor.*

I, therefore, come to the conclusion that had the learned trial

judge examined the true ambit of the powers conferred by Exhibit B, he would have discovered that the donee of the power of attorney had no such authority to institute this action on behalf of the donor.

On the whole, I come to the inevitable conclusion that the donee - Lateph Akingbade Adeniji - was not sufficiently armed or has not established proper authority with which to pursue or institute the action he has filed. The action, therefore, is incompetent."

The plaintiff has now appealed to this Court against the said judgment of the Court of Appeal. And in his brief of argument, he has raised three questions as calling for determination.

They are:

"(1) Was the Court of Appeal right in holding that Exhibit B is not a valid power of attorney as it was neither executed before nor authenticated before a Notary Public pursuant to the provisions of Section 117 of the Evidence Act?"

(2) Was the Court of Appeal also right when it held that Exhibit B as drafted does not give the donee the right to sue?"

(3) Assuming that the Court of Appeal was right on issues 1 and 2 above, was the Court right in holding that the action is incompetent and/or that there was no capacity to sue?"

The Company, in its Respondent's brief constricts the three questions into one issue that reads:

"Whether the Court of Appeal was right in setting aside the proceedings at the trial Court for reason of being incompetent."

I think the three questions raised by the Plaintiff can be dealt with together and this is what I intend to do. In doing so I shall examine the issue of the power of attorney and determine whether the action as constituted was competent.

Exhibit B is the power of attorney Mr. Adeniji relied on in acting on behalf of the Plaintiff. Exhibit B reads:

"PAGE 1

*To All to whom these presents shall come
I, Charles Cho Chiu Sin, M.A (Cantab),
Notary Public,*

Duly Admitted, Authorized and Sworn, Practising at Victoria Hong Kong do hereby Certify that to the best of my knowledge and belief, the signature "A.H Melwani" subscribed to the Power of Attorney hereunto annexed is the signature of Mr. Arjandas H. Melwani

which I have compared with his specimen signature filed in my records.....

In Testimony whereof I have hereunto subscribed my name and affixed my Seal of Office this 18th day of April in the year of our Lord One Thousand Nine Hundred and Eighty-Eight....

B *(Sgd.)*
Charles C.C.Sin
Notary Public
HONG KONG

C *"PAGE 2*
TO WHOM IT MAY CONCERN

I, the undersigned, Arjandas Hiranand Melwani residing in Hong Kong in my capacity of shareholder of Five Star Industries Ltd. Lagos hereby appoint Mr. Lateph Akingbade Adeniji of Lagos (Nigeria) to act as my attorney and as such to act for and on my behalf in all matters relating to my share holding in Five Star Industries Ltd Lagos.

Sgd.
(ARJANCDASH.MELWANI)"

E It is this document that the Court below, per Sulu-Gambari JCA, held not to be "adequate and create a power of attorney in favour of the donee." With respect to their Lordships of the Court below, I think they are wrong in this conclusion. **Exhibit B was made in Hong Kong, and not in Nigeria; there is no evidence that Exhibit B does not comply with the law of Hong Kong, a part of the Commonwealth at the time exhibit B was executed. By the virtue of section 117 of the Evidence Act (formerly section 116), the document was admissible for the same purpose for which it would be admissible in the United Kingdom.** Section 117 provides:

"117. When any document is produced before any court, purporting to be a document which by the law in force for the time being in any part of the Commonwealth would be admissible in proof of any particular in any court of justice in any part of the Commonwealth, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the court shall presume-
H *(a) that such seal, stamp or signature, is genuine; and*

(b) that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in the United Kingdom.”

Section 118 (formerly section 117) which the Court below relied on and which counsel in their briefs have relied on too, will not, in my respectful view, apply in this case as that section deals with a power of attorney executed in Nigeria or before a consul or representative of Nigeria or of the President.

The conclusion I reach on Exhibit B is that if that document is admissible in Hong Kong (where it was made) - and there is no evidence to the contrary - as a power of attorney, it is equally admissible in this country as such - Section 118 of the Evidence Act refers.

It is argued in the Respondent’s brief that there was nothing in Exhibit B authorizing the donee of the power of attorney to sue on behalf of the donor. Bryant, Powis, & Bryant v. La Banque Du Peuple (1893) AC 170, 177 is cited in support of this submission that a power of attorney is to be construed strictly. If Exhibit B did not empower Mr. Adeniji to sue on behalf of the Plaintiff, I think it is for the Plaintiff to complain and not the Company. Be that as it may, on a fair construction of Exhibit B, I think Mr. Adeniji had the power to sue on behalf of the Plaintiff in respect of the latter’s shares in the Company. The authority given by Exhibit B was “to act as my attorney and as such to act for and on my behalf in all matters relating to my shareholding in Five Star Industries Ltd Lagos.” This authority must necessarily include taking all steps, legal action inclusive, that were necessary to protect Plaintiff’s shareholding in the Company.

I have already set out in the early part of this judgment the caption of the action. It shows the Plaintiff as ARJANDAS HIRANAND MELWANI. That he sued through his attorney, Lateph Akingbade Adeniji only makes the latter an agent. How an agent is to institute an action on behalf of his principal has just been considered by this Court in a recent case Vulcan Gases Ltd. v. G.F Ind Gasverwertung A.G. (2001) 9 NWLR 610. In the case, this Court reviewed the ways

an agency may arise. It was decided in that case that generally there is no statutory requirement in Nigeria that a power of attorney for an agent to sue or defend on behalf of his principal should be by deed. It was also decided that in the circumstances of that case, the lawful attorney of the plaintiff properly took out the action under common
 B law and that the action was competently constituted. In that case, as in the instant case, the agent took out the action in the name of his principal.

***This case, on the issues under consideration, is on all
 C fours with the Vulcan Gases Ltd. Case. And on the authority of that case I hold that the action here was competently constituted. The agent, Mr. Adeniji, unlike the agent, Mr. Nahma in United Nigeria Company Ltd. v. Joseph Nahman & Ors. (2000) 9 NWLR 177, sued in the name of his principal, Arjandas
 D Hiranand Melwani. It is interesting to observe that Mr. Olojo, in oral argument, concedes it that the action as revealed by the caption is between A. H. Melwani and Five Star Industries Ltd. With this concession, it is difficult to argue that the action as constituted, is incompetent. The Court of Appeal was in
 E error when it held that the action was incompetently constituted. The appeal, therefore, succeeds and it is hereby allowed by me.***

***Mr. Olojo, learned counsel for the Company has argued in the respondent's brief that as the issue placed before
 F the Court of Appeal by the Company were not decided, this case, in the event of the appeal being allowed, should be remitted to the Court below for it to pronounce on the other issues raised in the appeal before that Court. I regret I cannot
 G accede to this request. The Company has not appealed to this Court against the failure of the Court below to pronounce on all the issues it placed before it. That Court took up only one of the issues and decided the appeal on it in favour of the Company. The latter took a chance by being content with what
 H that Court did and thus did not complain about the latter's failure to pronounce on the other issues. The appeal against the judgment of the Court of Appeal on the only issue pronounced upon by it having succeeded, the judgment of the Court is set aside. And the judgment of the trial Federal High***

Court is restored.

I award to the Plaintiff N2,000.00 costs of the appeal in the Court of Appeal and N10,000.00 costs of this appeal.

OGWUEGBU JSC

I have had the privilege of a preview of the judgment just delivered by my learned brother Ogundare, J.S.C. and I agree with the reasoning and conclusions therein. I agree that the appeal be allowed and I hereby allow it.

On issue (2), the last paragraph of Exhibit “B” reads:

“I, the undersigned, Arjandas Hiranand Melwani residing in Hong Kong in my capacity of shareholder of Five Star Industries Ltd. Lagos hereby appoint Mr. Lateph Akingbade Adeniji of Lagos (Nigeria) to act as my attorney and as such to act for and on my behalf in all matters relating to my share holding in Five Star Industries Ltd. Lagos.” (Underlining is for emphasis)

It is inconceivable to argue that a donee, such as Mr. Adeniji, with power “to act in all matters relating to” the donor’s shares in the Company is not clothed with power to take all necessary steps to protect the donor’s interest in those shares including the institution of legal proceedings in the name of the donor to protect the donor’s share from being taken away otherwise than as provided in the Articles and Memorandum of Association of the Five Star Industries Ltd. Lagos.

Had the Court below construed Exhibit “B” properly, it would have come to the conclusion that its ambit is wide enough to accommodate the initiation of the action leading to this appeal. The court below was therefore in error to hold otherwise.

The appeal is allowed by me with N10,000.00 costs to the appellant.

ONU JSC

Having been privileged to read in draft the judgment of my learned brother Ogundare, JSC just delivered, I am in complete agreement therewith that the Court of Appeal was in error when it held that the action was incompetently constituted. The appeal therefore

succeeds and it is hereby accordingly allowed by me.

I make similar consequential orders inclusive of costs as contained in the leading judgment, which I adopt as mine.

B

EJIWUNMI JSC

I was privileged to have read in advance the judgment just delivered by my learned brother, Ogundare JSC. And I also agree with the reasons given in the said judgment for allowing the appeal.

C But I need to add a few words of my own.

This appeal was apparently decided by the Court below upon whether the Power of Attorney Exhibit B, was a valid power of Attorney. And having arrived at the conclusion that the Power of Attorney was invalid, the court declared that the action was incompetent. Hence D the Court below upheld the appeal of the Respondent. For the purpose of this judgment, it is pertinent to state briefly that the Power of Attorney, Exhibit B, was granted by ARJANDAS HIRANAND MELWANI on the 18th day of April 1988 - Exhibit B, the power of Attorney in controversy reads:

E

"Page 1

To All to whom these presents shall come

I, Charles Cho Chiu Sin, M.A (Cantab),

Notary Public,

F

Duly Admitted, Authorized and Sworn, Practising at Victoria Hong Kong do hereby Certify that to the best of my knowledge And belief, the signature "A.H Melwani" subscribed to the Power of Attorney hereunto annexed is the signature of Mr. Arjandas H. Melwani which I have compared with his Specimen signature filed in my G records.....

In Testimony whereof I have hereunto subscribed my Name and affixed my Seal of Office this 18th day of April in The year of our Lord One Thousand Nine Hundred and Eighty-Eight.....

(Sgd.)

H

Charles C.C. Sin

Notary Public

Hong Kong

"PAGE 2

TO WHOM IT MAY CONCERN

I, the undersigned, Arjandas Hiranand Melwani residing in Hong Kong in my capacity of shareholder of Five Star Industries Ltd. Lagos hereby appoint Mr. Lateph Akingbade Adeniji of Lagos (Nigeria) to act as my attorney and as such to act for and on my behalf in all matters relating to my share holding in Five Star Industries Ltd. Lagos. B

Sgd.

(ARJANDAS H. MELWANI)"

The said Exhibit B, apparently became necessary following the illegal transfer of the shares held by Melwani in the Five Star Industries Ltd, the Defendant/Respondent, to a company known as Edict Limited. Pursuant to the grant of Exhibit B, the Appellant commenced this action against the Respondent claiming for the following reliefs: C

"1. A declaration that the resolution of the Board of Directors of the Defendant passed on the 21st day of February, 1986 transferring all the shares held by the Plaintiff in the company to Edict Limited is irregular, illegal, null and void and of no effect.

2. An order for an account to be rendered by the Defendant to the Plaintiff in respect of all dividends bonus shares and other rights and benefits due to the Plaintiff in respect of shares held by him in the Defendant Company." E

Pleadings were subsequently filed and exchanged between the parties. At the trial, Lateph Akingbade Adeniji, the Plaintiff's attorney gave evidence for the Plaintiff and was cross-examined by the learned counsel for the defence. Plaintiff also tendered documents, which were admitted as Exhibits. The defence did not lead evidence in defence of the action. F

The learned trial judge later delivered a considered judgment G in the course of which he made the following findings:

1. *"As far as I can see the power of attorney must be presumed to have been given on 18th April 1988 which is the date of attestation by the Notary Public who clearly describes it as "Power of Attorney" even though the effective power itself bearing the donor's signature is headed 'TO WHOM IT MAY CONCERN'. The style adopted may be unfamiliar to us but it does not make it inadmissible since the intent is quite manifest on the attestation."* H

2. *"...The register of members (Ex. A) was tendered without*

objection. The plaintiff's name is entered therein as the holder of 1, 129 shares, at any rate up to 21 February 1986. By virtue of section 26(2) of the Companies Act 1968 he is deemed to be a member of the defendant company to the extent of his shareholding."

B 3. *"The defendant company did not really deny that the self-same shares were recorded in favour of the company known as Edict Limited at page 159 of Ex. A."*

C 4. *"Once it has been established that the plaintiff was deprived of his shares in a manner contrary to section 75 of the Companies Act 1968 it follows that such a transfer must be illegal."*

5. *"Even though the defendant alleged in their statement of defence that some oral and written separation agreements were reached between the parties no evidence of this was placed before me."*

D As a result, the learned trial judge upheld the claims of the Plaintiff and entered judgment for him. As the Respondent was dissatisfied with the said judgment, the company appealed to the Court of Appeal. That Court upheld the appeal and the judgment of the High Court was set aside and the trial was declared incompetent. It
E seems clear from that judgment that the Court of Appeal focused mainly its attention to whether Exhibit B, the Power of Attorney was validly executed in favour of the Plaintiff's attorney.

F In arriving at the conclusion that Exhibit 'B' did not confer on Lateph Akingbade Adeniji the requisite power to prosecute the claim, the court below in the judgment delivered by Sulu Gambari, JCA (and with Which Kalgo JCA, as he then was, and Tobi, JCA agreed), stated as follows:-

G *"I am at one with the submission of the learned counsel for the appellant that a fair construction of the whole of Exhibit B reveals that the donee has not had it couched in sufficient terms the authority to institute any action on behalf of the donor.*

H *I, therefore, come to the conclusion that had the learned trial judge examined the true ambit of the powers conferred by Exhibit B, he would have discovered that the donee of power of attorney and no such authority to institute this action on behalf of the donor.*

"On the whole, I come to the inevitable conclusion that the donee - Lateph Akingbade Adeniji - was not sufficiently armed or has not established proper authority with which to pursue or institute the

action he has filed. The action, therefore is incompetent."

Therefore the Plaintiff has appealed to this court against the said judgment of the Court of Appeal. Three issues were raised in the brief of argument filed by the Plaintiff for the determination of his appeal. They read thus:

"(1) Was the Court of Appeal right in holding that Exhibit B^B is not a valid power of attorney as it was neither executed before nor authenticated before a Notary Public pursuant to the provisions of Section 117 of the Evidence Act?

(2) Was the Court of Appeal also right when it held that Ex-^Chibit B as drafted does not give the donee the right to sue?

(3) Assuming that the Court of Appeal was right in 1 and 2 above, was the Court right in holding that the action is incompetent and/or that there was no capacity to sue?"

For the Respondent, only one issue was set out for the determination of this appeal in the Respondent's brief of argument. It reads thus:

"Whether the Court of Appeal was right in setting aside the proceedings at the trial Court for reason of being incompetent."

In respect of the sole issue raised by the respondent, it is^E contended for the appellant that the court below apparently failed to consider the submission made before it with regard to the interpretation of section 117 (now section 118) of the Evidence Act which reads thus:-

"The Court shall presume that every document purporting^F to be as power of attorney, and to have been executed before and authenticated by a notary public or any court, judge, magistrate, consul or representative of Nigeria, or as the case may be, of president, was so executed and authenticated."^G

With due respect to the learned justices of the Court below, it is my humble view that the Court erred in this regard. That error apparently arose from the consideration of the question of the validity of Exhibit B by placing reliance on Section 118 of the Evidence Act (formerly Section 117). It is however common ground that as^H Exhibit B was created in Hong Kong, its validity ought to have been considered in accordance with the provisions of Section 117 of the Evidence Act. Had the Court below considered the question raised with regard to Exhibit B under and by virtue of Section 117 of the

Evidence Act, the Court might have reached a different conclusion-
Section 117 provides:

“117. When any document is produced before any court,
purporting to be a document which by the law in force for the time
being in any part of the Commonwealth would be admissible in proof
B of any particular in any court of justice in any part of the Common-
wealth, without proof of the seal or stamp or signature authenticating
it, or of the judicial or official character claimed by the person by
whom it purports to be signed, the court shall presume -
C (a) that such seal, stamp or signature, is genuine; and
(b) that the person signing it held, at the time when he signed
it, judicial or official character which he claims.
and the document shall be admissible for the same purpose
for which it would be admissible in the United Kingdom.”

D I therefore would hold that Exhibit B was wrongly rejected
by the Court below.

Being of the clear view that Exhibit B to all intents and pur-
poses was made out as power of attorney in favour of Lateph
Akingbade Adeniji by the Plaintiff, Arjandas Hiranand Melwani, it is
E my view that the Court of Appeal failed to advert to the above pro-
visions of the law in its determination of the validity of the power of
attorney, Exhibit B. It follows that as the Court below wrongly reject
Exhibit B, to allow the appeal, this appeal deserves to be allowed.
F See Ayeni v. Dada (1978) 3 S.C. 35.

The other point which I wish to address in this appeal is the
contention made for the Respondent that in the event that the court
should rule against it with regard to the validity of Exhibit B, the
matter should be remitted to the court below for the consideration of
G the other issues that were not raised by that court.

I do not think that that request ought to be granted. It is
apparent that the court below took the view that the power of attor-
ney raised a pedestal or threshold issue of the competence of the
action and therefore took the view that the only issue that fell for
H consideration among the issue raised in the appeal is whether Exhibit
‘B’ power of Attorney was a valid Power of Attorney.

In support of the position taken by the court below, I refer to
page 181 of the Record where the court said:

“Based on the case presented by the parties at the trial court

and the grounds of appeal filed, I think that the proper and only issue arising and which will adequately dispose of this appeal is whether Lateef Akingbade Adeniji Esq., through whom the plaintiff was said to have instituted the action, was validly donated the power of Attorney entitling him or endowing him the capacity to sue in this case.

The answer to this postulate would determine the entire case once and for all, rendering any other exercise or effort in the posing or determining of all other issues worthless as an exercise in futility. If the donee has no valid Power of Attorney, the whole action is misconceived and incompetent. Whatever decision is arrived at, based on an incompetent action, is altogether a nullity - nihil nil fit."

It is obvious that the Respondent has not appealed against the failure of the Court below to consider other issues raised before it. The inference that can rightly be made from the position is that they took a chance that the judgment of the court below would be affirmed by this Court. Having regard to what I have said above on the only issue considered by the Court below, it is manifest that the risk taken by the Respondent has not enured in its favour.

On the other, hand as already observed, the trial court had found for the Plaintiff/Appellant in respect of all his claims against the Respondent. As those findings remained undisturbed, it would not in my humble view, be right in the circumstances to now deny the Appellant of the fruits of his success by remitting the case to the Court below for the consideration of the issues that the Court deliberately left unconsidered in its judgment. The justice of the case demands that the Appellant should be granted all his claims as found by the trial Court. And it is hereby granted accordingly.

From all I have said above, this appeal must succeed and it is further observed for the above reasons and the fuller reasons given in the lead judgment of my brother, Ogundare JSC. I also abide with the order as to costs made in the said judgment.

AYOOLA JSC

I have had the privilege of reading in advance the judgment delivered by my learned brother, Ogundare, JSC. I agree with him that this appeal should be allowed.

The issues fall within a narrow compass. The appellant was

plaintiff in the Federal High Court where he sued in respect of shares in the defendant company, now respondent, which he alleged were transferred by the respondent to one Edict Ltd. by a resolution of the Board of the respondent dated 21st February 1986. The appellant's case was that the shares included his shares and that the resolution
 B was irregular, illegal, null and void because he never gave any instructions or mandate to the respondent or any person to transfer his shares in the respondent company to Edict Ltd. or to any other person. Apart from an evasive denial of the averment in the statement
 C of claim in regard to the resolution of 21st February 1986, the respondent tried to justify the transfer of shares by averring an agreement whereby, it was alleged, the shares in question were transferred to Edict Ltd.

The only witness at the trial was Lateph Akingbade Adeniji, a
 D legal practitioner, who said that he sued as the plaintiff's attorney. He gave evidence, inter alia, that the appellant had not signed any transfer for the transfer of his shares to Edict Ltd. He was cross-examined by counsel for the respondent extensively. As noted in the judgment of the trial court the respondent offered no evidence.

E Odunowo, J. who heard the suit found that there was no evidence from the respondent to rebut the evidence that Edict Ltd acquired the shares by the resolution alleged. He held that the appellant was deprived of his shares in a manner contrary to section 75 of the Companies Act, 1968 and that the transfer was consequently
 F illegal. In the result he granted the reliefs claimed by the appellant.

On the respondent's appeal of the Court of Appeal, there was no issue as to the merits of the case. The only issue was whether Mr. Adeniji through whom the appellant instituted the action "*was*
 G *validly donated the power of Attorney entitling him or endowing him the capacity to sue in this case.*"

Sulu-Gambari, JCA, who delivered the leading judgment of the court below upheld the two grounds on which the respondent had tried to impugn the power of attorney. These were, that the
 H donor of the power did not execute it before a notary public, nor had a notary public authenticated it; and, secondly, that the power of attorney did not authorize Mr. Adeniji to institute an action on behalf of the donor. Having upheld both of these grounds he came to the conclusion that Mr. Adeniji was not "*sufficiently armed or had not*

established proper authority with which to pursue or institute the action he has filed”, and that the action was therefore incompetent.

In my opinion it is expedient at the outset to note a few points which may have some bearing on the determination of this appeal. The action was instituted not in the name of Mr. Adeniji but in the name of Arjandas Hiranand Melwani (“*Melwani*”) who was and still is the recognized party to the proceedings either as plaintiff in the trial court or as appellant in this court and in the Court below. In paragraph 2 of the statement of claim the plaintiff (now appellant) averred that “*he authorized Mr. Lateph Akingbade Adeniji to prosecute this action on his behalf and the Plaintiff will rely on the power of Attorney dated the 18th day of April, 1988.*” In response to that averment the respondent averred in its statement of defence thus: “*The Defendant denies paragraph 2 of the Statement of Claim and puts the Plaintiff to the strictest proof thereof.*” It was when the document was to be tendered that objection was raised to its admissibility on the grounds that the power of attorney had not complied with section 117 of the Evidence Act because it was not executed before a notary public “*as required by law*”, and because it was not executed before a notary public “*as required by law*” and that the document was vague and imprecise as to what the attorney should do.

The trial court rejected these contentions but the court below thought otherwise. That court reasoned that as the power of attorney (Exhibit B) did not contain on the face of it that it was undated it could not “by any stretch of imagination be construed to be adequate and create a Power of Attorney in favour of the donee.” It also reasoned that the document did not disclose on the face of it that it authorized the donee to institute the action on behalf of the donor.

I now turn to the main question that arose from the reasoning of the court below. Was the power of attorney invalid because its execution before and authentication by a notary public cannot be presumed in terms of section 117 (as it then was, now 118) of the Evidence Act? That section provides that:

“*The court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a notary public, or any court, judge, magistrate, consul or representative of Nigeria, or as the case may be of her Majesty, was so executed and authenticated.*”

Learned counsel for the appellant adopted the argument advanced by him in the court below thus:

“A power of attorney not executed before and authenticated by a notary public as provided for under S. 117 of the Evidence Act will not be presumed to have been made by the Donor and the donor’s signature will then have to be proved if it is alleged that the document was not made by the donor.”

There is considerable force in the submission which finds support in the case of *Ayiwoh v. Hadji Akorede* 20 NLR 4. In that case the respondent sued as attorney of the landlord for arrears of rent and recovery of possession. Objection was taken to the power of attorney which was attested by a solicitor’s clerk who was not a notary public, but the Magistrate ruled that it was admissible. On appeal, Robinson, J. said in regard to the presumption in section 117:

“The object of that presumption is to help persons in like circumstances to this case when the instrument is executed abroad. It means that the court can presume proper execution without further proof.” He, however, held that there was no presumption of the particular power of attorney as its due execution had not been proved in any of the recognized ways and that it ought to have been rejected.

Compliance with the provisions of section 117 (which as I have said is now section 118) is one of the ways of proving the execution and authentication of a power of attorney, but on no reading of that section can it be said that it is the only way. Presumption of due execution and authentication raised by section 117 dispenses with the need to prove these facts but it does not exclude other means of proof. The court below put the position too high and, I dare say, inaccurately when it held, per Sulu-Gambari, JCA., that by reason of non-compliance with section 117, the document purporting to be a power of attorney, exhibit B, *“cannot by any stretch of imagination be construed to be adequate and create a power of attorney in favour of the donee.”* Section 117 deals with proof of facts of execution and authentication and not with the validity of the document. That execution and authentication of a document which purports to be power of attorney cannot be presumed in terms of section 117 does not mean that the power of attorney is invalid.

However, I do not think that the trial judge was right when

he held that the presumption in section 117 applied in this case. The reasoning by which he came to that conclusion is one with which I do not feel entirely comfortable. He said:

“The style adopted may be unfamiliar to us but it does not make it inadmissible since the intent is quite manifest on the attestation. It has not been suggested that the document is a forgery. The inclination of courts nowadays is to ensure that substantial justice is done. It is the antithesis of justice to insist on technicality of this nature.”

When the law presumes a fact on the satisfaction of certain conditions, a party who seeks to take advantage of such presumption must satisfy the conditions. It is by no means a technicality to insist that such conditions must first be satisfied. You cannot take the presumption and ignore the conditions. Rather, the only way of giving effect to the provisions of the statute is to abide by their conditions. What may amount to technicality is to insist on a particular form of proof of the authenticity of a document when all the surrounding circumstances point to its authenticity as the act of the maker. That is the position in this case. I do not think it is necessary to resort to the presumption in section 117 to do justice in the matter.

The nature of the action, the authentication of the signature of the appellant on the document by the notary public and the absence of a specific denial of its due signature in the defence all, in my opinion, point to the authority granted by the document to be truly granted by the appellant. Besides, the action was in the name of the appellant who alone from the nature of the action could directly derive any benefit from the action, since if he succeeded in the action the shares in question would remain in his name. Where an action is brought in the name of a plaintiff without his authority and he subsequently repudiates the action defendant in the action, may obtain an order for payment of their costs by the solicitors who issued the writ. See *Gelinger v. Gibbs* [1897] 1 Ch 479 The interest of the respondent being thus well and adequately protected it seems to me to be a mere technicality and somewhat an injustice to permit the action to be defeated at the threshold by such point as was upheld by the court below. It is perhaps expedient to distinguish the case of *Ayiwoh v. Hadji Akorede* (supra) in that in that case the purported attorney sued in his name for recovery of possession of the property of a

person claimed to be the principal.

On the extent of the authority of Mr. Adeniji, I am unable to agree with the view of the Court below that “*a fair construction of the whole of Exhibit B reveals that the donee has not had it couched in sufficient terms the authority to institute any action on behalf of the donor.*” To start with, the issue was not whether the donor had authority to institute “*any action*” but whether he had authority to institute an action in a matter pertaining to the donor’s shareholding in Five Star Industries Ltd. Lagos. A court cannot properly discern the extent of authority in a power of attorney if it has initially misdirected itself on the fundamental purpose of the document. In this case the authority granted to Mr. Adeniji was for him to act as the donor’s attorney “*in all matters relating to any shareholding in Five Star Industries Ltd/Lagos.*” In my opinion the authority granted by the donor was wide enough to include authority to commence and prosecute legal proceedings on behalf of the donor so long as the action related to the donor’s shareholding in the company mentioned.

I hold that the Court below was in error to have held that the action was incompetent. As I have earlier said, I agree with my learned brother Ogundare, JSC, that this appeal should be allowed. I too would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the Federal High Court. I abide by the order for costs he makes.

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