

SUPREME COURT OF NIGERIA

29TH APRIL, 2005. SC. 70/2000

**CORAM:- M. L. UWAIS CJN, A. I. KATSINA-ALU, A. O.
EJIWUNMI, N. TOBI, I. C. PATS-ACHOLONU, JJSC**

UNIBIZ NIGERIA LIMITED APPELLANT

AND

COMMERCIAL BANK (CREDIT LYONNAIS) RESPONDENT
NIGERIA LIMITED

PRACTICE & PROCEDURE - Orders of Court - Where a party neglects orders - Made against him - Section 72 of the Sheriff and Civil Process Act applies - And Forms 48 & 49 will issue only on contempt proceedings (H1)

APPEALS - Jurisdiction - Application - Where in the nature of mandatory prayer - And not for enforcement of orders - It is properly initiated - Without filing contempt proceedings (H2)

ACTIONS - Receivership - Admissions - What is not denied - Is presumed to be admitted (H3)

FACTS

The appellant/defendant was owing the respondent/plaintiff some money which the respondent claimed was N77,194,576.30 as at the end of September, 1999. The respondent instituted an action against the appellant by way of originating summons asking for an order of Court directing the receiver to take necessary steps in realising the assets of the respondent and also to restrain the respondent from preventing the receiver in performing his lawful duties. The trial court granted the two orders.

The appellant being dissatisfied, appealed to the Court of Appeal. While the appeal was pending, the appellant through its Managing Director with the aid of armed men broke the gate of the appellant's premises and moved away all vehicles along with other assets in the premises

under receivership. The respondent vide its application prayed the Court for an order directing the appellant to return all that was removed from the company's premises. The appellant on the other hand filed an application praying for dismissal of the respondent's application on the ground that the Court has no jurisdiction as the application was not initiated in accordance with prescribed procedure . It also raised the issue of lack of locus standi. The Court of Appeal held that it cannot at that stage decide the issue of locus standi. It ordered the appellant to return the vehicles back to its premises now in receivership. Being dissatisfied, appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal did not lack jurisdiction to entertain the respondent's application when the said application was not initiated in accordance with prescribed due process.

2. Whether the Court of Appeal should not have applied Section 149(d) of the Evidence Act to resolve the issue as to whether or not the respondent took an inventory of the assets of the appellant on 27th October, 1999."

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

Where a party neglects orders - Made against him

1. As it is, Section 72 can only be enforced against a person who refuses or neglects to comply with an order made against him.

Rule 13 (1) provides:

"1. When an order enforceable by committal under Section 72 of the Act has been made the registrar shall, if the order was made in the absence of the judgment debtor and is for the delivery of goods without the option of paying their value or is in the nature of an injunction, at the time when the order is drawn up, and in any other case, on the application of the judgment creditor, issue a copy of the order endorsed with a notice Form 48, and the copy so endorsed shall be served on the judgment debtor in the manner as a judgment summons."

Rule 13(1) is parasitic on Section 72 and it provides for the issuance of FORM 48. Forms 48 and 49 can only be issued if an applicant wants

to proceed against a party on contempt proceedings. Forms 48 and 49, in my view, do not issue in respect of a mandatory order of injunction. (p. 1082 F)

Application - Where in the nature of mandatory prayer

2. I entirely agree with learned counsel for the respondent that the respondent's application dated 19th November, 1999, "*was more in the nature of a prayer for a mandatory order of injunction than one of enforcement of orders made by the court.*"

And what is more, the Court of Appeal did not give any contempt order, vide relief No.3 in the respondent's application. Perhaps the point I am making will be clearer if I copy the two orders of the court:

"1. The applicant and more particularly Sunil Bhowani, its Managing Director and Chief Executive, should as a matter of urgency return to the premises of the appellant (now in receivership) all the nine Toyota Camry Saloon Cars, one Toyota bus and one Daewoo Racer Saloon Car forcibly removed from the said premises of the said appellant at 16, Idowu Street, Victoria Island, Lagos on the 10th November, 1999.

2. In the event that any or all the said cars and vehicles have been sold, the appellant should fully account for the amount for which they were sold. Payment or the amount realized from such sale should be made to the Deputy Chief Registrar of this court."

In the light of the above orders, the appellant cannot be heard to complain. The issue therefore fails. (p. 1083 B)

ACTIONS - Receivership - Admissions

3. After a careful reading of the affidavit in support and the counter affidavit, I have no difficulty in arriving at the conclusion that the appellant did not deny that the cars and vehicles were in the premises of the appellant at the material time. It is elementary law that what is not denied is presumed to have been admitted, and facts in an affidavit not contradicted are deemed admitted.

In the light of the above, I am of the view that the appeal lacks merit and it is hereby dismissed. (p. 1083 G)

REPRESENTATION

Babajide Koku Esq., for Appellant

O. M. Lewis (Miss), for the Respondent.

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CASES REFERRED TO

Nwosu v. Imo State Enviro. Sani. Authority (1990) 2 NWLR (Pt. 135) 658

Soy Agencies Ind. Serv. Ltd. v. Metalum Ltd (1991) 3 NWLR (Pt. 177) 35

C Uzouku v. Ezeani II (1991) 6 NWLR (Pt. 200) 708

Ezekiel-Hart v. Ezekiel-Hart (1990) 1 NWLR (Pt. 126) 276

C.C.B. (Nig.) Plc v. A-G Anambra State (1992) 8 NWLR (Pt. 261) 528

Lahan v. A-G of Western Region (1963) 2 SCNLR 47

Madukolu v. Nkemdilim (1962) 2 All NLR 581 at 589-590

D A-G Anambra State v. Okafor (1992) 2 NWLR (Pt. 224) 396

Abubakar v. Unipetrol Plc (2002) 8 NWLR (Pt. 769) 242

STATUTES & RULES REFERRED TO

E Evidence Act s. 149(d)

Sheriffs and Civil Process Act s. 72

Judgment (Enforcement) Rules O. 9 r. 13(1) and (2)

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LEAD JUDGMENT BY TOBI JSC

The appellant is the defendant. The respondent is the plaintiff. The appellant owed the respondent some money which the respondent claimed was N77,194,576.30 as at the end of September, 1999. The appellant failed to pay the amount. The respondent instituted an action by way of an originating summons for and on behalf of the receiver/manager against the appellant. The respondent asked for the following orders:

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"1. An order of this Honourable Court directing the Receiver to take such steps as may be necessary to realize the assets of the respondent with a view to paying its outstandings to applicant.

2. An order of this Honourable Court restraining the respondent, its agents, privies and assigns including but not limited to its directors, and officers from doing anything that would prevent the receiver from

performing his lawful duties as a receiver”

The trial court granted the two orders. Dissatisfied, the appellant appealed to the Court of Appeal. While the appeal was pending the appellant, through its Managing Director, Mr. Sunil Bhojwani, broke the gate of the appellant’s premises under receivership, in company of armed B men in plain clothes, and moved away all cars and vehicles along with other assets in the premises under receivership.

The respondent, by an application dated 19th November, 1999, prayed the Court of Appeal for the following orders:

“1. An order directing the defendant/appellant and more particu- C
larly its Managing Director and Chief Executive, Mr. Sunil Bhojwani to return to the premises of Unibiz Nigeria Limited (now in receivership) at 16 Idowu Taylor Street, Victoria Island, Lagos, all cars and vehicles unlawfully and forcibly removed from the premises of the said company D on the 10th of November, 1999.

2. In the event that any or all of the said cars and vehicles have been sold an order directing the defendant/appellant to disclose the names of the purchasers, the amount for which they were sold, and the payment to E the Chief Registrar of the court of the amount realized from such sale.

3. An order committing the Managing Director/Chief Executive Officer of Unibiz Nigeria Limited, to wit: Mr. Sunil Bhojwani to prison for aiding and abetting the flouting of the order of the High Court dated F the 26th of October, 1999 which order was duly served on him.”

The appellant, on its part, filed an application dated 29th November, 1999, praying for the dismissal or striking out of the respondent’s application dated 19th November, 1999, on the ground that the respondent G lacked locus standi to make the application. Both applications were argued together. The Court of Appeal held that it cannot at that stage decide on the issue of locus standi which was the fulcrum of the main appeal.

The court however made the following orders:

“1. The appellant and more particularly Sunil Bhojwani, Manag- H
ing Director and Chief Executive, should as a matter of urgency return to the premises of the appellant (now in receivership) all the nine Toyota Camry Saloon Car, one Toyota Bus and one Daewoo Racer Saloon Car

forcibly removed from the said premises of the said appellant at 16, Idowu Taylor Street, Victoria Island, Lagos on the 10th November, 1999.

2. In the event that any or all the said cars and vehicles have been sold, the appellant should fully account for the amount for which they were sold. Payment of the amount realized from such sale should be made to the Deputy Chief Registrar of this court.”

Dissatisfied with the interlocutory decision, the appellant has come to this court. Brief were filed and exchanged. The appellant originally formulated the following three issues for determination:

“1. Whether the Court of Appeal was right in refraining from pronouncing on the locus standi of the respondent to bring the application leading to the decision of the court when it was manifestly clear that the respondent lacked the requisite locus standi in respect of the matter.

2. Whether the Court of Appeal did not lack jurisdiction to entertain the respondent’s application when the said application was not initiated in accordance with prescribed due process.

3. Whether the Court of Appeal should not have applied Section 149(d) of the Evidence Act to resolve the issue as to whether or not the respondent took an inventory of the assets of the appellant on 27th October, 1999.”

The respondent formulated the following similar three issues for determination:

“1. Whether the Court of Appeal was right in refraining from pronouncing on the locus standi of the respondent to bring the application leading to the decision of the court.

2. Whether the Court of Appeal did not lack jurisdiction to entertain the respondent’s application.

3. Whether the Court of Appeal was right not to have applied Section 149 (d) of the Evidence Act.”

The appellant withdrew Issue No. 1 when the appeal was heard. The issue was accordingly struck out. The appellant was therefore left with issues Nos. 2 and 3 which counsel argued.

Arguing Issue No. 2, learned counsel for the appellant, Mr. Babajide Koku, submitted that the order sought being one for injunction, the

respondent ought to have complied with the provisions of Order IX Rule 13 (1) and (2) of the Judgment (Enforcement) Rules, Cap. 407. Citing Section 72 of the Sheriff and Civil Process Act, learned counsel submitted that the proper procedure for enforcing an order of injunction is by the issuance of forms 48 and 49 pursuant to the provisions of the Judgment (Enforcement) Rules, Cap. 407. He relied on *Uhunmwangho v. Okojie* (1989) 12 S.C. 142; (1989) 5 NWLR (Pt. 122) 471 at 483-485 and *Ezekiel - Hart v. Ezekiel-Hart* (1990) 1 NWLR (Pt. 126) 276.

Learned counsel submitted that where a particular procedure has been presented for the initiation of a proceeding that procedure and not other ought to be employed in order to give jurisdiction to the court. He cited the following cases: *Schroder v. Major* (1989) 2 NWLR (Pt. 101) 1 at 18; *Din v. A-G Federation* (1988) 9 S.C. 19; (1988) 4 NWLR (Pt. 87) at 186. *C.C.B. (Nig.) Plc v. A-G Anambra State* (1992) 8 NWLR (Pt. 261) 528 at 556. *Kano State Oil and Allied Products Ltd. v. Kofa Trading Ltd.* (1996) 3 NWLR (Pt. 436) 244 at 254 and *Lahan v. A-G of Western Region* (1963) 2 SCNLR 47.

Learned counsel submitted that as the respondent failed to initiate the application in accordance with prescribed procedure, the Court of Appeal lacked jurisdiction to entertain the application. He relied on *Madukolu v. Nkemdilim* (1962) 2 All NLR 581 at 589-590.

On Issue No.3, learned counsel referred to the affidavit of the respondent and the counter-affidavit of the appellant and submitted that the respondent had a duty to produce the inventory of the assets of the appellant. To learned counsel, the consequence of failure of the respondent to produce and exhibit before the court a copy of the alleged inventory is that if it had been produced, the contents would have been against the respondent. He urged the court to invoke Section 149 (d) of the Evidence Act, in the circumstances and allow the appeal.

Learned counsel for the respondent, Miss O. M. Lewis, submitted that the application of the respondent dated 19th November, 1999, was more in the nature of a prayer for a mandatory order of injunction than one of enforcement of orders made by the court. She relied on *A-G Anambra State v. Okafor* (1992) 2 NWLR (Pt. 224) 396 and *Abubakar v. Unipetrol*

Plc (2002) 4. S.C. (Pt.II) 100; (2002) 8 NWLR (Pt. 769) 242.

Learned counsel submitted on Issue No. 3 that as the issue of the cars and vehicles was not in dispute, there was no reason why the Court of Appeal ought to have applied Section 149 (d) of the Evidence Act. She argued that a presumption under the subsection can only apply when a party against whom it is sought to operate must have in fact withheld evidence and that mere failure to produce the evidence would not necessarily amount to withholding such evidence. She relied on *Tewogbade v. Akande* (1968) NMLR 404 at 408. She urged the court to dismiss the appeal.

Learned counsel for the appellant relied on Order IX Rule 13 (1) of the Judgment (Enforcement) Rules and Section 72 of the Sheriff and Civil Process Act. Let me first take Section 72 of the Act. It reads:

“If any person refuses or neglects to comply with an order made against him, other than for payment of money, the court instead of dealing with him as a judgment debtor guilty of the misconduct defined in paragraph (f) of Section 66 of this Act, may order that he be committed to prison and detained in custody until he has obeyed the order in all things that are to be immediately performed and given such security as the court thinks fit to obey the other parts of the order, if any, at the future times thereby appointed, or in case of his no longer having the power to obey the order than until he has been imprisoned for such time or until he has paid such fine as the court directs.”

As it is, Section 72 can only be enforced against a person who refuses or neglects to comply with an order made against him.

Rule 13 (1) provides:

“1. When an order enforceable by committal under Section 72 of the Act has been made the registrar shall, if the order was made in the absence of the judgment debtor and is for the delivery of goods without the option of paying their value or is in the nature of an injunction, at the time when the order is drawn up, and in any other case, on the application of the judgment creditor, issue a copy of the order endorsed with a notice Form 48, and the copy so endorsed shall be served on the judgment debtor in the manner as a judgment summons.”

Rule 13(1) is parasitic on Section 72 and it provides for the issuance of FORM 48. Forms 48 and 49 can only be issued if an applicant wants to proceed against a party on contempt proceedings. See generally Majoroh v. Fassassi (1986) 5 NWLR (Pt. 40) 243; Uhunmwangho v. Okojie (1989) 12 S.C. 142; (1989) 5 NWLR (Pt.122) B 471; Ezekiel-Hart v. Ezekiel-Hart (1990) 1 NWLR (Pt. 126) 276. Forms 48 and 49, in my view, do not issue in respect of a mandatory order of injunction.

I entirely agree with learned counsel for the respondent that the respondent's application dated 19th November, 1999, "was more in the nature of a prayer for a mandatory order of injunction than one of enforcement of orders made by the court." C

And what is more, the Court of Appeal did not give any contempt order, vide relief No.3 in the respondent's application. Perhaps the point I am making will be clearer if I copy the two orders of the court: D

"1. The applicant and more particularly Sunil Bhowani, its Managing Director and Chief Executive, should as a matter of urgency E return to the premises of the appellant (now in receivership) all the nine Toyota Camry Saloon Cars, one Toyota bus and one Daewoo Racer Saloon Car forcibly removed from the said premises of the said appellant at 16, Idowu Street, Victoria Island, Lagos on the 10th November, 1999. F

2. In the event that any or all the said cars and vehicles have been sold, the appellant should fully account for the amount for which they were sold. Payment or the amount realized from such sale should be made to the Deputy Chief Registrar of this court," F

In the light of the above orders, the appellant cannot be heard to complain. The issue therefore fails. G

And that takes me to Issue No.3. After a careful reading of the affidavit in support and the counter affidavit, I have no difficulty in arriving at the conclusion that the appellant did not deny that the cars and vehicles were in the premises of the appellant at the material time. It is elementary law that what is not denied is presumed to have been admitted, and facts in an affidavit not H

1084 Unibiz Ltd. v. Commercial Bank (C.L.) Ltd. (2005) 4 KLR Tobi JSC
contradicted are deemed admitted. See generally Nwosu v. Imo State
Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 658; Soy
Agencies Ind. Serv. Ltd. v. Metalum Ltd (1991) 3 NWLR (Pt. 177) 35;
Lijadu v. Lijadu (1991) 1 NWLR (Pt. 169) 627; Uzouku v. Ezeani II (1991)
6 NWLR (Pt. 200) 708.

**B In the light of the above, I am of the view that the appeal lacks
merit and it is hereby dismissed.** I award N10,000.00 costs in favour
of the respondent.

C UWAIS CJN

I have had the opportunity of reading in draft the judgment read by
my learned brother, Tobi, JSC. I entirely agree that this appeal lacks merit.

Accordingly, I too hereby dismiss it with N10,000.00 costs to the
D respondent against the appellant.

KATSINA-ALU JSC

E I have had the advantage of reading in draft the judgment of my
learned brother, Niki Tobi, JSC. I agree with it and, for the reasons he
gives, I, too, would dismiss the appeal. I abide by the order for costs.

EJIWUNMI JSC

F I was privileged to have read in advance the draft of the judgment
just delivered by my learned brother, Niki Tobi, JSC. As the questions
raised in the appeal have been duly considered in the said judgment, I adopt
it as my own. In the result, I also dismiss the appeal and award costs in
the sum of N10,000.00 in favour of the respondent.

G PATS-ACHOLONU JSC

I have read in draft the judgment of my learned and noble Lord, Niki
Tobi, JSC., and I agree with him. There is no merit whatsoever in the
H appeal. I hereby dismiss it and I abide by the order in the leading judgment.