

SUPREME COURT OF NIGERIA
7TH MARCH, 2008 SC. 223/2002
CORAM:- N. TOBI, S. A. AKINTAN, M. MOHAMMED,
I. F. OGBUAGU, F. F. TABAI, JJSC

1. GROUP DANONE
2. SOCIETE DES EAUX DE VOLVIC APPELLANTS
AND
VOLTIC (NIGERIA) LIMITED RESPONDENT

APPEALS - Motions - Place of first filing - Court of Appeal Rules - That provides for making some applications first at the High Court - Permits that they be filed first at Court of Appeal - In special circumstances as in this case (H1)

CONTEMPT OF COURT - Order in issue - Validity of - Where the order is being challenged - Contempt matter should wait till issue of validity is settled - This is an exception to the principle - Of not hearing a contemnor till he purges himself of the contempt (H2)

MOTIONS - Appeals - Relief granted by Court of Appeal - Though not strictly as prayed - Circumstances of this matter - Necessitated the order that was made (H3)

MOTIONS - Appeals - Ex parte order of injunction - Was rightly set aside by Court of Appeal - After due consideration of both parties' interests (H4)

FACTS

Before the Federal High Court Lagos, the plaintiffs/appellants filed an action against the defendant/respondent. Appellants claimed inter alia, that respondent's table water named La Voltic constitutes an infringement of their registered trademark, named Volvic used for sale of their natural mineral water. Filed along with the writ of summons were a motion ex parte and a motion on notice, seeking for various orders including interim injunction restraining the respondent from infringing the said trademark. They sought to stop respondent from

producing/selling her La Voltic table water and that her premises be searched so as to take all the infringing products into possession of the Federal High Court. The prayers were granted and over 2,000 cartons of finished products among other things, were impounded from the respondent's premises. The respondent filed a motion praying that the ex parte order be discharged, but the trial court refused the application. Respondent filed a notice of appeal against this refusal.

Several other processes were filed by the parties including a contempt proceedings against respondent for disobeying the orders of the trial court. The trial court refused to hear all other pending applications before it including the appellants' motion on notice that contained similar prayers as those granted vide their motion ex parte. It decided rather to hear the contempt proceedings first. This special circumstance and danger of being convicted for contempt of court compelled respondent to file an application directly to the Court of appeal seeking that the trial court's said ex parte order be varied, suspended or stayed. The Court of Appeal granted the application and also made some orders that were not prayed for. Being dissatisfied, appellants have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(a) Whether the Court of Appeal was right in entertaining the Respondent's application for a suspension of the Orders of the Federal High Court when an application in identical terms and another application for committal were both pending before the Federal High Court.

(b) Whether the Court of Appeal was competent to set aside the Ruling of the Federal High Court delivered on the 3rd of May, 2002, refusing to discharge the Orders granted against the Respondent.

(c) Whether the Court of Appeal gave equal or any consideration to the interest of the Appellant as it did to the interest of the Respondent before setting aside the Ruling of the Federal High Court dated the 3rd of June, 2002 and if it did not, whether such failure, ought to vitiate the Ruling of the Court of Appeal.

HELD (Unanimously dismissing the appeal per **TABAI JSC**)
APPEALS - Motions - Place of first filing

1. This was the position the Respondent found itself when it filed the application of the 27th June, 2002, the subject matter of this appeal. Order 3 Rule 3(4) of the Court of Appeal Rules provides to the effect that where an Appellant is entitled under the Rules to make an application either at the Court of Appeal or at the High Court, he shall make the application first at the High Court; and that it is only in special circumstances where it is impossible or impracticable to make the application at the High Court that it can be made first at the Court of Appeal.

Now are there such special circumstances in this case to justify the application made at the Court of Appeal. I shall answer this question in the affirmative.

In these circumstances, the Respondent had no alternative but to seek refuge in the Court of Appeal by filing the motion which has given rise to this appeal on the 27th June, 2002. It was, as it were, a pre-emptive strike. And in view of the foregoing considerations, I hold that there existed very special circumstances which entitled the Respondent to file the application at the Court of Appeal. There was no question of abuse of judicial process as suggested by the Appellants. I hold that the application was appropriately presented at the Court of Appeal which was equally competent to entertain same. The result is that the 1st issue is resolved in favour of the Respondent. (pp. 1227 F/1230 C)

CONTEMPT OF COURT - Order in issue - Validity of

2. It is settled principle of law that, where a Defendant in a cause challenges the validity of an order directed against him either by way of an appeal or other application, he cannot be proceeded against for contempt of that order unless and until the issue of its legality is settled one way or the other. And this is particularly so where, as in this case, the order was procured by the Plaintiff behind his back. The principle is an exception to the general common law rule that a person in contempt in a cause cannot be heard in the cause unless he purges himself of the contempt. In *Onwochei Odogwu v. Otemeoku Odogwu* (1992) 2 NWLR (Part 225) 539 at 554, this Court, per Karibi-Whyte, JSC., re-emphasised this principle when he said:

"The common law rule precluding persons in disobedience of

orders of court against them from being heard in respect of matters which they stand in disobedience of is of respectable antiquity. The principle has however been whittled down by exceptions. Thus, where the order disobeyed was made without jurisdiction; or where the party in disobedience is challenging the validity of the order, the principle does not apply.

It has not been and indeed, it cannot be suggested that the challenge is merely frivolous. I have no doubt that given the peculiar facts and circumstances of the case the validity issue is not merely frivolous. To the Respondent, the issue is fundamental. And so pending the determination of this crucial issue of the validity or otherwise of the order, the Respondent cannot be tried for its breach, lest he would be tried and punished for contempt of an order which might turn out to be without any legal basis. On the principle of *Odogwu v. Odogwu* (supra), I am of the firm view that the Respondent's case falls within the exceptions to the general rule which bars a contemnor in a cause from being heard unless he purges himself of the contempt. The trial court had no choice but to follow this principle. (pp. 1228 A/1229 A)

Relief granted by Court of Appeal

3. With respect to the 2nd issue for determination, I agree that the relief granted is not strictly as prayed.

There was no prayer for setting aside the ruling of the trial court of 3rd of May, 2002; nor was there any prayer for stay of further proceedings. But it can be seen that the Ex-parte Order of the 28th February, 2002 is the pivot on which this appeal turns. Because of its excruciating effect the Respondent reacted by filing a number of applications and the appeal.

While the stay of execution ordered is consistent with the relief sought; the stay of proceedings ordered, though not specifically sought, was necessary to stave off the Respondent's trial for contempt.

In conclusion, I hold that the use of the words "set aside" notwithstanding, there is no substance in the complaint in ground one of the Notice of Appeal on which the second issue is predicated. I therefore resolve that issue in favour of the respondent. (pp. 1230 F/1231 A/D)

Ex parte order of injunction - Was rightly set aside

4. The appellants filed a 45 paragraph counter-affidavit and although in paragraphs 39, 41 and 42 thereof, they denied that the Respondent was likely to be paralysed by the order, it is nevertheless clear that the effect was the infliction of irreparable damage on the Respondent. I do not therefore agree that the Appellants' interest was not considered by the court below in granting the application. This issue is therefore also resolved against the Appellants. B

In conclusion I hold that this appeal lacks substance. The ends of justice would, no doubt, have been better served in this case if the Appellants had pursued the substantive claim by establishing the alleged infringement of their trade mark instead of using precious litigation time trying to defend and perpetuate a patently questionable ex-parte Order. The appeal is for the foregoing reasons dismissed for lack of merit. (p. 1232 D) C D

NOTABLE POINTS OF INTEREST**TOBI JSC**

1. When contempt proceedings should not be taken before curative proceedings E

I do not think the Federal High Court was right in holding that it would hear the committal proceedings first. Where there is a court process to cure an anticipated contempt, that court process must be taken and disposed of before the contempt proceedings. This is because if the court process to cure the anticipated contempt proceedings succeeds, then there is no contempt against the applicant. I would like to think that the application for variation of the ex-parte order of the Federal High Court was aimed at curing the anticipated contempt, and I expected the Federal High Court to take that application first. I should point out that at the time the appellants initiated contempt proceedings in Form 49, the respondent was not in contempt and this is the point counsel for the respondent made in the respondent's brief. Invocation of contempt proceedings is different from conviction and committal for contempt. I therefore cannot fault the Court of Appeal in the Order it made. (p. 1235 E) F G H

OGBUAGU JSC

2. Ex parte injunction should last for a very short time

An ex parte Injunction, is expected to last for a very short time more so, as the procedure, is likely to be abused by litigants. This is why, the order, must be very sparingly made and only when the circumstances are urgent and compelling, such as to leave the court with no other alternative in preventing an anticipated injury of a grave nature. (p. 1243 B)

3. Court not to pre-empt substantive suit in an interlocutory application

I have also observed that in the said Ruling of the trial court, the parties and the court, made comments/observations and pronouncements, relating to the very issue that will be determined after the hearing of the substantive suit. It has been stated and restated in a line of decided authorities, that lower courts, should not upon a Ruling, in an interlocutory application, make orders which have the effect of pre-judging or pre-empting the issues for adjudication in the substantive suit before trying the suit.

In other words, in an application for an injunction pending the determination of the substantive claim, the Judge, has a duty to ensure that he does not in the determination of the application, determine the same issue or issues that would arose for determination in the substantive suit. (p. 1243 E)

REPRESENTATION

Olukayode Dada For the Appellants

A.O. Eghobamien For the Respondents

CASES REFERRED TO

Mobil Oil Nig. Ltd v Assan (1995) 8 N.W.L.R. (Part 412)129

Attamah v Anglican Bishop of The Niger (1999) 12 N.W.L.R. (Part 633) 6 at 12

Effiom v Ironbar (2000) 3 NWLR (Part 650) 545 at 556

Akinbobola v Plisson Fisko (Nig) Ltd (1991) 1 N.W.L.R, (Part 167) 270 at 278

Kalio v Kalio (1975) 2 SC 15 at 20

Mortune & Alhaji Gambo (1979) 3-4 S.C. 54 @ 57

Omonuwa v. Attorney-General Bendel State (1983) 4 NCLR 237

Ojukwu v. Governor of Lagos State (1986) 3 NWLR (Pt.26) 29 @ 45

A.C.B. Ltd. & anor. v. Prince Awogboro & anor. (1996) 3 NWLR (Pt. 437) 383 at 385 B

Ifekwu & anor. v. Mgbako & 2 ors. (1990) 3 NWLR (pt. 140) 588

Akinsete v. Akindutire (1966) 1 ANLR 147 @ 148

Eboh v. Oki (1974) 1 S.C. 179 (a), 189-190

Akintami v. Onwumechili (1985) 1 NWLR (Pt 17) 68 @ 73 C

Dr. Saraki v. Kotoye (1990) 4 NWLR (Pt. 143) 144 @ 191

STATUTES & RULES REFERRED TO

Companies & Allied Matters Act s. 31 (4)

Constitution of the Federal Republic of Nigeria, 1979 s. 220 (1) (g) D
(ii)

Court of Appeal Act ss. 16, 18

Trade Marks Act, Cap. 436, Laws of the Federation of Nigeria, 1990
ss. 2 (1), 3, 5 (1), 18 (7) & 33

Court of Appeal Rules, 1981 O. 3 r. 3 (4) E

LEAD JUDGMENT BY TABAI JSC

This is an appeal against the Ruling of the Court of Appeal, Lagos Division, on the 18th of July 2002. The ruling itself was sequel F
to an application therein dated and filed on the 27th of June 2002.
The motion prayed for:

(i) An order suspending varying or staying in terms set forth in the schedule hereto the Ex parte Orders granted by the Federal High Court (Honourable Justice Olotu. J.,) on 28th of February 2002 in G
favour of (1) Group Danone (2) Societe Des Eaus De Volvic.

(ii) An Order of Stay of Proceedings pending the determination of the appeal filed against the ruling of Honourable Justice Olotu. J., delivered on 3rd June 2002.

(iii) Such further or other Orders as this Honourable Court H
may deem fit to make in the circumstances.

Schedule

Term of Variation Proposed

"Discharging, suspending or staying that part of the order of the Federal High Court restraining the Defendant from selling or offering for sale Table Water in packages containers bearing the word "La Voltic" pending the hearing of the appeal now pending before this Honourable Court."

B The grounds for the application were stated therein to be:

(a) That an appeal (which raises substantial issues) has been filed against the ruling of the learned trial judge refusing to discharge the order of Ex parte granted against the Applicants.

C (b) That the Applicant is likely to be completely paralysed and wound-up if the ex-parte injunction is not varied before the hearing of the appeal.

(c) That the failure of the trial judge to entertain the application for stay or vary the injunction effectively grants to the Plaintiff D reliefs III (c) in the Plaintiff's particulars of claim notwithstanding the fact that, that question whether La-Voltic is deceptively similar to Volvic is yet to be determined.

For thorough understanding of the issues involved, it is necessary to state the salient facts up to the filing of the motion. The suit was E initiated on the 26/2/2002, when the writ of summons was issued. Filed along the writ of summons was a 28 paragraph Statement of Claim. The reliefs claimed as contained in the writ of summons and paragraph 28 of the Statement of Claim are:-

F (i) A Declaration that the use of the words "La VOLTIC" by the Defendant constitutes an infringement of the Plaintiffs' registered trade mark "VOLVIC" No 39259 in Class 32.

(ii) A Declaration that the adoption of the words "La VOLTIC" by the Defendant for the sale of their table water amounts to a passing off of same as and for the Plaintiffs natural mineral water sold G under the trade mark "VOLVIC"

(iii) An Order of Perpetual Injunction restraining the Defendant, its servants, agents, Directors or privies and or any of them or otherwise howsoever from doing the following acts or any of them, H that is to say:

(a) Infringing the Plaintiffs' registered trademark "VOLVIC" No 39259 in Class 32.

(b) Passing off, attempting to pass off, causing enabling or as-

sisting others to pass off bottled table water not of the Plaintiffs' manufacture or merchandise as and for the goods of the Plaintiffs by the use or in connection therewith in the course of trade of the trademark "La VOLTIC" or such other similar mark either alone or in combination with other design logo or colourable imitation thereof as to be calculated to lead to the belief that natural mineral water not of the Plaintiffs' manufacture or merchandise are products of the Plaintiff. B

(c) Bottling, manufacturing, selling or offering for sale table water sold in packages, cans, bottles or containers bearing the word "La VOLTIC" so closely resembling the Plaintiffs' trademark "VOLVIC" as to be calculated to lead to the belief that natural mineral water which are not of the Plaintiffs' manufacture and/or merchandise are products of the Plaintiffs. C

(iv) An Order for delivery up for destruction or obliteration upon oath of all bottled water and packaging not of the Plaintiffs' manufacture or merchandise bearing the trademark "La VOLTIC" and all moulds, raw materials printing blocks and other contraptions and devices in the possession, custody and control of the Defendant, its agents, Directors, servants, privies or assigns or any of them the use of which will be in breach of the injunction prayed for herein and verification upon oath that the Defendant has no such articles so marked in its possession custody or control. D E

(v) Damages of N5,000,000.00 (Five Million Naira) against the Defendant for infringement and passing off the Plaintiffs' trademark VOLVIC No. 39529 in Class 32. F

(vi) Alternatively, an Account of Profits or an Order that the Defendant whether acting by itself its agents, servants, privies or assigns or any of them do make and serve on the Plaintiffs' solicitors an affidavit disclosing when to whom and in what quantity it has sold, sent or supplied, purchased or received any such bottled table water branded as "La VOLTIC" aforesaid exhibiting true copies of all documents in their possession power or custody or relating to the facts and matters herein disclosed and payment of all sums due on making such an affidavit. G H

(vii) Cost

(viii) Further or other reliefs.

Also filed on the same 26th February 2002 were a motion on Notice for an interlocutory Injunction and another Ex parte Motion for some interim orders. The Ex parte motion is very much in focus in this appeal. It sought the following reliefs:

1. An Order of Interim Injunction restraining the Defendant B whether acting by themselves their agents privies or otherwise howsoever and pending the determination of the Motion on Notice filed herewith or further from doing or authorising the doing of the following acts or any of them that is to say:

C (a) Infringing the 2nd Plaintiffs/Applicant's Registered Trade-mark No 39259, in Class 32 adopted by the Plaintiffs in the sale of their natural mineral water.

(b) Passing off or attempting to Pass Off, or causing, enabling D or assisting others to Pass Off table water not of the Plaintiffs/Applicants manufacture or merchandise as and for the goods of the Plaintiffs/Applicants, by the use or in connection therewith in the course of the trademark "La VOLTIC" or such other similar mark either alone or in connection with other design or logo as to be calculated to lead to the belief that table water not of the Plaintiffs/Applicants manufacture E or merchandise are products of the Plaintiffs/Applicants.

(c) Manufacturing, importing, selling or offering for sale table F water sole in packages, can or containers bearing the word "La VOLTIC" or closely resembling the Plaintiff/Applicants trademark water which are not of the Plaintiffs/Applicants manufacture and or merchandise are products of the Plaintiffs/Applicants.

2. An Order directing the Defendants herein whether jointly or severally, by themselves, their directors, servants, employees, agents, privies or otherwise however in charge of the Defendant's premises G to permit the bailiffs of this Honourable Court serving this Order accompanied by a Police Officer not below the rank of an Assistant Superintendent of Police including such other policemen not less than six (6) in number and two (2) solicitors from the firm of Messrs Chris Ogunbanjo & Co. (Solicitors to the Plaintiffs/Applicants) to enter upon H the premises of the said defendant on any working day from Monday to Friday from the hours of 8.00 a.m. and 6.00 p.m. for the purpose of:

(i) Inspecting, taking samples and inventory of the infringing

products including making copies of order forms invoices, bills delivery orders and receipts in the custody, power, possession or control of the Defendants, their directors, officers, servants or agents or any of them which constitutes evidence of the infringement or volume of trade or transactions in the products bearing the offending mark at their premises at (1) No 58 Onitiri Close, Surulere Lagos and (2) No 50 Coker Road Shasha, Lagos or at any other premises in the possession power or control of the Defendant. B

(ii) Taking into possession of the Federal High Court, Lagos for safe keeping quantities of the infringing products branded "La VOLTIC table water found in the Defendant's premises at (1) No 58 Onitiri Close Surulere, Lagos and (2) No 50 Coker Road Shasha Lagos or at any other premises aforesaid and all contraption contrivances chemicals and other devices by means of which the infringement is being perpetrated, pending the outcome of the motion on notice filed herewith or further order. C D

3. An Order granting liberty to the Defendant to apply that any orders made pursuant hereto or such parts thereof be set aside upon giving at least 48 hours notice thereof to the Applicants solicitors. E

4. An Order granting leave to the bailiff of this Honourable Court to the effect along with the service of this order, service of the Writ Summons, Statement of Claim and Motion on Notice and all other processes on the named Defendant. F

5. Such further Order or other Orders as this Honourable Court may deem fit to make in the circumstances.

The motion was supported by an affidavit of 33 paragraphs. This motion was heard on the 28th of February 2002 and all the prayers sought were granted. On the 4th of March 2002 execution was levied on the Defendant/Respondent at its premises both at (1) No 50 Coker Road, Shasha Lagos and (2) No 58 Akanbi Onitiri Close, Surulere Lagos. The inventories of the Respondent's properties removed or impounded are at pages 152 and 153 of the record. They included over 2,000 cartons of finished products. G H

In reaction thereto the Respondent filed a motion on the 11th of March 2002. By its ruling on the 3rd of May 2002, the motion was refused. The Respondent filed a Notice of Appeal against the ruling.

This was on the 6th June 2002. On that same day, it filed yet another motion. I shall give details of the reliefs sought in these applications and the appeal later in this judgment.

Meanwhile the Appellants commenced contempt proceedings against the Respondent for disobedience of the orders of the 28th
B February 2002. On the 20/6/02 the trial court fixed the hearing of the contempt proceedings for hearing on the 23/7/02. This decision prompted the filing of the application which ruling has given rise to this appeal. I shall come back to these later in this judgment.

C Briefs have been filed and exchanged. The Appellants' Brief was prepared by Juliet Mfon Chunu. But the Appellants' Reply Brief was prepared by Harrison Asiegbu. The Respondent's Brief was prepared by Osaro Eghobamien. In the Appellants' brief the following three issues for determination were identified:

D (a) Whether the Court of Appeal was right in entertaining the Respondent's application for a suspension of the Orders of the Federal High Court when an application in identical terms and another application for committal were both pending before the Federal High Court.

E (b) Whether the Court of Appeal was competent to set aside the Ruling of the Federal High Court delivered on the 3rd of May, 2002, refusing to discharge the Orders granted against the Respondent.

F (c) Whether the Court of Appeal gave equal or any consideration to the interest of the Appellant as it did to the interest of the Respondent before setting aside the Ruling of the Federal High Court dated the 3rd of June, 2002 and if it did not, whether such failure, ought to vitiate the Ruling of the Court of Appeal.

G The Respondent adopted the three issues as identified by the Appellant. On the first issue it was the contention of the Appellant that in view of the Respondent's motion of 6th June 2002 for variation of the Ex-parte Order of the 28th of February 2002 which was still pending at the Federal High Court, it was an abuse of the courts
H process for the Respondent to file the motion of the 6th of June 2002 since there were no exceptional circumstances to do so. Reliance was placed on *Carribean Trading And Fidelity Corporation v N.N.P.C. (1991) 6 NWLR (Part 197) 362*; *Commissioner of Police v*

Fasehun (1997) 6 N.W.L.R. (Part 507) 170 at 180; Tate Industry Plc v Devcom Merchant Bank Ltd (2000) 15 N.W.L.R. (Part 689) 158; Pavex international co. Ltd v I.B.W.A. (1994) 5 N.W.L.R. (Part 347) 685.

It was the Appellants' farther submission that in view of the pending committal proceedings against the Respondent for its breach of the trial court's orders the discretionary powers of the court could not avail him. In support of this submission the Appellant relied on Shugaba v U.B.N. PLC (1999) 11 N.W.L.R. Page 459, Mobil Oil Nig. Ltd v Assan (1995) 8 N.W.L.R. (Part 412) 129.

With respect to the second issue the Appellant referred to the relief sought as contained in the Notice of Appeal filed on the 6th of June 2002 and the relief granted by the Court of Appeal on the 18th of July 2002 and contended that by its ruling, the court had granted the substantive relief in the appeal even before the appeal was heard, submitting that a court should refrain from determining, at an interlocutory stage issues in the substantive matter. In support of this submission, the Appellant relied on University Press Ltd v I.K. Martins (NIG) LTD (2000) 4 N.W.L.R. (Part 654) 584; Tate Industry Plc v Devcom Merchant Bank Ltd (2000) 15 N.W.L.R. (Part 689) 164, Olaniyi v Aroyehun (1991) 5 NWLR (Part 194) 652; Shell Petroleum Dev. Co. (nig) Ltd v Omu (1998) 9 NWLR (Part 567) 672 at 682. The Appellant further contended that there were no exceptional circumstances warranting the grant of the relief sought in the Ruling submitting that the facts referred to by the Court of Appeal as special circumstances were not, in fact, special circumstances. According to the appellant as at the 18th of July 2002 the records of appeal had neither not been settled nor accepted by the Court of Appeal and submitted that the Court was therefore not competent to give the ruling.

The Appellants' arguments on the third issue were premised mainly on the competing rights of the parties and balance of convenience. They referred to sections 2(1) 3 and 5(1) of the Trademarks Act, the fact that they were the proprietors of the registered Trade Mark "VOLVIC" the fact that the Respondent's Trade Mark "La VOLTIC" had not been duly registered and submitted that while the Appellants have a proprietary interest in the trademark "VOLVIC" to

protect, the Respondent has neither legal nor equitable interest to protect. It was the Appellant's argument therefore that the Orders of the Federal High Court which protected their legal rights ought not to have been disturbed by the Court of Appeal. They referred to portions of the Ruling and contended that while the Court of Appeal considered the interests of the Respondent, it failed to consider the corresponding interest of the Appellants. It was further submitted that by the trial court's ruling on the 3rd of May 2002, the interim injunction of the 28th February 2002 had metamorphosed into an interlocutory injunction and that had the Court of Appeal given due consideration to this fact it would have exercised its discretion in the Appellant's favour. Reliance was placed on *Attamah v Anglican Bishop of The Niger* (1999) 12 N.W.L.R. (Part 633) 6 at 12 and *Effiom v Ironbar* (2000) 3 NWLR (Part 650) 545 at 556. Finally the Appellants urged that the appeal be allowed.

On the first issue the Respondent proffered the following arguments. The Respondent referred to the circumstances leading to the application of the 6th June 2002 and argued that the trial court's refusal to hear it and to take the committal proceedings constituted "special" circumstances to warrant the Lower Court's decision to entertain it. For this submission the Respondents relied on *Shodeinde v Registered Trustees* (1983) 2 SCNLR 284 and *Holman v Kigo* (1980) 8-11 SC 43. The Respondent had not yet been adjudged a contemnor and so the principle of a court not to exercise its discretion in favour of a contemnor does not apply in this case, it was contended.

As respects the second issue, it was the contention that although isolated passages in the ruling give the impression that the trial court's order was set aside, a reading of the entire Ruling shows that it only varied or suspended the trial Court's Order.

For the third issue of whether the Court of Appeal gave equal or any consideration to the corresponding interest of the Appellants as it did to that of the Respondent, it was the submission that the court did consider the affidavit evidence of both parties before the exercise of its discretion to grant the application and which discretion ought not to be interfered with by this court. It was urged that the appeal be dismissed.

In the Appellants' Reply Brief, the Appellants relying on the

provisions of Order 3 Rule 3(4) of the Court of Appeal Rules and the decision in *Commissioner of Police v Fasheun* (1997) 6 N.W.L.R (Part 507) 170 at 179 submitted that the Respondent failed to establish the special circumstances warranting the application to be made first at the Court of Appeal, contending that Respondent had no choice in the matter and was under a duty to file and move the application first at the High Court. On the second issue, it was the submission of the Appellants that a court can only grant a relief sought by an applicant and any order made in excess of the prayers in an application must be rejected and set aside. For this submission the Appellants relied on *Akinbobola v Plisson Fisko (Nig) Ltd* (1991) 1 N.W.L.R, (Part 167) 270 at 278 and *Kalio v Kalio* (1975) 2 SC 15 at 20.

I have considered the arguments of counsel for the parties as submitted in their respective briefs of argument. First it has to be stated clearly that this appeal has nothing to do with the substantive issue of whether the Respondent's trade mark or purported trade mark "LA VOLTIC" is an infringement of the Appellants' registered trade mark "VOLVIC". That is the issue for trial and determination at the High Court.

For this appeal, the first issue is whether having regard to the fact that the reliefs in the Respondent's motion of the 6th of June 2002 pending at the Federal High Court and those in the motion at the court below which has given birth to this appeal are identical, it was incompetent for the court below to entertain it. In bringing the application the Respondent relied on sections 16 and 18 of the Court of Appeal Act and Order 3 Rule 3(4) of the Court of Appeal Rules 1981. Order 3 Rule 3(4)

"Where an application may be made either to the High Court or to the Court of Appeal, the Appellant is enjoined by the provision of Order 3 Rule 3(4) of the Court of Appeal Rules 1981 (as amended) to make the application first to the High Court. He can only apply to the Court of Appeal without first applying to the High Court where there are special circumstances which make it impossible or impracticable to apply to the High Court,"

Learned counsel for the Appellant submitted that there were no special circumstances to warrant bringing the application first at the Court of Appeal. The submission of learned counsel for the Re-

spondent was that the contempt proceeding itself constituted the circumstances to justify the application at the Court of Appeal. For a proper perception of this issue it is necessary to critically examine the facts and circumstances leading to the filing of the application on the 27/6/2002.

B The whole problem of this appeal turns on the propriety or otherwise of the Ex-parte Order of the 28th of February 2002. In granting the order the learned trial judge had this to say:-

"I have carefully considered the application by the Court and the submissions made by the learned counsel in furtherance of it and I am of the view that the Plaintiff/Applicant has satisfied the Court as to the essential ingredients necessary for the grant of the application he is seeking. The Court is satisfied that the Plaintiff has prima facie shown that he has a right to protect. He has also shown that this application be heard and granted ex parte if the infringing products and related documents are to be preserved. He has also shown prima facie that his product VOLVIC is being infringed by the Defendant's product. I therefore grant his prayers for interim injunction and Anton Pillar as prayed in his motion paper dated and filed 26th February 2002."

The reliefs granted are a copy of the reliefs sought which I have reproduced. All the prayers were granted and they are at pages 74 - 77 of the record. For constraints of time and space, I need not reproduce them. They are, no doubt, far reaching and devastating. The Court of Appeal described them as draconian. They contain injunctive orders the total practical effect of which was the closing down of the Respondent's industry albeit "temporarily." And worse still, the orders include Anton Piller which authorised the Appellants to enter upon the Respondent's two premises and thereon take, seize and impound products and other properties of the Respondent. And all these orders were made and execution thereof authorised even before the Respondent became aware of the suit against it. The Respondent became aware of this suit only on the 4th of March 2002 when execution was levied on its two premises.

Under such excruciating circumstances, it was only natural for the Respondent to react by filing its motion of the 11th of March 2002. The motion prayed for:

"An Order setting aside, discharging and vacating forthwith on its entirety the order pronounced by this Honourable Court on the 28th February in favour of Group Danone and Societe Des Eaux De Volvic against Voltic Nigeria Limited."

The motion was supported by a 21 paragraph affidavit. In paragraphs 13, 14, 17, 18, 19 and 20 thereof the Respondent deposed to facts some of which were that it was a substantial entity with its products found in most prominent supermarkets and open markets in most states of Nigeria; that it was therefore unlikely to conceal or destroy evidence that would be subsequently required in the litigation to warrant the Antom Piller order; that it has substantially heavy investments in the industry with a monthly turn over of about N20,000,000.00 and with over 100 staff in its employment; and that unless the order of the 28th February 2002 was discharged it would suffer irreparable damages and even go into bankruptcy. Although the Appellants filed a 27 paragraph counter affidavit the above facts were not controverted.

Despite these circumstances the trial court refused the application by its ruling on the 3rd of May 2002. In apparent desperation, the Respondent filed both the Notice of Appeal against the ruling and a motion for variation of part of the controversial order of the 28th February 2002. Then came the decision of the trial court on the 20th June 2002 to try the Respondent for contempt of the self same order of the 28th February 2002 which validity the Respondent had doggedly challenged in the various applications and the appeal. The contempt proceedings were fixed for the 23/7/02 for hearing. (See page 250 of the record) ***This was the position the Respondent found itself when it filed the application of the 27th June, 2002, the subject matter of this appeal. Order 3 Rule 3(4) of the Court of Appeal Rules provides to the effect that where an Appellant is entitled under the Rules to make an application either at the Court of Appeal or at the High Court, he shall make the application first at the High Court; and that it is only in special circumstances where it is impossible or impracticable to make the application at the High Court that it can be made first at the Court of Appeal.***

Now are there such special circumstances in this case

to justify the application made at the Court of Appeal. I shall answer this question in the affirmative.

Firstly ***it is settled principle of law that, where a Defendant in a cause challenges the validity of an order directed against him either by way of an appeal or other application, he cannot be proceeded against for contempt of that order unless and until the issue of its legality is settled one way or the other. And this is particularly so where, as in this case, the order was procured by the Plaintiff behind his back. The principle is an exception to the general common law rule that a person in contempt in a cause cannot be heard in the cause unless he purges himself of the contempt. In Onwochei Odogwu v. Otemeoku Odogwu (1992) 2 NWLR (Part 225) 539 at 554, this Court, per Karibi-Whyte, JSC., re-emphasised this principle when he said:***

"The common law rule precluding persons in disobedience of orders of court against them from being heard in respect of matters which they stand in disobedience of is of respectable antiquity. The principle has however been whittled down by exceptions. Thus, where the order disobeyed was made without jurisdiction; or where the party in disobedience is challenging the validity of the order, the principle does not apply. See Gordon v Gordon & Gordon (1904) p. 163."
(Underlining mine)

In this case, the Respondent has demonstrably challenged the validity of the Ex-parte Order first by its application of the 11th of March 2002, the Notice of Appeal filed on the 6th of June against the ruling sequel thereto and the motion also of the 6th of June 2002. In the Notice of Appeal, the relief sought from the Court of Appeal is stated to be:-

"An Order setting aside the ruling of the Honourable Justice Olotu delivered on the 3rd of May and in its place discharging in its entirety the Order of Ex-parte and Anton Pillar order granted on the 28th day of February 2002."

And in the motion of the 6th of June 2002 the Respondent prayed for an order:

"Discharging or suspending that part of the Order of the Fed-

eral High Court restraining the Defendant from selling or offering for sale Table Water sold in packages, cans, containers bearing the word "LA VOLTIC" pending the hearing of the appeal filed herein."

The above shows clearly the Respondent's continued challenge of the validity of the Ex-parte Order of the 28th February 2002. **It has not been and indeed, it cannot be suggested that the challenge is merely frivolous. I have no doubt that given the peculiar facts and circumstances of the case the validity issue is not merely frivolous. To the Respondent, the issue is fundamental. And so pending the determination of this crucial issue of the validity or otherwise of the order, the Respondent cannot be tried for its breach, lest he would be tried and punished for contempt of an order which might turn out to be without any legal basis. On the principle of *Odogwu v. Odogwu* (supra), I am of the firm view that the Respondent's case falls within the exceptions to the general rule which bars a contemnor in a cause from being heard unless he purges himself of the contempt. The trial court had no choice but to follow this principle.**

However, on the 20th June 2002 there were, pending before the trial court the Appellants' application for contempt proceedings against the Respondent and the Respondent's application for discharge or suspension of part of the Order of the 28th February 2002. There was argument as to the application to be heard first. In its ruling the trial court said:-

"Following the analysis of the various exceptions to the general rule that a contemnor cannot be heard, it is clear that the defendant cannot be exempted from the general rule by being heard in respect of their application. This is because the application which they want to be heard does not come within any of the exceptions to the general rule as analysed herein. Therefore in the circumstances the defendants cannot be exempted from the general rule which bars a contemnor from being heard and to their application for an order to suspend or vary the terms of the order of this court cannot be heard now. The application of the Plaintiffs would therefore be taken. By agreement of the parties, case is adjourned to 23/7/2002 for Plaintiffs' application for contempt."

The Court having thus decided that the Respondent cannot be heard and having regard to the fact that the appeal which challenges the order cannot be heard before the 23/7/2002, the Respondent stood the imminent danger of being punished for breach of an Order which propriety it had, on good grounds, persistently challenged.

B The foregoing aptly demonstrates the precarious situation, the Respondent found itself. Implicit in the ruling itself is the fact that the Respondent was already adjudged to be guilty of the contempt. It was clear therefore that the Respondent would be imprisoned or
C otherwise inflicted with some form of punishment on the 23/7/2002 unless it earlier folded up its water industry, and all these before the determination of the ultimate issue of whether "La VOLTIC" infringes VOLVIC.

In these circumstances, the Respondent had no alternative but to seek refuge in the Court of Appeal by filing the motion which has given rise to this appeal on the 27th June, 2002. It was, as it were, a pre-emptive strike. And in view of the foregoing considerations, I hold that there existed very special circumstances which entitled the Respondent to file the application at the Court of Appeal. There was no question of abuse of judicial process as suggested by the Appellants. I hold that the application was appropriately presented at the Court of Appeal which was equally competent to entertain same. The result is that the 1st issue is resolved in favour of the Respondent.

With respect to the 2nd issue for determination, I agree that the relief granted is not strictly as prayed. The relief sought in the application which ruling has given rise to this appeal had been
G re-produced above. At the concluding part of its ruling the court below, Per Galadima JCA at page 351 said:-

*"In summary, all things considered this application succeeds and it is hereby allowed. Therefore the ruling of the lower court delivered on the 3/6/2002 refusing to discharge the orders granted
H against the applicant is set aside. In its place and order granting stay of execution of that order is hereby substituted Further proceedings before the lower court are stayed pending the determination of the appeal in this court."*

There was no prayer for setting aside the ruling of the trial court of 3rd of May, 2002; nor was there any prayer for stay of further proceedings. But it can be seen that the Ex-parte Order of the 28th February, 2002 is the pivot on which this appeal turns. Because of its excruciating effect the Respondent reacted by filing a number of applications and the appeal. And all the applications i.e. the one of the 11th of March 2002, 6th of June 2002, the Notice of Appeal filed on the 6th of June 2002 and the application which ruling has given rise to this appeal were directed either at vacating the Order in its entirety or otherwise varying, suspending or staying the said order. The ruling of the 3rd of May 2002 consolidated the Ex-parte Order complained of and the reaction of the Court of Appeal was therefore to render the order inoperative by staying its execution. And the order for stay of proceedings was apparently to stave off the Respondent's impending trial for contempt. Although the words setting aside were used the intention of the court is clear from the stay of execution and stay of proceeding ordered. ***While the stay of execution ordered is consistent with the relief sought; the stay of proceedings ordered, though not specifically sought, was necessary to stave off the Respondent's trial for contempt.***

In conclusion, I hold that the use of the words "set aside" notwithstanding, there is no substance in the complaint in ground one of the Notice of Appeal on which the second issue is predicated. I therefore resolve that issue in favour of the respondent.

As regards the 3rd issue for determination the complaints of the Appellants were on the competing rights of the parties and the issue of balance of convenience. It was their submission that the order of the 28th February 2002 which protected their legal rights ought not to have been disturbed. It has to be noted that the substantive issue for trial and determination is whether the Respondent's mark "La VOLTIC" infringes the Appellants' registered trade mark "VOLVIC". By the very nature of the case the trial would entail essentially a comparison of the two marks within the provisions of the Trade Marks Act and can be completed in a few days. If the Appellants succeed in establishing the alleged infringement they would be entitled to the

declarations and injunctions of the type granted and permanently too. But instead of pursuing their alleged infringement in the substantive case, the Appellants have been at great pains for the six years to perpetuate a questionable order. And there is nothing from the affidavit evidence to show that if the Respondent had been put on notice and the motion on notice heard a few days after the 28/2/02, the Appellants would have suffered greater damages than they suffered in the five months before the filing of the suit.

At page 350 of the record the court below reasoned as follows:

"The orders made by the lower court in the instant case are clear and they point to one direction only that is stoppage of the entire business of manufacturing of the Applicant's products."

The applicant has stated in paragraph 25 that they are likely to suffer irreparable damage and loss if their production in the same of "La VOLTIC" is halted albeit temporarily. They have given details.

The appellants filed a 45 paragraph counter-affidavit and although in paragraphs 39, 41 and 42 thereof, they denied that the Respondent was likely to be paralysed by the order, it is nevertheless clear that the effect was the infliction of irreparable damage on the Respondent. I do not therefore agree that the Appellants' interest was not considered by the court below in granting the application. This issue is therefore also resolved against the Appellants.

In conclusion I hold that this appeal lacks substance. The ends of justice would, no doubt, have been better served in this case if the Appellants had pursued the substantive claim by establishing the alleged infringement of their trade mark instead of using precious litigation time trying to defend and perpetuate a patently questionable ex-parte Order. The appeal is for the foregoing reasons dismissed for lack of merit.

I assess the costs of this appeal at N10, 000.00 in favour of the Respondent.

TOBI JSC

The quarrel in this matter is in respect of two trade marks. One

is Volvic. The other is La Voltic. Volvic is registered. This was in 1981. It wears registration No. 39259. Voltic is unregistered. As a matter of fact, Volvic is registered in over 200 countries. Societe Des Eaux de Volvic is the proprietor of Volvic. Voltic (Nigeria) Limited is the manufacturer of the table water, La Voltic. It is the seller too. So too Societe Des Eaux de Volvic as it relates to the table water Volvic. B

Voltic (Nigeria) Limited filed an application dated 30th March, 2001 for the registration of the trade mark "La Voltic". The application was acknowledged by the Registrar of Trade Marks on a letter of acceptance dated 6th April, 2001. The appellants, realizing that its trade mark, Volvic was similar to "La Voltic", applied to the Registrar of the Corporate Affairs Commission to exercise its powers under section 31(4) of the Companies and Allied Matters Act to direct the respondent, Voltic (Nigeria) Limited, to change its name. The appellants also applied to the Registrar of Trade Marks to exercise its powers under section 18(7) of the Trade Marks Act, Cap. 436, Laws of the Federation of Nigeria, 1990 to withdraw its acceptance of the registration of Trade Mark in the exercise of his powers under the Trade Marks Act, vide letter dated 28th January, 2002. The 28th January, 2002 letter gave the respondent a period of one month within which to appeal against the withdrawal. The Registrar of Trade Marks withdrew the letter of acceptance issued to the parent company, Voltic International Inc., in respect of the application, Voltic TP No 41917/99. C D E

Neither the respondent nor Voltic International Inc., appealed against the withdrawal. The respondent continued to manufacture and sell its bottled table water under the trade mark "La Votic". Appellants filed an action at the Federal High Court for trade mark infringement. They claimed declaratory and injunctive reliefs. F G

In the interim, the appellants applied for and obtained ex-parte, an interim injunction/Anton Piller order against the respondent. That was on 28th February 2002. The respondent's application for the discharge of the ex-parte order was refused by the court in its 3rd June, 2002 Ruling. In an appeal to the Court of Appeal, that court set aside the Ruling of the Federal High Court and ordered a stay of proceedings at the Federal High Court. H

Galadima. JCA, ordered at page 351 of the Record;

"In summary, all things considered, this application succeeds and it is hereby allowed. Therefore, the ruling of the lower court delivered on 3/6/2002 refusing to discharge the orders granted against the applicant is set aside. In its place an order granting stay of execution of that order is hereby substituted on the following conditions:

B 1. *The Appellants/Applicants shall keep proper account of goods manufactured and sold.*

 2. *The Appellants/Applicants shall give an undertaking in damages in the event that the order is made unjust and it is wrongly stayed.*

C 3. *Furthermore, the Appellants/Applicants shall give undertaking to prosecute the appeal with diligence with liberty reserved to the respondent to apply to this Court to discharge the orders in case the appeal should not be prosecuted with due diligence as ordered.*

D 4. *Further proceedings before the lower court are stayed pending the determination of the appeal in this court."*

 This appeal is against the above order of the Court of Appeal. Briefs were filed and duly exchanged. Appellants filed a Reply Brief the appellant's formulated three issues for determination. The respondent accepted the issues formulated by the appellants.

 The issue in this appeal is whether it was proper for the respondent to file the same application in the Court of Appeal when it was still pending before the Federal High Court. It is the submission of counsel for the appellants that it is an abuse of the court process to do so. He submitted that the proper order that the Court of Appeal should have made was to strike out the application before it being an abuse of court process. It is the submission of counsel for the respondent that the Court of Appeal was in perfect order to have entertained the 27th January 2002 application, notwithstanding the pending application before the Federal High Court. Learned counsel for the respondent argued that failure on the part of the Federal High Court to hear the application for variation of its order is sufficient special circumstances, permitting the respondent to proceed to the Court of Appeal. He argued that the application for variation of the order of the Federal High Court ought to have been taken first before that for contempt in Form 49.

 Let me get the picture straight. This is the scenario and I pick it

from the Appellants Brief because it is very well presented there.

"On 3rd June 2002 when the suit came up before the Federal High Court, the court noted that there were pending before it, the following motions:

(i) motion for interlocutory injunction dated 18th February, 2002 B

(ii) Committal proceedings filed on 26th March, 2002 and 22nd April, 2002 and

(iii) the Respondent's application for a variation of the ex-parte order dated 6th June 2002. C

After hearing arguments from both sides on the issue of priority of the hearing of the pending applications, the Federal High Court held that it would hear the pending applications in the following order:

(ii) Committal proceedings filed on 26th March, 2002 and 22nd April, 2002. D

(iii) The Respondent's application for a variation of the ex-parte order dated 6th June 2002; and (i) motion for interlocutory injunction dated 26th February, 2002.

The court thereafter adjourned the suit to the 20th of June 2002 for the hearing of (ii) (See pages 246, 318 to 334 of the Record)." E

I do not think the Federal High Court was right in holding that it would hear the committal proceedings first. Where there is a court process to cure an anticipated contempt, that court process must be taken and disposed of before the contempt proceedings. This is because if the court process to cure the anticipated contempt proceedings succeeds, then there is no contempt against the applicant. I would like to think that the application for variation of the ex-parte order of the Federal High Court was aimed at curing the anticipated contempt, and I expected the Federal High Court to take that application first. I should point out that at the time the appellants initiated contempt proceedings in Form 49, the respondent was not in contempt and this is the point counsel for the respondent made in the respondent's brief. Invocation of contempt proceedings is different from conviction and committal for contempt. I therefore cannot fault the Court of Appeal in the Order it made. F G H

Issue No 2 is that the Court of Appeal was wrong in granting orders in an interlocutory application which it ought to have granted

as substantive relief on appeal In its Ruling of 18th July, 2002, the Court of Appeal gave the following order at page 281 of the Record:

"An order setting aside the ruling of the Honourable Justice Olotu delivered on 3rd June 2002 and in its place discharging in its entirety the order of Ex parte Anton Piller Order granted on the 28th

B

of February 2002"

I do not see in the above order similar to the substantive relief. The order of the court was not made in vacuo but in relation and in the context of the prayer sought, and should be so construed. The relief sought by the respondent was in respect of "the ex-parte orders granted by the Federal High Court (Honourable Justice Olotu, J) on 28/2/2002 in favour of (1) Group Danone. (2) Societe Des Eaux De Volvic" (See Prayer 1 of the application of the respondent). And so, the Court of Appeal set aside the ex-parte order of the Federal High Court. At the end of the case and at the level of granting substantive relief in the event of the respondent's case succeeding, the court will not grant any ex-parte relief because there wilt be none at that final stage. At that stage relief No (iii) for an order of perpetual injunction will be granted.

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It is in the light of the above reasons and the fuller reasons given by my learned brother, Tabai, JSC, that I too dismiss the appeal. I abide by his orders as to costs.

F

AKINTAN JSC

The dispute between the parties in this appeal centered around allegation of infringement of trade marks. The 2nd appellant was the registered owner of the trade mark "Volvic". It was registered at the Trade Marks Registrar in 1981 as No, 39259 in Class 32 which it uses for the manufacture and sale of table water. The respondent company, on the other hand, was incorporated in 1998 and manufactures and sells table water in Nigeria under the Trade Mark "La Voltic" which was yet to be registered with the Trade Marks Registry. The respondent filed an application for the registration of the trade mark "La Voltic" dated 30th March. 2001. The Trade Marks Registry acknowledged the receipt of the respondent's application in a letter of acceptance dated 6th April, 2001.

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The appellants, upon discovery of the respondent's name being similar to their registered trade mark "Volvic," wrote to the Registrar of the Corporate Affairs Commission urging the registrar to prevail on the respondent to change its name - Voltic Nigeria Ltd. (RC No. 346209) being a name similar to their registered Trade Mark "Volvic". The appellants also applied to the Registrar of Trade Marks to exercise his power under section 18(7) of the Trade Marks Act to withdraw the acceptance issued to the respondent's application for the registration of "La Voltic" as its trade mark. The Registrar of Trade Marks, acting on the appellants' request accordingly withdraws the acceptance earlier issued to the respondent in respect of its application for the registration of "La Voltic" as its trade mark. B C

When the appellants discovered that the respondent was still using the trade mark "La Voltic" after its acceptance had been withdrawn by the Registrar of Trade Marks, they instituted an action against the respondent at the Federal High Court alleging trade mark infringement and claiming injunctive reliefs among others. The appellants then sought for and obtained ex-parte, an interim injunction/Anton Piller Order against the respondent at the Federal High Court on 28th February, 2002. D E

On 11th March 2002, the respondent applied to the court for a discharge of the ex-parte order. The application was considered and refused in a ruling delivered on 3rd June, 2002.

The respondent was dissatisfied with the ruling and filed an appeal against it to the Court of Appeal. While the appeal was pending, the appellants filed at the Federal High Court Forms 48 and 49 seeking to commit the respondent for contempt. However, in a ruling delivered on 18th July 2002, the Court of Appeal set aside the ruling of the Federal High Court by which the Federal High Court refused to discharge its order of injunction against the respondent. The present appeal is from the Court of Appeal ruling. F G

The parties filed their briefs in this court. The following 3 issues were formulated in the appellants' brief which are also adopted by the respondent- H

"1. Whether the Court of Appeal was right in entertaining the respondent's application for a suspension of the orders of the Federal High Court when an application in identical terms and another appli-

cation for committal were both pending before the Federal High Court.

2. Whether the Court of Appeal was competent to set aside the ruling of the Federal High Court delivered on 3rd June, 2002 to discharge the orders granted against the respondent.

B *3. Whether the Court of Appeal gave equal or any consideration to the interest of the appellants as it did to the interest of the respondent before setting aside the ruling of the Federal High Court dated 3rd of June 2002, and if it did not, whether such a failure*
C *ought to vitiate the ruling of the Court of Appeal."*

Each of the above issues and all other questions raised in the appeal are fully treated in the lead judgment written by my learned brother, Tabai, JSC and I therefore do not intend to repeat same.

D All I will like to add is that the court below acted properly in discharging the order made by the trial High Court having regard to the circumstances of the case. I also believe that the rush for the committal of the respondent was pre-mature since the question whether the names "Volvic" and "La Voltic" are too similar was still
E pending issue in action pending before the court. For the above reasons and the fuller reasons given in the said lead judgment which I also adopt, I dismiss the appeal with costs as assessed in the lead judgment.

F

MOHAMMED JSC

This is an appeal against the decision of the Court of Appeal, Lagos Division, delivered on 18th July, 2002 setting aside the Ruling of the trial Federal High Court, Lagos of 3rd June, 2002, in which
G the Court refused to discharge its earlier ex-parte order given on 28th February, 2002 restraining the Respondent in this appeal from infringing the 2nd Appellant's registered Trade Mark "volvic." The ruling was delivered after hearing the Respondent's application on notice for the discharge of the said ex-parte order. On appeal to the
H Court of Appeal by the Respondent in this Court, and on the application on notice by the Respondent pending the hearing and determination of the appeal, granted the reliefs sought by setting aside the ruling of the trial Federal High Court of 3rd June, 2002 refusing to

discharge the ex-parte order of injunction and staying the proceedings before the Federal High Court.

Dissatisfied with the ruling of Court of Appeal, the Appellants are before this Court on appeal raising three issues for determination in their Appellant's brief. However, having regard to the circumstances of this case in which the case instituted by the Appellants still remains unheard at the trial Federal High Court while the Respondent's appeal is also awaiting hearing and determination on the out come of this appeal, I am strongly of the view that the main issue for determination in this appeal is not more than whether the Court of Appeal was right in entertaining and granting the Respondent's application, pending the hearing and determination of the substantive appeal. In this respect, I entirely agree with my learned brother Tabai, JSC in his judgment that the Court of Appeal was right in its ruling. Accordingly there being no merit at all in this appeal, I also hereby dismiss it, abiding with the order on costs in the leading judgment.

OGBUAGU JSC

This is another Interlocutory appeal in a suit that was filed February, 2002 and up till date, the hearing of the substantive suit, has not taken off. It is an appeal against the Ruling of the Court of Appeal, Lagos Division delivered on 18th July, 2002 setting aside the Ruling of the Federal trial High Court, Lagos Judicial Division presided over by Olotu, J. refusing to discharge his/her Ex Parte Order dated 28th February, 2002, granting the Appellants, an Interlocutory Injunction restraining the Respondent, from inter alia, infringing the 2nd Appellant's registered trade mark "VOLVIC".

Dissatisfied with the said Ruling, the Appellants, have appealed to this Court on three (3) grounds of appeal. Without their particulars, they read as follows:

Ground 1

The learned Justices of the Court of Appeal erred in law when they said as follows:

"Therefore, the ruling of the lower court delivered on 3rd June, 2002 refusing to discharge the orders granted against the applicant is set aside"

Ground 2

The Court of Appeal misdirected itself in law when It failed to make a dispassionate consideration of the interest of both parties before granting the Order setting aside the Federal Court's Ruling dated 3rd June, 2002.

B Ground 3

The Court of Appeal erred in law in entertaining the Defendant/Respondent's application dated 27th June 2002, for inter alia, a suspension or variation or stay of the ex-parte Orders of the Federal High Court dated 28th February 2002, when an application in identical terms and another application for committal were both pending before the Federal High Court".

The facts briefly stated are that the Appellant's trade mark "VOLVIC", is registered in the Trade Marks Registry as No 39259 in Class 32 Trade Marks Act 1990, while the Respondent's trade mark "LA - VOLTIC" both parties, manufacture and sell table water. The Respondent, applied on 30th March, 2001, to the Trade Marks Registrar (hereinafter called "the Registrar") for the registration of its said Trade mark. The Registrar, after conducting the mandatory search and being satisfied that it did not infringe a registered trademark, issued "Acceptance Form dated 25th October, 2001 (See page 14 of the Records). Aggrieved by the "Acceptance", the Appellants, applied to the said Registrar, to vacate/withdraw it from its Register. The Respondent states that the Registrar, without hearing from it/them, withdrew the said "Acceptance" claiming/stating in their letter of 28th January, 2002, that it was wrongly accepted. (See page 15 of the Records). I note that in the said Setter, the Respondent was given the right to apply to the Registrar for a hearing under "regulation 33 of the Trademarks regulation, Cap 436 Laws of the Federation of Nigeria 1990. After the said withdrawal, the Appellants instituted the action in the said Federal High Court for breach of its trademark and passing off. It also applied and was granted, an Ex parte order of Interim Injunction. The Respondent, applied for the discharge of the said Order. In a considered Ruling delivered on 3rd June, 2002, the learned trial Judge refused the application.

I note that the Appellants filed in the trial court, Forms 48 and 49 dated 26th March and 22nd April, 2002 respectively, for con-

tempt. The application to cite the Respondent for contempt is still pending in the trial court which on 20th June, 2002, set down the application for hearing.

The Respondent, appealed against the said Ruling to the court below and sought for an order setting aside the said Ruling. I note that the Respondent on 6th June, 2002, applied to the trial court, for a variation of the said Ex parte Order granted on 28th February, 2002. That application is still pending in the trial court. I note also that the Respondent in its application dated 27th June, 2002, also applied to the court below, for an order suspending, varying or staying of the said Ex parte order without the determination of its said application for variation in the trial court. The court below, in its said Ruling, set aside the said Order of the trial Court and ordered a stay of the proceedings at the trial court hence the present appeal to this Court.

The Appellants, have formulated three (3) issues for determination which have been adopted by the Respondent.

"4.1 Whether the Court of Appeal was right in entertaining the Respondent's application for a suspension of the Orders of the Federal High Court when an application in identical terms and another application for committal were both pending before the Federal High Court."

4.2 Whether the Court of Appeal was competent to set aside the Ruling of the Federal High Court delivered on the 3rd of June 2002, refusing to discharge the Orders granted against the Respondent."

4.3 Whether the Court of Appeal gave equal or any consideration to the interest of the Appellant as it did to the interest of the Respondent before setting aside the Ruling of the Federal High Court dated 3rd of June 2002, and if it did not, whether such failure ought to vitiate the Ruling of the Court of Appeal".

When this appeal came up for hearing on 11th December, 2007, Dada, Esqr, learned counsel for the Appellants, adopted their Brief of Argument and urged the Court to allow the appeal and set aside the said Ruling of the court below. Eghobamien (Jnr.) Esq, - learned counsel for the Respondent, adopted their Brief which was deemed duly filed on 19 June, 2006 and referred the Court specifi-

cally to page 156 of the Records - i.e. the Ruling of the trial court (which spans from pages 156 to 190 of the Records i.e. 46 pages in very small typing letters). He urged the Court to dismiss the appeal. Thereafter, Judgment was reserved till today.

B It is noted by me that the reliefs/Orders the Respondent sought in its motion on Notice to the court below, at page 282 of the Records, are:

C *"(1) An order suspending, varying or staying in terms set forth in the schedule hereto the Exparte orders granted by the Federal High Court (Honourable Justice Olotu, J) on 28th of February, 2002 in favour of (1) Group E Danone (2) Societe Des Eaux De Volvic.*

(2) An order of stay of proceedings pending determination of the appeal filed against the ruling of Honourable Justice Olotu, J., delivered on 3rd June, 2002.

D *(3). Such further or other orders as this honourable Court may deem fit to make in the circumstances".*

It therein, stated the Terms or the Nature of the Variation purposed or sought. One of the grounds for the application is stated thus:

E *(b) The Applicant is likely to be completely paralysed and wound-up if the ex-parte injunction is not varied before the hearing of the Appeal".*

In its said Ruling, the court below, made the following orders:

F *"1. The Appellant/Applicants shall keep proper account of goods manufactured and sold.*

2. The Appellant/Applicant shall give an undertaking in damages in the event that the order is made unjust and it is wrongly stayed.

G *3. Furthermore, the Appellant/Applicant shall give undertaking to prosecute the Appeal with diligence with liberty reserved to the respondents to apply to this Court to discharge the orders in case the appeal should not be prosecuted with due diligence as ordered.*

H *4. Further proceedings before the lower court are stayed pending the determination of the appeal in this Court".*

Frankly speaking and in my respectful view, I agree with the court below that the said order of interim injunction by the trial court is draconian in nature. (See the drawn up Order at pages 74 to 77 of

the Records). I observe or note from page 76 of the Records that although one of the orders, is that the Ex parte interim injunction was to last, pending the determination of the substantive motion on Notice which the court also ordered that the Bailiff of the court do serve along with other processes, the Motion on Notice, (dated 11th March, 2002). An ex parte Injunction, is expected to last for a very short time more so, as the procedure, is likely to be abused by litigants. This is why, the order, must be very sparingly made and only when the circumstances are urgent and compelling, such as to leave the court with no other alternative in preventing an anticipated injury of a grave nature. See the case of Ogbonna v. NURT Workers & 5 ors. (1990) 3 NWLR (Pt.141) 696 @ 709 C.A. What appears at page 218 of the Records is that after refusing the said application of the Respondent to discharge the said interim injunction, the case was adjourned to 14th March, 2002 for mention. The trial court, in my respectful view, was in error not to take the said application before that of an alleged contempt. At that stage, the Respondent, had not been found liable of any contempt and was therefore, not a contemnor. That was why he went to court below and rightly too.

I have also observed that in the said Ruling of the trial court, the parties and the court, made comments/observations and pronouncements, relating to the very issue that will be determined after the hearing of the substantive suit. It has been stated and restated in a line of decided authorities, that lower courts, should not upon a Ruling, in an interlocutory application, make orders which have the effect of pre-judging or pre-empting the issues for adjudication in the substantive suit before trying the suit. See the case of Mortune & Alhaji Gambo (1979) 3-4 S.C. 54 @ 57; Omonuwa v. Attorney-General Bendel State (1983) 4 NCLR 237; Ojukwu v. Governor of Lagos State (1986) 3 NWLR (Pt.26) 29 @ 45. Globe Fishing Industries Ltd. & 4 ors. v Chief Coker (1990) 7 NWLR (Pt.162) 265; (1990) 11 SCNJ 56 & 71, 85-86. Just to mention but a few.

In other words, in an application for an injunction pending the determination of the substantive claim, the Judge, has a duty to ensure that he does not in the determination of the application, determine the same issue or issues that would arose for determination in the substantive suit. See the case of A.C.B. Ltd. & anor. v. Prince

Awogboro & anor. (1996) 3 NWLR (Pt. 437) 383 at 385: (1996) 2 SCNJ 233. It will therefore, be worse, if in an ex-parte application which is heard at the back of defendant and perforce, will amount to a denial of fair hearing, an issue or issues which will be determined in substantive action, is determined at that stage.

B Even where the substantive application for interlocutory injunction is heard, there is bound to be conflicting affidavits. In such a situation, it is settled that the trial court, must call for oral evidence where the issue will be resolved. See the cases Ifekwu & anor. v. Mgbako & 2 ors. (1990) 3 NWLR (pt. 140) 588 citing the cases of C Akinsete v. Akindutire (1966) 1 ANLR 147 @ 148; Eboh v. Oki (1974) 1 S.C. 179 (a), 189-190 and Akintami v. Onwumechili (1985) 1 NWLR (Pt 17) 68 @ 73. See also The Military Administrator, Federal Housing Authority & anor. v. Aro (1991) 1 SCNJ 154.

D I note that at paragraph 27 in the supporting affidavit of the Respondent at page 288 of the Records, it was/is averred as follows:

"By refusing to discharge the Ex-parte orders the Trial Judge appears to have decided the merit of the case even though the Applicant strongly believes it has a proprietary claim which will be eliminated if the injunction is not varied before the appeal is heard".
E [The underling mine]

In the schedule of the said motion to discharge the interim injunction, as to the ground for the application, it is further stated in page (c) thereof as follows:
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"(c) The issue as to whether the use of the label La-Voltic infringes the Plaintiffs trade mark is yet to be determined consequently the plaintiff can permitted (sic) to continue to trade".

Again, in its application for variation in the court below, ground G (c) on which the application was brought, reads as follows:

"The failure of the trial Judge to entertain the application for stay or vary the injunction effectively grants to the plaintiffs relief III (c) in the plaintiffs particulars of claim notwithstanding the fact that the question whether La-Voltic is deceptively similar to Voltic is yet to be deter mined".
H

[The underlining mine]

It is because of the likelihood of pre-empting or prejudging the issue or issues for determination in the substantive suit before trying

it, that it is said that unless the justice of the case, is as clear as was in the case of *Thompson v. Park* (1944) 2 All E.R, 477, (where the defendant, was adjudged to be a trespasser), the court should be very, very slow and very hesitant, in making orders for interim injunction.

I wish to pause here and state and this is settled, that the Court of Appeal, has the power to reduce the scope of an "interlocutory" injunction granted by a trial court provided, there is justification for such a cause of action, by "cutting down" so to speak, to its proper size having regard to the mischief apprehended and established before the trial court, See the case of *Dr. Saraki v. Kotoye* (1990) 4 NWLR (Pt. 143) 144 @ 191; (1990) 6 SCNJ. 31 (Pt. 191) - per Agbaie. JSC. This power, in my respectful view, will be urgent and also applicable, to an Ex parte/interim injunction as in the instant case.

As to the nature of an ex-parte injunction, the duty of the court and its life span and the discharge of the order. See the case of *Ogbonna v National Union of Road Transport Workers Enugu Branch & 5 ors.* (1990) 3 NWLR (Pt.141) 696 (a), 705 - 906 - per Uwaifo, JCA.

I note that the Appellants in paragraph 5.44 at page 22 of their Brief, submitted that the said interim injunction,

"had metamorphosed into an interlocutory injunction following the refusal of the Federal High Court to discharge the interim Order after hearing the Respondent's motion on notice for a discharge of the interim Order",

Nothing can be as strange and untenable to me as this submission. There is no wonder therefore, that the Appellants, proceeded not only to initiate committal proceedings even when they were aware that an appeal had been filed by the Respondent, but on 4th March, 2002, the said Order of the trial court, was executed or enforced. He cited and relied on the case of Chief Attamah & 4 ors. v. The Anglican Bishop of the Niger - Dr. Jonathan Onyemelukwe & 3 ors. (1999) 12 NWLR (Pt.633) 6 at 12 (it is also reported in (1999) 9SCNJ. 23).

For the avoidance of doubt, let me reproduce the statement of this Court at that page 12 of the NWLR - per Kutigi, JSC (as he then was, now CJN). It reads, inter alia, as follows:

"..... The High Court made an interim order of injunction on 25/6/92 which it refused to discharge or vacate on 12/8/92. By refusing to vacate or discharge its order, it seems clear to me that the High Court had once again confirmed the order of interim injunction made earlier on. The effect being that, the order of injunction remained in force and binding on the Defendant until vacated or otherwise ordered",
[the underlining mine]

The above is clear and unambiguous. Because the word "interim", was not added before "Injunction", Mr. Harrison Asiegbu - the learned counsel who settled/prepared the Brief, has submitted (albeit most erroneously) that the interim injunction, had metamorphosed into an interlocutory injunction following the refusal of the trial court to discharge the interim injunction. It cannot be!

Learned counsel also cited and relied on the case of Efftom v. Ironbar (2000) 3 NWLR (Pt. 650) 545 (a) 556 C.A., part of which he reproduced. In that case, the Court of Appeal, stated that where there are two motions of interim and interlocutory injunctions, that the normal practice, is to take them together and then, rule on them - i.e. to grant or refuse the application for interlocutory injunction. That if the court decides to take only the application to discharge the order of interim injunction, it will either grant the application and discharge the order or refuse the application. That the court's refusal of the application, is equivalent to grant of the interlocutory injunction. It added immediately, as follows:

"A grant or refusal to grant application to discharge an order for interim injunction is in itself an order refusing or granting an injunction and it is covered by the provision of Section 220 (1) (g) (ii) of the 1979 Constitution and an appeal lies as of right against that decision. In result, the appellants' appeal is competent as they do not require leave to appeal to this Court".

It did not say an interlocutory injunction. It was interpreting the said Section as was done in Chief Attamah & ors v. The Anglican Bishop of Niger & ors. (supra). Sub-section (g) (ii) of the said Constitution provides as follows;

"Where an injunction or the appointment of a receiver is granted or refused".

It did not say interim or interlocutory and this is why that court stated that a grant or refusal to grant an application for interim injunction is in itself an order refusing or granting an injunction, Period. There is no ambiguity in my respectful view. It need be emphasized that all learned counsel must bear in mind that each case, must be confined to and treated or dealt with the particular or peculiar facts of that case. Otherwise, there is bound to be confusion and misconceptions where there should be none. B

There are differences between an interim and an interlocutory injunction even though the orders form a genre of each other. The two orders are said to be all aimed at ensuring the preservation or protection of the res. The orders, vest in the court, the discretionary power to grant or refuse the order which is common to the two applications. See the cases of *Kotoye v. Central Bank of Nigeria & 7 Ors* (1989)1 NWLR (Pt. 98) 419; (1989) 2 S.C. (Pt. 1) 1 @ 29; (1989) D 2 SCNJ 31, - per Nnamani, JSC, (of blessed memory) and *Oluwa Glass Co. Ltd, v. Chief Ehinlanwo* (1990) 7 NWLR (pt. 160) 14 @ 34. C.A. - per Ejiwunmi, JCA (as he then was). In the instant case, the trial court did not take the two applications together. It took only the application to discharge without advertng its mind to the fact that there was a substantive motion of interlocutory injunction pending the hearing of the substantive suit before it. E

Before concluding this Judgment, I note that the trial court failed, refused and/or neglected to even extract from the Appellants, an undertaking in respect of damages in case they lost at the end of the trial. The importance of this extraction, was dealt with or stated by this Court in the case of *Kotoye v. Central Bank of Nigeria & 7 Ors*, (1989)1 NWLR (Pt. 98) 419; (supra) - per Nnaemeka-Agu, JSC. See also the case of *Oluwa Glass Co. Ltd, v. Chief Ehinlanwo* G (supra).

In ending this Judgment, in my respectful view, the court below, was however, in error in setting aside the Ruling/decision of the trial court at that stage, since the application before it (not the main appeal) was/is for variation of the trial court's order and stay of proceedings pending the determination of the appeal before it. This is also so, having regard to its said order No. 4. H

It is from the foregoing and the reasoning and conclusions in

the lead Judgment of my learned brother, Tabai, JSC, which I am in agreement with, that I too, see no merit in this appeal. I too, dismiss the same and I abide by the orders including that on costs.

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