

SUPREME COURT OF NIGERIA

3RD JUNE, 2005. SC. 140/2000

**CORAM:- M. L. UWAI S CJN, S. M. A. BELGORE, S . U. ONU,
U. A. KALGO, D. O. EDOZIE, JJSC**

GONZEE NIGERIA LTD. APPELLANT
AND

1. NIGERIAN EDUCATIONAL
RESEARCH AND DEVELOPMENT
COUNCIL (N.E.R.D.C.)

2. ALHAJI AMADI KURFI
(CHAIRMAN, N.E.R.D.C.) RESPONDENTS

3. DR. U.M.O. IVOVI
(SECRETARY N.E.R.D.C.)

APPEALS - Courts - Record of Appeal - Court and parties are bound - By the record of appeal as certified - And it is presumed correct - Unless the contrary is proved (H1)

CONTRACTS - Breach of - Banking - Dishonoured cheque - Damages - Is the loss flowing naturally from the breach - Incurred in direct consequence of the breach (H2)

DAMAGES - Pleadings - Special damages - Should be specifically pleaded - In a manner clear enough - To enable defendants know the origin (H3)

COURTS - Evidence - Where evidence is unchallenged and uncontradicted - Trial Court has a duty to evaluate it - And be satisfied that it is sufficient to sustain the claim (H4)

DAMAGES - Courts - Proof - Where plaintiff did not establish on the pleadings - That it sustained any loss - As a result of defendants' breach of contract - The award of damages - Is arbitrary (H5)

FACTS

Before the Onitsha High Court, the plaintiff/appellant, a contracting firm in Onitsha filed a writ of summon against the defendant/respondent, the Nigerian Educational Research and Development Council. The dispute arose from the contract awarded by the Council to the plaintiff for the construction of the Council's Administrative Complex in Abuja at a contract sum of N4.9 million. Payment was to be installmental based on the certificate of the Council's consultant architect. On the 19th of October, 1990, the Council issued to the plaintiff a cheque for the sum of N97,234.79 for the work evidenced by a certificate. The plaintiff paid the cheque into its account with the Co-operative and Commerce Bank Onitsha, for clearance with CBN. But the cheque was dishonoured because the Council had not adopted the proper procedure laid down by CBN in issuing the cheque.

Aggrieved by the circumstances surrounding the dishonour of the cheque the plaintiff alleged that it was the negligence of the Council that led to the breach of the contract it entered into with it, and had suffered losses and therefore the plaintiff made claim from the defendants jointly and severally for the sum of N25,000,000 damages. The trial Judge held that the defendants were liable severally and jointly for breach of contract and awarded damages of N5.5 million with N10,000 cost to the plaintiff. The defendants appealed to the Court of Appeal which upheld the trial court's decision on the issue of liability but remitted the case to that court for assessment of damages. Being aggrieved, the plaintiff has now appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Were the learned Justices of the Court of Appeal correct when they set aside the damages awarded in favour of the plaintiff/appellant by the trial court and remitted the case back to the High Court to assess damages a second time on the ground that they could not locate and examine the documentary exhibits on which the said award was based by the trial court?”

HELD (Unanimously allowing the appeal in part per **EDOZIE JSC**)
Courts - Record of Appeal

1. The court and the parties are bound by the record of appeal as certified and it is presumed correct unless the contrary is proved, A party who challenges the correctness of record of proceedings must swear to an affidavit setting out the facts or part of the proceeding omitted or wrongly stated in the record. Such affidavit must be served on the Judge or Registry of the court concerned.

The mere assertion in his brief of argument by learned counsel for the plaintiff that the relevant exhibits were before the court below at the material time is insufficient to controvert the statement of the court below to the contrary. Learned counsel not being the Registrar of the court below who is the custodian of the exhibits, is not in a position to say whether those exhibits were before the court below at the material time. I am, therefore, prepared to agree with the statement by the court below that the exhibits were not made available to it despite its request for them. (p. 1582 F)

CONTRACTS - Banking - Dishonoured cheque

2. The point I have endeavoured to stress is that the plaintiff did not establish any loss resulting from the dishonour of the cheque in question to entitle it to the damages awarded by the trial court which, with respect, made the award arbitrarily.

In an action for breach of contract, the measure of damages is the loss flowing naturally from the breach and is incurred in direct consequence of the breach. In the instant case, the plaintiff did not prove any loss it sustained as a direct consequence of the dishonour of the cheque issued to it. It is not its case that as a result of the dishonour of the cheque it was constrained to stop work and that when it eventually resumed the cost of labour and material had escalated and thus increased the cost of execution of the contract far beyond the contract sum. The matters pleaded by the plaintiff in paragraphs 6, 7, 8, 9, 10 and 17 of the amended Statement of Claim set out in this judgment, that is, that as a result of the dishonour of the cheque, its bank refused to assist it to purchase the earth moving equipment at a concessional price, did not flow naturally from the breach of contract nor could they be said to be within the contemplation of the parties at the time they made the contract. (p. 1584 H)

Pleadings - Special damages

3. The appellant's claim is in the nature of special damages. The requirement of the law is that special damages should be specifically
B pleaded in a manner clear enough to enable the defendant know the origin or nature of the special damages being claimed against him to enable him prepare his defence. A claim in the nature of special damages to succeed must be proved strictly/ the court is not entitled to make its own estimate
C on such a claim.

Strict proof in the context of special damages means that the person making a claim in special damages should establish his entitlement to that type or class of damages by credible evidence of such character as would satisfy the court that he is indeed entitled to an award under that head.
D (p. 1586 F)

COURTS - Evidence

4. In the case in hand, the appellant did not in its statement of claim give
E detailed particulars of the losses in monetary terms which it suffered as a result of the breach of the contract by the respondents. At the trial, the receipts for the cost of hiring machinery amounting to about N7.5 million is far less than the lump sum of N25 million claimed. The learned trial Judge
F had stated in the course of his judgment that Exhibits 3, 4, 5A-H are not challenged hence he placed reliance on them. But even where the evidence is unchallenged and uncontradicted, the trial court has a duty to evaluate it and be satisfied that it is credible and sufficient to sustain the claim.⁵ Had
G the trial court properly evaluated the exhibits before it, it ought to have occurred to it that they in no way reflected the losses incurred by the appellant as a consequence of the breach of contract by the respondents.
(p. 1587 B)

DAMAGES - Courts - Proof

5. The upshot of all that I have been saying is that the plaintiff did not establish either on the pleading or evidence that it sustained any loss as a result of the defendants' breach of the contract they entered into with it.

The award of N5.5 million made by the trial court to the plaintiff, with respect, is arbitrary and cannot be sustained. This is evident from the record of the proceedings including the judgment of the trial court. The court below was right to have set aside the award but the order remitting the case to the trial court for re-assessment of damages cannot be justified. B
It ought to have proceeded to dismiss the appellant's claim for N25 million for lack of evidence in proof thereof.

Consistent with the foregoing, this appeal is partially allowed. I set aside the order of the court below remitting the case to the trial court and in its place, the plaintiff's claim for N25 million is hereby dismissed C
(p. 1587 F)

REPRESENTATIONS

Hon. Austin Enendu, (with him, Ben Chuks Udoh, Esq.), for the Appellant. D
Oluwole Aina Esq., for the Respondents.

CASES REFERRED TO

Ehikeoye v. C.O.P, (1992) 4 NWLR (Pt, 233), 57 E
Sommer v. F.I.I.A. (1992) 1 NWLR (Pt, 219) 548
Texaco Panama Inc. v. Shell PDC Nig. Ltd., (2002) 2 S.C. (Pt, II) 1
Swiss Nigeria Wood Industries Ltd, v. Bogo (1970) 6 NSCC 235
Hadley v. Baxendale (1854) 9 Ex 341
Chukwumah v. Shell Petroleum (1993) 4 NWLR (Pt. 289) 512 at 563 F
Agbanelo v. U.B.N. Ltd. (2000) 4 S.C. (Pt. I) 233; (2000) 7
Dumez (Nig) Ltd, v. Ogboli (1972) 3 S.C. (Reprint) 188; (1972) 1
Oshinjirin & Ors. v. Alhaji Elias & Ors. (1970) 1 All NLR 153 at 156 G
Folorunso v. Adeyemi (1975) 1 NMLR 128 at 132
Odiase v. Agho & Ors. (1972) 3 S.C (Reprint) 69; (1972) 1
Balogun v. Adejobi (1995) 2 NWLR 3 (Pt. 376) 131.

LEAD JUDGMENT BY EDOZIE JSC

H
The plaintiff, herein appellant, is a contracting firm having its registered office in Onitsha. By a writ of summons filed at the Onitsha High Court on 20th June, 1991, the plaintiff commenced legal proceedings

against the Nigerian Educational Research and Development Council, a Council established under the Nigerian Educational Research and Development Council Act, Laws of the Federation of Nigeria, 1990, (Cap. 302). The Council was sued as 1st defendant and joined in the suit, as 2nd and 3rd defendants, were respectively Chairman and the Secretary of the Council.

The background facts giving rise to the action are not contentious. The dispute arose from the contract awarded by the Council to the plaintiff for the construction of the Council's Administrative complex at Shede village, Lokoja Road, in the Federal Capital Territory, Abuja, at a contract sum of N4.9 million. Payment was instalmental, based on the certificate of the Council's consultant architect, for the construction of the complex and payment was made accordingly up till certificate No. 11 issued by the consultant architect on 19th October, 1990, in respect of which the Council issued to the plaintiff a cheque for the sum of N97,234.79 in payment for the work evidenced by the certificate. The cheque was drawn on the Council's account with the Central Bank of Nigeria (CBN). The plaintiff paid the cheque into its account with the Co-operative and Commerce Bank (CCB) Onitsha branch, for clearance with the CBN. But when the cheque was presented at the CBN, it was returned and marked "self-confirmation required". The plaintiff re-presented the cheque to the CBN on two subsequent occasions, but on each occasion the cheque was dishonoured. The reason for the dishonour of the cheque was not that the Council had no funds in the sum of the value of the cheque but because the Council had not adopted the proper procedure laid down by CBN in issuing the cheque. Apparently, in compliance with the procedure, the Council issued to the plaintiff another cheque for the same value as the dishonoured cheque and this was honoured on presentation.

Aggrieved by the circumstances surrounding the dishonour of the cheque in question, the plaintiff alleged that it was due to the negligence of the Council in not adopting the proper procedure prescribed for account holders with CBN; that the negligence of the Council has led to the breach of the contract it entered into with it and that, the plaintiff has as a result suffered losses. Paragraphs 6, 7, 8, 9, 10, 17 and 21 of the amended

statement of claim spell out the details of its losses. The paragraphs are reproduced hereunder:-

“6. The plaintiff shall call evidence that it had a trade or business practice with its said bankers whereby it would negotiate for (and sometimes obtain) facilities’ from the bank *supra* with which to purchase equipment for its business or to execute its contract jobs on the understanding that when cheques or monies issued or paid to the plaintiff arrive same would be lodged into the plaintiff’s account with its bankers in partial or full repayment or amortisation of the facilities so granted.

7. The plaintiff says that at all times material to this action, it had an exceptional offer from a friendly company - S & C Plants of B18 Nkpor - Enugu Express-way for the purchase of some heavy duty machines and vehicles at a concessional total cost of N10,400,000.00.....

8. The offer hereinbefore pleaded was open for 90 days only after which it would lapse. It was also a condition for any valid acceptance of the said offer that the plaintiff made a down payment of the sum of N2,000,000.00 within 30 days of the said offer.

9. The plaintiff needed the said machines/vehicles for its business and not having ready cash with which to purchase same, applied for a loan of N2,000,000.00 from its aforesaid bankers with which to make the down payment above-mentioned.

10. The plaintiff was then expecting the defendant’s cheque (pleaded in paragraph 4 *supra*), and, in accordance with the practice deposed to in paragraph 6 (*supra*) used same as an instrument with which to convince the bank that the repayment of the facilities which was being applied for would start almost immediately thereafter. On that score, the bank expressed willingness to grant the plaintiff the said facility.

17. By reason of the foregoing, the plaintiff had suffered loss and damage.

PARTICULARS

(i) the plaintiff’s offer to purchase the machines/ vehicles pleaded above lapsed and the machines/vehicles were purchased by another company.

(ii) *the plaintiff thus lost for ever the chance of ever acquiring the aforesaid machines/vehicles at the concessional price offered or at all.*

(iii) *the plaintiff continued on account of the events pleaded in (i) and (ii) supra, to hire machines and vehicles to execute its contract jobs when, (if it had bought the ones offered) it would not only have been using them for its jobs but would also let them on hire at handsome fees.*

(iv) *the plaintiff's business suffered a permanent set back.*

(v) *the plaintiff's rare understanding with its bankers pleaded supra was upset as the bank withdrew from same.*

(vi) *the plaintiff's application for N2m facility from the bank also failed.*

(vii) *the plaintiff lost credibility and its business image was greatly tarnished in the eyes of its bankers and the general public*

(viii) *the plaintiff suffered incalculable business embarrassment.*

21. *Wherefore, the plaintiff claims from and against the defendants jointly and severally the sum of N25,000,000.00 damages."*

After hearing both parties, the learned trial Judge, in a reserved judgment delivered on 9th February, 1996, held that the defendants were liable jointly and severally for breach of contract and in assessing damages adjudged the plaintiff entitled to N5.5 million with N10,000 costs.

Against that judgment, the defendants lodged an appeal to the Court of Appeal, Enugu Division (coram Tobi, JCA., (as he then was) Olagunju and Fabiyi, JJCA.) and that court upheld the decision of the trial court on the issue of liability. It however lamented that the relevant exhibits upon which the trial court based its assessment of the quantum of damages were not at its disposal despite request for them, and on account of that, it remitted the case back to the trial court for assessment of damages with N3,000 costs to the defendants.

Both parties are before this court upon the appeal by the plaintiff against the decision of the Court of Appeal remitting the case to the trial court for assessment of damages. Briefs were filed and exchanged. Both parties identified one identical issue for determination, to wit:-

"Were the learned Justices of the Court of Appeal correct when they set aside the damages awarded in favour of the plaintiff/appellant by the

trial court and remitted the case back to the High Court to assess damages a second time on the ground that they could not locate and examine the documentary exhibits on which the said award was based by the trial court?”

In regard to this solitary issue, it was submitted on behalf of the plaintiff in the appellant’s brief that Exhibits 3, 4, 5A-5H which the trial court relied upon in assessing the quantum of damages were properly before the Court of Appeal and are among the documents compiled by the registry of that court and transmitted to this court along with the record of proceedings. It was, therefore, submitted that the finding of the Court of Appeal that the said exhibits were not before it is perverse and ought to be set aside on the authority of the following cases:- *Nkado v. Obiamo* (1997) 5 NWLR (Pt. 503) 31 and *Okino v. Obanebira* (1999) 12 S.C. (Pt. II) 38; (1999) 13 NWLR (Pt. 636) 535. In the alternative, it was submitted that even if the said exhibits were not available to the court below, it was still in error to set aside the damages awarded by the trial court and remit the case to that court for re-assessment. This is because, it was argued, it is not open to an appellate court to disturb a finding or award of a court of first instance merely because the materials on which it would review same are unavailable. It was stressed that the error which can lead to the reversal of a decision of a trial court must be an error that relates to its findings in the case and not a matter extrinsic to the decision. The following cases were referred to:- *Akujinwa v. Nwaonuwa* (1998) 11-12 S.C. 112; (1998) 13 NWLR (Pt. 583) 632. *Sanusi v. Ameyogun* (1992) 4 NWLR (Pt. 237) 527. Finally, this court is urged to allow the appeal, set aside the order of the court below remitting the case to the trial court and restoring the award of damages made by the trial court.

In response to the above submissions, learned counsel for the defendants, in his brief of argument, is of the view that the court below made the right decision by setting aside the award of damages made by the trial court and remitting the case to that court since the court below had no material upon which to review the award. It was stated, though erroneously, that Exhibits 3,4 and 5A-H which should have formed the basis of assessment of damages were not referred to in the judgment of

(the trial court and by that omission, the trial court had left undone what it ought to have done, a situation which made it necessary for the appellate court to review the assessment of damages pursuant to Order 1 rule 20 of the Court of Appeal Rules, 2002. Referring to Section 16 of the Court of Appeal Act, Cap. 75, Laws of the Federation of Nigeria, 1990 and the v cases of Awoala v. Qgunbiyi (1986) All NLR (Pt. 1) p. 371 at 377 ad Ademolaju v. Adenipekun (1999) 1 NWLR (Pt. 587) 440 at 455, learned v counsel submitted that the course taken by the court below was justified.

The court below was confronted with the task of reviewing the quantum of damages awarded by the trial court but it lamented its inability of doing so due to the absence of the relevant exhibits on the basis of which the trial court made the award. At p. 184 lines 10 - 33, the Court of v Appeal observed thus:-

“As I noted earlier, the documentary exhibits were not forwarded to this court along with the record of appeal. Indeed, they were not made available to the Deputy Chief Registrar of this court who was directed to ask for their production. Nor did the assistance of learned counsel for which was enlisted as a last resort lead to production of the exhibits by the Registrar of the Onitsha Judicial Division of the Anambra State High Court who with his staff were passing the buck as regards the custody of the exhibits as this court was made to understand.....”

On the assessment of damages, the only order that will meet the justice of this case is to remit the case back to the Anambra State High Court with direct control over the exhibits for the assessment of damages.....”

The court and the parties are bound by the record of appeal as certified and it is presumed correct unless the contrary is proved, A party who challenges the correctness of record of proceedings must swear to an affidavit setting out the facts or part of the proceeding omitted or wrongly stated in the record. Such affidavit must be served on the Judge or Registry of the court concerned: See Ehikeoye v. C.O.P, (1992) 4 NWLR (Pt. 233), 57; Sommer v. F.I.I.A. (1992) 1 NWLR (Pt, 219) 548; Texaco Panama Inc. v. Shell PDC Nig. Ltd., (2002) 2 S. C. (Pt, II) 1; (2002) 5 NWLR (Pt. 759) 209 at 234.

The mere assertion in his brief of argument by learned counsel for the plaintiff that the relevant exhibits were before the court below at the material time is insufficient to controvert the statement of the court below to the contrary. Learned counsel not being the Registrar of the court below who is the custodian of the exhibits, is not in a position to say whether those exhibits were before the court below at the material time. I am, therefore, prepared to agree with the statement by the court below that the exhibits were not made available to it despite its request for them. But the crucial question is whether it was really necessary for the court below to see those exhibits before reaching a decision on the issue of assessment of damages. In making its assessment in that regard, the trial court, in two passages of its judgment at pp. 14 and 18 of the record, stated thus:-

P14 "The plaintiff in order to mitigate its loss or injury was constrained to hire equipment with which to execute the contract and other jobs as shown in Exhibits 5 A-H. The defendants did not and could not challenge Exhibits 3, 4 and 5A-H in cross- examination.

P. 18 The plaintiff paid in the cheque from the negligent customer who did not comply with the conditions and it was dishonoured a number of times for reasons already examined. The plaintiff suffered damages in consequence as given in unchallenged and uncontradicted evidence - see Exhibits 3,4 and 5 A . After a careful consideration of the peculiar facts and circumstances of the case, I assess and award N5.5 million (five million five hundred thousand naira) damages to the plaintiff against the defendants jointly and severally."

As is evident from the above excerpts, the learned trial Judge in arriving at the figure of N5.5 million appeared to have relied on Exhibits 3, 4,5 A-H ostensibly representing the losses incurred by the plaintiff as a result of the defendants' breach of contract due to the dishonoured cheque. But as I will demonstrate anon, these exhibits do not represent the losses incurred by the plaintiff and were not at all related to the award of N5.5. million. The exhibits are sufficiently described in the body of the judgment of the trial court and it was not necessary, in my view, for the Court of Appeal to see those exhibits in order to determine the reasonable-

ness of the award of the trial court. The following passages of the judgment of the trial v court will bear out my contention. At p. 69 of the record, the trial court stated, inter alia:

B “The Manager of the plaintiff’s bank informed it of the dishonour by Exhibit 3 to which was attached a photocopy of the dishonoured cheque Exhibit 3A. The cheque was represented a second time for payment by the plaintiff’s bank and was again dishonoured. In its letter Exhibit 4 communicating the second dishonour to the plaintiff, its bank in exasperation stated.....

C And at p. 2 of the record, the trial court continuing stated:-

D “Chief Chike Amago Amanze a director of the plaintiff who gave the above evidence as P.W.I tendered nine receipts Exhibits 5 A-H on its hire of machinery. He gave evidence of the loss and damages suffered by the plaintiff with particulars

From the above passages, it is evident that Exhibits 3 and 4 are letters by the plaintiff’s bank forwarding to the plaintiff the dishonoured cheques.

E The exhibits did not purport to represent any loss to the plaintiff. Exhibits 5 A-H are the receipts for the cost of hiring earth moving equipment for the execution of the contract. Although the actual amount involved in the hiring of the machinery is not indicated in the passages reproduced above, that is of no moment because whatever that amount F may be it could not conceivably represent the loss sustained by the plaintiff as a result of the dishonour of the cheque in question. The plaintiff by tendering for the contract the subject matter of this case represented that it had the resources to do the work. Whatever arrangement it made to G execute the job either by hiring machinery or by buying its own machinery with the financial assistance of its bankers was its own internal affairs and not the business of the defendants. The money spent by the plaintiff in hiring machinery for the job cannot be classified as a loss since the hiring H of the machinery is necessary or incidental to the execution of the contract and must have formed part of the basis of the tender for the job. **The point I have endeavoured to stress is that the plaintiff did not establish any loss resulting from the dishonour of the cheque in question to entitle**

it to the damages awarded by the trial court which, with respect, made the award arbitrarily.

In an action for breach of contract, the measure of damages is the loss flowing naturally from the breach and is incurred in direct consequence of the breach: See *Swiss Nigeria Wood Industries Ltd, v. Bogo* (1970) 6 NSCC 235, *Hadley v. Baxendale* (1854) 9 Ex 341, *Chukwumah v. Shell Petroleum* (1993) 4 NWLR (Pt. 289) 512 at 563, *Agbanelo v. U.B.N. Ltd.* (2000) 4 S.C. (Pt. I) 233; (2000) 7 NWLR (Pt. 666) 534 at 551. **In the instant case, the plaintiff did not prove any loss it sustained as a direct consequence of the dishonour of the cheque issued to it. It is not its case that as a result of the dishonour of the cheque it was constrained to stop work and that when it eventually resumed the cost of labour and material had escalated and thus increased the cost of execution of the contract far beyond the contract sum. The matters pleaded by the plaintiff in paragraphs 6, 7, 8, 9, 10 and 17 of the amended Statement of Claim set out in this judgment, that is, that as a result of the dishonour of the cheque, its bank refused to assist it to purchase the earth moving equipment at a concessional price, did not flow naturally from the breach of contract nor could they be said to be within the contemplation of the parties at the time they made the contract.**

In a Reply brief filed on behalf of the plaintiff, learned counsel intimated that the relevant exhibits form part of the record of appeal transmitted to this court.

He submitted thus:

“..... The said Order 8 rule 12(2) of the Supreme Court Rules (as amended in 1999) empowers my Lords to give any judgment and make any order which the court below ought to have made and make such further or other order as cases require in the interest of justice. Therefore, the honourable court will not suffer any handicap in respect of assessment of damages awarded by the trial court because the said Exhibits 3, 4, and 5 A- H (which were indeed in the custody of the courts below at the time of appeal) are now part of the record of appeal before the Honourable Court. My Lords will have unfettered privilege to look at the

said exhibits and draw inferences therefrom and make appropriate orders thereto.”

Although an appellate court is in as good a position as a trial court in the evaluation of documentary evidence, if the merit of this appeal turned
B on the correct appraisal of Exhibits 3, 4, 5A-H, it would have been more appropriate to remit this case to the Enugu Division of the Court of Appeal to carry out that exercise but for the fact that the three Justices who sat on the case are no longer there. Pursuant to Order 8 rule 12(2) of the Rules
C of this court, supra, this court can examine the exhibits in question and draw the necessary inferences. I have seen and examined the exhibits but they have not affected the opinion I had expressed. As I indicated earlier, Exhibits 3 and 4 are the letters written by the appellant’s bank forwarding to it the dishonoured cheques. There is nothing in them to indicate the
D losses incurred by the appellant in consequence of the dishonour of the cheques. Exhibits 5, 5A-H are nine receipts allegedly issued to the appellant for payment for the hire on diverse dates of bulldozer, grader, pail loader, etc. The total cost of the hire is about N7,461,000.00 only. It is surprising
E that the appellant who was awarded a contract for N4.9 million would spend about N7.5 million in the execution of the contract. It is even more surprising that Exhibits 5A-H were issued by dealers on building materials and not those in the business of hiring of earth moving equipment. Even
F on the assumption that the exhibits are genuine, how did the learned trial Judge arrive at the award of N5.5 million bearing in mind that the appellant’s claim was for N25 million? There is no indication to that effect in the judgment of the trial court. **The appellant’s claim is in the nature of special damages. The requirement of the law is that special**
G **damages should be specifically pleaded in a manner clear enough to enable the defendant know the origin or nature of the special damages being claimed against him to enable him prepare his defence. A claim in the nature of special damages to succeed must**
H **be proved strictly/ the court is not entitled to make its own estimate on such a claim:** see *Dumez (Nig) Ltd, v. Ogboli* (1972) 3 S.C. (Reprint) 188; (1972) 1 All NLR 241, *Jaber v. Basma* 14 WACA, 140.

Strict proof in the context of special damages means that the

person making a claim in special damages should establish his entitlement to that type or class of damages by credible evidence of such character as would satisfy the court that he is indeed entitled to an award under that head: See *Oshinjinrin & Ors. v. Alhaji Elias & Ors.* (1970) 1 All NLR 153 at 156, *Dumez (Nig) Ltd, v. Ogbolu supra.*

In the case in hand, the appellant did not in its statement of claim give detailed particulars of the losses in monetary terms which it suffered as a result of the breach of the contract by the respondents. At the trial, the receipts for the cost of hiring machinery amounting to about N7.5 million is far less than the lump sum of N25 million claimed. The learned trial Judge had stated in the course of his judgment that Exhibits 3, 4, 5A-H are not challenged hence he placed reliance on them. But even where the evidence is unchallenged and uncontradicted, the trial court has a duty to evaluate it and be satisfied that it is credible and sufficient to sustain the claim.⁵ Had the trial court properly evaluated the exhibits before it, it ought to have occurred to it that they in no way reflected the losses incurred by the appellant as a consequence of the breach of contract by the respondents. As I had earlier emphasized, the expenses incurred by the plaintiff in hiring machinery did not represent any loss, rather they were expenses incurred in the normal course of the execution of the contract job.

The upshot of all that I have been saying is that the plaintiff did not establish either on the pleading or evidence that it sustained any loss as a result of the defendants' breach of the contract they entered into with it. The award of N5.5 million made by the trial court to the plaintiff, with respect, is arbitrary and cannot be sustained. This is evident from the record of the proceedings including the judgment of the trial court. The court below was right to have set aside the award but the order remitting the case to the trial court for re-assessment of damages cannot be justified. It ought to have proceeded to dismiss the appellant's claim for N25 million for lack of evidence in proof thereof.

Consistent with the foregoing, this appeal is partially allowed.

I set aside the order of the court below remitting the case to the trial court and in its place, the plaintiff's claim for N25 million is hereby dismissed with N10,000.00 costs to the defendants.

B

UWAIS CJN

C I have had the opportunity of reading in draft the judgment read by my learned brother, Edozie, JSC. I entirely agree that the Court of Appeal acted in error to have remitted the case to the lower court for the damages to be assessed. The evidence relied upon by the plaintiff to prove the damages being claimed was in fact in the record of proceedings as copied exhibits. Therefore, the Court of Appeal was in a position itself to assess the damages claimed without remitting the case to the lower court to do so.

D I too, therefore, allow the appeal in part by setting aside the order made by the Court of Appeal remitting the case to the trial court. I hereby dismiss the plaintiff's claim for N25 million as damages suffered by it, with E N10,000.00 damages in favour of the defendants against the plaintiff.

BELGORE JSC

F I allow this appeal because to allow the judgment of the court below to stand may inadvertently amount to miscarriage of justice. It is better to have the issues before Court of Appeal to be heard by another panel of that court that will be afforded the opportunity of seeing and considering all the exhibits the previous panel never saw. I make order as to costs as in the G judgment of my learned brother, Edozie, JSC.

ONU JSC

H I have been privileged to read before now the judgment of my learned brother, Edozie, JSC., just read. I agree with him that the appeal is meritorious and ought therefore to succeed.

The introduction and relevant facts of this appeal have been fully set

out in the cases made out by the parties and circumspectly reviewed in the judgment of my learned brother, Edozie, JSC., that I do not intend to repeat them.

It will suffice for me to say that the appellant has submitted the following as the sole issue for determination, the same which the respondent adopted to the effect that:

“Were the learned Justices of the Court of Appeal correct when they set aside the damages awarded in favour of the plaintiff/appellant by the trial court (and remitted the case back to the High Court to assess damages a second time) on the ground that they could not locate and examine the documentary exhibit on which the said award was based by the trial court (especially when the said exhibits were, in fact, before the Court of Appeal)?”

ARGUMENT

On the sole issue for determination, the trial court concluded on the issue of damages as follows:

‘Having found the defendants negligent and liable, what is the measure or quantum of damages to which the plaintiff is reasonably entitled? The defendants submitted that:-

“the only element of the breach that could naturally flow from the alleged breach, if any, is the value of the cheque that is, N97,243.79 which became subsumed in Exhibits 8 and 13 to constitute accord and satisfaction.”

I have already disposed of the submission on accord and satisfaction as not establish

The plaintiff paid in the cheque from the negligent customer who did not comply with the condition and it was dishonoured a number of times for reasons already examined. The plaintiff suffered damages in consequence as given in unchallenged uncontradicted evidence - See Exhibits 3, 4 and 5A-H.”

What it means therefore is that the trial court based its assessment of damages on Exhibits 3, 4 and 5A-H which were tendered before it and which constituted unchallenged evidence.

In the further appeal to the court below, that court (the Court of

Appeal) made the following orders:

“On the assessment of damages, the only order that will meet the justice of this case is to remit the case back to the Anambra State High Court with direct control over the exhibits for assessment of damages.”

B

Before making the above orders the court below regretted its inability to get and examine the exhibits despite effects made in that regard. At that stage and in all the circumstances of the case was the court below justified in setting aside the award of damages made by the trial court and remitting the case back to the said court to re-assess damages? My answer is in the negative because contrary to the stance adopted by the court below, the Exhibits (3, 4, 5A - 5H) on which the trial court based its assessment of damages were in its (Court of Appeal) custody.

D

It is significant to note, however, that the said exhibits which the court below observed were not before it, are among the documents compiled and transmitted by the Registry of that court to this court.

E

In view of the foregoing, I agree with the appellant's submission that the finding of the court below (as well as all conclusions and orders emanating or flowing therefrom) are in my opinion perverse and deserve only to be set aside. See *Nkado v. Obiano* (1997) 5 NWLR (Pt. 503) 31 and *Okino v. Obanebira* (1999) 12 S.C. (Pt. II) 38; (1999) 13 NWLR (Pt. 636) 535. See also Order 8 Rule 12(2) of the Supreme Court Rules (as amended). I am also of the view that even if the exhibits are not available to the court below it would still be in error to strike down the assessment of damages made by the trial court and remit the case back to the High Court to assess damages afresh. Be it noted that the judgment of a court is presumed to be correct until the contrary is established.

G

See *Folorunso v. Adeyemi* (1975) 1 NMLR 128 at 132; *Odiase v. Agho & Ors.* (1972) 3 S.C (Reprint) 69; (1972) 1 All NLR (Pt. 1) 170 at 176 and *Balogun v. Adejobi* (1995) 2 NWLR 3 (Pt. 376) 131.

H

The court below did not fault the learned trial Judge's assessment or award of damages - either that it is too low or too high. Nor did the court below find that any of the complaints against the said assessment/award had been proven/established.

The only thing that can be said is that the material upon which the court below could review the assessment and award of damages by the trial court in this matter were not before it. Consequently, the court below was disabled from doing so.

It is for these reasons, and the more compelling ones advanced by B my learned brother, Edozie, JSC., that I too partially allow the appeal and make similar consequential orders as to costs as therein contained.

KALGO JSC

I agree with the judgment just delivered by my learned brother, Edozie JSC., in this appeal which I had the opportunity to read in advance. For the reasons contained in the said judgment which I adopt as mine, I also allow the appeal in part and abide by the consequential orders made therein D including the order as to costs.

C

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