

SUPREME COURT OF NIGERIA
THURSDAY 11TH JULY, 2002 SC.109/1998
CORAM:- M. L. UWAIJS CJN, M. E. OGUNDARE,
U. MOHAMMED, U. A. KALGO, E. O. AYOOLA, JJSC

HASTON NIG. LTD APPELLANT
AND
AFRICAN CONTINENTAL BANK PLC RESPONDENT

COMPANY LAW - Actions - Commencement - Proper party - Foss v. Harbottle - Proper plaintiff in action for wrong done to company - Is the company itself (H1)

CONTRACTS - Banking - Fiduciary duty - Bank has duty to send statements of account to customer - At regular interval as may be agreed upon by parties (H2)

DAMAGES - Special damages - Proof - Respondents failed to prove its claim - As a result of discrepancies in pleaded figure - And figure attested to in evidence (H3)

DAMAGES - Exaggerated claims - Proof - Where plaintiff claims more than he can prove - He is awarded the lesser amount (H4)

DAMAGES - General damages - Proof - Since there was no proof of dishonoured cheque - There was no justification for award of N3.5 million general damages (H5)

FACTS

Before the High Court of Enugu State, Enugu plaintiff/appellant instituted this action against defendant/respondent. Appellant was a current account holder of respondent. The sole signatory to the account was one Victor Ndoma-Egba who was described as the chairman of appellant. The said Victor Ndoma-Egba discovered on his visit to the Bank that the said account had been debited with some unauthorised withdrawals. He therefore demanded for the cheques relating to the withdrawals. He discovered that the cheques bore signatures purported to be his but which were obviously forged.

Appellant thus demanded of respondent that the account be credited with the said fraudulent withdrawals. Appellant also made a report to the police. Respondent unfortunately ignored appellant's demands. This led to the institution of this action. Appellant claimed inter alia, for special and general damages and interest rate on the said illegal withdrawals. Respondent contended that appellant cannot validly initiate the action. At the end of hearing, the court held in favour of Appellant. Dissatisfied with the judgment, respondent appealed to the Court of Appeal, Enugu where the appeal was allowed. Aggrieved, appellant filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the appellant's suit was a nullity
2. Whether there did not exist a relationship between the appellant as customer with the respondent as banker, and
3. Whether the appellant was not entitled to the damages awarded by the trial court.

HELD (Unanimously allowing the appeal in part per

OGUNDARE JSC)

COMPANY LAW - Actions - Commencement - Proper party

1. The evidence of DW1 supported all the averments in these paragraphs. The action was instituted by the plaintiff in her own name. This obviously is a proper course. It has been the rule for a long time now since *Foss v. Harbottle* (supra) was decided that the proper plaintiff in an action for a wrong done to a company is the company itself. The contention of the defendant in the two courts below and in this court is that the company by a resolution of her board of directors, must authorize that an action be taken. But this must be presumed until the contrary is proved by the party that asserts the contrary. The defendant has not led a shred of evidence to support its contention that the action here was not authorized by the plaintiff's board of directors. (p. 2272 D)

Banking - Fiduciary duty

2. The grounds of appeal from which Issue 2 was distilled rose

as a result of the finding of their Lordships of the court below that as Exhibits 4 and 5 were written by a firm of legal practitioners on behalf of Victor Ndoma-Egba, they were not demands by the plaintiff for statements of account etc. With respect to their Lordships, I think this is an unnecessary digression, an unnecessary legalism. Their Lordships lost sight of the fact that from the facts of this case, Victor Ndoma-Egba was an agent of the plaintiff in respect of Account No. 05604 being the sole signatory to the account and thus in a fiduciary position to the company. In a banker/customer relationship, it is the duty of the banker to send statements of account to the customer at regular interval as may be agreed upon by the parties. When Victor Ndoma-Egba reported to the defendant that there had been some fraudulent withdrawals from account No 05604, one would expect the defendant, as banker, to take a serious view of the matter, to report to the police and carry out internal investigation. She did not have to wait for the plaintiff to demand all these. This is so because the defendant owed the plaintiff a duty of care. Their relationship is contractual and has been described as that of debtor and creditor and principal and agent. (p. 2274 D)

Special damages - Proof

3. In the instant appeal, the total amount claimed under paragraph 7 of the Further Amended Statement of Claim is N212,500.00. Whereas in their evidence, they testified to N212,700.00. Clearly, that is another way of saying that the respondent failed to prove its claim on balance of probabilities and the claim therefore failed and the court lacks the power to tinker (sic) with the difference in the two figures. In spite of the difference between the pleaded figure and the figure attested to in evidence, the learned trial judge in his judgment awarded the amount pleaded under paragraph 7 of the Further Amended Statement of Claim. This is wrong. Furthermore, since the amount claimed in the aforesaid paragraph 7 was characterized as special damages, the law enjoins the respondent to prove same strictly. This he has failed to do. (p. 2275 G)

DAMAGES - Exaggerated claims - Proof

4. This is a rather astonishing conclusion. Surely, the law is trite that where a plaintiff claims more than he can prove, he is awarded the lesser amount. In the case on hand I cannot
B **see any difference in the amount claimed and pleaded and the amount proved in evidence. The three cheques involved in the fraud were for N158,000.00, N52,200.00 and N2,500.00 totaling N212,700.00. (p. 2276 B)**

C *General damages - Proof*

5. As rightly observed by the court below, no evidence was led in support of the averments in the paragraph above. The bare ipse dixit of PW1 that “cheques issued on that account have
D **been returned,” cannot be sufficient evidence in proof of paragraph 15. No single returned cheque was tendered in evidence. While the plaintiff might claim for damages where her cheques were wrongfully dishonoured - Balogun v. N.B.N. (supra), as there was no proof of any dishonoured cheque, she would not**
E **be entitled to any such damages in this case. The net result is that there was no justification for the award of N3.5 million general damages and the court below rightly, in my respectful view, set aside that award. (p. 2278 D)**

F **REPRESENTATION**

V. Ndoma-Egba Esqr. with T. E. Tawo for the appellant
O. A. Obianwu Esqr., for the Respondent

G **CASES REFERRED TO**

Ejekam v. Davon Industries Ltd (1998) 1 NWLR
Foss v. Harbottle (1843) 2 Hare 461
Edwards v. Halliwell (1950) All ER 1064
Abubakar v. Smith (1969) NSCC 415
H Yesufu v. A.C.B. (1981) 1 SC 74
Balogun v. NBN (1978) 3 SC 155

STATUTE REFERRED TO

Companies and Allied Matters Act 1990, ss. 65, 650

LEAD JUDGMENT BY OGUNDARE JSC

The plaintiff, who is now appellant before us, was at all time relevant to this case, a current account customer of the defendant bank, who is now the respondent, the plaintiff opened and maintained account “No. 05604 at the Calabar branch of the defendant Bank. The sole signatory to the account was one Victor Ndoma-Egba who was described on the mandate card lodged with the Bank as the plaintiff’s chairman. Victor Ndoma-Egba’s specimen signature was given to the Bank, as well as his passport photograph. The said Ndoma-Egba, a legal practitioner was either sole or joint signatory to other accounts at the said Calabar branch of the defendant Bank.

On 30th March, 1993, Victor Ndoma-Egba discovered on his visit to the Calabar branch of the Bank that the account of Ndoma-Egba, Ebri & Co., legal practitioners, of which he was a joint signatory with his partner, Richard David Ebri had been debited with some unauthorized withdrawals. This prompted him (Ndoma-Egba) to call for the ledgers of other accounts of which he was a signatory. On going through the ledger of plaintiff’s account No. 05604 he discovered that that account too had been debited with some unauthorized withdrawals. He demanded for the cheques relating to the withdrawals. He discovered that the cheques dated 11th February, 1993 for N158,000.00, 16th February, 1993 for N52,000.00 and 8th March, 1993 for N2,500.00 respectively bore signature purporting to be his but which were obviously forged.

The plaintiff demanded of the defendant Bank that her account be credited with the said fraudulent withdrawals, and other instruments drawn on the account. Plaintiff also made a report to the police. The defendant Bank appeared not to have given the plaintiff any co-operation in the matter as it ignored all the latter’s demands. This led the plaintiff to institute the action leading to this appeal, claiming:-

“(i) N212,700.00 being money fraudulently withdrawn from the plaintiff’s account No. 05604 as a result of the defendant’s negligence and collusion.

“(ii) Interest on the principal sum calculated at the rate of 54% per annum from the date of withdrawal until judgment.

“(iii) N2 (two Million Naira) being general damages for breach

of contract, negligence and loss of reputation.”

Pleadings were ordered, filed and exchanged and by orders of court amended and further amended. By its further amended statement of claim,

B plaintiff increased the damages claimed in claim (iii) to read:

“N5 Million being damages for breach of contract, negligence and loss of reputation.”

C The action proceeded to trial at which Victor Ndoma-Egba and one

Paul Chidindu, a police hand-writing expert testified for the plaintiff. An official of the defendant Bank, Christian Uchechukwu Okwula testified

D for the defendant. After addresses by learned counsel for the parties the learned trial judge, in a reserved judgment, found:-

“1. I had during the course of this proceedings examined Exhibits 1-1d, I had no hesitation nor reservation whatsoever in coming to the conclusion that the signatories on them are quite different from that on the mandate card exh. 2 and that the signatures on Exhibits 1- 1d are forgeries. The difference is so clear and glaring that one does not even need to be a handwriting expert to come to such inevitable conclusion.”

F *2. “That Exhibits 1 - 1d were honoured with such amateurish forgeries amazes me.”*

3. “The plaintiff has proved the forgeries beyond reasonable doubt.”

He adjudged:

G *“Finally I hereby enter judgment for the plaintiff as follows:-*

(1) N212,700.00 being money fraudulently withdrawn from the plaintiff’s Account No. 05604 as a result of the defendant’s negligence and collusion.

H *(2) Interest on the principal calculated at the rate of 54% per annum from the date of withdrawal until judgment.*

(3) N3.5 million being general damages for the breach of contract, negligence and loss of reputation. N1,000.00 as costs”

Being dissatisfied with that judgment the defendant appealed

to the Court of Appeal (Enugu Division) which court, in a unanimous decision allowed the appeal and set aside the judgment of the trial High Court. It is with the consequential order that there appeared to be some divergence. Achike, J.C.A. (as he then was) who read the lead judgment, dismissed plaintiff's action. Ejiwunmi, J.C.A. (as he then was) made no specific consequential order, he merely said:-

"As I was privileged to have read in advance the judgment just delivered by my learned brother, Okay Achike, JCA I agree for the reasons given that this appeal ought to succeed."

I therefore also allow the appeal. The judgment of the lower court is hereby set aside. The appellant being entitled to its costs is awarded the sum of N2,000.00 only."

Ubaezonu, JCA., on the other hand, adjudged:

"In the final analysis, I agree that this appeal should be allowed and it is hereby allowed. The judgment of the lower court is set aside. In exercise of my power under s. 16 of the Court of Appeal Act. I declare the proceedings in the lower court a nullity. I make the same order as to costs as is made in the lead judgment."

The plaintiff has now, with the leave of this court, appealed against the judgment of the Court of Appeal upon six grounds of appeal which, without their particulars, read:

"(I) The lower court erred in law when it held that - 'in the absence of the said resolution any action so instituted on behalf of the company is a nullity"

(II) The lower court erred in law when it held that - 'it is manifest that Exhibits 4 and 5 do not strictly relate to anything done on behalf of the plaintiff/respondent, Haston Nigeria Limited, indeed, the preamble of Exhibit 4 makes it clear that that document was written on behalf of one Victor Ndoma-Egba."

(III) The lower court erred in law when it assumed that the issue before it was one of internal regulation of the appellant as regards whether P. W. 1 was indeed appellant's Chairman or Director, when the issue was simply that of the relationship between appellant as customer, with the respondent as banker."

(IV) The lower court misdirected itself on the facts when it held 'Also it is not borne out from evidence on record that respondent's company, a limited liability company, made any demand on the ap-

pellant for either for (sic) for a statement of account (either in writing or orally through its servants) for paid cheques or for restitution for unauthorized payments made on Exhibits 1 and 1B.

(V) The lower court erred in law, which error occasioned a grave miscarriage of justice, when it failed to hold that the respondent was estopped from challenging the status of P. W. 1, Victor Ndoma-Egba, in relation to the appellant.

(VI) The learned Justices of the Court of Appeal erred in law when they held that -

‘It seems clear to me that in the appeal on hand the damages that may be founded for breach or breaches of contract constitute a separate ground of action from the tortuous act of negligence alleged in the suit.’

Pursuant to the rules of this court, the parties filed and exchanged title respective briefs of argument which they adopted at the oral hearing of the appeal and offered no further arguments. The plaintiff has, in its appellant’s brief, raised three issues as calling for determination in this appeal, that is to say:

1. Whether the appellant’s suit was a nullity
2. Whether there did not exist a relationship between the appellant as customer with the respondent as banker, and
3. Whether the appellant was not entitled to the damages awarded by the trial court.

The defendant in its respondent’s brief re-framed the issues thus:

“(i) Whether upon a calm view of the pleadings, the evidence and all the circumstances of the case, their Lordships, the Honourable Justices of the Court of Appeal below came to a correct decision when they held that the competency of the suit was effectively challenged and that the competency was not satisfactorily established and therefore that the suit was incompetent.

(ii) Whether upon a calm view of the pleadings, the evidence and all the circumstances of the case, their Lordships, the Justices of the Court of Appeal below came to a correct decision when they held that Exhibits 4 and 5 do not strictly relate to anything done on behalf of the plaintiff/appellant and that it was not borne out by

evidence that the appellant qua a limited liability company made any demand 1 on the respondent whether for statements of Account or for return of paid cheques or for restitution for unauthorized payments on Exhibits 1 and IB.

(iii) Whether their Lordships were right when they enunciated the principle of law to be that damages which may be found for breach or breaches of contract constitute a separate ground of action from the tortuous act of negligence alleged in the suit.”

The two sets of issues raise identical questions, plaintiff's set being a shorter form of defendant's.

Issue 1:

Whether the appellant's suit was a nullity.

In the further amended statement of claim plaintiff pleaded thus:

“1. The plaintiff is a private Limited Liability Company having its registered Office at No. 101 Marian Road, Calabar. It is registered under the Laws of Nigeria to engage in, amongst other activities, Trading, Engineering construction and contracting.

2. The defendant is a Public Limited Liability Company engaged in the business of commercial banking through its branches all over Nigeria including its branch in Calabar.

3. The plaintiff opened a Current Account No. 05604 at the defendant's Calabar branch for the purpose of its trade and business.

4. In order to operate the said Account, the plaintiff provided the defendant a specimen of the signature of Chief Victor Ndoma-Egba who is the only signatory to the plaintiff's Account. This specimen signature was made on a card provided by the Defendant. At the trial, the plaintiff shall found upon the said card and hereby gives the defendant NOTICE to produce same.”

The Defendant replied by pleading as hereunder:-

“1. The Defendant denies paragraph 1 of the plaintiff's further amended statement of claim filed on the 29th day of November, 1993 and puts the plaintiff to the strictest proof thereof.

2. The defendant denies paragraph 2 of the plaintiff's said further amended statement of claim (hereinafter referred to simply as amended statement of claim) and puts the plaintiff to the strictest proof thereof.

3. *The defendant denies paragraph 3 of the amended statement of claim and further states that in any event even if such an account as mentioned exist it was not opened by the plaintiff nor is it subsisting with the Defendant.*

4. *Paragraph 4 of the amended statement of claim of the plaintiff is false and is denied. The Defendant further states as follows :-*

(i) *Chief Victor Ndoma-Egba is neither a Director nor a shareholder of the plaintiff. The specimen signature allegedly supplied by him to the Defendant was not signed by any Director of the Plaintiff authorizing the opening of the account and there is no resolution of the Plaintiff authorizing the commencement of this action.*

(ii) *The purported Directors of the Plaintiff is set out in the Memorandum and Articles of Association submitted to the Defendant by the Plaintiff are: Patrick Tawo and John Bikon Owan both of Block 3 Agabisi Estate No. 11 Ogoli Ogoja. The Defendant will at the hearing tender and rely on the said Memorandum and Articles of Association."*

At the trial PW1, Victor Ndoma-Egba testified thus:

"*I know the parties in this case. I am the Chairman of the Board of Directors of the plaintiff's Company. The plaintiff has account No. 05604 at the Calabar Branch of the Defendant. I am the only signatory to that Account. Plaintiff is a Contractor and Trader - etc. On the opening of the Account, I was given a mandate form by the defendant to fill. To the best of my knowledge it is the only mandate that the defendant has in respect of that account. That mandate carries my specimen signature, my name and my passport photograph the mandate is in the custody of the Bank - the Defendant.*"

Cross-examined, he testified:-

"*The plaintiff is not Chief Victor Ndoma-Egba. It is a Company incorporated under the laws of Nigeria. It is a limited liability Co. There is a certificate of Incorporation. I did not tender any certificate of Incorporation. The Bank got a copy from me. I am a director because I am a Chairman. A Chairman is a director. Patrick T. Tawo is the other director. I would be surprised to know that I am not a director. There was a resolution before I was appointed a director. The defendant satisfied themselves before the Account was opened and maintained for at least three years, they did not complain about*

my directorship.

The memo and Articles of Association was tendered with the Bank. It was not needed in this case. We are not contesting the internal matter of the company. We are here to contest the issue of paying unworthy cheque”.

DW1, Christian Uchechukwu Okwula, in his own testimony B said:-

“I know the plaintiff. They are current account holders at Calabar Branch of the A.C.B.”

Cross-examined, he testified:

“The only thing that will change the mandate is a new mandate card. There is none other than Exhibit 2 in this case. It is when the account is being opened that the customer is given a blank mandate card.”

We demand resolutions.

Certificate of incorporative. (sic)

Memo and Articles of Association.

P.W.1: introduced himself as Chairman in all the forms. It was after we had gone through all the forms - resolutions etc. Money was paid in and withdrawn from the account. We did not question it. We question it now because of this case.”

In his judgment the learned trial judge (Effanga, J. as he then was) listed the issues for determination before him as follows:-

“1. Were Exhibit 1 and 1D (The cheques) forged?”

2. Is the defendant under an obligation to furnish the plaintiff, a customer, with statement of accounts and copies of cheques and other instrument drawn on her account at his expense.

3. Even if there was generally no such duty, will the duty arise in the present circumstances where there has been forgery, and consequently a demand?”

4. Has the plaintiff adequately discharged the onus and burden of proof on her?”

5. Has the plaintiff suffered any damage as a result of the defendant’s conduct?”

6. Has the plaintiff suffered any damage as a result of the defendant’s conduct not been so unconscionable and aggravating as to warrant the award of exemplary damages.”

He did not consider the issue of the competence of the suit in

so far as it related to the question whether there was authority given by the plaintiff to P.W. 1, Victor Ndoma-Egba to sue on its behalf, as an important issue. He, however, treated it as a preliminary issue and resolved it this way:

- B *“The question of the threshold issue as to the competence of the suit does not arise. The averments in paragraphs 4-8 of the Further Amended Statement of Defence are misconceived and misplaced and frivolous. In the first place the issue before the court is not one of internal management of the plaintiff as to who is Chairman or who is*
- C *Director. Those are issues for the members of the company themselves to raise. See Okoya v. Santilli (1990) 2 NWLR (pt. 131) p. 122 Held II. What is the threshold issue of competence being raised by Defendant’s counsel? He has not identified any. His submission is therefore, purely academic. D.W. 1 said in cross-examination.*
- D *‘It is when the account is being opened that the customer is given mandate card. We demand resolution, certificate of incorporation, memo and articles of association. P. W. 1 introduced himself as Chairman in all the forms. It was after “we had gone through all the forms - resolutions etc. that the account was opened. Money*
- E *was paid in and withdrawn from the account. We did not question it. We question it now because of this case. “This is a most telling bit of evidence. Having opened the account and operated it, the defendant is stopped from raising the issue of the mandate. In any case,*
- F *the counsel for defendant appears to have confused the competence of plaintiff to institute the action, and the competence of P.W. 1 to be its Chairman.”*

The defendant questioned the correctness of this conclusion in her appeal to the Court of Appeal. This was made Issue 2 in the G appeal in that court. The court below, per Achike. JCA., observed:

- H *“It goes without saying, and indeed as good legal principles that for a suit to be validly constituted the plaintiff must have the capacity and competence to initiate it. The right to initiate a suit can be challenged, and invariably is challenged as soon as possible in order to enable the trial court make a decision in respect thereof. Competence of the plaintiff is a fundamental issue as it goes to the question of competence of the court to entertain the suit. In other words, it goes to the issue of jurisdiction. Where there is a challenge to a party’s right to initiate an action, as was done by the defendant/*

appellant in the instant case, the burden rests on the plaintiff/respondent to establish his competence to initiate the action. Ajao v. Sonola Ors. (supra) is a good authority that there must be competence as well as capacity by plaintiff/respondent's counsel to institute an action. Contrary to what learned respondent's counsel has submitted. I am clearly of opinion that Ajao case is helpful on the issue of competence of the appellant to institute the action at the lower court. By section 244(1) of CAMA, 1990, as well as by Exhibit 6, it is unquestionably clear that management of a company is the collective duty of the Board of Directors. It is also firmly established that no person can institute an action in the name of a company unless it is so instituted on the authorization of the company upon the resolution of the Board of Directors or the resolution of the shareholders. This is so because where an injury has been done to a company, it is the company that has the right of the action and not any of the members or group of shareholders, acting together. See Foss v. Harbottle [1843] 3 Hare 461. In the absence of aforesaid resolution any action so instituted on behalf of the company is a nullity. See Danish Merchantile Co. Ltd & Ors. v. Beaumont & Anor. (1931) 1 All E.R. 925. But it is also open to the purported plaintiff company to ratify the unauthorized act of the person who constituted the action in a general meeting to give the authorization by ordinary resolution. See Marshall's Value Gear Co. Ltd. v. Manning, Wardle & Co. Ltd. [1909] 1 Ch. 267. Having perused Exhibit 6, the Memorandum and Articles of Association of respondent company, I am clearly of opinion that there is nothing in it that confers even on a director the right to initiate an action.

Despite the challenge to the respondent's company to initiate the action, it simply contended, and placed reliance on the evidence of the ipse dixit of PW1, that the suit was regularly initiated without however producing any resolution authorizing the commencement of the suit. Surely the learned trial judge was in error to deny that there was compelling need for the respondent to prove its competence by producing the resolution of the Board or ordinary resolution of members of the company. I am of opinion that failure to produce this authority to initiate the legal action is fatal to the claim. See Provincial Highway Chemist (Nig.) Ltd. v. S.S. Umaru & 2 Ors. (1986) F.G.C.L.R. 196 and Trans Atlantic Shipping Agency Ltd. &

Anor. v. Dan Trans. Nigeria Limited (1996) 10 NWLR (pt. 478) 360 at 368. The contrary view of the learned trial judge that the production of the resolution authorizing the commencement of the legal proceedings was un-neededful, is insupportable. In the result the 2nd issue is resolved against the respondent. ”

B Ubaezonu, J.C.A.. in his own contribution, said:

“I agree with the findings of my learned brother in the lead judgment that the respondent would not seem to have shown that it has the authority to commence the suit. If it has no such authority the suit he has commenced is null and void, the proceedings thereon are a nullity. It is my view that in such a situation the whole proceeding should be declared a nullity.”

This decision is now on attack in this appeal.

For the plaintiff it is contended that it was she who initiated the
D action in her name and not by someone-else on her behalf and that
PW1 was merely a witness. It is further contended that on the evidence as a whole, particularly that of DW1, Defendant cannot be heard to deny the existence of the plaintiff. Relying on *Ejekam & Ors. v. Davon Industries Ltd. (1998) 1 NWLR*, learned counsel for
E the plaintiff submitted that the burden of proving “that a person who holds himself out as a director of a company and acts on behalf of the company by maintaining an action on behalf of the company has no such authority is on the person who challenges his authority to act
F as such director by proving that (a) he is not a director, (b) even if he is director he has no authority to maintain the action in the first place. It is further submitted, relying on *Foss v. Harbottle (1843) 2 Hare 461, 67 E.R. 189. Edwards v. Halliwell [1950] All E.R. 1064 and Abubakri & Ors. v. Smith & Ors. (1969) NSCC 415* that the proper
G plaintiff in an action for a wrong done to a company is the company itself. For the defendant, it is submitted as follows:-

“It is our most humble submission that their Lordships, the Honourable Justices of the Court of Appeal were right when they held in effect that the suit commenced by Kanu G. Agabi & Associates as Legal Practitioners in the name of the appellant based on a personal instruction of Chief Victor Ndoma-Egba without proof of authorization by the Board of Directors or Shareholders of the appellant which authority was properly called for and put in issue by the respondent is incompetent.”

Reference was made to paragraph 4 of the Defendant's further amended statement of defence in which the competence of the suit was challenged. It is asserted in the respondent's brief that though Victor Ndoma-Egba was the sole signatory to the account in question, he is neither a Director nor a subscriber nor shareholder of the appellant's company. These averments were never countered. B

I have carefully considered the submissions of learned counsel in their respective briefs. In paragraphs 5 and 6 of her further amended statement of defence, the defendant pleaded:-

5. Paragraph 5 of the amended statement of claim is false and is hereby denied. The defendant repeats and adopts paragraph 4(i) C and (ii) of this further amended statement of defence hereinafter referred to simply as the amended statement of defence Chief Victor Ndoma-Egba is not Chairman of the plaintiff and has no locus standi to deal with the account of the plaintiff or with matters concerning D the plaintiff and particularly has no authority to initiate the present proceedings on behalf of the plaintiff.

6. Paragraph 6 of the amended statement of claim is denied. The plaintiff's Chairman never made such a demand. The plaintiff has no Chairman properly so called. E

The evidence of the only witness for the defence, however, belied the averments in paragraphs 1-6 of the defendant's pleading. Victor Ndoma-Egba was described in Exhibit 2 with which the plaintiff opened her account as "Chairman". He was the sole signatory to the account. The defendant dealt with him as such. I think it does not now lie in her mouth for the defendant to deny that Victor Ndoma-Egba was Chairman of the plaintiff. Chairman, in the context the word is used, can only mean chairman of the Board of Directors and must necessarily be a director to be the chairman. See the definition F of "director" in section 650 of the Companies and Allied Matters Act. G

I must express some dismay at the attitude of the defendant in this matter. One would think that the dispute between the parties centred on whether or not exhibits 1 - ID were forged. Rather than admitting simple and non-controversial facts pleaded by the plaintiff H in paragraphs 1-4, the defendant denied them including the averments in paragraph 2 that —

"1. The plaintiff is a private Limited Liability Company having its registered Office at No. 101 Marian Road, Calabar. It is registered

under the Laws of Nigeria to engage in, amongst other activities, Trading, Engineering construction and contracting.

2. The defendant is a Public Limited Liability Company engaged in the business of commercial banking through its branches all over Nigeria including its Branch in Calabar.

B 3. The plaintiff opened a Current Account No. 05604 at the defendant's Calabar Branch for the purposes of its trade and business.

C 4. In order to operate the said Account, the plaintiff provided the defendant a specimen of the signature of Chief Victor Ndoma-Egba who is the only signatory of the plaintiff's Account. This specimen signature was made on a Card provided by the defendant. At the trial, the plaintiff shall found upon the said Card and hereby gives the defendant NOTICE to produce same."

D **The evidence of DW1 supported all the averments in these paragraphs. The action was instituted by the plaintiff in her own name. This obviously is a proper course. It has been the rule for a long time now since Foss v. Harbottle (supra) was decided that the proper plaintiff in an action for a wrong**
E **done to a company is the company itself. The contention of the defendant in the two courts below and in this court is that the company by a resolution of her board of directors, must authorize that an action be taken. But this must be presumed**
F **until the contrary is proved by the party that asserts the contrary. The defendant has not led a shred of evidence to support its contention that the action here was not authorized by the plaintiff's board of directors.**

G In any event section 279(3) of the Companies and Allied Matters Act enjoins a director (and the chairman of the board is a director) to

H "...act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business and promote the purposes for which it was formed and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances."

What is involved in this case is the assets of the plaintiff. Victor Ndoma-Egba was not only the chairman of the plaintiff company but also the sole signatory to its current account with the defendant

Bank. Who is best in the position to act in circumstances of this case where the company's account had been debited with fraudulent withdrawals other than the chairman and sole signatory of the account? By describing Victor Ndoma-Egba as its chairman in Exhibit 2 and holding him out as sole signatory of its account, the plaintiff has expressly or impliedly authorized him to act in the matter concerning her account. See section 65 of Companies and Allied Matters Act which provides:-

"65. Any act of the members in general meeting, the board of directors, or of a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person.

Provided that

(a) the company shall not incur civil liability to any person if that person had actual knowledge at the time of the transaction in question that the general meeting, board of director, or managing director, as the case may be, had no power to act in the matter or had acted in an irregular manner or if, having regard to his position with or relationship to the company, he ought to have known of the absence of such power or of the irregularity.

(b) if in fact a business is being carried on by the company, the company shall not escape liability for acts undertaken in connection with that business merely because the business in question was not among the business authorized by the company's memorandum."

I agree entirely with the observations of the learned trial judge quoted earlier in this judgment. With profound respect, I cannot subscribe to the view of their Lordships of the court below on the issue of the competence of the action. They appear to have mistaken this action as one instituted by Victor Ndoma-Egba in his own name rather than one instituted by the plaintiff in her own name. It is not in dispute that the plaintiff had the capacity and competence to institute the action leading to this appeal, I can see no ground for challenging either her capacity or competence. Nor has there really been a challenge to her capacity or competence. Rather the challenge was to the capacity or competence of Victor Ndoma-Egba who, in any event, did not sue but only testified as a witness for the plaintiff.

I have no hesitation in resolving Issue 1 in favour of the plain-

tiff, her suit is not a nullity as wrongly decided by the court below.

Issue 2

Whether there did not exist a relationship between, the appellant as customer, with the respondent as banker.

I do not think that this issue requires the rather lengthy treatment given it in the appellant's brief. Notwithstanding the denial by the defendant of paragraph 3 of the plaintiff's further amended statement of claim, on the totality of the oral and documentary evidence adduced at the trial of this case, particularly the admissions made by the only defence witness, there can be no doubt that plaintiff was at all time relevant to this action a customer of the defendant Bank, plaintiff was the holder of the current account No. 05604 at the Calabar branch of the defendant. That much is overwhelmingly established by the evidence on both sides.

The grounds of appeal from which Issue 2 was distilled rose as a result of the finding of their Lordships of the court below that as Exhibits 4 and 5 were written by a firm of legal practitioners on behalf of Victor Ndoma-Egba, they were not demands by the plaintiff for statements of account etc. With respect to their Lordships, I think this is an unnecessary digression, an unnecessary legalism. Their Lordships lost sight of the fact that from the facts of this case, Victor Ndoma-Egba was an agent of the plaintiff in respect of Account No. 05604 being the sole signatory to the account and thus in a fiduciary position to the company. In a banker/customer relationship, it is the duty of the banker to send statements of account to the customer at regular interval as may be agreed upon by the parties. When Victor Ndoma-Egba reported to the defendant that there had been some fraudulent withdrawals from account No 05604, one would expect the defendant, as banker, to take a serious view of the matter, to report to the police and carry out internal investigation. She did not have to wait for the plaintiff to demand all these. This is so because the defendant owed the plaintiff a duty of care. Their relationship is contractual and has been described as that of debtor and creditor and principal and agent. See Yesufu v. A.C.B. (1981) 1 SC 74, 98-99, Balogun v. N.B.N. (1978) 3 SC 155, 163-164.

I resolve Issue 2 in favour of the appellant.

Issue 3

Whether the appellant was not entitled to the damages awarded by the trial court

The trial court found that the defendant was liable and awarded in favour of the plaintiff (1) N212,700.00 being money fraudulently withdrawn from plaintiffs account, (2) 54% interest on the said sum from the date of withdrawal until judgment and (3) N3.5 million being general damages for the breach of contract, negligence and loss of reputation. On award(1), it was contended in the court below that what was claimed in the pleadings (N212,700.00) was different to what was proved in evidence.

Commenting on this submission the court below, per Achike. JCA, said:-

“Nevertheless, in support of the court’s power to invoke the slip-rule learned respondent’s counsel cited and relied on UBA v. TAAN (1993) 4 NWLR. (pt. 287) 368, where Tobi, J.C.A., while reviewing the authorities collated on the question of the slip-rule, stated by way of general proposition as follows at p. 371.

(d) Where accidental omission or arithmetical errors are committed on the face of the record

This statement is not as simple as it may appear. My understanding of it, and this is the only way it may be in consonance with the authorities, is that if by way of clerical error a judge who had wanted to write N55,000.00 mistakenly writes N50,000.00, omitting N5,000.00, the mistake may clearly be corrected under the slip-rule and substituted N55,000.00 for N50,000.00. But it is however not the same thing for the court to substitute N55,000.00 as attested to by P.W. 1 with N5,000.00 being the figure stated by P.W. 1 in his pleadings. The simple error here is that the evidence does not correspond with the pleading and the plaintiff’s case must fail. See Emegokwue v. Okadigbo (supra).”

In the instant appeal, the total amount claimed under paragraph 7 of the Further Amended Statement of Claim is N212,500.00. Whereas in their evidence, they testified to N212,700.00. Clearly, that is another way of saying that the respondent failed to prove its claim on balance of probabilities and the claim therefore failed and the court lacks the power to tinker (sic) with the difference in the two figures. In spite of

the difference between the pleaded figure and the figure attested to in evidence, the learned trial judge in his judgment awarded the amount pleaded under paragraph 7 of the Further Amended Statement of Claim. This is wrong. Furthermore, since the amount claimed in the aforesaid paragraph 7
B was characterized as special damages, the law enjoins the respondent to prove same strictly. This he has failed to do.

In the result, the 5th issue is resolved in favour of appellant.

This is a rather astonishing conclusion. Surely, the law
C is trite that where a plaintiff claims more than he can prove, he is awarded the lesser amount. In the case on hand I cannot see any difference in the amount claimed and pleaded and the amount proved in evidence. The three cheques involved in the fraud were for N158,000.00, N52,200.00 and N2,500.00 to-
D taling N212,700.00. PW1 testified thus:-

"I remember on the 11/2/93 - the sum of N158,000.00 had been withdrawn without my mandate. On 16/2/93 - the sum of N52,200 had been withdrawn without my mandate. On 8/3/93- the sum of N2,500.00 had been withdrawn without mandate. "

E The learned trial judge awarded that sum. The reason given by the court below for refusing that award not being sustainable, I hereby affirm the award. On the award of interest, the court below per Achike JCA observed :-

F *"With regard to paragraph 14 of the amended statement of claim, respondent pleaded that in consequence of the fraud perpetrated on the respondent's account, it was obliged to spend money for running its business as traders and contractors and forced to borrow money from finance house at the rate of 15% monthly interest*
**G but PW1 testified (at p.110 of the record) that if borrowed money from Finance Houses at the interest rate of 60%. Clearly, this piece of evidence is contrary to the pleadings and parties and even the courts are bound by the pleadings. Such conflict in evidence goes to no issue, it does not avail the respondent. It is good as saying that
H the pleaded facts have been abandoned Emegokwue v. Okadigbo (1973) 4 S.C. 113 at 117 and Woluchem v. Gudi (1981) 5 S.C. 291."**

Now paragraph 14 of the plaintiff's further amended statement of claim reads :-

“14. As a result of the defendant’s negligence, the plaintiff has suffered in its trade and business as it has not been able to find sufficient funds to carry on its business as Traders and contractors, and has consequently been forced sometimes to borrow money from Financial House at the rate of 15% monthly interest to carry on its business.” B

Testifying in support of this averment and the claim for interest PW1, Victor Ndoma-Egba said:-

“In all, the plaintiff lost N21,2,700.00 from the three cheques made available to us. The company had to borrow funds from finance Houses at very high interest rate. At one point we had to pay 60% interest. We had to borrow to pay salaries. The stolen money came from our trading activities. It constituted our capital. We issue cheques and they are returned. C

I am asking for judgment in the sum of N212,700.00 - the total from the three cheques plus 54% interest which was the prevailing rate at that time.” D

No doubt the evidence of PW1 was at variance with the averment in paragraph 14 of plaintiff’s pleading in so far as it related to the amount of interest the plaintiff paid on loans raised to carry on her business. But claim (2) was not based on paragraph 14 but on what was pleaded in paragraph 23, that is on the prevalent rate. And the evidence of PW1 was in line with the claim as pleaded in paragraph 23 of the pleading. The Defendant who was in a better position so to do, led no evidence as to the prevailing rate of interest at the relevant time. The evidence of P.W.1, therefore, remained unchallenged. It was accepted by the learned trial judge. I see no reason to disturb the award of 54% interest on N212,700.00 from the date of the fraudulent withdrawals to the date of judgment, that is 19th December, 1995. I affirm the award. E F G

I now come to the third award of N3.5 million as damages for breach of contract, negligence and loss of reputation. The plaintiff had claimed one sum (N5 million) for all the alleged wrongs. And the trial judge awarded a lump sum (N3.5 million) too. It is not discernible from the judgment what he awarded in respect of each wrong. For breach of contract it would amount to double compensation for the learned trial judge to award reliefs (1) and (2) for N212,700.00 and interest of 54% and at the same time award general damages - H

P.Z. & Co. Ltd. v. Ogedengbe (1972) 1 ANLR for those are the damages that naturally flowed from the defendant's breach of contract.

The plaintiff alleged negligence but the negligence complained of was subsumed in the breach of contract, it was not the tort of negligence. There could, therefore, be no award for this. The plaintiff also claimed damages for loss of reputation. In paragraph 15 of her pleading, plaintiff averred:

"15. The plaintiff has also been injured as to its credit by the Defendant's negligence as it has not been able to pay its creditors and its cheques have been returned unpaid by the defendant. At the trial, the plaintiff shall rely upon all such dishonoured cheques. One such dishonoured cheque is African Continental Bank Plc. Cheque dated 2/4/93 drawn in favour of one SAID HENOUD valued at N40,000.00. This cheque shall be relied upon at the trial of this suit."

As rightly observed by the court below, no evidence was led in support of the averments in the paragraph above. The bare ipse dixit of PW1 that "cheques issued on that account have been returned," cannot be sufficient evidence in proof of paragraph 15. No single returned cheque was tendered in evidence. While the plaintiff might claim for damages where her cheques were wrongfully dishonoured - Balogun v. N.B.N. (supra), as there was no proof of any dishonoured cheque, she would not be entitled to any such damages in this case. The net result is that there was no justification for the award of N3.5 million general damages and the court below rightly, in my respectful view, set aside that award.

From all I have been saying, this appeal succeeds in part. I set aside the judgment of the court below except as to the dismissal of the award of N3.5 million general damages which I hereby affirm. The awards of (1) N212,700.00 and (2) 54% interest made by the trial court are affirmed. I award to the plaintiff N10,000.00 costs of this appeal but make no order as to the costs of the appeal in the Court of Appeal.

UWAIS CJN

I have had the advantage of reading in draft the judgment read by my learned brother Ogundare, JSC. I entirely agree with the

judgment and have nothing to add.

Accordingly I too allow the appeal. I set aside the decision of the Court of Appeal and affirm the decision of the trial court. I adopt the order contained in the said judgment.

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MOHAMMED JSC

I agree with the opinion of my learned brother, Ogundare, J.S.C., in the judgment read. I have had the advantage of reading the draft of the judgment before now. I agree that the award of damages of N3.5 million which the trial High Court granted to the appellant was rightly set aside by the Court of Appeal. That notwithstanding, the awards of N212,700.00 & 54% interest which the trial High Court made and were set aside by the Court of Appeal are hereby restored. I abide by the order made in the lead judgment on costs.

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KALGO JSC

I have had the privilege of reading in draft the judgment of my learned brother, Ogundare, J.S.C., in this appeal. I entirely agree with his reasoning and the conclusions reached on all the issues which arose for determination therein. In the result, I find that there is merit in the appeal and I allow it in part to the extent set out in the leading judgment. Accordingly I set aside the decision of the Court of Appeal except as to the order made in respect of the award of the lump sum award of N3.5million as general damages for breach of contract, negligence and loss of reputation. The award of N212,700.00 with 54% interest thereon made by the trial court in favour of the appellant is hereby restored. I award N10,000.00 costs to the appellant against the respondent.

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AYOOLA JSC

I have read in draft the judgment delivered by my learned brother, Ogundare, J.S.C. For the reasons he gives, I too would allow the appeal in part. I abide by the consequential orders the makes and by the order as to cost.

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