

**SUPREME COURT OF NIGERIA**

13<sup>TH</sup> JULY 2007 SC.289/2002

**CORAM:- S. U. ONU, A. I. KATSINA-ALU, D. MUSDAPHER,  
W. S. N. ONNOGHEN, I. F. OGBUAGU, F. F. TABAI,  
I. T. MUHAMMAD JJSC**

ASSOCIATED DISCOUNT HOUSE LIMITED ..... APPELLANT  
AND  
AMALGAMATED TRUSTEES LIMITED ..... RESPONDENT

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ACTIONS - Reliefs - Parties and court - Are bound by the case presented and issues raised thereby - Instant Case deals with trial court's lack of jurisdiction (H1)

APPEALS - Motions - Issues - Relevance of - Issue of whether Lagos State High Court - Has the power to transfer case to Federal High Court - And invitation to Supreme Court - To depart from Omisade case - Are not relevant in the appeal and present application (H2)

STATUTES - Interpretation - Shall - Whether obligatory or permissive in an enactment - Depends on the context - Whether used in the constitution, statute or Rules of Court (H3)

STATUTES - Interpretation - Mandatory or permissive provision - Where intention of the legislature is not clear - Court will impute most probable intention - That is most consistent with reason (H4)

STATUTES - Constitution - Construction - Proviso in an enactment - Is an exception or qualification of the enacting part - Seven man panel of Supreme Court should be exceptional under proviso to s. 234 of 1999 Constitution (H5)

SUPREME COURT - Appeals - Panel of seven Justices - Provided for by use of "shall" in the proviso to s. 234 of 1999 Constitution - Is permis-

sive - So that panel of five justices - That determined the appeal in issue  
- Is not unconstitutional (H6)

### **FACTS**

The parties herein are involved with a protracted case that was filed since 1998, but has not yet been commenced before the trial court as a result of many of interlocutory matters being raised by the respondent. It is judgment of the Supreme Court delivered on the 5<sup>th</sup> May, 2006, that respondent/applicant has applied that it be set aside, and that a panel of seven justices be reconstituted to rehear the appeal. Applicant relied on ten grounds, and a 14 paragraph affidavit. He restated three questions that call for determination in the appeal. The major complaint of the applicant is that the appeal between the parties relates to interpretation and application of s. 251(1) (d) of the 1999 Constitution. That by s. 234 of the said Constitution, a panel of five instead of seven Justices heard and delivered judgment in the appeal. That an application it filed after date for judgment had been fixed, to pray for a panel of seven Justices was not heard before judgment was delivered.

Applicant submitted that the judgment delivered on 5-5-2006 by a five man panel is a nullity, being delivered without jurisdiction and in violation of fair hearing principle. In compliance with court's directives, the parties submitted their written addresses in which they agree that only one issue is sufficient for determination of the application.

### **ISSUE FOR DETERMINATION**

*Whether given the circumstances of this case the Supreme Court ought to set aside its judgment delivered on the 5<sup>th</sup> May 2006 and rehear the appeal?*

**HELD** (Unanimously dismissing the application per **TABAI JSC**)

### ***Reliefs - Parties and court***

1. It is settled law that parties are bound by the case they presented to the court and the issues raised thereby for trial. Similarly the court is bound to limit itself to the case presented and the issues raised by the parties. And none of the parties is allowed to make a new case either at the court

of trial or on appeal without amending the originating process.

In the instant case the originating process which culminated in the appeal that was decided on 5/5/2006 and which decision is sought to be set aside is the Notice of Preliminary Objection dated 1/7/99 but filed on 2/7/99 copied at page 10 of the record. The relief sought therein states:

*“That this Honourable court lacks jurisdiction to entertain the matter and that the matter should be struck out with substantial costs in favour of the Defendant/Applicant herein accordingly, the same being a gross abuse of the court process.”*

Thus the Defendant/Respondent/Applicant simply sought a striking out order for the trial court’s alleged lack of jurisdiction. There was no prayer for transfer of the case back to the Federal High Court from where the suit had originated. It is not surprising therefore that in the ruling of the learned trial Judge K.O. Alogba J of 12/1/2001 there was no pronouncement made on the question of whether the Lagos State High Court had power to transfer a matter in which it has no jurisdiction to the Federal High Court. And both in the grounds of appeal to the Court below and the issues formulated there from none of the parties raised that issue. (p. 3202 B)

### ***APPEALS - Motions - Issues***

2. The issue of whether the Lagos State High Court has the power to transfer a case to the Federal High Court was not relevant to the determination of the single issue of jurisdiction in the appeal, same not having been raised in the originating Preliminary Objection filed at the Lagos State High Court on 2/7/99. A court of law will not engage itself in adjudicating on an academic or hypothetical question simply because counsel for the parties have raised it in their addresses. For the foregoing considerations therefore I hold that the resolution of the conflict in the decisions of this Court on the power of a State High Court to transfer a case to the Federal High Court was not relevant to the determination of the single issue of jurisdiction raised in the Preliminary Objection in the appeal. The issue is therefore also not necessary in this application and so its resolution in whichever way would be a mere academic exercise. I have no

doubt that the issue of whether a State. High Court has the power to transfer a case over which it has no jurisdiction to the Federal High Court ought to and should be resolved in an appropriate case, but definitely not in this case.

B And for the same reasons contained in the foregoing considerations I hold also that the invitation by the Respondent/Applicant for this Court to depart from OMISADE v AKANDE was not relevant to the determination of the appeal, and equally not relevant in this application.

C (p. 3203 F)

***STATUTES - Interpretation - Shall***

3. There is no laid down rule as to whether the word “shall” used in a statute carries mandatory or merely directory connotation and that its  
D real purport depends by and large on the particular context in which it is used. The learned Senior counsel for the Respondent/Applicant also accepted this principle and relied on ALHAJI OLOYEDE ISHOLA v MEMUDE AJIBODE (1994) 6 N.W.L.R. (Part 352) 506 where this Court  
E restated the above principle in ascribing meaning to the word “shall” on section 238 of the 1979 Constitution. At page 598 the Court per Iguh JSC said:

*“I have given the above submissions some anxious consideration  
F and I entirely agree with the learned amicus curiae that the word “shall” in section 238 of the Constitution is used in a directory or permissive context and not in a mandatory sense...”*

It is clear from the foregoing that whether the word “Shall” in an enactment conveys an obligatory rather than merely directory or permissive  
G connotation depends on the very context in which it is used and that its construction, whether used in the Constitution, Statute or Rules of Court is the same. (p. 3206 B/ G)

***H STATUTES - Interpretation - Mandatory or permissive provision***

4. There is yet another aspect of the principle of the interpretation of statutes. Where in a Statute the Legislature has expressed no clear intention as to whether a particular provision is mandatory or merely permis-

sive the court has a duty to impute to the Legislature that intention which is most probable and most consistent with reason. See the opinion of the learned author in the Book ON THE INTERPRETATION OF STATUTES by MAXWELL 1991 Edition at page 340 where he said:

*“In all cases, however, the question as to the Legislature intending a provision to be imperative or directory .....is to be determined by weighing the consequences of either view. Where the Legislature has expressed no intention on the point, that intension should be imputed to it which is most consistent with reason, and due regard to convenience and justice.”* (p. 3206 H)

***Constitution - Construction - Proviso in an enactment***

5. I am persuaded by the argument of learned counsel for the Appellant/Respondent that if the construction urged by learned Senior Counsel for the Respondent/Applicant is upheld, this Court would end up sitting in a panel of seven in practically every case. That would make a panel of seven of the Supreme Court the rule rather than the exception and I think that would be the very antithesis of the provisions of section 234 of the Constitution. In my view such a result could not have been intended by the framers of the Constitution. As far as I can understand it, a proviso in an enactment is simply an exception to or some qualification of the first or enacting part. In the English case of JENNINGS & ANOR v KELLY (1940) AC 206 at 229 the House of Lords, per Lord Wright, defined the scope of proviso in an enactment thus:

*“It is said that where there is a proviso, the former part, which is described as the enacting part must be construed without reference to the proviso. No doubt there may be cases in which the first part is so clear and unambiguous as not to admit in regard to the matters which are there clear any reference to any other part of the section; the proviso may simply be an exception out of what is clearly defined in the first part, or it may be some qualification not inconsistent with what is expressed in the first part.....”*

I would like to adopt the above description of a proviso in its entirety. If the proposition of learned senior counsel for the Respondent/

Applicant is accepted the provision of section 234 of the Constitution would be reversed making a seven man panel of the Supreme Court the rule rather than the exception. The result of such a construction would be outright inconvenience and even inconsistent with the first or enacting part of section 234 of the Constitution. (p. 3208 B)

***SUPREME COURT - Appeals - Panel of seven Justices***

6. In these circumstances I prefer a construction of the word “*Shall*” in the proviso to section 234 of the Constitution to be “*May*”, conveying a directory or permissive connotation and having room for some discretion as to when to constitute a panel of seven Justices in appeals with respect to questions under section 233(2)(b) and (c) of the Constitution.

I have no doubt that this appeal which arose from the Defendant/Respondent/Applicant’s challenge of the jurisdiction of the Lagos State High Court by virtue of the provisions of section 251(1)(d) of the Constitution comes within the “purview of section 233(2)(b) of the Constitution. But having regard to the fact that the self same issue has been decided by this Court in some previous decisions, I hold that the court was at liberty to hear the appeal with the normal and regular panel, of five Justices on 6/2/2006. And I hold therefore that the subsequent judgment on 5/5/2006 is not unconstitutional.

For the foregoing reasons, this application is refused and is accordingly dismissed. (p. 3209 A)

**NOTABLE POINTS OF INTEREST**

**ONNOGHEN.JSC**

*1. The word shall is directory as to empaneling 7 justices of the Supreme Court*

Having regard to the context in which the word “*shall*” is used in section 234 of the 1999 constitution, it is my considered view that the word is permissive or directory not mandatory, In other words, the decision to empanel either 5 or 7 justices to hear a particular case depends on the nature of the case, its complexity, significance, public or legal interest or novelty, as submitted by learned Counsel for the respondent, in that case,

it is not always that an application of any provision of the Constitution is required that a seven member justices must be empanelled to hear the matter. I hold the view that in such a situation a panel of five justices can and do legally constitute the court for the purpose of determining the matter. In the instant case, as can be seen from the grounds of appeal and the issues formulated by both counsel for determination that the interpretation or construction of section 251(1) (d) of the 1999 Constitution was not in issue in the appeal at all. Secondly, the full Court of this Court had earlier interpreted the said provisions of section 251(1)(d) of the 1999 Constitution in the two cases earlier referred to in this judgment and what the appellant in the appeal was complaining about is the failure of the Court of Appeal to apply the decision of the fun court on the said section 251(1)(d) of the 1999 Constitution as decided in the case FMBN VS NDIC (supra); not a call for fresh interpretation of the said section. That being the case I hold the view that a panel of five justices of this court can validly and legally determine the appeal by applying the decision of the full court in respect of section 251 (1)(d) of the 1999 Constitution to the facts of the instant case. (p. 3222 C)

### **OGBUAGU JSC**

#### *2. Finality of Supreme Court judgments emphasized*

In other words, yes, this Court, can set aside its Judgment, in appropriate cases, when certain things are shown, otherwise, the decision of this Court, is final. In the case of S. N. Ibe v. Peter Onuorah (1996) 12 SCNJ. 128, the finality of the decisions of this Court pursuant to Section 215 of the Constitution of the Federal Republic of Nigeria, 1979, was restated. As a matter of fact, Order 8 Rule 16 of the Supreme Court Rules, 1985 and the three principles enshrined therein, demonstrates unequivocally, a clear prohibition on the interference subsequently with the operative and substantive of a Judgment of this Court or any part thereof except under the Slip Rule.

It is therefore, now firmly settled that Judgments of this Court, cannot be reviewed. The Court, has no power to overrule, reverse or nullify, its previous decisions whether on questions of substantive or

**3192** Associated Disc. H. Ltd v. Amalgamated Trustees Ltd (2007) 7 KLR  
procedural law. (p. 3225 D)

**MUHAMMAD JSC**

3. *Supreme Court's jurisdiction - Is not punctured by an ill-timed motion*

B Again, although it is the general principle of the law that all applications  
should be disposed of before hearing of an appeal, it is clear, as well as  
admitted by the applicant's counsel that the application of 17<sup>th</sup> March,  
2006 was filed when the appeal was already reserved for judgment. This  
C to me, was a clever way of arresting the delivery of the judgment which  
was already written and to be delivered on the very day the applicant  
wanted that motion to be taken.

Learned SAN for the applicant, I believe, knows it very well that  
courts do not make orders in vain and they are meant to be obeyed. It  
D was ordered on the 6<sup>th</sup> day of February, 2006 that judgment would be  
delivered on 5<sup>th</sup> May, 2006. Thus, unless there were exceptional circum-  
stances which could make the delivery of that judgment on that date  
impossible the court was under a duty to deliver the judgment on the day  
E announced in open court. Thus, filing an application in between the date  
when judgment was reserved and the date of delivery, which application  
had the effect of arresting the delivery of that judgment cannot, in my  
view, be an exceptional circumstances. I find it difficult to agree with the  
F learned SAN for the applicant that the judgment of 5<sup>th</sup> May, 2006 was  
delivered without jurisdiction. (p. 3241 C)

**REPRESENTATION**

G Dr. B.O Babalakin SAN, with O. Akoni SAN, CJ. Agbu, A.S. Oyinloye,  
K.E. Akanbi, H. Sulaiman (Mrs), O. Oyewunmi, A. Adekoya (Mrs) for  
the Applicant.

Ayo Ajayi for the Respondent.

**H CASES REFERRED TO**

BAMAIYI v A.G. OF THE FEDERATION (2001) 12 NWLR (Part 727)  
468

OGIDEE v THE STATE (2005) 5 NWLR (Part 918) 286



ISHOLA v AJIBOYE (1994) 6 N.W.L.R. (Part 352) 506

OMISADE v AKANDE (1987) 2 NWLR (Part 55) 158

ALUMINIUM MANUFACTURING CO. (NIG) LTD v NIGERIAN  
PORTS AUTHORITY (1987) 1 NWLR (Part 51) 475

AWOLEYE v BOARD OF CUSTOMS & EXCISE (1990) 2 NWLR (Part B  
133) 490

FASHAKIN FOODS (NIG) LTD v SHOSANYA (2006) 10 NWLR (Part  
987) 126

NDUKAUBA v KOLOMO (2005) 4 NWLR (Part 915) 411

MAGNA MARITIME SERVICES LTD v OTEJU (2005) ALL FWLR (Part C  
270) 1995 2012

COOKEY v FOMBO (2005) 15 NWLR

Chime vs Ude (1996) 7 NWLR (pt. 461) 379

Ogbu VS Urum (1981) vol. 2 NSCC 81

Igwe VS Kalu (2002) 14 NWLR (pt 787) 435

### **STATUTES & RULES REFERRED TO**

Constitution of Nigeria 1999 ss.251 (1) (d), 234, 36,233,236, Cap iv E  
Federal High Court Act s.22 (3)

Supreme Court Act s. 22

Court of Appel Rules O.3 r. 2 (1)

Constitution of Nigeria 1979 ss. 238,215

University of Ilorin Act s. 15 (4)

Supreme Court Rules O.6 r. 5 (4), 0.8 r. 16

### **BOOK REFERRED TO**

Interpretation of Statutes by Maxwell 1991 Ed. p. 340

### **LEAD JUDGMENT BY TABAI JSC**

This ruling is sequel to an application dated and filed on the 11/10/  
2006. The application seeks the following reliefs: H

1. *SETTING ASIDE* the judgment of this Honourable Court de-  
livered in this appeal on Friday 5<sup>th</sup> May 2006.

2. *REHEARING* of the appeal by a reconstituted panel of Justices

*of this Honourable Court consisting of 7 (seven) Honourable Justices.*

The grounds for the application are stated therein to be that:

B (i) *The appeal giving rise to the said judgment relates to a decision of the Court of Appeal in a civil matter on a question as to the interpretation and application of section 251 (1) (d) of the Constitution of the Federal Republic of Nigeria 1999 (“the 1999 Constitution”).*

(ii) *By virtue of section 234 of the 1999 Constitution appeals requiring the interpretation and application of the Constitution by this Honourable Court.*

C (iii) *The panel of the Supreme Court that heard this appeal on 6<sup>th</sup> February 2006 was made up of only 5(five) learned Justices.*

(iv) *The Honourable Court was not properly constituted to hear the appeal and thus lacked the jurisdiction to do so or to deliver a judgment thereon. ,*

E (v) *After hearing the appeal but prior to the delivery of judgment of this Honourable Court the Respondent/Applicant brought an application dated and filed on the 17<sup>th</sup> March 2006 seeking a rehearing of the appeal by a reconstituted 7(seven) man panel of learned Justices of this Honourable Court.*

(vi) *The application referred to in paragraph 5 above was not heard before judgment was delivered and remains pending.*

F (vii) *The delivery of the court’s judgment without hearing the pending application amounted to a determination and refusal of the said application without granting the Respondent a fair hearing or any hearing at all contrary to section 36 of the 1999 Constitution.*

G (viii) *The judgment of this Honourable Court delivered on 5<sup>th</sup> May 2006 is a nullity being one in which the appeal was heard without the fulfilment of a condition precedent to the exercise of jurisdiction and which also violates the principle of fair hearing.*

H (ix) *This Honourable Court has the jurisdiction to set aside its own judgment where it is found to be a nullity.*

(x) *Jurisdiction being a sine qua non for the existence of the power to adjudicate can be raised at any time.*

The application is supported by a 14 paragraph affidavit. In paragraph 4

thereof the Applicant restated the three questions that called for determination in the appeal as follows :-

(i) *The interpretation and application of section 251(1)(d) with particular reference to the proviso to the said section, as to whether or not a dispute between a financial institution and its client is one over which the Federal High Court has exclusive jurisdiction.* B

(ii) *Whether or not the proviso to section 251(1)(d) of the 1999 Constitution which exempts disputes between a bank and its individual customers from the exclusive jurisdiction of the Federal High Court applies when the dispute is between a financial institution and its client.* C

(iii) *Whether or not by section 22(3) of the Federal High Court Act which purports to empower the High Court of a State to transfer a matter over which it has no jurisdiction to the Federal High Court is valid and subsisting as an existing law by the combined effect of sections 4, 274 and 315 of the 1999 Constitution.* D

In compliance with the directives of this court, learned counsel for the parties submitted their written addresses which they adopted on 17/4/07 when the appeal was heard. The Applicant's written address and the written address in reply to the Respondent's address were prepared by the law firm of Babalakin & Co. and they were filed on 30/1/07 and 6/4/07 respectively. The address on behalf of the Respondent was prepared by Ayo Ajayi of P.O. Fagbohunge & Co. and same was deemed filed on 12/3/07. F

The Applicant raised one issue for determination. It is:

*Whether given the circumstances of this case the Supreme Court ought to set aside its judgment delivered on the 5<sup>th</sup> May 2006 and rehear the appeal?* G

And the only question raised by the Appellant/Respondent in its brief is:-

*Whether or not the judgment delivered by the Supreme Court in this appeal on the 5<sup>th</sup> May 2006 should be set aside and the appeal reheard?* H

The parties therefore agree on the only issue that calls for determination of this application.

Arguing the motion the Applicant cited a number of authorities on the inherent powers of this Court and other superior courts of record to set aside their own judgments and the circumstances that warrant such setting aside orders. The Applicant referred to sections 233(2) and 234  
B of the 1999 Constitution and submitted that the Supreme Court is only properly constituted to hear an appeal that entails the interpretation and/or application of the provisions of the Constitution if it is constituted by a panel of 7 (seven) Justices and that it was unconstitutional for the 5  
C (five) man panel to hear the appeal on 6/2/2006 and that the subsequent judgment of 5/5/2006 was for that reason null and void. On the competence of the court to set aside its own judgment on the ground of nullity reliance was placed on ODOFIN v OLABANJI (1996) 3 N.W.L.R. (Part 435) 126 at 133. It was argued that the provisions of sections 233(2) and  
D 234(2)(b) of the 1999 Constitution are clear and unambiguous and urged that a literal interpretation be given to them. Reference was made to the word “*shall*” used in the proviso to section 234 of the Constitution and submitted that as a general rule the word connotes a command and that it  
E is imperative mandatory and admits of no discretion. In support of this submission the Applicant relied on BAMAIYI v A.G. OF THE FEDERATION (2001) 12 NWLR (Part 727) 468 at 497; OGIDEE v THE STATE (2005) 5 NWLR (Part 918) 286 at 327. Although it was conceded that  
F the word “*shall*” may in some circumstances have a directory rather than mandatory connotation, it was submitted however that such connotation applied mostly in the interpretation of rules of court and not to Statutory and constitutional provisions. Reliance was placed on KATTO  
G v CENTRAL BANK OF NIGERIA (1991) 9 NWLR (Part 214) 126 at 147. It was further argued that whether the word “*shall*” in a context is merely intended to be directory or obligatory depends on the particular context in which it is used. For this submission the Applicant relied on ISHOLA v AJIBOYE (1994) 6 N.W.L.R. (Part 352) 506. It was the fur-  
H ther submission of the Applicant that while the word “*shall*” in the first limb of section 234 about 5(five) Justices of the Supreme Court can be said to be intended to be directory, the word in the proviso for 7 (seven) Justices is definitely intended to be mandatory and should be so con-

strued. The Applicant referred to the meaning ascribed to the word proviso in an enactment in *NDIC v OKEM* (2004) 10 NWLR (Part 880) 184 and submitted that if the word “*shall*” in the proviso to section 234 of the Constitution is construed to be merely directory the result will be the very antithesis of the object meant to be achieved in the provision. It was argued that if the word “*shall*” in the proviso in section 236 were meant to be merely directory leaving room for discretion it would have been absolutely needless to insert it since same objective had already been met in the first limb of section 234. According to the Applicant, the gravamen of the appeal is the determination of whether a “*financial institution*” as used in section 251(l)(d) of the 1999 Constitution is a bank and argued that no previous decision of this Court has settled that issue. It was submitted therefore that this is an appropriate constitutional matter for a 7 (seven) man panel of this Court.

The Applicant further referred to what it regards as a set of conflicting decisions of this Court and for the resolution of which conflict a seven man panel was necessary. The first is *OMISADE v AKANDE* (1987) 2 NWLR (Part 55) 158 at 171 which, according to the Applicant, suggests that State High Court may transfer a matter to the Federal High Court where it finds that it has no jurisdiction to entertain it. The other set is made up of *ALUMINIUM MANUFACTURING CO. (NIG) LTD v NIGERIAN PORTS AUTHORITY* (1987) 1 NWLR (Part 51) 475 at 488-489, *AWOLEYE v BOARD OF CUSTOMS & EXCISE* (1990) 2 NWLR (Part 133) 490 and *FASHAKIN FOODS (NIG) LTD v SHOSANYA* (2006) 10 NWLR (Part 987) 126 at 147 which, according to the Applicant decided that a State High Court has no power to transfer a matter to the Federal High Court. According to the Applicant the judgment sought to be set aside has again decided that the State High Court has the power to transfer a matter to the Federal High Court. The Applicant further referred to page 22 of the Respondent’s Brief and the invitation therein for this Court to depart from its decision in *OMISADE v AKANDE* (1987) 2 NWLR (Part 55) and submitted that the said invitation, which was consistent with the usual practice of this court and the provisions of Order 6 Rule 5(4) of the Rules of this Court, necessitated a panel of 7 (seven)

Justices of the Court, since it would be unusual for a panel of 5 (five) Justices to review and possibly depart from its decision by a panel of 7 (seven) Justices of this Court. *ADEGOKE MOTORS LTD v ADESANYA* (1989) 3 NWLR (Part 109) 250 at 268-275, 276-277 was cited in support of this submission.

On the issue of fair hearing the Applicant referred to its application dated 17<sup>th</sup> March 2006 seeking a re-hearing of the appeal, and the decisions in *NDUKAUBA v KOLOMO* (2005) 4 NWLR (Part 915) 411 at 429; *AFRO-CONTINENTAL (NIGERIA) LTD & ANOR v. CO-OPERATIVE ASSOCIATION OF PROFESSIONALS INC.* (2003) 5 NWLR (Part 813) 303 at 317-318, *MAGNA MARITIME SERVICES LTD v OTEJU* (2005) ALL FWLR (Part 270) 1995 2012, *COOKEY v FOMBO* (2005) 15 NWLR (Part 947) 182 at 201 and submitted that the subsequent judgment is a nullity. It was finally urged that the appeal be re-heard by a newly constituted panel of 7 (seven) Justices.

On behalf of the Appellant/Respondent, the following arguments were submitted The first submission is that at the time the appeal was heard section 251(l)(d) of the 1999 Constitution had been interpreted over and over again by a full seven man panel of this court in *FEDERAL MORTGAGE BANK OF NIGERIA v NIGERIA DEPOSIT INSURANCE CORPORATION* (1999) 2 NWLR (Part 591) 333 and *NIGERIA DEPOSIT INSURANCE CORPORATION V OKEM ENTERPRISES LTD* (2004) 10 NWLR (Part 880) 107 and that in the circumstances it sufficed for five Justices of this Court to sit over the present appeal since there was nothing new in the provision to be interpreted. It was submitted that it is only when a ground of appeal raised questions about the interpretation of the Constitution that is recondite or substantial that a full court may be required to pronounce upon such issues. In support of this submission the Appellant/Respondent referred to *BAMAIYI v ATTORNEY-GENERAL OF THE FEDERATION* (2001) 12 NWLR (Part 727) 468 and the decision in this appeal reported as *ASSOCIATED DISCOUNT HOUSE LTD v AMALGAMATED TRUSTEES LTD* (2006) 10 NWLR (Part 989) 635.

With specific reference to section 234 of the 1999 Constitution it

was the submission of the Appellant/Respondent that the interpretation urged by the Respondent/Applicant would make the provision unworkable, unrealistic and unwieldy. It was pointed out that the proviso to section 234 refers to appeals brought under Section 233(2)(b) or (c) of the 1999 Constitution and argued that the Respondent/Applicant's arguments were only on Section 233(2)(b) but were conspicuously silent on Section 233(2)(c) which concerns the provisions of Chapter IV of the 1999 Constitution. It was the Appellant's view that if the construction urged by the Applicant is accepted then this Court would sit as a full court in practically every appeal since there is hardly any appeal that does not involve some complaints about fair hearing. Such a situation, it was argued, could not have, been the intendment of the framers of the Constitution and that the provision of section 234 is permissive or directory and not mandatory. It was the further submission of the Appellant/Respondent that when this Court is faced with two alternative interpretations of the Constitution, the alternative that is consistent with the smooth running of the system should prevail. For this submission the Appellant/Respondent relied on *TUKUR v GOVT. OF GONGOLA STATE* (1989) 4 NWLR (Part 117) 517 at 579.

The Appellant/Respondent proffered arguments to distinguish *ISHOLA v AJIBOYE* (1994) 6 NWLR (Part 352) 506 from the present case and submitted that the principle in that case is not applicable in this case, or at best it is only an obiter dictum: On the submission of the Respondent/Applicant about there being a conflict in the decisions of this Court in *OMISADE v AKANDE* (supra) *ALLUMINIUM MANUFACTURING COMPANY v NIGERIAN PORTS AUTHORITY* (supra), *AWOLEYE v BOARD OF CUSTOMS & EXCISE* (supra), *FASHAKIN FOODS (NIG) LTD v SHOSANYA* (supra) and this case *ASSOCIATED DISCOUNT HOUSE LTD v AMALGAMATED TRUSTEES LTD* (2006) 10 NWLR (Part 989) 635, the submission of the Appellant/Respondent was that there was no such conflict. It was further submitted that the constitutionality or otherwise of section 22(3) of the Federal High Court Act is not an issue in the application. On the invitation of the Respondent/Applicant at page 22 of its (Respondent's) Brief for this Court to depart from

its previous decision in *F.M.B.N. v N.D.I.C.* (supra) and *OMISADE v AKANDE* (supra) it was argued, that such invitation was not made one of the grounds either in the application for hearing the appeal dated 16/3/2006 or in the present application of 11/10/2006.

B On the issue of 'fair hearing', it was the submission of the Appellant/Respondent that the failure to hear the motion of 16/3/2006 did not occasion any miscarriage of justice particularly having regard to the outcome of the appeal. The Appellant/Respondent gave details of the various applications filed by the Respondent/Applicant and opined that it was a ploy by the Applicant for delay and has actually occasioned a delay for about nine years and urged that the application be dismissed.

C In its Reply Brief the Respondent/Applicant referred to the Appellant's Brief of Argument in the substantive appeal filed on 1/4/2003, D its request therein to interpret the word "*Bank*" in section 251(l)(d) of the 1999 Constitution and submitted that a full court ought to have heard the appeal. It was submitted that the question of whether the word "*Bank*" in section 251(l)(d) of the 1999 Constitution should be interpreted to E include a financial house had not been decided in either *FMBN v NDIC* or *NDIC v OKEM*.

The Respondent/Applicant further referred to Section 233(2) and 234 (b) and (c). *BAMAIYI v A.G. OF THE FEDERATION* (supra) GOVERNOR OF KWARA STATE v OJIBAKA (2007) MJSC vol. I page 10 F and submitted that the proviso to section 234 admits of no qualification as to the type of appeals brought under section 233(2)(b) or (c) and that section 233(2)(c) is relevant and that the use of the word "*shall*" in the proviso must be given its mandatory intention.

G With respect to fair hearing, it was the further submission of the Respondent/Applicant that the lack of fair hearing cannot be waived and that the failure to hear the application of 17/3/2006 rendered the judgment of 5/5/2006 null and void irrespective of whatever the result of the H hearing would, have been. Reliance was placed on *MOBIL PRODUCING (NIG) UN LTD & ANOR v MINIKPO & ORS* (2003) 18 NWLR (Part 852) 346 at 413; *STATE v ONAGORUWA*. NWLR (Part 221) 56 ADIGUN v A.G. OYO STATE. (1987) 1 NWLR (Part 53) 678 at 709 and



721, ADEYEMI v IKE-OLUWA & SONS (1993) NWLR (Part 309) 27 at 40 and AMADI v THOMAS APLIN & CO. LTD. (1972) 4 SC 228.

I have considered the application, the supporting affidavit together with the various documents attached thereto and the submissions of counsel for the parties. Let me first dispose of an issue in respect of which B counsel for the parties proffered considerably detailed submissions. The issue pertains to whether there exists a conflict in the decisions of this Court in OMISADE v AKANDE (supra), ALLUMINIUM MANUFACTURING CO. v NIGERIAN PORTS AUTHORITY (supra), AWOLEYE C v. BOARD OF CUSTOMS AND EXCISE (supra), FASHAKIN FOODS NIG LTD v SHOSANYA (supra) and this case ASSOCIATED DISCOUNT HOUSE LTD v AMALGAMATED TRUSTEES LTD (supra) and if so, whether such a conflict automatically necessitated a panel of seven (7) D Justices of this Court to hear the appeal.

Firstly, I agree with the Respondent/Applicant that there exists a conflict in the decisions of this Court in OMIS ADE v AKANDE (supra) on the one hand and ALLUMIMIUM MANUFACTURING CO. (NIG) LTD v NIGERIAN PORTS AUTHORITY, AWOLEYE v BOARD OF CUS- E TOMS & EXCISE and FASHAKIN FOODS (NIG) LTD v SHOSANYA the other. In OMISADE v AKANDE (1987) 2 NWLR (Part 55) 158; (1987) 1 NSCC 486 decided on 10/4/87 this Court held that a State High Court has, by reason of the provisions of section 22(3) of the Federal F Revenue Court (Amendment) Act 1975, the power to transfer a case over which it has no jurisdiction to the Federal High Court and invoking the provisions of section 22 of the Supreme Court Act, ordered transfer of the case to the Federal Revenue Court. It is to be noted that there is no indication in the report that the attention of this court was drawn to its G earlier decisions on 27/2/87 in ALLUMTNIUM MANUFACTURING CO. (NIG) LTD v NIGERIAN PORTS AUTHORITY (1987) 1 NWLR (Part 51) 475; (1987) 1 N.S.C.C. 224; In ALLUMINUM MANUFACTURING CO. (NIG) LTD v N.P.A. (supra), AWOLEYE v BOARD OF CUSTOMS H & EXCISE (1990) 2 NWLR (Part 133) 490 and FASHAKIN FOODS (NIG) LTD v SHOSANYA (2006) 10 NWLR (Part 987) 126 this court held that a State High Court has no power of transfer of a case over

which it has no jurisdiction to the Federal High Court.

But the matter does not end there. The question is was the resolution of this conflict as to the authority of a State High Court to transfer a case over which it has no jurisdiction to the Federal ‘High Court relevant  
 B in the determination of the appeal in this case? In other words, was the resolution of that conflict an issue in the appeal that was decided on 5/5/2006? **It is settled law that parties are bound by the case they presented to the court and the issues raised thereby for trial. Similarly  
 C the court is bound to limit itself to the case presented and the issues raised by the parties. And none of the parties is allowed to make a new case either at the court of trial or on appeal without amending the originating process.** See AKINFOLARIN v AKINOLA (1994) 3 NWLR (Part 335) 659; NATIONAL INVESTMENTS AND  
 D PROPERTY CO. LTD v THOMPSON ORGANISATION LTD (1969) 1 ALL NLR 138; ONYIA v ONYIA (1989) 1 NWLR (Part 99) 514; ENANG v ADU (1981) 11-12 SC 25 at 36.

In the instant case the originating process which culminated  
 E in the appeal that was decided on 5/5/2006 and which decision is sought to be set aside is the Notice of Preliminary Objection dated 1/7/99 but filed on 2/7/99 copied at page 10 of the record. The relief sought therein states:

F *“That this Honourable court lacks jurisdiction to entertain the matter and that the matter should be struck out with substantial costs in favour of the Defendant/Applicant herein accordingly, the same being a gross abuse of the court process.”*

Thus the Defendant/Respondent/Applicant simply sought a  
 G striking out order for the trial court’s alleged lack of jurisdiction. There was no prayer for transfer of the case back to the Federal High Court from where the suit had originated. It is not surprising therefore that in the ruling of the learned trial Judge K.O. Alogba  
 H J of 12/1/2001 there was no pronouncement made on the question of whether the Lagos State High Court had power to transfer a matter in which it has no jurisdiction to the Federal High Court. And both in the grounds of appeal to the Court below and the issues

**formulated there from none of the parties raised that issue.**

In its judgment on 16/9/2002 however, the Court below in the concluding paragraph at pages 82-83 of the record apparently while contemplating a transfer of the suit to the Federal High Court raised the issue *suo motu* and considered same. There is not hing on the record to show B that the parties were heard on the issue. And in the appeal before this court both parties, apparently taking a cue from the Court below, raised the issue in their Briefs of Argument. In its judgment on 5/5/2006 this Court considered the issue and ruled, correctly in my view, that the issue C was not relevant to the determination of the appeal. It nevertheless expressed the opinion that the High Court of a State can, under the provisions of section 22(3) of the Federal High Court Act, transfer a case in respect of which it has no jurisdiction to the Federal High Court. The opinion was clearly the Court's passing remark. It was clearly an obiter D dictum. At page 649 of the report, the Court, per Pats-Acholonu JSC, stated:-

*"...believe that where a provision in a statute is liable to be construed either in the positive or in the negative form or connotation, then E it is definitely more beneficial to adopt the interpretation that is more in tune with public will and benefit. In appropriate cases it is my view that the High Court can make an order of transfer but that is not relevant in the case here.*

I agree with the underlining above that the issue of whether the F Lagos State High Court has the power to transfer a case to the Federal High Court was not relevant to the determination of the single issue of jurisdiction in the appeal, same not having been raised in the originating Preliminary Objection filed at the Lagos G State High Court on 2/7/99. A court of law will not engage itself in adjudicating on an academic or hypothetical question simply because counsel for the parties have raised it in their addresses. See AKINFOLRIN v AKINNOLA (supra) and DIKE v NZEKA (1986) 4 NWLR H (Part 34). For the foregoing considerations therefore I hold that the resolution of the conflict in the decisions of this Court on the power of a State High Court to transfer a case to the Federal High Court

was not relevant to the determination of the single issue of jurisdiction raised in the Preliminary Objection in the appeal. The issue is therefore also not necessary in this application and so its resolution in whichever way would be a mere academic exercise. I have  
B no doubt that the issue of whether a State. High Court has the power to transfer a case over which it has no jurisdiction to the Federal High Court ought to and should be resolved in an appropriate case, but definitely not in this case.

C And for the same reasons contained in the foregoing considerations I hold also that the invitation by the Respondent/Applicant for this Court to depart from OMISADE v AKANDE was not relevant to the determination of the appeal, and equally not relevant in this application.

D         THE MAIN ISSUE

The only issue of whether or not it was mandatory for a seven man panel of this Court to hear this appeal because it involves the interpretation and/or application of section 251(1)(d) of the 1999 Constitution  
E of the Federal Republic of Nigeria depends, in my view; wholly and entirely on the meaning to be accorded the provision of section 234 of the same Constitution. Section 234 provides:

*“For the purpose of exercising any jurisdiction conferred upon it  
F by this Constitution of any law, the Supreme Court shall be duly constituted if it consists of not less than Jive Justices of the Supreme Court.*

*Provided that where the Supreme Court is sitting to consider an appeal brought under section 233(2)(b) or (c) of this Constitution, or to exercise its original jurisdiction in accordance with section 232 of this  
G Constitution, the Court shall be constituted by seven Justices.”*

And Section 233(2)(b) and (c) covered by the above proviso says:  
233(2)

*“An appeal shall lie from decisions of the Court of Appeal to the  
H Supreme Court as of right in the following cases*

(a) .....

(b) *decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution.*

*(c) decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution has been, is being or is likely to be contravened in relation to any person.”*

The substance of the argument of the Respondent/Applicant is that this appeal which involves the interpretation or application of section 251(1)(d) of the Constitution falls within the matters contemplated in section 233(2)(b) of the Constitution which in turn comes within the proviso to section 234 of the Constitution mandatorily requiring a panel of seven Justices and that the decision of 5/5/06 having been reached by a panel of five was unconstitutional, null and void. The submission of the Appellant/Respondent was that the use of the word “*shall*” notwithstanding the proviso was, in the context, merely directory and that the five man panel sufficed.

The bone of contention is whether the word “*SHALL*” in the proviso conveys a mandatory or merely directory connotation. Learned Senior Counsel for the Respondent/Applicant conceded that the word “*SHALL*” may, in some, circumstances, have directory rather than mandatory connotation but submitted that such a connotation applies only to rules of Court and not to constitutional or statutory provisions. He relied on *KATTO v C.B.N.* (1991) 9 N.W.L.R. (Part 214) 126 at 147. With respect, I do not think that in *KATTO v C.B.N.* this court made any distinction in the interpretation of the word “*SHALL*” used in the Rules of Court on the one hand and statutes and the Constitution on the other. Although the court was faced with the meaning of the word “*Shall*” in Order 3 Rule 2(1) of the Court of Appeal Rules, it merely restated the general principle in construing the word in statutes. At page 147 of the report this Court, per Akpata JSC, had this to say:

*“It is true that by Order 3 Rules 2(1) an appellant “shall state also the exact nature of the relief sought.” The use of the word “shall” tends to give the impression that it is mandatory or imperative to specify the exact nature of the relief sought. Generally the term “shall” is a word of command and donates obligation and gives no room to discretion. It imposes a duty. The term is however sometimes construed as merely permissive or directory to carry out the legislative intention, particularly in*

3206 Associated Ltd v. Amalgamated Ltd (2007) 7 KLR Tabai JSC  
cases where its being construed in mandatory sense will bestow no right  
or benefit to anyone. When construed as being permissive or directory it  
carries the same meaning as the word “May” (emphasis mine)

The underlining above is only a re-emphasis of the generally ac-  
B cepted principle of interpretation of statute that **there is no laid down**  
**rule as to whether the word “shall” used in a statute carries man-**  
**datory or merely directory connotation and that its real purport**  
**depends by and large on the particular context in which it is used.**  
C See also PATRICK ANIGALA OKPALA v THE DIRECTOR GENERAL  
OF NATIONAL COMMISSION FOR MUSEUMS & MONUMENTS &  
ORS (1996) 4 N.W.L.R. (Part 444) 585. The learned Senior counsel  
for the Respondent/Applicant also accepted this principle and re-  
lied on ALHAJI OLOYEDE ISHOLA v MEMUDE AJIBODE (1994)  
D 6 N.W.L.R. (Part 352) 506 where this Court restated the above prin-  
ciple in ascribing meaning to the word “shall” on section 238 of the  
1979 Constitution. At page 598 the Court per Iguh JSC said:

*“I have given the above submissions some anxious consider-  
E ation and I entirely agree with the learned amicus curiae that the word*  
*“shall” in section 238 of the Constitution is used in a directory or*  
*permissive context and not in a mandatory sense...”*

See also DR. TUNDE BAMGBOYE v UNIVERSITY OF FLORIN  
F & ANOR (1999) 10 N.W.L.R. (Part 622) 290 at 336 and 348-349 where  
the word “shall” in section 15(4) of the UNIVERSITY OF ILORIN ACT  
was construed to carry a merely directory rather than mandatory conno-  
tation. See on the other hand UNIVERSITY OF NIGERIA TEACHING  
HOSPITAL MANAGEMENT BOARD & ANOR v HOPE CHTNYERE  
G NNOLI (1994) 8 N.W.L.R. (Part 363) 376 at 419 where the word “shall”  
was construed as conveying a mandatory intention. **It is clear from the**  
**foregoing that whether the word “Shall” in an enactment conveys**  
**an obligatory rather than merely directory or permissive connota-**  
H **tion depends on the very context in which it is used and that its**  
**construction, whether used in the Constitution, Statute or Rules of**  
**Court is the same.**

There is yet another aspect of the principle of the interpre-

tation of statutes. Where in a Statute the Legislature has expressed no clear intention as to whether a particular provision is mandatory or merely permissive the court has a duty to impute to the Legislature that intention which is most probable and most consistent with reason. See the opinion of the learned author in the Book **ON THE INTERPRETATION OF STATUTES** by MAXWELL 1991 Edition at page 340 where he said:

*“In all cases, however, the question as to the Legislature intending a provision to be imperative or directory .....is to be determined by weighing the consequences of either view. Where the Legislature has expressed no intention on the point, that intension should be imputed to it which is most consistent with reason, and due regard to convenience and justice.”*

In the light of the above discussion,’ should the word “shall” in the proviso to section 234 of the 1999 Constitution be construed to carry mandatory intention requiring a seven man panel of the Court whenever an appeal involves matters coming within the provisions of section 233(2)(b) and (c) of this Constitution? For the purpose of resolving this question it is necessary to examine the matters that properly come within the provisions of section 233(2)(b) and (c). On this question, I agree with learned counsel for the Appellant/Respondent that there is hardly any appeal that does not either involve the interpretation or application of the Constitution or allege breaches or likely breaches of Chapter IV of the Constitution.

There is, for instance, hardly any suit involving master and servant relationship that does not allege some breaches of the servant’s fundamental rights under the Constitution. All criminal appeals necessarily involve the individual’s rights to life and liberty under Chapter IV of the Constitution. All appeals, whether civil or criminal, which allege lack of or improper evaluation implicitly allege violation or likely violation of the principles of fair hearing under Chapter IV of the Constitution. Appeals emanating from Applications for bail, amendments, stay of execution and stay of proceedings pending appeal all necessarily involve complaints of breaches or likely breaches of the Constitution. Similarly there is rarely

any appeal from applications for setting aside judgments in default of defence or for relisting a suit or appeal dismissed or struck out for want of prosecution that does not raise complaints about violation of the Constitution. And by its very nature every application for the enforcement of the individual's Fundamental Rights and appeal emanating therefrom fall within the definition of questions under section 233(2) and (c) of the Constitution.

**I am persuaded by the argument of learned counsel for the Appellant/Respondent that if the construction urged by learned Senior Counsel for the Respondent/Applicant is upheld, this Court would end up sitting in a panel of seven in practically every case. That would make a panel of seven of the Supreme Court the rule rather than the exception and I think that would be the very antithesis of the provisions of section 234 of the Constitution. In my view such a result could not have been intended by the framers of the Constitution. As far as I can understand it, a proviso in an enactment is simply an exception to or some qualification of the first or enacting part. In the English case of JENNINGS & ANOR v KELLY (1940) AC 206 at 229 the House of Lords, per Lord Wright, defined the scope of proviso in an enactment thus:**

*"It is said that where there is a proviso, the former part, which is described as the enacting part must be construed without reference to the proviso. No doubt there may be cases in which the first part is so clear and unambiguous as not to admit in regard to the matters which are there clear any reference to any other part of the section; the proviso may simply be an exception out of what is clearly defined in the first part, or it may be some qualification not inconsistent with what is expressed in the first part....."*

**I would like to adopt the above description of a proviso in its entirety. If the proposition of learned senior counsel for the Respondent/Applicant is accepted the provision of section 234 of the Constitution would be reversed making a seven man panel of the Supreme Court the rule rather than the exception. The result of such a construction would be outright inconvenience and even in-**



consistent with the first or enacting part of section 234 of the Constitution.

**In these circumstances I prefer a construction of the word “*Shall*” in the proviso to section 234 of the Constitution to be “*May*”, conveying a directory or permissive connotation and having room B for some discretion as to when to constitute a panel of seven Justices in appeals with respect to questions under section 233(2)(b) and (c) of the Constitution.**

I have no doubt that this appeal which arose from the Defen- C  
dant/Respondent/Applicant’s challenge of the jurisdiction of the Lagos State High Court by virtue of the provisions of section 251(l)(d) of the Constitution comes within the “purview of section 233(2)(b) of the Constitution. But having regard to the fact that the self same issue has been decided by this Court in some previous decisions, I D  
hold that the court was at liberty to hear the appeal with the normal and regular panel, of five Justices on 6/2/2006. And I hold therefore that the subsequent judgment on 5/5/2006 is not unconstitutional. E

For the foregoing reasons, this application is refused and is accordingly dismissed. I assess the costs of this application at N10,000.00 in favour of the Appellant/Respondent against the Respon- F  
dent Applicant.

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ONU JSC

I agree entirely.

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KATSINA -ALU JSC

I have read in draft the judgment delivered by my learned brother Tabai JSC, in this appeal. I agree with it and, for the reasons he has given H  
I also find no merit whatsoever in the application which I hereby dismiss. I wish only to stress that the self same issue has been decided by this Court in some previous cases. I hold that this Court is under no obliga-

tion to constitute a panel of 7 Justices each time the issue arises. This application, in the circumstances of this case, is unjustified and absolutely uncalled for. I dismiss it with =N=10,000.00 costs in favour of Appellant/Respondent.

B \_\_\_\_\_

### **MUSDAPHER JSC**

I have read before now the Ruling of my Lord Tabai just delivered in this matter with which I entirely agree. In the aforesaid Ruling His Lordship has admirably and comprehensively discussed all the relevant and pertinent issues. I see no need to repeat them. I adopt his reasonings as mine and I refuse the application in its entirety and accordingly dismiss it. I abide by the order for costs contained in the aforesaid ruling.

D \_\_\_\_\_

### **ONNOGHEN JSC**

On the 11<sup>th</sup> day of October 2006, the respondent/applicant filed a motion in this court praying for the following reliefs:

*"1 SETTING ASIBE the judgment of this Honourable Court delivered in this appeal on Friday 5<sup>th</sup> May, 2006.*

*2. REHEARING of the appeal by a reconstituted panel of justices of this Honourable Court consisting of 7 (seven) Honourable Justices".*

The grounds on which the reliefs are sought are stated as follows:-

*(i) The appeal giving rise to the said judgment relates to a decision of the Court of Appeal in a civil matter on a question as to the interpretation and application of section 251(1)(a) of the Constitution of the Federal Republic of Nigeria; 1999 ("the 1999 Constitution").*

*(ii) By virtue of section 254 of the 1999 Constitution appeals requiring the interpretation and application of the Constitution by this Honourable court.*

*(iii) The panel of the supreme Court that heard this appeal on 6<sup>th</sup> February, 2006 was made up of only 5 (five) learned Justices.*

*(iv) The Honourable Court was not properly constituted to hear*

*the appeal and this lacked the jurisdiction to do so or to deliver a judgment therein.*

(v) *After the hearing of the appeal but prior to the delivery of judgment of this Honourable court the Respondent/Applicant brought an application dated and filed on 17<sup>th</sup> March 2006, seeking a re-hearing of the appeal by a reconstituted 7 (seven) man panel of learned Justices of this Honourable court.*

(vi) *The application referred to in paragraph 5 was not heard' before judgment was delivered and remains. pending.*

(vii) *The delivery of the court's judgment without hearing the pending application Counted to a determination and refusal of the said application without granting the Respondent a fair hearing or any hearing at all contrary to section 36 of the 1999 Constitution.*

(viii) *The judgment of this Honourable court delivered on 5<sup>th</sup> May 2006 is a nullity being one in which the appeal was heard without the fulfillment of a condition 7 precedent to the exercise of jurisdiction and which also violates the principles of fair-hearing.*

(ix) *This Honourable Court has the jurisdiction to set aside its own judgment where it is found to be a nullity.*

(x) *Jurisdiction being a sine qua non for the existence of the power to adjudicate can be raised at any time."*

The application is supported by an affidavit of 14 paragraphs on which the applicant relied in moving the at court.

The facts of the case include the following:

Sometime in 1998 the present respondent (to the motion) instituted suit No. FHC/L/CS/1076/98 at the Federal High Court, Lagos Claiming the sum of N120 million plus accrued interest being debt owed to the respondent by the applicant since May, 1995 as well as a declaration that the applicant had created an enforceable equitable mortgage over the applicants property known as "*The ROOFTOP*" at No. 24A Campbell Street, Lagos and an order granting leave to the respondent to sell the said property.

In relation to that claim, the respondent/applicant, as defendant to the action, filed a notice of preliminary objection dated 22/2/99 by which

the applicant contended that the Federal High Court lacked the jurisdiction to entertain the claim. The objection was sustained as a result of which the Federal High Court made a consequential order transferring the action to the Lagos State High Court pursuant to section 22(2) of the Federal High Court Act and Order 8 of the Federal High Court (Civil Procedure) Rules, 1999, Consequently, the respondent's suit was registered at the Lagos State High Court as suit No. LD/1677/99.

However, upon the said registration of the claim, the applicant filed yet another notice of preliminary objection challenging the jurisdiction of the Lagos State High Court on the ground that the Federal High Court, which it had earlier contended successfully not to have the requisite jurisdiction, had exclusive jurisdiction to entertain the respondent's claim- see pages 8 to 10 of the record to appeal. The Notice of preliminary objection was heard and dismissed by the Lagos State High Court vide a ruling delivered on 21/1/01 which resulted in an appeal to the Court of Appeal by the applicant filed on 18/1/01.

On the 16/9/02 the court of Appeal delivered its judgment holding that the Lagos state High court lacked jurisdiction to entertain the action and struck out the claim of the respondent. The respondent was aggrieved by the judgment and consequently appealed to this court vide a notice of appeal filed on 20/9/02 which appeal was duly heard and in a considered judgment this Court allowed the appeal and remitted the matter to the Lagos State High Court for proper adjudication and determination. The judgment of this Court on that appeal was delivered on the 5<sup>th</sup> day of May, 2006. It is that judgment that the instant application seeks to set aside on the grounds earlier reproduced in this judgment.

From the applicant's written address or argument filed on 30/1/2007 the issue for determination in this application is:-

*"Whether given the circumstances of this case the Supreme Court ought to set aside its judgment delivered on 5<sup>th</sup> May, 2006 and re- hear the appeal."*

It is the submission of learned senior counsel for the applicant that this Court has the jurisdiction inherent in it, to set aside its judgments where:

(a) the decision is a nullity;

(b) It is obvious, that the court was misled into giving the judgment under a mistaken belief that the parties consented to it; and,

(c) Where the judgment has been obtained, by fraud of one of the parties practiced on the court, relying on *Alao vs ACB* (2000) 9 NWLR (pt. B 672) 264 at 283; *Chime vs Ude* (1996) 7 NWLR (pt. 461) 379 at 414; *Ogbu VS Urum* (1981) vol. 2 NSCC 81 at 88; *Sken consult vs Ukey* (1981) vol. 12 NSCC 1 at 16 -17; *Igwe VS Kalu* (2002) 14 NWLR (pt 787) 435 at 435- 455; *Obimonure vs Erinosh*o (1966) ANLR 245 at 247- 248. C

Submitting further, learned Senior Counsel stated that the primary reason why the judgment should be set aside is because it is a nullity in that it suffers from a fundamental vice; relying on the case of *General & Aviation “services Ltd vs Thahal* (2004) 10 NWLR (pt. 880) 50 at 80; *Okafor vs A-G of Anambra State* (1991) 6.NWLR (pt. 200L659 at 678; that the fundamental vice constituting the ground why the judgment should be set aside include the lack of jurisdiction in this Court and denial of applicant’s right of fair hearing as Constitutionally guaranteed; that the considerations for the determination as to whether a court is with jurisdiction to entertain a matter are as stated or laid down in the case of *Madukolu vs Nkemdilim* (1962) 1 All NLR (pt. 4) 587 and *Western steel works Ltd vs iron and Steel workers Union* (1986) 3NWLR (pt. 30) 617 F at 627; that this Court was not properly constituted when it heard the appeal and delivered the judgment sought to be set aside in that instead of seven members of the court sitting to determine the appeal as provided founder the proviso to section 234 of the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter called/referred to as “*the 1999 Constitution*”, only five members of the court sat, heard and determined the appeal particularly as the issues in the appeal called for the interpretation or application of the revisions of the 1999 Constitution; that the provisions of sections 233(2) and 234(b) of tire 1999 Constitution are H very clear to the effect that it is in all cases where an appeal raises a Constitutional issue that seven justices must be empanelled to hear and determine same since the word “*shall*” as used in the proviso to section G

234 of the 1999 Constitution makes the exercise mandatory, not permissive or directory; that the Constitutional issues that arose for interpretation In the appeal are not settled issues as may warrant constituting a panel of five justices only as the gravamen of the appeal lies in the Issue B as to whether “*a Financial institution*” as used and contemplated in section 251(i) (d) of the 1999 Constitution is a bank.

Arguing in the alternative, learned senior counsel submitted that assuming without conceding that the Constitutional provision in issue C had been settled in the case of *FMBN vs NDIC* (1999) 2 NWLR (pt. 591) 333 and that this fact might have obviated the need to empanel a full court of seven justices, such a full court should still be empanelled to hear the appeal since applicant “*In the Appellant’s Brief, the Applicant specifically applied and urged the court to depart from 2 (two) of the earlier decisions namely FMBN vs NDIC (supra) and omisade vs Akande (supra) as it is entitled to do under Order 6 Rule 5 (4) of the Rules of this Honourable Court. This singular reason puts it beyond argument that a panel of 7 (seven) justices ought to have been empanelled, because it D would be unusual for a panel of 5 (five) Justices of this Honourable Court to review and possibly depart from a decision arrived at by a panel of 7 (seven) Justices of the Court.*” E

*He urged the court to grant the application.*

F On his part, learned Counsel for the respondent submitted that if the court finds that the court was properly constituted by the five justices who heard and determined the appeal then the applicant’s earlier motion filed on 12/3/06 seeking an order for re-hearing of the appeal by seven Justices before delivery of judgment on 5/5/06 would be rendered G academic; that the real issues in the appeal are not what the applicant formulated in the brief earlier referred to by learned Senior Counsel for the applicant which issues have no relevance having regard to the three grounds of appeal contained in the Amended Notice of Appeal, exhibit H “*TAI*” as it is trite law that in order to identify or determine the issue(s) for determination in an appeal, the proper process is to examine the grounds of appeal; that the grounds of appeal did not call for interpretation of the Constitutional provision but complains that though the decision of this

Court in the case of FMBN vs NDIC (supra) was cited and relied upon in the Court of Appeal that court failed to rely on same in coming to its decision in the matter; that section 251 (1) (d) of the 1999 Constitution had been expressly interpreted by the full court in the case of FWBN vs NDIC (supra) which interpretation was affirmed by the court in the case of NDIC vs. Okem Enterprises Ltd (2004) 10 NWLR (pt. 880) 107 and therefore no longer, novel or recondite and as such the court was properly constituted when it heard and determined the appeal by a panel of five justices; that learned Senior Counsel for the appellant has not contended that the decision of the court would have been different if the full court had sat on the appeal. C

Learned Counsel further submitted that the provisions of section 234 of the 1999 Constitution are directory, not mandatory as his learned friend had submitted particularly as the interpretation given to the section by counsel for the applicant would make the section unworkable, unrealistic and unwieldy; that the “*intention of the makers of section 234 of the 1999 Constitution was that questions as to the interpretation or application of the Constitution (section 233 (2) (b) or questions as to the breach of any of the provisions of chapter IV of the Constitution (section 233(2) (c) that are of very serious substance or complexity or sensitivity, or of significant legal or public interest, or that involves moral or landmark issues of law MAY be heard by the Supreme Court constituted of seven (7) Justices.....*”); that the provisions of the constitution must be read together as a whole in order to determine the object of the provision, which, learned counsel submitted, is to ensure smooth running of the judicial system in the dispensation of justice. D E F

On the invitation of the applicant to the court to depart from its decisions in FMBN vs. NDIC (supra) and Omisade vs Akande (supra) thereby making it necessary for the full court to sit and conduct the business, learned Counsel submitted that the invitation to depart from an earlier decision of the court was not one of the grounds stated in the earlier application for rehearing of the appeal dated 16<sup>th</sup> March, 2006 or the instant application dated 11/10/06. He urged the court to dismiss the application. G H

It is settled law that issues for determination must be distilled from the grounds of appeal which grounds must be complaints against the ratio decidendi in the judgment appealed, against. It is therefore clear that since issues for determination are distilled from the ground(s) of appeal, there must exist a valid notice and grounds of appeal from which the issues can be formulated, In the instant case, the respondent applicant did not cross appeal against the judgment of the Court of Appeal. Only the appellant/ respondent appealed against that judgment, it is clear from the Amended Notice of Appeal filed that only three grounds of appeal were raised against the judgment of the Court of Appeal out of which two issues were formulated by learned counsel for the appellant for determination in the appellants brief of argument filed on 28/10/02.

For case of reference and clarity of the complaints therein, I reproduce the Amended grounds of appeal hereunder:

**GROUND ONE**

*The Court of Appeal erred when it held that the Federal High Court (as opposed to the Lagos state High Court) has exclusive jurisdiction to entertain the Appellant's claim against the Respondent under section 251(1) (d) of the 1999 Constitution and that consequently, the proviso to the said section cannot sustain the Appellant's claim against the Respondent.*

**PARTICULARS OF ERROR:**

a. *The subject matter of this action is not connected with or pertaining to banking, banks or other financial institutions.*

b. *The Court of Appeal failed to properly consider and follow the binding decision of the Supreme Court of Nigeria in FEDERAL MORTGAGE BANK OF NIGERIA VS NIGERIA DEPOSIT INSURANCE CORPORATION (1999) 2 NWLR (pt. 591) 323.*

c. *The word "bank", for the purposes of section 251(1) (d) of the 1999 Constitution, as defined by the Supreme Court of Nigeria in the aforesaid case, includes discount houses such as the Appellant.*

d. *The court of Appeal did not properly consider the provision of section 29(a) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 which defined and created*



two different categories of banks.

*e. There is nothing in Decree no. 18 of 1994 which expressly provides or suggests that the meaning of the word “bank” as defined in the decree was specifically “widened” or “expanded” in the aforesaid Supreme Court decision as held by the Court of Appeal.* B

*f. The Court of Appeal failed to properly consider the Appellant’s status as a bank by virtue of section 61 of the Banks and other Financial Institutions Decree (BOFID) of 1991 based on the aforesaid Supreme Court decision.*

*g. The court of Appeal did not even consider any of the Appellant’s submission on its status as a bank by virtue of section 15(1) of the Nigeria Deposit insurance Corporation Decree of 1988 arising from the said Supreme Court decision.* C

*h. contrary to the finding of the Court of Appeal, the Supreme Court relied on the definition of “bank” in Decree No. 18 of 1994 without limiting its reliance on that definition to the purpose which Decree 18 was meant to serve.* D

*i The subject matter and issues which were formulated or determination by the Supreme Court in FMBN vs NDIC (supra) did not having anything to do with financial malpractices in a failed bank as held by the Court of Appeal, yet the Supreme Court relied on the Failed Banks Decree.* E

*j. In FMBN vs NDIC (supra), the Supreme court had already defined “bank” to mean an organization that provides financial service (such as the Appellant) even before reference was ever made to Section 29 of the Failed Banks Decree.* F

*k. Sections 5 (1)(a), 15 and 20 of the NDIC Decree of 1988 cumulatively recognize that the deposit liabilities of the Appellant must be insured along with the deposit liabilities of banking institutions within the banking system in Nigeria.* G

*l. The applicant is recognized by Nigerian law as being part and parcel of the banking system in Nigeria.* H

*m. The Faired Bank Decree does not contain any provision of definition section which restricts the application of the definition of “bank”*

contained in section 29 of that Decree as urged by the Respondent and upheld by the Court of Appeal.

n. The Court of Appeal also failed to consider all the other judicial reasons which the Court of first instance used to justify its finding that the Lagos State High Court has jurisdiction to entertain this action.

## GROUND TWO

The Court of Appeal erred and acted without jurisdiction when it overruled the decision of the Lagos High Court dated 12/1/01 and consequently held that the Federal High Court has exclusive jurisdiction to entertain the Appellant's claim against the Respondent in this action whereas the second or latter of the two judicial reasons relied upon by the Lagos High Court in support or justification of the overruled decision of 12/1/01 remains valid, subsisting and binding on the parties herein and the court of Appeal up till date (having not been appealed against) and the Court of Appeal did not consider, reverse or overturn that second judicial reason relied upon in the decision of the Lagos High court.

## PARTICULARS OF ERROR:

a. In the ruling delivered in this action on 12/1/01, the Lagos High Court affirmed that it had jurisdiction to entertain the Appellant's claim against the Respondent.

b. The Lagos High Court gave two independent or distinct judicial reasons for affirming its jurisdiction over his action.

c. The first judicial reason was the Lagos High Court's finding that the Appellant could be "subsumed as a bank of same sort" and in making that finding, the Lagos High Court relied on the decision of the Supreme court in *FMBN vs NDIC* (supra).

d. The second judicial reason was the Lagos High Court's examination of the "intent" of the makers of section 251 (1)(d) of the 1999 Constitution, and its consequent finding that, apart from the first reason stated above, the Lagos High court also had jurisdiction to entertain this action because the subject matter of this action does not touch or concern government's fiscal policy or measures which is what section 251(1)(d) seeks to vest the Federal High Court with exclusive jurisdiction over.

e. The second finding or reason which the Lagos High Court relied

*upon in affirming its jurisdiction in this action was not, and still has not been appealed against by the Respondent.*

*f. The second finding of the Lagos High court remains subsisting, valid and binding upon the parties herein and the Court of Appeal as well as the Supreme court.*

B

*g. It is trite that the decision of a Court can be sustained or supported by several judicial reasons or by just one judicial reason.*

*h. It is also settled law that even when one of two or more judicial reasons given by a lower court in support or justification of its finding is overruled or set aside by an appellate Court, the decision of the lower court would still be sustained because of the other judicial reason(s) which has not been overruled or set aside by the appellate court.*

C

*i The second judicial reason given by the Lagos High Court in support or justification of its affirmation of its jurisdiction remains unappealed against and subsists up till date.*

D

*j. The Court of Appeal had no jurisdiction or power to overrule or set aside the finding made by the Lagos High court in the ruling of 12/1/01 when one of the two judicial reasons (upon which the ruling was founded) remained subsisting, valid and binding up till date.*

E

**IN THE ALTERNATIVE:**

*iii. An order transferring this action from the Lagos state High court to the Federal High court for hearing and determination.”*

F

From the above grounds of appeal, the following issues were formulated for determination by learned, counsel for the appellant, to wit:-

*“3.01 Did the Court of Appeal have jurisdiction to overrule the decision of the Lagos High Court dated 12/1/01, and consequently hold that it is the Federal High Court that is vested with exclusive jurisdiction to entertain the Appellant’s claim to this action against the respondent, whereas the second or latter of the two reasons or ratio which the Lagos High Court relied upon in support of its said decision was not appealed against by the Respondent, and the court of Appeal too did not consider, reverse or overturn the second reason or ratio relied upon in We overturned decision of the Lagos High Court?*

G

H

*Does the Appellant qualify to be described-as a bank within the*

*meaning of section 251 (1)(d) of the 1999 Constitution in the manner that would vest the Lagos High Court with jurisdiction to entertain the Appellant's Claim against the Respondent in this action as was held by the Lagos High court in its decision of 12/1/01?"*

B On the other hand, learned Senior Counsel for the respondent/applicant in the Respondent's brief of argument filed in the appeal on the 9/8/03 formulated the, following two issues for determination at page 2 of the said brief:-

C *"(i) Whether the Court of Appeal was correct when it held that the High Court of Lagos state does not have jurisdiction to entertain the suit of the Appellant.*

D *(ii) Whether the Court of Appeal was correct when it held that the High Court of Lagos State does not have the power to transfer a matter in respect of which it lacks jurisdiction to the Federal High Court."*

There is no doubt, and I hereby hold that the issues as formulated for determination by both counsel are the issues distillable from the three amended grounds of appeal earlier reproduced in this judgment.

E It is not in doubt that ground 1 of the amended grounds of appeal queried the exclusive jurisdiction of the Federal High Court to entertain appellant's claim by virtue of the provisions of section 251(1) (d) of the 1999 Constitution but both counsel agreed that the said section 251(1) (d) of the 1999 Constitution had already been interpreted many times by F this Court Sitting as a full court in the case of Federal Mortgage Bank of Nigeria (FMBN) vs Nigeria Deposit insurance corporation (NDIC) (supra) and Nigeria Deposit Insurance Corporation vs Okem Enterprises Ltd (supra). When one looks at particular (b) of ground 1 of the amended G grounds of appeal (supra) it is clear that the complaint does not call for fresh interpretation of section 251(1) (d) of the 1999 constitution but that the Court of Appeal was in error in failing to follow the interpretation H court in the case of FMBN vs NDIC (supra) which decision was binding on the court.

Turning now to section 234 of the 1999 Constitution which provides as follows:-

*“For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law the Supreme Court shall be duly constituted if it consists of not less than five justices of the Supreme court:*

*Provided that where the Supreme Court is sitting to consider an appeal brought under section 233(2) (b) or (c) of this Constitution, or to exercise its original jurisdiction in accordance with section 232 of this Constitution, the court shall be constituted by seven justices.”*

As can be seen from the above provisions, the word “shall” is used twice, once in the main section 234 and the other in the proviso to the said section 234 both of the 1999 Constitution. From the submissions of learned Senior Counsel for the applicant it is clear that he is that whereas the word “shall” as used in the first limb of section 234 of the 1999 Constitution is directory or permissive as to the constitution of the supreme court by five justices, the same word is mandatory as used in the second limb or proviso to section 234 of the said 1999 Constitution making it mandatory for seven justices of the court to sit in the circumstances described therein.

It is settled law that when a court is faced with the interpretation of a constitutional provision, the entire provision must be read together as a whole so as to determine the object of that provision. Secondly, it is settled principle of law that where a court is faced with alternatives in the course of interpreting the Constitution or Statute, the alternative construction that is consistent with smooth running of the system shall prevail as held in *Tukur vs Government of Gongola State* (1989) (4 NWLR (pt. 117) 517 at 579:

*“I must remember that this court has said it several times that the provisions of the Constitution ought to be read and interpreted as a whole in that related sections must be read together.....*

*Finally, I must approach the matter from the view point that since the decision of this Court in *Nafiu Rabi'u vs The State* (1981) 2 NCLR 293, this Court has opted for the principle of construction often expressed in the maxim *ut res magis valeat quam pereat*. This means that even if alternative constructions are equally open, I shall opt for that alternative which is to be consistent with the smooth working of the system, which*

*the Constitution, read as a whole, has set out to regulate, and so the alternative which will disrupt the smooth development of the system is to be rejected.”*

In the instant case, two interpretations of the word *shall*” have been offered by both counsel each in support of their contending positions. This Court is therefore faced with the two alternatives - either to interpret the word “*shall*” as used in the context as compulsory, mandatory or that it directory or permissive, it is settled law that where the words used in a Statute or constitution are clear and unambiguous, there is nothing for the court to interpret, the duty of the court in such a situation being simply to give the words their ordinary meaning. Having regard to the context in which the word “*shall*” is used in section 234 of the 1999 constitution, it is my considered view that the word is permissive or directory not mandatory, In other words, the decision to empanel either 5 or 7 justices to hear a particular case depends on the nature of the case, its complexity, significance, public or legal interest or novelty, as submitted by learned Counsel for the respondent, in that case, it is not always that an application of any provision of the Constitution is required that a seven member justices must be empanelled to hear the matter. I hold the view that in such a situation a panel of five justices can and do legally constitute the court for the purpose of determining the matter. In the instant case, as can be seen from the grounds of appeal and the issues formulated by both counsel for determination that the interpretation or construction of section 251(1) (d) of the 1999 Constitution was not in issue in the appeal at all. Secondly, the full Court of this Court had earlier interpreted the said provisions of section 251(1)(d) of the 1999 Constitution in the two cases earlier referred to in this, judgment and what the appellant in the appeal was complaining about is the failure of the Court of Appeal to apply the decision of the fun court on the said section 251(1)(d) of the 1999 Constitution as decided in the case *FMBN VS NDIC* (supra); not a call for fresh interpretation of the said section. That being the case I hold the view that a panel of five justices of this court can validly and legally determine the appeal by applying the decision of the full court in respect of section 251 (1)(d) of the 1999 Constitution to the

facts of the instant case. To hold otherwise would not be in the best interest of the smooth running of the Supreme Court where the justices, as legal practitioners or judges might have participated in some of the cases either in the trial or appellate courts prior to the final appeal to the supreme Court which necessarily disqualifies such justices from participating in the hearing of the particular appeal in the interest of the rules of natural justice. That factor necessarily leaves lesser justices available to constitute the panels and having regard to the volume of appeals coming to the Supreme Court would result in inordinate delays or a complete breakdown of the system, In any event, what is the sense in constituting a panel of seven justices just to apply me decision of the full court which interpreted a provision of the Constitution when there is no issue before the court calling for a departure from the earlier decision. In the instant case, there is no issue before the court calling on this Court to depart from the decision of this Court in the two earlier decisions interpreting section 251(1)(d) of the 1999 Constitution and I further hold the view that the allegation of the applicant that such an issue exists is not borne out of the grounds of appeal and the issues formulated therefrom for determination - such an alleged issue is a make belief by the applicant for the purpose of causing as much further delay as possible, aimed at frustrating the respondent.

I hold the further view that having resolved the issue as to the competence of the panel of five justices that heard the appeal in question in favour of the respondent, it follows that the sub issue of fair hearing arising from the motion calling on the court to re-hear the appeal by a panel of seven justices is thereby rendered academic. To hold that the word “*shall*” as used in the context of section 234 of the 1999 Constitution is mandatory means that even if an appeal is against the refusal of the lower court to grant bail, this court must empanel a full court to determine the matter as the same would fall within the provisions of section 233(2)(c) of the 1999 Constitution.

We should not forget the fact that though the full compliments of the Supreme Court is 22 justices including the Chief Justice of Nigeria, at the moment the court has fifteen (15) justices. Even if the court has it’s

full complements it would be a near impossibility to insist on a full court hearing every appeal of action brought, under either section 233(2)(b) or (c) of the 1999 Constitution.

However, judging from the antecedents of this case, which for nine years has not passed the stage of pleadings at the trial court, I don't need to be a Prophet to say that the applicant is likely to find another reason for embarking on another Pilgrimage to the Supreme court in another interlocutory appeal judging from the fact that from the contentions of the applicant neither the Federal High Court nor the Lagos State High Court is clothed with the requisite jurisdiction to hear and determine the substantive matter, it may be it is the Customary court, or Area court or Magistrate court or Court of Appeal or even the Supreme Court that has the original jurisdiction to hear the substantive matter!! or should it be understood that the applicant just does not want the case to be heard by any court? Where then is justice?

In conclusion, agree with my learned brother, TABAI, JSC that the application is grossly without merit and is accordingly dismissed with N10,000.00 costs against the applicant. This is a very special case where much more ought to have been awarded by way of costs but the law ties our hands to the paltry sum of N10,000.00. So be it.

Application dismissed.

F

### OGBUAGU JSC

I have had the advantage of reading before now, the lead Judgment/Ruling of my learned brother, Tabai, JSC, just delivered. I have nohesitation in agreeing that this application stands dismissed. However, for purposes of emphasis, I will only set out the reliefs sought in the application and the issue formulated by each of the parties which is substantially the same although differently couched and make my own contribution.

The reliefs /prayers sought read as follows:

“1. *SETTING ASIDE the Judgment of this Honourable Court delivered in this appeal on Friday 5<sup>th</sup> May 2006.*



2. *REHEARING of the appeal by a reconstituted panel of Justices of this Honourable court consisting of 7 (seven) Honourable Justices*”.

In the written Address of the Respondent/Applicant, the lone issue formulated for determination, reads thus:

“3.1 *Whether given the circumstances of this case the Supreme Court ought to set aside its Judgment delivered on 5<sup>th</sup> May 2006 and re-hear the appeal?*”.

*The Appellant/Respondent on its part*, also formulated one (1) issue for determination, namely,

“3.01 *Whether or not the judgment delivered by the Supreme Court in this appeal on 5<sup>th</sup> May 2006 should be set aside and the appeal re-heard?* “

So, the one (1) issue of the parties, is very clear and unambiguous. In a number of decided authorities of this Court, the general principles in setting aside the Judgment of this Court, have been stated and re-stated. In other words, yes, this Court, can set aside its Judgment, in appropriate cases, when certain things are shown, otherwise, the decision of this Court, is final. See the cases of Onwuka & 4 ors. v. Maduka & 4 ors. (2002) 9 SCNJ. 113 @ 121, and Okulate & 4 ors. v. Awosanya & 2 ors. (2000) 1 SCNJ. 75 (2000) 1 S.C. 107 @ 112-113. In the case of S. N. Ibe v. Peter Onuorah (1996) 12 SCNJ. 128, the finality of the decisions of this Court pursuant to Section 215 of the Constitution of the Federal Republic of Nigeria, 1979, was re-stated. See also the case of Alhaji Alao v. African Continental Bank Ltd. (2000) 9 NWLR (Pt.672) 264 @, 283; (2000) 6 SCNJ. 63 @ 77; (2000) 6 S.C. (Pt.1) 27@ 36. As a matter of fact, Order 8 Rule 16 of the Supreme Court Rules, 1985 and the three principles enshrined therein, demonstrates unequivocally, a clear prohibition on the interference subsequently with the operative and substantive of a Judgment of this Court or any part thereof except under the Slip Rule.

It is therefore, now firmly settled that Judgments of this Court, cannot be reviewed. The Court, has no power to overrule, reverse or nullify, its previous decisions whether on questions of substantive or procedural law. See the cases of *Adefulu & 16 ors. v. Chief Okulaja &*

6 ors. (1998) 5 NWLR (Pt.550) 435 @ 462 (1998) 4 SCNJ. 139 @ 147 and Owunari Long - John & Chief Iboroma & 2 ors. v. Chief Black & 2 ors. (1998) 6 NWLR (Pt.555) 524; @ 546; (1998) 5 SCNJ. 68 @ 86.

I note that the Respondent/Applicant in paragraph 4.1.1 of its written address, concedes this firmly established principle and has stated rightly in my view, that the Court has inherent powers to set aside its Judgment in a number of circumstances which it also stated and cited and relied on some other decided authorities In respect thereof i.e. - *Alao v. ACE Ltd*, (supra); *Chime & anor. v. Ude & ors. (1996) 7NWLR (Pt.461) 379 @ 414* (it is also reported in (1996) 7 SCNJ. (81) *Ogbu v. Urum (1981) Vol. 12 NSCC 81 @ 88; Skeconsult v. Ukey (1981) Vol. 12 NSCC 1 @ 16-17; Chief Igwe & ors. v. Chief Kalu & ors. (2002) 14 NWLR (Pt.787) 435 @ 435-455 (sic)* (it is also reported in (2002) 2 SCNJ. 126) and *Obimonure v. Erinoshio (1966) ANLR 245 @ 247 -248*. I will add some other cases in which this Court has re-stated the grounds under which it will depart from and overrule its previous decisions or its own Judgment set aside. See *Samuel Oke v. Lamidi Aiyedun (1986) 4 S.C. 61; Ukpe Orewere & ors. v. Rev. Moses Abeigbe & ors. (1973) 1 All NLR (Pt.II) 1* and *The Attorney-General of the Federation v. Guardian Newspaper Ltd. (1999) 5 SCNJ. 324 @ 404* citing several other cases therein.

The reason or rationale behind this power, was graphically or beautifully stated by Oputa, JSC in the case of *Adegoke Motors Ltd, v. Dr. Adesanya & anor. (1989) 3 NWLR (Pt. 109) 250 @ 274; (1989) 5 SCNJ. 80*, inter alia, thus;

“We are final not because we are infallible, rather we are infallible because we are final. Justices of this Court are human beings, capable of erring. It will certainly be shortsighted arrogance not to accept this obvious truth. It is also true that this Court can do inestimable good through its wise decisions. Similarly, the Court can do incalculable harm through its mistakes. When therefore it appears to learned counsel that any decision of this Court has been given per in curiam, such counsel should have the boldness and courage to ask that such decision shall be over-ruled. This Court has the power to over-rule itself (and has done so in the past) for it gladly accepts that it is far better to admit an error than

*to preserve in error”.*

However, I note that the Applicant, is not asking the full Court or the Court, to overrule or depart from its previous decisions. Rather, it is stated that the ground for seeking for the setting aside of its said Judgment, is “*that it is a nullity*” being, according to the Applicant, “*one of the circumstances in which a court has the inherent powers to set aside its own decision*”. It then posed the question “*What makes the decision of a Court a nullity?*” It cited and relied on the cases of General & Aviation Services Ltd, v. Captain Thamal (2004) 10 NWLR (Pt.880) 50 @ 80 (it is also reported in (2004) 4 SCNJ. 89) and Okafor v. Attorney-General Anambra State (1991) 6 NWLR (Pt.200) 659 @ 678 S.C. as to the circumstances in which a judgment may be declared a nullity. It then contends that the grounds upon which the said Judgment of this Court, is a nullity, are:

“(1) *The judgment was given without jurisdiction (See grounds (i) -(iv) of the Applicants motion paper).*

(2) *The Applicant was denied its constitutionally guaranteed fundamental right to fair hearing in the proceedings prior to the delivery of the judgment. (See grounds (v) - (viii) on the Applicant’s motion paper)* “.

I note that Section 251 (1) (d) of the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter called “*the Constitution*”), had/ has been interpreted and applied by this Court in the cases of *Federal Mortgage Bank of Nigeria v. Nigeria Deposit Insurance Corporation* (1999) 2 NWLR (Pt.591) 333. (it is also reported in (1999) 2 SCNJ. 57) and recently, *Nigeria Deposit Insurance Corporation (Liquidator of Allied Bank of Nigeria PLC.) v. Okem Enterprises Ltd. (2004) 10 NWLR (Pt.880) 107* (it is also reported in (2004) 4 S.C. (Pt.11) 77) cited and relied on in the Appellant’s/Respondent’s Brief. That Section provides as follows:

“251. (1) *Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other*

court in civil causes and matters -

(d) connected with or pertaining to banking, banks, other financial institutions, including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from banking, Foreign Exchange, Coinage, Legal Tender, Bills of Exchange, Letter of Credit, Promissory Notes and other fiscal measures:

Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank”;  
[the underlining mine]

So, it is no longer a “*novel or recondite*” issue or matter. What appears novel in my respectful view, is the present request or invitation by the Applicant to give it perhaps, a third interpretation by another constituted full court of seven (7) Justices.

From the said lone issue formulated by the Applicant, there is in my respectful view, no semblance of any issue relating to the full court, interpreting the said Section or its sub-section. Even if that were to be so, (which is not conceded), that will be with respect, a gross misconception. So, if I may humbly and respectfully ask the Applicant and its learned Senior Advocate, what is the full court of seven (7) Justices going to interpret in this matter? What makes the said decision of the Court of five (5) Justices, a nullity as respectfully, I am not persuaded by the Applicant’s said grounds. These questions are pertinent in my respectful view because, firstly, the provisions in the said Section 251(1) (d) are clear and unambiguous and the decisions of the said full court in the said two (2) cases FMBN v. NDIC and NDIC v. *Okem Enterprises* (supra) subsist and are binding on all courts including this Court. Secondly, I note that when the appeal filed on 20<sup>th</sup> September, 2002 giving rise to the Judgment of the Panel of the five (5) Justices that is now being sought to be set-aside, was heard, here was no application by the Applicant to that Court, raising an objection, that the Court, had no jurisdiction to entertain, hear and determine the said appeal on the ground that it was not properly constituted. After a considered Ruling delivered on 5<sup>th</sup> May, 2006, allowing the appeal and remitted the matter to the Lagos State High Court,

about five (5) months thereafter, the instant application was filed. I have no hesitation in holding most respectfully, that this application, is brought in very bad faith in order to frustrate the Appellant/Respondent. I will expatiate later in this Judgment. I however, hold that the said Panel of Five (5) Justices, were properly constituted. I also hold with respect, B that what came up for determination before the said Lordships, was never and could not be at all, another interpretation of Section 251 (I) (d) of the Constitution. It could not have been as with respect, erroneously stated in paragraph 4.2.6 of the written Address of the learned SAN for the C Applicant.

This should have taken care of this application, but if I must, let me for purposes of emphasis, deal even briefly, with the provisions of Section 234 of the Constitution. It is conceded in paragraph 4.3.1 page 9 D of the Applicant's written Address, that the provisions of Sections 233 (2) and 234(2) (b) are clear and unambiguous. It is submitted that the word "*shall*", is used in the Proviso to Section 234 of the Constitution which prescribes that this Court, be constituted by seven (7) Justices E when hearing appeals that entail the interpretation of application of the provisions of the Constitution. That when used in an enactment, it has been held in innumerable cases, to, "as a general rule", connote a command. That it is imperative and mandatory and admits of no discretion. The cases of *Lt. General Bamaiyi (Rtd.) v. Attorney-General of the Fed-* F *eration & ors. (2001) 12 NWLR (Pt. 727) 468 @ 497 (it is also reported in (2001) 7SCNJ. 346) and Ogidee (sic) v. The State (2005) 5 NWLR (Pt. 918)\_286 @ 327 (it is also reported in (2005) 1 S.C. (Pt.1) 98) are cited and relied on. I note that at paragraph 4.3 thereof, the poser is, "Is G it Every Instance where an Appeal Raises a Constitutional Issue that 7 (Seven) Justices must be Empanelled)?"*

I note that it is conceded in the Applicant's written Address that the position of the law, is that the word "*shall*", may in some instances, have a directory rather than a mandatory connotation. It is however, H surprisingly, submitted that this connotation of the word,

*"is mostly applied for interpretation of the provisions of the rules of court rather than for statutory provisions and much less constitutional*

provisions”.

The case of *Katto v. Central Bank of Nigeria (1991) 9 NWLR (Pt.214) 126 @ 147* is cited and relied on (it is also reported in *(1991) 12 SCNJ. 1*). It is further submitted that in determining whether to ascribe a directory or (spelt on) mandatory connotation to the word “shall”, the Court must examine the context in which the word is used, to arrive at the intention of the legislature. I agree. The case of *Alhaji Ishola v. Alhaji Ajiboye (1994) 6 NWLR (Pt.352) 506 @ 598* is cited and relied on (it is also reported in *(1994) 7-8 SCNJ. 1*). It is then submitted that a careful examination of the context in which “shall” is used in the proviso to (sic) (meaning in) Section 234 of the Constitution, makes it clearly that it cannot be directory. I am therefore, obliged to reproduce Section 234 of the Constitution. It reads as follows:

“For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law, the Supreme Court shall be duly constituted if it consists of not less than Jive Justices of the Supreme Court.

*Provided that where the Supreme Court is sitting to consider an appeal brought under Section 233 (2) (5) or (c) of this Constitution, or to exercise its original jurisdiction in accordance with Section 232 of this Constitution the Court shall be constituted by seven Justices”.*

It is submitted in the Applicant’s written Address at paragraph 4.3.7 that the word “shall” in the first limb, may be directory because, it prescribes a minimum number of Justices, but no maximum number. That this means that the number of Justices, could be more than five (5). In other words, I take it by this submission, that it means the Panel of this Court in the first limb, is uncertain. That it could be six, seven or more and in effect, since the full compliment of this Court, is twenty-one (21) and as at present, there are fifteen (15) Justices, the entire fifteen Justices, can sit at once or at the same time for purposes of exercising jurisdiction conferred on it by Section 233 (1) of the Constitution. But that when it relates to the Proviso, only seven (7) Justices, shall constitute the Panel no more no less.

I think the law is settled that in the construction or interpretation of the Constitution or a Statute, where the words are plain, clear and

unambiguous, effect would be given to them in their ordinary and natural meaning, except where to do so, will result in absurdity. See the cases of *Lawal v. G. B. Ollivant* (1972) 3 S.C. 124 @ 137; *Toriola v. Williams* (1982) 7 S.C. 27@ 46; *Sunmonu v. Oladokun* (1996) 8 NWLR (Pt.467) 387 @ 419, 422 and recently, *Chief Nnonye v. Anyichie* (2005) 1 SCNJ. B 306 @ 316; (2005) 1 S.C. (Pt. II) 96 @ 102. In other words, where an interpretation, will result in defeating the object of the Statute or Constitution, the Court, would not lend its weight to such an interpretation. That the language of the Statute or Constitution, must not be stretched, to defeat the aim of the Statute or Constitution. See the case of *Ansaldo Nig. Ltd, v. National Provident Fund Management Board* (1991) 2 NWLR (Pt.174) 392; (1991) 3 SCNJ. 22. Thus, any interpretation which appears to defeat the intention of the legislature, should and must be by-passed in favour of that which would further the object of the Statute or Constitution. See the case of *Idehen & 2 ors. v. Idehen & 2 ors.* (1996) NWLR (Pt.198) 382 @ 432-434, citing other cases therein; and (1991) 7 SCNJ. (Pt.II) 196.

In effect, and in my respectful view, or speaking for myself, if the interpretation given by the learned Senior Advocate for the Appellant, is upheld or adopted, by this Court, it will render the said Section 234 first limb, to a complete absurdity and ridiculous in the extreme. So, in effect, except in a matter where the said proviso applies or is applicable, the Panel of Justices in respect of the said first limb, will be fluid and uncertain. With the greatest respect, I do not think or subscribe to any suggestion that this is the intention of the draftsmen or lawmakers. That is why in the case of *Barnes v. Jarvis* (1953) 1 WLR 649 @ 652, Lord Goddard, C.J. stated that a certain amount of commonsense, must be applied in construing Statutes (I will add Constitution) and that the object of the Act, (Statute) has to be considered. As a matter of fact, in the case of *Olowu & 3 ors. v. Abolore & anor.* (1993) 6 SCNJ. (Pt.1) 1 @ 19 - 20, it was stated/held, that it is one of the cardinal rules of interpretation, to avoid judicial legislation and avoid making nonsense of a Statute and I also add (Constitution) in order not to defeat the manifest intention of the legislature.

In the case of *Curtis v. Stovin* (1889) 22 Q.B.D. 513. Bowen, L.J., as to the duty of the Court in the construction of Statutes, put the position, as follows:

B “The rules for the constructing of statute are very much like those of which apply to the construction of other documents especially as regards one crucial rule viz that if possible, the words of the Act of Parliament must be construed so as to give a sensible meaning to them.The words ought to be construed ut res magis valeat quam pereat”.

C [the underlining mine]

Note: The Latin maxim, means that the construction, should ensure that the intention of the legislature, is not frustrated or defeated.

Indeed and in fact in the case of *Savannah Bank (Nig.) Ltd, v. Ajilo & anor.* (1989) 1 NWLR (Pt.97) 305 @\_326; (1989) 1 SCN.J. 169, D Obaseki, JSC, stated inter alia, as follows:

E “..... where alternate construction are equally open that alternative is to be chosen which would be consistent with the smooth working of the system which the Statute (I will add the Constitution) E purports to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system - *Shannon Realities Ltd, v. Ville de St. Michel* (1924) Act. 185”.

F See also the case of *Esther Osho & 2 ors. v. Philips & 13 ors.* (1972) 4 S.C. 259; (1972) 3 S.C. (Reprint) 226. I therefore, with humility and respect, hold that Section 234 of the Constitution, is directory.

G It is settled that not every breach of a Statutory provision, renders an act void and that to be void, it must be not merely directory, but mandatory. See *Odua Investment Co. Ltd, v. Talabi* (1997) 10 NWLR (Pt.523) 1; (1997) 7 SCN.J. 600 @ 649 - per Ogbundare, JSC (of blessed memory). I have held that Section 234 of the Constitution, is directory and it is conceded by the Applicant that the first limb, is directory. Therefore, since I have found as a fact and have held that the matter before this H Court constituted of a Panel of five (5) Justices was not a question/issue of interpretation once again of Section 251 (1) (d) of the Constitution, I therefore hold, that this application, is grossly misconceived and it fails. This is because, that Panel, was competent and had the jurisdiction to



hear and determine it as it did. The said appeal, in my respectful view, arose from the applicant's challenge of the jurisdiction of the Lagos High Court by virtue of Section 251 (1) (d) which this Court (full court) had decided on at least, two different decisions/occasions.

I had indicated hereinabove, that I will come to my reason for B stating or holding, that this application, is brought in very bad faith. From the Records, when the Plaintiff/Appellant instituted the action in the Federal High Court, the Applicant, through his learned counsel, raised a Preliminary Objection that that court, had no jurisdiction to entertain, hear C and determine the matter. The Objection, was sustained/upheld. That court, then transferred the suit, to the Lagos State High Court for hearing and determination. Soon after the transfer and the suit, was registered at the said High Court of Lagos, the Applicant, filed another Preliminary D Objection contending, that by virtue of Section 251 (1) (d) of the Constitution, the Lagos High Court has no jurisdiction to entertain and hear the matter. It made a U-turn so to say and "ate its words" by insisting that it was the very Federal High Court it had said lacked the jurisdiction to entertain and hear the action, that had/has jurisdiction to entertain, hear E and determine the suit. However, the said High Court presided over by Alogba, J. in his Ruling of 12<sup>th</sup> January, 2005, rejected the contention and held that it/he had/has the jurisdiction to entertain and hear the action.

The Applicant, then appealed against the said Ruling of Alogba, J., F to the Court of Appeal, Lagos Division. That court - per Oguntade, JCA (as he then was) on 16<sup>th</sup> September, 2002, allowed the appeal and held that the Lagos State High Court, did not have the jurisdiction to entertain and hear the suit/action. It then struck out the action and as a result, the G Appellant/Respondent, appealed to this Court. This Court in its Judgment of 5<sup>th</sup> May, 2006, held that by virtue of Section 251 (1) (d) of the Constitution, that the High Court of Lagos, had/has the jurisdiction to entertain and hear the action. The said appeal and decision of this Court is reported in (2006) 10 NWLR (Pt.989) 655; (2006) 5 SCNJ. 31; (2006) 5 S.C. H (Pt.1) 52; (2006) 6 SCM (Supreme Court Monthly) 25; (2006) 26 NSCQR 1240 and (2006) All FWLR (Pt.320) 1008.

This Court, then remitted the action to the High Court of Lagos

State, to be tried on its merits. This was nearly, nine (9) years after it was filed at the said Federal High Court. It is most disgusting to me and perhaps all fair minded persons, that that High Court, up till now, has not been able to proceed with the said hearing because of the instant application. I note that the Applicant, did not file any pleadings in any of the two trial courts. Instead of the Applicant allowing the action to be heard by the Lagos State High Court (and who knows whether it should have won on the merits), but to frustrate the hearing of the said action, it has brought the instant application to further delay the hearing and determination of an action filed in 1998, for reasons best known to it. Or is it afraid or apprehensive that it may lose the case? I or one may ask. Even if so, if that action had been heard and determined in 2001 in the High Court which the Applicant, originally stated had jurisdiction to entertain and hear it, I believe that whichever way the decision may have gone, the suit by now, (all things being equal), should or may have finally been disposed by this Court if any losing party, appealed finally to it. But for the Applicant, the hearing of the suit, must never take off. It must continue to take all the courts including this Court, for a ride so to say. Now, or this time around, it is that this Court, must be constituted by a Panel of Seven (7) Justices or perhaps by all the Justices of this Court, in order to have “a full house” to hear it. I had noted in this Judgment that when the Panel of five (5) Justices, sat to hear the said appeal, the Applicant, never objected by filing or raising a Preliminary Objection, that the Court as constituted, lacked the jurisdiction to entertain the appeal.

In fact, (I have read the said Judgment of 5<sup>th</sup> May, 2006), Pats-Acholonu, JSC (of blessed memory) in apparent disgust, had this to say in his lead Judgment, inter alia, as follows:

“..... *The transaction that gave rise to the dispute was a simple contract which the parties readily understood what it was all about. There is something seemingly obscene and unethical in this case. It is instructive that the respondent before it filed the preliminary objection in the two courts seised of the matter at one time or the other, did not file any pleadings. The respondent did not provide the High Court with the opportunity to see or read its pleadings so as to have a proper birds eye view*

*of the real issues in controversy. Therefore this court has not been enabled to know what in the financial world or in law the respondent can be described as. It therefore boils down to the case of a mere customer, which is a financial institution and a body that accepts loans from individuals to do business. The respondent more or less strove to convert the court to a vaudeville of legal playhouse by using or relying and embarking on all sorts of subtleties and merry-go-round proceedings to circumvent the real issue before the High Court which is, whether or not the appellant's money is locked up in the respondent's company. The legal gymnastics employed by the respondent to have a roller coaster ride and its seeking to use the processes of the court to put the appellant in the woods though ingenious it may appear, is to my mind both unethical, inconsiderate as it failed to respond to the appellant's case or attend to the matter in issue. If the appellant cannot sue in the Federal High Court and at the same time cannot equally sue in the Lagos High Court, which court would the action be then commenced. It is a case of "such welcome and unwelcome news at once. It is too hard to reconcile"*

*[Shakespeare (in Macbeth)].*

*There comes a time in the difficult but challenging art or science of adjudication and administration of justice when a court is faced with consideration of pure justice, and of course abstract law that seeks to shroud itself in concepts, dreariness and the theory of law. It is then that a court should dig deep into its reservoir of knowledge of its forensic arsenal borne out of experience and mete out justice that can easily be understood and appreciated by the common man in the street and the litigant. The courts are the products of the society. They are established to solve and give remedies to people who complain of having been short-changed or wronged somehow. Therefore it should not allow undue technicalities likely to wreak havoc in the other party's case to be introduced in an otherwise situations that do not admit of cloudiness or woolliness"*

*[the underlining mine]*

Yet, in spite of this "stricture", the Applicant, with the team of its lawyers/counsel, are at it again. It is most unfortunate to say the least. I say no more about this application. My answer to the said lone issue of

the parties, is in the Negative.

In conclusion, I had the privilege of reading before now, the lead Judgment of my learned brother, Tabai, JSC. From the foregoing and his fuller reasons and conclusion, I too, hold that the said Judgment of this Court by the Panel of five (5) Justices, was and is still, constitutional. I too, dismiss the application which with respect, is unmeritorious. It is in fact in my respectful but firm view, an abuse of the process of this Court and this should not be encouraged by the Court. I abide by the consequential order in respect of costs although, but for the Rules of this Court this appeal, should have attracted substantial costs against the Applicant. The sooner the said Rules are urgently reviewed by the CJN. the better.

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D **MUHAMMAD JSC**

My Learned brother, Tabai, JSC, afforded me with a draft copy of the ruling just delivered. I am in complete agreement with my brother Tabai, JSC in his conclusion that the application is very unmeritorious which must be dismissed.

The application before this court contains the following reliefs:

1. *“SETTING ASIDE the judgment of this Honourable Court delivered in this appeal on Friday 5<sup>th</sup> May, 2006,*
2. *RE-HEARING of the appeal by a reconstituted panel of Justices of this Honourable Court consisting of 7 (seven) Honourable Justices AND for such further or other order(s) as this Honourable Court may deem fit to make in the circumstances.”*

The grounds upon which the reliefs were premised are as follows:

- i. *“The appeal giving rise to the said judgment relates to a decision of the court of Appeal in a civil matter on a question as to the interpretation and application of section 251(1)(d) of the Constitution of the Federal Republic of Nigeria, 1999 (“the 1999 Constitution”).*
- ii. *By virtue of section 234 of the 1999 constitution appeals requiring the interpretation and application of the Constitution by this Honourable Court.*
- iii. *The panel of the Supreme Court that heard this appeal on 6<sup>th</sup>*

*February, 2006 was made up of only 5 (five) learned Justices.*

*iv. The Honourable Court was not properly constituted to hear the appeal and thus lacked the jurisdiction to do so or to deliver a judgment thereon.*

*v. After the hearing of the appeal but prior to the delivery of B judgment of this Honourable Court the Respondent/Applicant brought an application dated and filed on 17<sup>th</sup> March, 2006, seeking a re-hearing of the appeal by a reconstituted 7 (seven) man panel of learned Justices of this Honourable Court.*

*vi. The application referred to in paragraph 5 above was not heard C before judgment was delivered and remains pending.*

*vii. The delivery of the court's judgment without hearing the pending application amounted to a determination and refusal of the said application without granting the Respondent a fair hearing or any hearing D at all contrary to section 36 of the 1999 Constitution.*

*viii. The judgment of this Honourable Court delivered on 5<sup>th</sup> May, 2006 is a nullity being one in which the appeal was heard without the fulfillment of a condition precedent to the exercise of jurisdiction and E which also violates the principles of fair-hearing.*

*ix. This Honourable Court has the jurisdiction to set aside its own judgment where it is found to be a nullity.*

*x. Jurisdiction being a sine qua non for the existence of the power F to adjudicate can be raised at any time."*

The motion was moved by the learned Senior Advocate for the applicant Mr. Akoni, on the 17<sup>th</sup> day of April, 2007, and replied by Mr. Ajayi on behalf of the respondent. Written addresses in respect of the motion were earlier on filed and exchanged by the parties with the applicant filing a reply on points of law. The motion was supported by a 14 paragraph affidavit and an Exhibit. G

The applicant's counsel set out in his address one issue for determination. It reads as follows: H

*"Whether given the circumstances of this case the Supreme Court ought to set aside its judgment delivered on 5<sup>th</sup> May, 2006 and re-hear the appeal."*

The respondent on its part set out the following issue for determination:

*“Whether or not the judgment delivered by the Supreme Court in this appeal on the 5<sup>th</sup> May, 2006 should be set aside and the appeal re-heard?”*

My learned brother, in his leading Ruling, has set out in a summary nature, the submissions of the respective counsel. I do not think I should repeat same.

It is a matter well settled in this country that the Supreme Court generally, enjoys finality of its decisions. Except for some clerical mistakes or accidental slips or omissions, it seldom re-visits its decisions by way of review, variation or setting aside. For instance, the court in the case of *Ibero v. Obioha* (1994) 1 SCNJ 44, after it had finally decided an appeal before it, the respondent in the appeal filed a motion seeking amongst other things a review of the said judgment. One of the grounds in support of his application challenged the jurisdiction of the Supreme Court to pronounce on the correctness VEL NON of the decision of the Divisional Officer’s court, Exhibit K. In dismissing the application, the unanimous decision of the Court held, per Belgore, JSC (as he then was) (pages 52 -53) as follows:

*“The purpose of this application is clear; it is an appeal cloaked in the guise of a motion. From the wordings of the motion and the grounds for bringing it, it is manifestly clear that the validity of the judgment of this court as given on 26<sup>th</sup> February, 1993 is being challenged..... Once the Supreme Court has entered judgment in a case, that decision is final and will remain so for ever. The law may in future be amended to affect future issues on the same subject, but for case decided, that is the end of the matter.”*

Order 8 Rule 16 of the Supreme Court Rules (as amended in 1999) is very clear and unambiguous on the issue of non-reviewing, reversal or setting aside of its earlier order or judgment. It provides:

*“16. The court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so*

*as to give effect to its meaning or intention. A judgment or order shall not be varied when it correctly represents what the Court decided nor shall the operative and substantive part of it be varied and a different form substituted.”*

That apart, the Supreme Court as is the practice in other superior B Courts of Record possesses inherent power to set aside its judgment in appropriate cases. Such cases are as follows:

- i When the judgment is obtained by fraud or deceit.*
- ii When the judgment is a nullity such as when the court itself was C not competent; or*
- iii. When the court was misled into giving judgment under a mistaken belief that the parties had consented to it; or*
- iv. Where judgment was given in the absence of jurisdiction; or*
- v. Where the procedure adopted was such as to deprive the deci- D sion or judgment of the character of a legitimate adjudication*

See generally: Aloa v. ACB Ltd (2000) 9 NWLR (Pt.672) 264; Madukolu & Ors v. Nkemdilim (1962) 2 SCNLR 341; Igwe v. Kalu (2002) 14 NWLR (Pt.787) 435; Chime v.Ude (1996) 7 NWLR (Pt.461) 379; E Ogbu v. Urum (1981) Vol / 12 NSCC 81; Sken Consult v. Ukey (1981) Vol. 12 NSCC 1; Obimonure v. Erinosho (1966) ANLR, 245.

The applicant has prayed this court to invoke its inherent jurisdiction to set aside its earlier judgment of 5<sup>th</sup> May, 2006 as it did not fulfill a F condition precedent to the exercise of jurisdiction and rendered it a nullity. It was submitted that this is one of the circumstances in which a court has inherent powers to set aside its own decision. Learned SAN for the applicant enumerated the circumstances in which a decision may be G declared a nullity. He stated further that what made the earlier judgment of this court delivered on the 5<sup>th</sup> May, 2006 to be a nullity are:

1. the judgment was given without jurisdiction (Grounds I - IV) of the applicant’s Motion on Notice;
2. the applicant was denied its Constitutionally guaranteed funda- H mental right to fair hearing in the proceedings prior to the delivery of the judgment, (grounds (v - viii) of the Motion on Notice).

It was the contention of learned SAN for the applicant that the

basis upon which the applicant contended that the said judgment was delivered without jurisdiction is because this Honourable Court was not properly constituted having regard to the number of the members on the Bench who heard and determined the appeal contrary to the provision of section 234 of the Constitution of the Federal Republic of Nigeria, 1999.

I have had a look at the proceedings which led to the judgment delivered on the 5<sup>th</sup> of May, 2006 and the judgment itself. I also had a look at the Motion on Notice which was filed on 17<sup>th</sup> March, 2006. My findings are that:

a) the appeal on which the said judgment of 5<sup>th</sup> May, 2006, was delivered was reserved for judgment on the 6<sup>th</sup> of February, 2006.

b) A five man panel of the Supreme Court Justices sat on the appeal and came-up with a unanimous decision.

c) The effect of the judgment of 5<sup>th</sup> May, 2006 is that this court allowed the appeal and remitted the matter to the Lagos High Court for proper adjudication.

d) The motion on notice, which sought to arrest the delivery of the judgment of 5<sup>th</sup> May, 2006, was filed on the 17<sup>th</sup> of March, 2006, barely eleven days after judgment was reserved.

e) That according to the learned SAN for the applicant, it was on the date of delivery of the judgment i.e. on the 5<sup>th</sup> day of May, 2006 that the learned counsel for the respondent/applicant brought to the attention of the Justices on that panel on the existence of that Motion filed on 17<sup>th</sup> March, 2006.

f) That the panel of the Justices who sat to deliver the judgment refused, rightly in my view, to hear and determine the application before delivering the judgment.

The contention of learned SAN for the applicant is that the failure of the Court to hear and determine the application of 17<sup>th</sup> March, 2006 rendered the judgment of 5<sup>th</sup> May, 2006 null and void. He relied on a number of decided authorities including Mobil (Nig.) Ltd. & Anor v. Minikpo & Ors (2003) 18 NWLR (Pt.852) 346 at 413; Amadi v. Thomas Aplin & Co. Ltd. (1972) 4SC 228.

I commend the learned SAN for citing plethora of cases on the



issue of what confer jurisdiction on a Court of Law. Perhaps what needs to be reiterated and in order to remind the learned SAN for the applicant is that as at the time the panel of this court sat to deliver the judgment of 5<sup>th</sup> May, 2006, the learned Justices were of the correct impression, which I too believe same to be so, that they had the jurisdiction to deliver that judgment. The parties, the subject matter of dispute were all properly before the Court. None of the parties during the process of hearing the appeal, objected to the jurisdiction of the court. The panel in accordance with the requirement of the Constitution, sat in the required number of five Justices to consider the appeal. (I shall come back to the issue of Coram later in this judgment).

Again, although it is the general principle of the law that all applications should be disposed of before hearing of an appeal, it is clear, as well as admitted by the applicant's counsel that the application of 17<sup>th</sup> March, 2006 was filed when the appeal was already reserved for judgment. This to me, was a clever way of arresting the delivery of the judgment which was already written and to be delivered on the very day the applicant wanted that motion to be taken.

Learned SAN for the applicant, I believe, knows it very well that courts do not make orders in vain and they are meant to be obeyed. See: *NNSC Ltd. V. Alh. Sabana & Co. Ltd.* (1988) 2 NWLR (Pt.74) 23. It was ordered on the 6<sup>th</sup> day of February, 2006 that judgment would be delivered on 5<sup>th</sup> May, 2006. Thus, unless there were exceptional circumstances which could make the delivery of that judgment on that date impossible the court was under a duty to deliver the judgment on the day announced in open court. Thus, filing an application in between the date when judgment was reserved and the date of delivery, which application had the effect of arresting the delivery of that judgment cannot, in my view, be an exceptional circumstances. I find it difficult to agree with the learned SAN for the applicant that the judgment of 5<sup>th</sup> May, 2006 was delivered without jurisdiction.

On the issue of the constitution of the panel of members that sat and decided the appeal on which judgment of 5<sup>th</sup> May, 2006 was delivered, the learned SAN for the appellant argued that it was unconstitu-

tional for the 5 (five) Justices Panel to hear the appeal on 6<sup>th</sup> February, 2006 and that the subsequent judgment of 5<sup>th</sup> May, 2006 was for that reason null and void.

Let me start by setting out the provisions of section 234 of the  
B 1999 Constitution:

*“234: For the purpose of exercising any jurisdiction conferred upon it by the Constitution or any law, the Supreme Court shall be duly constituted if it consists of not less than five Justices of the Supreme Court:*

*Provided that where the Supreme Court is sitting to consider an*  
C *appeal brought under section 233 (2)(b) or (c) of this Constitution, or to exercise its original jurisdiction in accordance with section 232 of this Constitution, the Court shall be constituted by seven justices.”*

*(underlining supplied for emphasis)*

D Thus, by law and practice, it is not necessary to have the full compliment of the Justices of this court all sitting for the court to be duly constituted to entertain appeals brought before it. A panel of not less than five (5) justices will make the court duly constituted and can hear and  
E determine any matter brought to it in its appellate jurisdiction. A panel of seven (7) Justices will only be required necessarily in some instances. (I shall come to this later).

The central issue which arose for resolution before the panel that  
F determined the appeal which was heard on 6<sup>th</sup> February, 2006 was on the interpretation and application of section 251 (1) (d) of the 1999 Constitution. This, according to the learned SAN for the applicant, could only be entertained by a panel of seven (7) Justices of this court.

I already have set out earlier the provisions of section 234 of the  
G 1999 Constitution. Let me now take a look at section 233 of the same Constitution which deals with appeals brought as of right:

*“233 (2): An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases:*

H a) .....

b) *Decisions in any civil or criminal proceedings, on questions as to the interpretation or application of this Constitution*

c) *Decisions in any civil or criminal proceedings on questions as*

*to whether any of the provisions of chapter iv of this Constitution has been, is being or is likely to be, contravened in relation to any person.”*

*(underlining supplied for emphasis)*

The provision to section 234 of the Constitution relates to the interpretation or application of these provisions in addition to the provisions of section 232 of the Constitution. The requirement is that a panel consisting of seven (7) Justices shall be constituted to hear any appeal relating to these provisions.

Section 251 (i) (d) of the Constitution falls under section 233 (2) (b) in the sense that it is a section of the constitution whose interpretation or application is sought. The interpretation of the word “*shall*” in an enactment does not always connote mandatoriness. It often connotes permissiveness or directory. Giving a community reading to section 234, the intention of the legislature, as argued by learned counsel for the respondent, is that when it comes to the interpretation or application of the constitution i.e. section 233, (2) (b) and (c) or breach of chapter iv of the Constitution, matters of complexity or sensitivity or of significant legal or public interest or that which involves novel or landmark issues of law may be heard by this court when it is constituted by seven (7) Justices. Other matters which are of normal occurrence and subjected to courts of law including this court almost on daily basis, should be treated by the ordinary panel constituted by five (5) Justices of this court. The interpretation and application of section 251 (i) (d) of the Constitution inclusive. In the case of *Adelekan v. Ecu-line NV* (2006) 5 SCNJ; 137; (2006) 5 SC (Pt.11) 32) this court gave the interpretation of section 251 of the Constitution. The court was constituted by a panel of five (5) Justices. See also: *Societe Bancaire (Nig.) Ltd, v. Margarida Salvado De Iluch* (2004) 12 SCNJ 93; *Alidu Adah v. National Youth Service Corps* (2004) 7 SCNJ 374; *NEPA v. Edeghero & Ors* (2002) 12 SCJN 173; *Odutola v. University of Ilorin* (2004) 12 SCNJ: 236; *Federal Republic of Nigeria v. Olloh* (2002) 4 SCNJ 423. In all the above cases the interpretation of a provision of the Constitution was involved and this court sat in a Coram of five (5) Justices. Thus, in order for this court to ensure coherence, stability and smooth running of the judicial system, some amount of consis-

tency, which does not derogate from the Constitution, has to be maintained. This is in conformity with what this court once said in the case of *Tukur v. Government of Gongola State* (1989) 4 NWLR (Pt.117) 517.

“.....since the decision of this court in *Nafiu Rabi'u v. the State* (1981) 2 NCLR 293, this court has opted for the principle of Constitution often expressed in the Latin Maxim *UT RES MAG IS VALEAT QUAM PEREAT*. This means that even if alternative constructions are equally open, I shall opt for that alternative which is to be consistent with the smooth working of the system which the Constitution, read as a whole, has set out to regulate, and so the alternative which will disrupt the smooth development of the system is to be rejected.”

Certainly, if this court will throw itself into the straight jacket of attempting to form a Coram of the full court of seven on almost every conceivable issue, including those to be decided on same principles of law already decided by a lesser number than the full court (i.e. the normal Coram of five Justices) which of course is permitted by the Constitution, then I foresee difficulty arising as the smooth running of the machinery of Justice in this court may be disrupted one day. My brother Tabai, JSC, has listed a number of instances which will compel this court to sit in its full compliment in almost every case. I agree with him totally that if that happens, then that would make a panel of seven Justices of the Court to be the rule rather than the exception. It is not the intention of the Constitution to create a situation for the courts which is difficult to operate. It is not the desire of this court to unnecessarily overburden itself where alternative measures will ameliorate the conduct of affairs for the court.

For these and the fuller reasons of my brother, Tabai, JSC, I too find this application very unmeritorious. I hereby dismiss the application with N10,000.00 costs in favour of the respondent/applicant.

H