

**SUPREME COURT OF NIGERIA**  
7TH JANUARY, 2005. SC. 19/2001  
**CORAM:- S. U. ONU, A. O. EJIWUNMI, N. TOBI, D. O.**  
**EDOZIE, S. A. AKINTAN, JJSC.**

LAGOS STATE DEVELOPMENT AND  
PROPERTY CORPORATION ..... APPELLANT  
AND  
ADOLD STAMM INTERNATIONAL NIG. LTD. .... RESPONDENT  
AND  
FIRST BANK NIG. PLC. .... 3RD PARTY RESPONDENT

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EVIDENCE - Affidavits - Conflict therein - Is ascertained by looking at the issue in controversy (H1)

EVIDENCE - Affidavits - Conflict that would warrant oral evidence - Did not arise in this case - As facts averred were not controverted (H2)

ACTIONS - Joinder of parties - Where both parties were duly heard - In respect of a third party joinder issue - Appellant was not denied fair hearing (H3)

EVIDENCE - Documents - Fair hearing - Where appellant failed to controvert - The content of a document - Court's reliance on it - Is not a denial of fair hearing (H4)

APPEALS - Judgments - Interest on judgment debt - Directive by Supreme Court to trial court - To ascertain additional interest - Cannot be queried before the trial court (H5)

**FACTS**

The appellant and respondent had entered into a building contract out of which a dispute arose. In keeping with the terms of the contract, the dispute was by an order of the Lagos High Court referred to a sole

arbitrator. The arbitrator published his report on 18-10-1982 and ordered the appellant to pay N5,566,437.21 to the respondent with 5% interest per annum thereon from 11-3-1981 to 18-10-1982. The respondent applied to the High Court for the enforcement while the appellant applied to set aside the award. In a ruling delivered by Ilori J. in May 1986, it ordered the enforcement of the award. Appellant's appeal to the Court of Appeal was dismissed. Further appeal to the Supreme Court was also dismissed. But the cross appeal of the respondent was upheld by the apex court. It then ordered that the case be remitted back to Ilori J. to determine the interest payable on the judgment debt. The 3rd party made a bond to pay a certain amount before the High Court granted a stay of execution to the appellant. It has discharged the bond, and is not a party in the present appeal, strictly speaking.

It seeking to comply with the Supreme Court's directive to determine the interest payable, Ilori J. ordered the parties to file affidavit evidence. Respondent made averments calculating interest based on what the judgment debt would have yielded if placed in a fixed deposit account. It annexed documents from Afribank and a chartered accountant in seeking to establish the sum of over N15 million as due interest. Appellant in its affidavit did not controvert the figure or calculation but merely sought to establish that no further interest was payable. The trial court awarded the said amount presented by the respondent. Being dissatisfied, appellant appealed to the Court of Appeal and being unsuccessful, it has further appealed to the Supreme Court.

#### **ISSUES FOR DETERMINATION**

1. Whether the court below was right in holding that there was no conflict in the affidavit of interest filed to warrant the taking of oral evidence by the trial court.

2. Whether the court below was right in affirming the decision of the trial court on the lumping together in the same judgment the determination of interest payable to the respondent and the application for leave to set aside the 3rd party notice filed by the 3rd party/respondent.

3. Whether the court below was right in arriving at the conclusion that there was no denial of fair hearing to the appellant by the failure of

the respondent to give the appellant the opportunity to respond to be heard on the document relating to interest payable.

4. Whether the court below was not in error in agreeing with the trial court that the respondent is entitled to further interest on the judgment sum of N6,784,095.43k placed with the 3rd party/respondent in an interest yielding account as directed by this court in its judgment in Suit No. SC/282/91 of 5/8/94.”

**HELD** (Unanimously dismissing the appeal per **AKINTAN JSC**)

***Affidavits - Conflict therein***

1. In deciding whether or not the contents of the two documents are conflicting, one must look at the issue in controversy in the particular case before the court. This is because where, for example, the conflicts in affidavits are not material to the case before the court or where the facts are inadmissible, or are flimsy and are on an issue irrelevant and alien to the matter before the court, the need to call oral evidence to resolve the conflicts would not arise. (p. 89 A)

***Affidavits - Conflict that would warrant oral evidence***

2. As already shown above, while the facts set out in the respondent’s affidavit relate to the interest due on the judgment debt which was what the Supreme Court directed Ilori, J., should determine, the appellant on the other hand, did not controvert or challenge the accuracy or otherwise any of the figures put forward in the affidavit filed by the respondent, instead, it was claiming that there was no need for the appellant to pay any other interest other than the one based on the judgment of Desalu, J. It is therefore correct to say that there was in fact no conflict in the affidavit evidence placed before the trial court since the alleged conflicts are in fact not relevant to the case before the court. There is therefore no merit in the appeal as it relates to that issue. (p. 89 C)

***ACTIONS - Joinder of parties***

3. The question whether it was proper for the learned trial Judge to handle the issue of third party joinder along with the substantive case before the

court, being queried in the appellant's second issue, is to me very ridiculous. This is because the third party joinder issue arose in the same suit before the court. Both parties were duly heard in respect of both the third party issue and the substantive matter before the court delivered its judgment or ruling in the two matters before the court. The appellant's complaint was not that he was not heard or was not given the opportunity of being heard in respect of both matters. I therefore see no reasons to support or justify the contention that the appellant's right to fair hearing was infringed upon. (p. 89 F)

***Documents - Fair hearing***

4. The next question to be resolved is the allegation that the appellant's right of fair hearing was breached when the court accepted the document prepared by the chartered accountant and produced in court in respect of calculations of interest due on the judgment debt. The said calculation was based on the same principle used by the Afribank Plc., and it was meant to cover the period immediately after that which was prepared by Afribank Plc., up to the date the entire judgment debt was settled. The content of the document in question is merely an arithmetical calculation based on the same principle adopted in the document prepared by Afribank Plc., which the respondent had earlier attached to its affidavit as Exhibit 2, a copy of which had earlier been served on the appellant. As I have already mentioned above, the appellant did not raise an objection to the content of that document prepared by the Chartered Accountant, which is the subject-matter of the present complaint, which could as well be prepared by the court itself since its contents were based on the principles in an uncontroverted evidence before the court. (p. 90 A)

***Judgments - Interest on judgment debt***

5. Finally, the question raised in the appellant's fourth issue is whether the respondent was entitled to more interest over the amount that was assessed in the judgment of Desalu, J., which has since been paid. The directive by this court to Ilori, J., was to assess the additional interest

now being queried in the issue. The fact that Desalu, J., had earlier made some assessment of interest was in existence and known to the Supreme Court at the time it made its order directing Ilori, J., to embark on assessing the interest payable. It was not open to Ilori, J., to act as an appellate court over the clear and unambiguous directive given by the Supreme Court in the matter. In the result, I hold that there is also no merit in the appeal as it relates to that issue. (p. 90 F)

## NOTABLE POINT OF INTEREST

### TOBIJSC

#### *1 . Affidavits - Nature of conflict that may warrant oral evidence*

For conflict in affidavit to receive the attention of the court, the conflict must really affect the live issues involved in the case. The conflict must be tangible, not intangible; it must be material not immaterial; and it must be substantial and fundamental to the live issues in the case. Where conflicts are peripheral, cosmetic, inarticulate or a mere farce orchestrated by the party, a court of law will not order that oral evidence be led to resolve or reconcile the “conflicts” in inverted commas.

Learned Senior Advocate for the respondent has clearly stated in the respondent’s brief the matter in controversy. Like him, I do not also see any conflicts deserving oral evidence. If at all there are conflicts, they are not material, thus not deserving oral evidence in the matter, I think the learned trial Judge was right in making his order of damages on the affidavit evidence and I cannot fault him. (p. 94 A)

## REPRESENTATION

Mr. Segun Fabunmi, for the Appellant.

Chief Ladi Williams, SAN., (with him, M. Sallau), for the Respondent.

Mr. Alex A. Ajayi, for the 3rd Party Respondent.

## CASES REFERRED TO

Falobi v. Falobi (1976) 9-10 S.C. (Reprint) 1; (1976) 9-10 S.C 1

Okupe v. F.I.B.R. (1974) 4 S.C (Reprint) 69; (1974) All NLR 284 (Reprint)

Garba v. University of Maiduguri (1986) 1 NWLR (Pt. 18) 550

L.S.D.P.C. v. Adold/Stamm Int. Ltd. (1994) 7 NWLR (Pt. 358) 545 at 560-561

Akinsete v. Akindolire (1966) 1 All NLR 147 at 148

B Ibukun v. Ibukun (1974) 2 S.C. (Reprint) 35; (1974) 3 S.C. 35 at 64

### **LEAD JUDGMENT BY AKINTAN JSC**

This is an appeal from the judgment of the Lagos Division of the Court of Appeal (Coram: Oguntade, Galadima & Aderemi, JJCA.), delivered on 13th June, 2000, in Suit No. CA/L/380/97. The appellant and the respondent had entered into a building contract out of which a dispute arose. The contract agreement between them had provided for reference of disputes arising from the contract to an arbitrator. To that end, the dispute was, by an order of the Lagos State High Court, referred to Late Hon. Justice G. B. A. Coker as sole arbitrator. The arbitrator published his report on 18th October, 1982. In the report, the arbitrator ordered the appellant to pay N5,566,437.21 to the respondent with 5% interest per annum thereon from 11/3/81 to 18/10/82. The respondent later applied to the High Court for the enforcement of the award. The appellant, on the other hand, applied to the same court to set aside the award.

The two applications came before Ilori, J., (as he then was). In his ailing delivered on 9/5/86, on the applications, the learned Judge ordered the enforcement of the award and refused the application to set aside the award. The appellant was dissatisfied with the ruling of Ilori, J. An appeal to the Court of Appeal against the ruling was dismissed. On a further appeal to this court, the appeal by the appellant was also dismissed. But the cross-appeal by the respondent was successful in that this court ordered that the case be remitted back to the High Court for the purpose of determining the interest payable. Ilori, J., determined the interest payable as ordered by this court. The appellant was again dissatisfied and appealed to the Court of Appeal.

The First Bank Plc., the 3rd party respondent, came into the matter as a result of the bond it provided under an order by Ilori, J., made on an application for stay of execution of the award pending the appeal filed

by the appellant. When the appeal was dismissed, the respondent instituted an action at the Lagos State High Court for the enforcement of the bond.

The claim came before Desalu, J., as Suit No. LD/2185/90. Desalu, J., entered judgment against the First Bank Plc., to the extent of the limit of the amount guaranteed by the bank and the interest due thereon. The bank has since fully settled the judgment debt. The bank was brought into the proceedings before Ilori, J., by the appellant issuing a third party notice by motion which the learned trial Judge granted. But the High Court, in its ruling, awarded the interest payable and dismissed the third party notice. The appellant did not appeal against the dismissal of the third party notice to the Court of Appeal. The Bank is therefore strictly speaking not a party in the present appeal. C

Briefs were filed by the appellant, the respondent as well as the Third Party in this court. The appellant formulated the following four issues for determination in the appellant's brief: D

1. Whether the court below was right in holding that there was no conflict in the affidavit of interest filed to warrant the taking of oral evidence by the trial court. E

2. Whether the court below was right in affirming the decision of the trial court on the lumping together in the same judgment the determination of interest payable to the respondent and the application for leave to set aside the 3rd party notice filed by the 3rd party/respondent. F

3. Whether the court below was right in arriving at the conclusion that there was no denial of fair hearing to the appellant by the failure of the respondent to give the appellant the opportunity to respond to be heard on the document relating to interest payable. G

4. Whether the court below was not in error in agreeing with the trial court that the respondent is entitled to further interest on the judgment sum of N6,784,095.43k placed with the 3rd party/respondent in an interest yielding account as directed by this court in its judgment in Suit No. SC/282/91 of 5/8/94." H

The respondent adopted the issues formulated by the appellant in its brief. The procedure adopted by Ilori, J., in determining the interest

payable as directed by this court is contained in the following order made on 10th January, 1995, by the learned Judge:

“(i) *The principal sum comprised in the judgment shall be paid to the plaintiff by the defendants and or their guarantor before the adjourned date.*

(ii) *The plaintiff shall file and serve an affidavit on interest claimed within 14 days from this day,*

(iii) *The defendants shall file and serve an affidavit on interest offered within 10 days of service of the plaintiff’s affidavit.”*

The plaintiff filed its affidavit evidence as directed by the court on 27th January, 1995, and the defendant filed its own affidavit on 7th March. 1995.

The plaintiff’s affidavit was deposed to by Adegboyega Adetokunbo Edu, a Legal Practitioner in Chief Rotimi Williams Chambers. He deposed inter alia, in paragraphs 3,4,5,6 & 7 of the said affidavit as follows:-

“3. *The Afribank Nigeria Plc., is a reputable bank duly licensed to carry on the business of commercial banking in Nigeria.*

4. *Chief Rotimi Williams Chambers did make inquiries from the aforementioned Bank to ascertain the amount of interest payable on a sum of N6,015,411.21 if such had been placed on fixed deposit with the said Bank from 9th May, 1986.*

5. *Now shown to me and marked Exhibit 1 is the photocopy of amount of interest computed by the said Bank from 9.5.86 to 31.10.94.*

6. *I have also requested the Chief Accountant in Chief Rotimi Williams Chambers, Mr. David Adekunle Araoye who is an Associate of the Institute of Accountants of Nigeria to make a computation of the amount so payable up to 23rd February, 1995. A photocopy of that computation is now shown to me and marked Exhibit 2.*

7. *Exhibit 2 shows that the gross amount which would have been paid by the Bank as at 23rd February, 1995 is N16,937,743.57 whilst the net amount after deducting tax would be N 15,563,458.37.”*

The defendant’s affidavit was, on the other hand, deposed to by Abayomi Bisuga, a Legal Practitioner in the chambers of B. O. Benson,

SAN. He too deposed as follows in paragraphs 3 to 11 of his said affidavit:

“3. That judgment was given on 9/5/86 for N6,015,411.21 in this suit.

4. That on 11/6/86 stay of execution granted on condition that a bond guaranteeing the payment of the judgment debt and interest on judgment being given by the Court of Appeal against the defendant. B

5. Bond was entered into by 1st Bank of Nigeria Plc., for the payment plus interest at 5% per annum from 9/5/86. C

6. The plaintiff on 22/10/90 filed an action against the 1st Bank, the Guarantor as contained in the Writ of Summons, copy attached hereto as Exhibit 1.

7. That on 6/5/92 judgment was delivered as follows:- (i) For the sum of N5,566,437.21 D

(ii) Interest on the said amount at 5% per annum from 9/5/86 to 25/9/90 amounting to N1,217,683.13.

(iii) Interest on the total sum of N6,784,095.34 at 6% per annum from 2/10/90 till date of payment and for N 100.00 costs. E

8. That attached hereto and marked Exhibit 2 is copy of the judgment of late Hon. Justice Desalu in favour of the plaintiff.

9. That the plaintiff appealed against the portion of the judgment relating to 6% per annum interest from 21 10/90 and attached hereto is copy of the N/A as Exhibits. F

10. That the appeal on Exhibits 2 and 3 has not been dealt with.

11. That there is no need to determine fresh interest on the judgment debt and cost, the same having been determined in Suit No. LD/2185/90, Adold Stamm International Nigeria Limited v. The First Bank of Nigeria Limited.” G

Ruling on the facts deposed to in the two affidavits and the written addresses submitted by learned counsel for the parties, the learned trial Judge, (Ilori, J.), found as a fact in his judgment delivered in the matter on 7/10/96 that no interest was awarded in favour of the application in his earlier judgment in the case and that the 5% interest which appeared on the bond was the limit of interest the third party bonded itself to pay. H

The learned Judge then said further as follows in his said judgment:-

“No interest was awarded in favour of the applicant in the earlier judgment of this court. The 5% interest which appeared on the bond was the limit of interest the Third Party bonded itself to pay. While the respondent appealed against the whole decision, the appellant herein appealed against this court’s failure to award interest. The Supreme Court dismissed the respondent’s appeal and remitted this suit back to this court for interest payable to be determined.

Chief F. R. A. Williams, SAN., learned counsel for the appellant, placed before this court, vide affidavit deposed to by Adegboyega Adetokunbo Edu. Esq., interest payable as calculated by the Afribank Plc., of a sum of N6,015,411.21k had been placed on fixed deposit with effect from 9th May, 1986. Chief B. O. Benson, SAN., by an affidavit deposed to by Abayomi Bisuga, Esq., deposed that there is no need to determine fresh interest on the judgment and costs, the same having been determined in Suit No. LD/2185/90. I pause here to remark that suit No. LD/2185/90 was instituted to recover from the Third Party its liability on the Bond provided in fulfilment of the condition for stay of execution. It was not a suit between Adol/Stamm International Nigeria Ltd. and the respondent herein. A decision in that suit cannot extinguish the respondent’s liability to the applicant in its entirety. If upon satisfaction of the judgment in that suit it appears to the applicant that the respondent’s liability is not completely extinguished, it appears to me proper for the applicant to claim whatever it considers to be still outstanding against the respondent. The third party quite clearly, cannot be liable for more than the responsibility it incurred under the Bond. Neither can the rate of interest the third party bonded itself to pay, replace award of interest by the court.”

The learned Judge also held further that Exhibit 1 to the applicant’s affidavit was calculated on the basis of the information supplied by Afribank while Exhibit 2 was also a calculation of interest on the same basis up to 23rd February, 1995. He then held that the net interest after deducting withholding tax amounted to N15,563,458.37. The learned Judge then entered judgment for the plaintiff as follows in the concluding paragraph of his said judgment:

*“.... On the premises, my judgment is that the defendant/ respondent shall pay interest on the judgment debt from 9th May, 1986, as calculated in the schedule of interest payable exhibited with the further affidavit of Adegboyega Adetokunbo Edu dated 27th January, 1995. It is ordered that the defendant/respondent shall pay to the plaintiff/ applicant the sum of N15,563,458.37 together with any further interest calculated at the same rate until the judgment debt on this judgment is fully paid.”*

As I have stated earlier above, the plaintiff was not satisfied with the ruling and an appeal filed against it in the Court of Appeal was dismissed, hence, the present appeal to this court. The judgment of the lower court is attacked in the appellant’s brief on three grounds as set out in the issues formulated in the brief - viz: (1) that the affidavit evidence placed before the learned trial Judge contained conflicting averments and as such the learned Judge ought to have called for oral evidence to resolve the conflicts. The court’s failure has led to denial of fair hearing; (2) that the lower court was wrong in fixing the amount of interest payable based on the figures obtained from documents not properly before the court; and (3) the learned Judge was in error in lumping together in his judgment the application to set aside the 3rd party notice by the 3rd party respondent and the interest payable.

It is submitted in the appellant’s brief, on the conflicts in the affidavit filed, that since the only issue to be determined by the trial court was interest payable by the defendant/appellant and there being no admission but rather apparent conflict, the conflict ought to have been resolved by no other means than by calling evidence on how the figures of principal sum and interest payable were arrived at, probably evidence from the Central Bank of Nigeria on fixed range (floor to ceiling of lending rate given to Commercial and Merchant Banks for their customers). The learned Justices of the Court of Appeal are therefore said to have acted wrongly when they agreed that the appellant was not denied fair hearing because the trial court could have calculated the figures on the basis of the data provided in Exhibits 1 and 2.

On the admission and reliance on the figures in Exhibits 1 and 2 in

arriving at the interest payable without giving the defendant/appellant an opportunity to react to same is said to be a breach of the principle of natural justice of audi alteram partem. The result of the breach of that principle is that the entire proceedings should be declared null and void. It is also submitted that since the rate of interest used in arriving at the amount payable is above 5%, the sum fixed is said to be contrary to the directive of this court to the High Court and therefore the amount fixed is illegal.

It is also submitted in respect of the lumping of the proceedings in respect of the interest payable and that in respect of the application to set aside the 3rd party notice that the way and manner and the stage the said two separate proceedings were lumped together and hurriedly concluded was far from being fair to the defendant/appellant.

It is submitted in reply in the respondent's brief that there was no conflict in the affidavit of interest filed to warrant the taking of oral evidence by the trial court. Reference is made to the order of this court of 5/8/94 to the effect that:

*"The case be remitted for the interest payable to be determined by the High Court (Ilori, J.)."*

It is argued that since the principal sum involved was N6,015,411.21 and the plaintiff's case in the courts below and on the affidavit filed was to ascertain from a licensed bank how much interest the said principal sum would earn, if it had been placed on fixed deposit with the said Bank from 9/5/86, the date when Ilori, J., granted leave to enforce the arbitrator's award as a judgment of the High Court.

The defendant's case, on the other hand, on the affidavit filed by him, was that the plaintiff had sued the First Bank of Nigeria Plc., on the bank's guarantee by bond to secure the judgment debt for which the defendant was liable. It was alleged by the defendant that judgment entered in favour of the plaintiff on 6/5/92 on its claim on the guarantee for the sum of N5,566,437.21 plus interest at 6% per annum from 2/10/90. The defendant accordingly contended that:

*"There is no need to determine fresh interest on the judgment debt and costs, the same having been determined in Suit No. LD/2185/90."*

It is argued that the defendant did not directly or indirectly dispute either the quantum or the rate of interest claimed by the plaintiff. It is submitted that all it did was to contend that having obtained judgment for N5,566,137.21 in Suit No. LD/2185/90, there was no need to determine fresh interest on the judgment debt. It is further argued that the substance of the plaintiff's affidavit evidence consists mainly of a report of inquiries made from Afribank Nig. Plc., showing the calculation of "*the amount of interest payable on a sum of N6,015,411.21 if such sum had been placed on fixed deposit with the said bank from 9th May, 1986 to 31/10/94.*" It is therefore submitted that there was in fact no conflict (not to talk of irreconcilable conflict) between the affidavit evidence of the plaintiff and that of the defendant to warrant a resolution by cross-examination of the deponent or the calling of any testimony from witnesses.

The real matter in controversy between the parties is said to be whether or not there was any need for the High Court to embark upon the determination of what amount of interest should be paid by the defendant when the plaintiff had already obtained judgment for interest at 6% per annum from 2/10/90 in Suit No. LD/2185/90. The issue as to the correctness or otherwise of the quantum or rate of interest payable by the defendant was therefore not raised nor did it ever arise in the High Court.

On the joint trial of the two matters raised in the appellant's second issue, it is submitted that it is at the discretion of the trial Judge, on the application of the parties, to determine whether or not he will try the issue in the original matter and that raised in the third party notice jointly or separately. That since the appellant has not shown that he suffered any prejudice as a result of the joint trial of the two questions, we are urged to hold that the Court of Appeal was correct in holding that the High Court was right in deciding to try the two questions together.

The question raised in the appellant's third issue is whether there was not denial of fair hearing by the failure of the respondent to give the appellant the opportunity to respond or be heard on the document relating to the interest payable. It is submitted that there was nothing wrong in a trial Judge looking at a document which he was asked to look at in the

presence of the other side who raised no objection to his doing so. That since the said document was purely a question of arithmetic calculation making use of a rate of interest, the accuracy of which was never challenged, it is submitted that there is totally no merit in the point now raised

B on the matter.

On the question raised in issue 4 whether the Court of Appeal was not in error in agreeing with the trial court that the respondent is entitled to further interest on the judgment sum of N6,784,095.34 placed with the third party respondent in an interest yielding account as directed by this court in Suit No. SC. 282/91 on 5/8/94, reference is made to the relevant portion of the said judgment delivered by Ogwuegbu, JSC. It is then submitted that the defendant was wrong in considering that the order of the Supreme Court related only to the determination of interest based on the judgment of Desalu, J., which dealt only with the interest ordered by the arbitrator as part of his award. But the interest ordered to be determined by the Supreme Court is said to be interest which ought to have been imposed by Ilori, J., as a condition for granting a stay.

E The question to be resolved in the appellant's first issue is whether there are conflicts in the affidavits filed by the parties. The two affidavits are already reproduced earlier above. The sum total of the appellant's case as set out in the affidavit filed by it was that there was no need for a new interest to be determined outside the one awarded earlier by Desalu, F J. On the other hand, the respondent sought the assistance of Afribank, a commercial bank, on the rate of interest payable on the judgment debt had the sum been placed in a fixed deposit in a commercial bank within the time specified in the request made to the bank. The reply from the bank was exhibited as an annexure to the affidavit filed by the respondent. The second document also produced by the respondent is another calculation made by a Chartered Accountant but based on the same principle adopted by the bank and it was aimed at covering the period not G covered by the calculation made by the bank. This was the document later produced in court. But it was also exhibited with the respondent's motion as Exhibit 2.

The question in this case therefore is whether one can say that the

contents of the two affidavits filed by the parties can be said to be conflicting. **In deciding whether or not the contents of the two documents are conflicting, one must look at the issue in controversy in the particular case before the court. This is because where, for example, the conflicts in affidavits are not material to the case before the court or where the facts are inadmissible, or are flimsy and are on an issue irrelevant and alien to the matter before the court, the need to call oral evidence to resolve the conflicts would not arise:** see Falobi v. Falobi (1976) 9-10 S.C. (Reprint) 1; (1976) 9-10 S.C 1; Okupe v. F.I.B.R. (1974) 4 S.C (Reprint) 69; (1974) All NLR 284 (Reprint); Garba v. University of Maiduguri (1986) 1 NWLR (Pt. 18) 550; and L.S.D.P.C. v. Adold/Stamm Int. Ltd. (1994) 7 NWLR (Pt. 358) 545 at 560-561. **As already shown above, while the facts set out in the respondent's affidavit relate to the interest due on the judgment debt which was what the Supreme Court directed Ilori, J., should determine, the appellant on the other hand, did not controvert or challenge the accuracy or otherwise any of the figures put forward in the affidavit filed by the respondent, instead, it was claiming that there was no need for the appellant to pay any other interest other than the one based on the judgment of Desalu, J. It is therefore correct to say that there was in fact no conflict in the affidavit evidence placed before the trial court since the alleged conflicts are in fact not relevant to the case before the court. There is therefore no merit in the appeal as it relates to that issue.**

**The question whether it was proper for the learned trial Judge to handle the issue of third party joinder along with the substantive case before the court, being queried in the appellant's second issue, is to me very ridiculous. This is because the third party joinder issue arose in the same suit before the court. Both parties were duly heard in respect of both the third party issue and the substantive matter before the court delivered its judgment or ruling in the two matters before the court. The appellant's complaint was not that he was not heard or was not given the opportunity of being heard in respect of both matters. I therefore see no reasons to**

support or justify the contention that the appellant's right to fair hearing was infringed upon. The appeal as it relates to this issue also lacks merit and I accordingly dismiss it.

The next question to be resolved is the allegation that the appellant's right of fair hearing was breached when the court accepted the document prepared by the chartered accountant and produced in court in respect of calculations of interest due on the judgment debt. The said calculation was based on the same principle used by the Afribank Plc., and it was meant to cover the period immediately after that which was prepared by Afribank Plc., up to the date the entire judgment debt was settled. The content of the document in question is merely an arithmetical calculation based on the same principle adopted in the document prepared by Afribank Plc., which the respondent had earlier attached to its affidavit as Exhibit 2, a copy of which had earlier been served on the appellant. As I have already mentioned above, the appellant did not raise an objection to the content of that document prepared by the Chartered Accountant, which is the subject-matter of the present complaint, could as well be prepared by the court itself since its contents were based on the principles in an uncontroverted evidence before the court. I therefore also see no merit in that issue and I dismiss it.

Finally, the question raised in the appellant's fourth issue is whether the respondent was entitled to more interest over the amount that was assessed in the judgment of Desalu, J., which has since been paid. The directive by this court to Ilori, J., was to assess the additional interest now being queried in the issue. The fact that Desalu, J., had earlier made some assessment of interest was in existence and known to the Supreme Court at the time it made its order directing Ilori, J., to embark on assessing the interest payable. It was not open to Ilori, J., to act as an appellate court over the clear and unambiguous directive given by the Supreme Court in the matter. In the result, I hold that there is also no merit in the appeal as it relates to that issue.

In the final conclusion and for the reasons I have given above, the appeal lacks merit and I accordingly dismiss it with N 10,000.00 costs in favour of the respondent.

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**ONU JSC**

Having been privileged to read before now the judgment of my learned brother, Akintan, JSC., just delivered, I am in entire agreement with him that the appeal lacks substance and ought therefore to fail.

I adopt the judgment as mine and have nothing further to add thereto.

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**EJIWUNMI JSC**

I have had the privilege of reading before now the draft of the leading judgment just delivered by my learned brother, Akintan, JSC. In that judgment, it is clear to me that the facts and the issues raised thereon have been carefully considered, and I have no reason to differ from the conclusions reached thereon by my learned brother, Akintan, JSC. For reasons given in the said judgment, the appeal is also dismissed by me and I award costs in the sum of N 10,000.00 in favour of the respondents.

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**TOBI JSC**

The facts of this case are very complicated. I will try to state them with less complication. I do hope I succeed. Let me try. On 18th October, 1982, the late Justice G.B.A. Coker, acting as an arbitrator appointed by the court under a contract between the parties, awarded consequential damages to the plaintiff/respondent together with interest on the damages at 5% per annum. Dissatisfied with the award, the appellant instituted proceedings to set it aside. The respondent, on the other hand, instituted proceedings for an order to enforce the award as judgment of the court.

The trial Judge, Ilori, J., (as he then was), refused to set aside the award made by the Arbitrator, but granted leave to enforce it as judgment of the court for N6,015,411.21, arbitration award inclusive of 5% interest. The appellant appealed to the Court of Appeal. That court dismissed the appeal. No award of interest on the judgment delivered by the trial Judge on 9th May, 1986, was made. The court, however, granted a stay of execution, subject to the judgment debtor providing a bond guaranteeing the payment of the judgment debt with interest if judgment in the appeal was against the appellant.

In compliance with the order, the 3rd party/respondent, the First Bank of Nigeria Plc., executed to pay to the plaintiff/respondent any amount so adjudged not exceeding the sum of N6,015,411.21 together with interest at 5% per annum from 9th May, 1996.

An appeal was lodged in this court. The court dismissed the appeal but ordered inter alia that “*this case be remitted for the interest payable to be determined by the High Court (Ilori, J.)*”. And so this case has come to this court twice in the light of the present appeal.

Following the above order, the trial Judge, Ilori, J., (as he then was), directed the parties to prepare oral evidence in view of the nature of the application before the court. On 7th October, 1996, the trial Judge gave judgment, relying on affidavit evidence. He ordered as follows:

“*It is ordered that the defendant/respondent shall pay the plaintiff/applicant the sum of N15,563,458.37 together with any further interest calculated at the same rate until the judgment - debt on this judgment is fully paid.*”

Dissatisfied, the appellant went to the Court of Appeal. That court dismissed the appeal. The appellant has come to this court. Briefs were filed and duly exchanged. The appellant formulated four issues for determination:

“3.1 *Whether the court below was right in holding that there was no conflict in the affidavit of interest filed to warrant the taking of oral evidence by the trial court.*

3.2. *Whether the court below was right in affirming the decision of the trial court on the lumping together in the same judgment the deter-*

*mination of interest payable to the respondent and the application for leave to set aside the 3rd party notice filed by the 3rd party/respondent.*

3.3. *Whether the court below was right in arriving at the conclusion that there was no denial of fair hearing to the appellant by the failure of the respondent to give the appellant the opportunity to respond or be heard on the document relating to interest payable.* B

3.4. *Whether the court below was not in error in agreeing with the trial court that the respondent is entitled to further interest on the judgment sum of N6,784,095.34k placed with the 3rd party/ respondent in an interest yielding account as directed by this court in its judgment in suit No. SC/282/91 of 5/8/94.”* C

The respondent adopted the issues formulated by the appellant. The main argument advanced by counsel for the appellant, Mr. Segun Fabimmi, is that the affidavits were irreconcilably in conflict and that what the court should have done in the circumstances was to take oral evidence to resolve or reconcile the conflict. He cited *Falobi v. Falobi* (1976) 9-10 S.C. (Reprint) 1; (1976)9-10S.C. 1; *Akinsete v. Akindolire* (1966)1 All NLR 147 at 148; *Ibukun v. Ibukun* (1974) 2 S.C. (Reprint) E 35; (1974) 3 S.C. 35 at 64 and *LSDPC v. Adold/Stamm* (1994) 7-8 SCNJ 625. He urged the court to allow the appeal.

Learned counsel for the respondent, Mr. Williams, SAN., did not see any conflict. He submitted that there was in fact no conflict (not to talk of irreconcilable conflict) between the affidavit evidence of the plaintiff and that of the defendant to warrant a resolution by cross-examination of the deponent or by calling of any testimony from witnesses, The real matter in controversy between the parties is whether or not there was any need for the court below to embark upon the determination of what amount of interest should be paid by the defendant when the plaintiff had already obtained judgment for interest at 6% per annum from 2nd October, 1990 in Suit No. LD/2185/90, learned Senior Advocate explained. On the issue as to the correctness or otherwise of the quantum or rate of interest payable by the defendant, learned Senior Advocate argued that the issue was never raised nor did it ever arise in the court below, as all the evidence on that point was one way. Counsel submitted that the issue F G H

is not open to the defendant to be raised in this appeal. He urged the court to dismiss the appeal.

For conflict in affidavit to receive the attention of the court, the conflict must really affect the live issues involved in the case. The conflict must be tangible, not intangible; it must be material not immaterial; and it must be substantial and fundamental to the live issues in the case. Where conflicts are peripheral, cosmetic, inarticulate or a mere farce orchestrated by the party, a court of law will not order that oral evidence be led to resolve or reconcile the “conflicts” in inverted commas.

Learned Senior Advocate for the respondent has clearly stated in the respondent’s brief the matter in controversy. Like him, I do not also see any conflicts deserving oral evidence. If at all there are conflicts, they are not material, thus not deserving oral evidence in the matter, I think the learned trial Judge was right in making his order of damages on the affidavit evidence and I cannot fault him. I do not intend to take the other issues.

It is in the light of the above, and the more detailed reasons given by my learned brother, Akintan, JSC., that I too dismiss the appeal. I award N 10,000.00 costs in favour of the respondent.

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**EDOZIE JSC**

The leading judgment of my learned brother, Akintan, JSC., was made available to me before now. I agree with him that the appeal lacks substance. Accordingly, I dismiss it with N10,000.00 costs to the respondent.

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