

SUPREME COURT OF NIGERIA
18TH APRIL, 2008 SC. 225/2004
CORAM:- S. U. ONU, N. TOBI, D. MUSDAPHER, G. A.
OGUNTADE, S. A. AKINTAN, F. F. TABAI, I. T.
MUHAMMAD, JJSC

VEEPEE INDUSTRIES LIMITED APPELLANTS
AND
COCOA INDUSTRIES LIMITED RESPONDENT

SALE OF GOODS - Debts - Interest - Significance - Definition and types of interest - It is capable of bearing variegation meanings and concepts - It connotes compensation for the use of borrowed money (H1)

EVIDENCE - Facts - Burden of proof - Is placed on a party who would otherwise fail - And on the person who wishes the court to believe - On the existence of that fact - Save where the fact is admitted (H2)

SUMMARY PROCEEDINGS - Debts - Proof - Interest rate claimed in this case - Was not proved vide averments - In the affidavit evidence (H3)

MOTIONS - Affidavits - Depositions therein - Take the place of averments in a pleadings - Where a matter is decided under a motion - Mere averment does not prove a fact - Seeing that pleadings is not evidence (H4)

DEBTS - Interest rate - Uncertainty of - "About" - Meaning and definition - Claim on rate of interest - Has to be proved by admissible evidence - And not by mere uncertain averment of a law clerk - Using the phrase "about" (H5)

DOCUMENTS - Certification of - Interest rate claim - In respect of debt arising from sale of goods - A certified document from the bank that is to be paid the interest - Is a better proof than mere uncertain averment by a law clerk (H5)

EVIDENCE - Affidavits - Averments - Interest rate - Deposition that did not state source of belief or information - Is no evidence - Court of Appeal rightly reversed the decision (H6)

EVIDENCE - Admission - Averring that one is not in a position to deny or admit - Though an insufficient traverse - Where there is further particulars in pleadings - That show denial of that fact - Admission will not be inferred (H7)

ACTIONS - Claims - Relief not claimed - Interest rate claimed - Where not proved - Court cannot grant another rate of interest on the pre-judgment debt - As there was no claim of an alternative rate of interest (H8)

APPEALS - Leave - Issues - Fresh point - That was not canvassed before the Court of Appeal - Cannot be made an issue before the Supreme Court - Without obtaining leave of court (H9)

JUDICIAL PRECEDENTS - Justice - Ekwunife case - That was not decided per incuriam - Still remains good law and binding - Save Supreme Court judicially departs from it (H10)

FACTS

Before High Court Ikeja, Lagos State, the plaintiff/appellant filed an action against the defendant/respondent. Appellant claimed the sum of over N500,000.00 with interest at the rate of 35% per annum both before and after the judgment date till the debt is fully settled. Respondent denied liability and pleaded that the amount in issue has been paid. In its default judgment, the trial court entered judgment in favour of appellant as claimed, including the 35% interest rate.

Respondent's appeal to the Court of Appeal was allowed with respect to the interest. Lower court set aside the 35% interest granted by the trial court and dismissed the appellant's claim as regards pre-judgment interest. Dissatisfied with that decision, appellant has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"(i) Whether the appellant proved the rate of interest awarded by the trial court, by evidence.

(ii) Whether pre-judgment interest could not have been awarded (even if the 35% award was not proved or claimed)."

HELD (Unanimously dismissing the appeal per **MUHAMMAD JSC**)
Interest - Significance - Definition and types of

1. I think the word "*interest*" is of significance here. If it is used in the ordinary sense, the word is capable of bearing variegated meanings and concepts. In financial transactions however, with which we are minded here, "*interest*" connotes a compensation allowed by law or fixed by the parties for the use or forbearance of borrowed money. It is that payment a borrower pays a lender for the use of the money sought and obtained by the borrower from the lender. In other words, it is the cost of using credit or funds of another. Even here, interest is in categories: there is the accrued interest, which is an interest earned but not yet paid; accumulated interest, that is the one on bonds and other debts which is due or overdue but not yet paid; compound interest, i.e. interest paid on principal sum plus accrued interest; simple interest, i.e. one which is paid for the principal or sum lent, at a certain rate or allowance, made by law or agreement of parties. It connotes an interest calculated on principal lent as distinguished from compound interest; conventional interest; i.e. the one in which the rate thereof is agreed upon and fixed by the parties themselves as distinguished from that which the law would prescribe in the absence of an explicit agreement. "*Interest rate,*" on the other hand, refers to the percentage of an amount of money which is paid for its use for a specified time. This is far from exhaustion of the definition and types of interest and its rates in a financial transaction involving the concepts. (p. 1886 C)

EVIDENCE - Facts - Burden of proof

2. In our adversarial system of litigation in this country, the law places the burden of proving an existing fact which is claimed by a party who would otherwise fail if no evidence at all were given on either side (Sections 135-137 of the Evidence Act, Cap.112, LFN, 1990).

The Evidence Act, requires further that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that, proof of that fact shall lie on any particular person. (Section 139 of the Evidence Act, op. cit). Another situation which calls for no proof is where, in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings (Section 75 of the Evidence Act). (p. 1888 D)

SUMMARY PROCEEDINGS - Debts - Proof

3. The only affidavit evidence laid before the trial court in respect of the rate of interest claimed by the plaintiff is the one deposed to by one Emmanuel Edokpolor, a solicitor's clerk in the office of plaintiff's counsel. Mr. Edokpolor averred to the following facts:-

"5. That the claim of the applicant against the respondent as stated in the Writ of Summons together with the Statement of Claim is for the sum of N553,316.08 (Five Hundred and Fifty Three Thousand, Three Hundred and Sixteen Naira, Eight Kobo) with interest at the rate of 35% per annum from the 24th of February, 1992, till the date of judgment in this case and thereafter at the same rate of interest until the total debt is finally and fully settled.

17. That the applicant is in dire need of its fund to pay its mounting debt to its creditors and the prevailing bank rate is about 35%."

(Underlining supplied for emphasis)

Looking at the above depositions and not any other in the affidavit evidence of the plaintiff I agree with the court below that the paragraphs merely stated the claim of the plaintiff against the defendant. The deponent therein, Mr. Edokpolor, did not aver anywhere in his affidavit in support of the Motion on Notice that the prevailing bank rate was 35% per annum. There was therefore no proof of the rate of interest before the trial court to support the 35% rate. (p. 1889 C)

MOTIONS - Affidavits - Depositions therein

4. Where a matter is decided under a motion or an application, the depositions in affidavit take the place of averments in a pleading. And, it is elementary in the law of pleadings that an averment is not proved by merely repeating it without more in the affidavit of the party on whom lies the burden of proof. Pleadings is not evidence. It is the pivot upon which evidence will find a resting place. (p. 1890 A) B

Interest rate claim - Uncertainty of- "About" - Meaning

5. The prefix about, no doubt connotes something 'near to' in number, time, place, quality, size, quantity or degree. If it is related to number, it means the exact number is not known. If it relates to size, it means the exact size is not known. If it relates to time, it means the exact time is not known, etc. So it is a word which comes with uncertainty or speculation. Rate of interest of any bank cannot be treated with levity or uncertainty. Speculation will not help to arrive at the exact bank rate. C D

Thus, any claim on a rate of interest, except where concrete agreement between the parties is owned up by them or where there is positive and unequivocal admission by a party, that rate of interest has to be proved by admissible evidence. It is naive for any court of law to simply believe that a clerk in a counsel's chamber is truly and professionally discharging the responsibility of a banker on mere verbal information. A certified document from that bank in whose favour the interest, is to be paid, or any of its authorized officers can more competently be a reliable source for such information. (p. 1890 D) E F

Deposition that did not state source of belief or information

6. On the issue on hand, all the law requires from Mr. Edokpolor was to disclose his source of information of how he came about the facts he founded his evidence on i.e. the rate of interest of 35%. That is the requirement of Section 86 of the Evidence Act. Further, when a person deposes to his belief in any matter of fact, as did Mr. Edokpolor, and his belief is derived from any source other than his own personal knowledge, he is required to set forth explicitly the facts and circumstances forming the ground of his belief (Section 88 of the Evidence Act). There is no scintilla of evidence linking up Mr. Edokpolor's belief that the prevailing bank rate of interest was 35%. Thus, as the G H

decision of the trial court was based on no evidence regarding the interest rate claimed by the plaintiff, the court below, rightly in my view, set aside the trial court's decision. (p. 1891 G)

Averring that one is not in a position to deny or admit

B 7. On the submission of learned counsel for the appellant that the respondent averred in its counter-affidavit that it was not in a position to deny or admit the correctness of the evidence. This, I think refers to paragraph 5 of the counter-affidavit filed by the defendant.

C That paragraph states as follows:-

"5. That the defendant/respondent is not in a position to either admit or deny paragraphs 2, 3 and 17 of the affidavit in support of motion."

D Although, it has generally been held to be an insufficient traverse in effectively denying essential and material allegation of fact and a bad pleading, it does not amount to an admission where the pleadings of the defendant goes further in other paragraphs to state his case in his Statement of Defence that he intends to deny the particular averment in the Statement of Claim. In the counter-affidavit of the defendant, paragraph 8 states:-

"That the defendant/respondent vehemently denies paragraph 10 of the affidavit in support of motion. The transactions between the parties were devoid of interest payments."

F In view of paragraphs 3, 9, 10, 12 and 15 of the counter-affidavit, which deny any indebtedness to plaintiff including those that accrue by way of interest, it is difficult to read admission of liability by the defendant as held by the trial court. (p. 1892 C)

G ***ACTIONS - Claims - Relief not claimed***

H 8. On the second issue by the appellant that the Court of Appeal could have awarded interest on the pre-judgment debt even if 35% was not proved. I must honestly say my main difficulty in finding myself agree with the learned counsel for the appellant in his submission on the Issue is that from the reliefs prayed for before the trial court, (reproduced earlier in this judgment), there is no relief which asks for an alternative rate of interest, in the event the 35% rate claimed by the appellant failed. It is the law that a court of law

has no right to act outside the four walls of the record of appeal place before it. Again, it is the duty of a court not to grant a relief not sought. If a court of law would grant to a party that which the party has not asked for, then the court is turning itself into a charitable organization or a father xmas, which, in reality, it is not. (p. 1893 B)

APPEALS - Leave - Issues - Fresh point

9. It is my observation on this issue also that the question whether or not the court below could have awarded a lower rate of interest after its finding that the plaintiff at the trial court did not establish its claim of 35% interest rate never formed part of the proceedings had before the court below and or its decision. An appeal therefore, cannot legitimately be made to this court on a point that did not form part of the case argued and decided by the court below. This is because a point not canvassed before it cannot be entertained without the requisite leave of court sought and obtained. (p. 1893 F)

JUDICIAL PRECEDENTS - Justice - Ekwunife case

10. The appellant in this appeal with due respect, has failed to show us that the decision in Ekwunife (supra), was reached per incuriam or that it perpetuated any injustice or that it has been annulled by legislation or by a judicial decision of this court given intra-judicially. Learned counsel for the appellant has himself recognized that fact where he said in his Brief:-

“My Lord, the decision is Ekwunife v. Wayne (supra), is probably not inconsistent with the Constitution, neither was it erroneously reached per incuriam, it is, but not so much about fettering the judicial discretion of the Court of Appeal or of any other court, it is mainly that continuing to follow it is perpetuating injustice and also that there have been developments which the Supreme Court did not advert to and which were not brought to the attention of the court while deciding the case which render the decision therein, I submit with the greatest respect no longer good law, and, or oppressive in its application.”

I do not think following the decision in Ekwunife’s case will perpetuate injustice unless injustice is understood only in the way learned counsel for the appellant epitomized it. The law as espoused

in Ekwunife's case is still good and shall continue to have binding force until when it is departed from judicially by this court.
(p. 1895 B)

NOTABLE POINTS OF INTEREST

B TOBI JSC

1. *Averments - Need not be construed too technically*

I do not agree with the Court of Appeal that paragraph 5 of the affidavit did not aver that the prevailing bank rate was 35%. Paragraph 5 avers that the debt carried an interest of 35% per annum. Is it because the averment did not contain the word "prevailing" that gave rise to the conclusion of the Court of Appeal? If so, that is rather too technical and abstract for my liking. The paragraph, without the word "prevailing" is clear that the 35% is the prevailing bank interest.
D That is unnecessary hair splitting and semantics. It does not carry the matter anywhere other than mere technicality. And I am not for that.
(p. 1897 G)

2. *Affidavits - What is admitted need no proof*

E I do not also agree with the Court of Appeal on the issue of proof. It is the law that what is admitted need not be proved. In paragraph 4 of the counter-affidavit, the respondent averred as follows:-

"That the defendant/respondent admits paragraphs 4, 5, 9 and 10 of the affidavit in support dated 1st November, 1993."

F As paragraph 4 of the counter-affidavit admitted paragraph 5 of the affidavit in support, proof is no more necessary. I should say that the admission in paragraph 4 of the counter-affidavit in respect of paragraph 5 of the affidavit in support does not affect the live issue
G in the matter. I say this because the respondent denied paragraph 6 of the affidavit in support which, in my view, is the live issue.
(p. 1898 A)

3. *What to consider before overruling previous decision*

H This court takes most seriously the invitation by counsel to overrule its earlier decision because so much is involved in the exercise. Because a reversal of the earlier of this court can give rise to instability of the judicial precedent, particularly those governing stare decisis, this

court must be convinced that its decision was clearly and patently wrong, In considering that, this court will closely examine the facts of the decision it is called upon to reverse in the light of facts of the case calling for the reversal. This is because facts are the fountain head of the law and case are not decided in a vacuo or in a vacuum but in relation to the particular facts of the case before the court. I have carefully examined the decision in Ekwunife and I do not see my way clear in overruling it. (p. 1901 D)

AKINTAN JSC

4. How to pursue request for departure from previous decision

On the request that this court should depart from the principle of law established in the Ekwunife case, (supra), the position of the law is that ordinarily this court adheres to the principle of stare decisis. It will therefore hold itself bound by its previous decisions. But where it is satisfied that any of its previous decisions is erroneous or was reached per incuriam and will amount to injustice to perpetuate the error by following such decision, it will overrule if or depart from it. This power of the Supreme Court is predicated on the fact that it is better to admit an error than to persevere in error. It is necessary to say that a party in an appeal before the Supreme Court desirous of the court departing from its previous decision must, in accordance with Order 6 Rule 4(4) of the Supreme Court Rules (1999 as amended), invite the court to depart from that previous decision before the question of such departure will arise in the appeal before the court. See *Adesokan v. Adetunji* (supra), 540 at 562. In the present appeal, the appellant gave the necessary notice as prescribed by the aforementioned rule of this court. But it failed to establish that any of the conditions that must exist before the request to depart from or overrule the principle of law established in the case as enunciated above, was in- existence. The request can therefore not be granted. (p. 1903 C)

REPRESENTATION

Chief O. T. Akinbiyi, (with him; O. H. Oyajimi, R. E. Itua, A.A... Adeniran and A.E. Audu), for the Appellant.
Adeyinka Olumide-Fusika, with Tomi Olagunju, for Respondent.

CASES REFERRED TO

- Jefford v. Gee (1970) 1 NWLR 702 at 707,
 Kano Textile Printers Plc. v. Tukur (1999) 2 NWLR (Pt.589) 78 at 84.
 Adesokan v. Adetunji (1994) 5 NWLR (Pt.346) 540
 B Johnson v. Lawanson (1971) 1 All NLR 56
 Odi v. Osafire (1985) 1 NWLR (Pt.I) 17
 Adegoke Motors Ltd. v. Adesanya (1989) 3 NWLR (Pt. 109) 250
 Ishola v. Ajibore (1994) 6 NWLR (Pt.352) 506
 C Akinsanya v. U.B.A. (1986) 4 NWLR (Pt.33) 273
 C Bucknor-Maclean v. Inlaks Ltd. (1980) 8-11 S.C. 1

STATUTE & RULES REFERRED TO

- Evidence Act, Cap. 112, LFN, 1990, ss. 75, 86, 88, 89, 135, 136,
 D 137, 139, 155 (1)
 Court Appeal Rules, O. 3 r. 14 (1), (2)
 Lagos State High Court (Civil Procedure) Rules, 1972, O. 2 r. 4, O.
 10 r. 1 (a), O. 28 r. 6
 Supreme Court Rules, 1999, O. 6 r. 4 (4)
 E

LEAD JUDGMENT BY MUHAMMAD JSC

- The claim of the appellant herein, who was the plaintiff at the
 Lagos State High Court of Justice, holden at Ikeja (trial court), as per
 the specially indorsed writ is for-
 F

- “The sum of N553.316.08 (Five Hundred and Fifty-Three
 Thousand Three Hundred and Sixteen Naira Eight kobo) with interest
 at the rate of 35% per annum from the 24th of February, 1992,
 till judgment in this case and thereafter at the same rate of interest
 G until the total debt is finally and fully settled.”*

- Paragraph 13 of the plaintiff’s Statement of Claim repeated
 the above claim. In its Statement of Defence the defendant pleaded
 not liable to the sum claimed as same had been paid and not liable
 also to any interest whatsoever.
 H In its judgment in default of defence by the defendant, the trial
 court entered judgment in the said sum including the 35% interest as
 claimed by the plaintiff.

Dissatisfied with that decision, the defendant/respondent ap-

pealed to the court below. The court below found merit in the appeal and allowed the appeal. It set aside the award of 35% interest made by the trial court and in its place dismissed the plaintiff's claim as regards pre-judgment interest.

Dissatisfied again, the plaintiff is now on appeal before this court.

Learned counsel for the parties filed and exchanged their respective Briefs of Argument. Learned counsel for the appellant formulated two issues for determination. They are as follows:-

“(i) Whether the appellant proved the rate of interest awarded by the trial court, by evidence.

“(ii) Whether pre-judgment interest could not have been awarded (even if the 35% award was not proved or claimed).”

Learned counsel for the appellant made submissions in respect of the two issues above. On issue (i), learned counsel submitted that the rate of interest claimed by the appellant was specifically pleaded especially in paragraphs 10, 11 and 12 of the Statement of Claim. The appellant also claimed categorically in paragraph 13 of the Statement of Claim the sum of N551,316.08 with interest at the rate of 35% from 24th of February, 1992, to the date of judgment in this case and thereafter at the same rate of interest until the total debt is finally and fully liquidated. The learned counsel argued further, after referring to paragraphs 2, 3 and 17 of the affidavit in support of the motion and of the respondent's Statement of Defence, that although the respondent generally denied the categorical averment that bank interest rate fluctuated around 35% between 1992 and 16th August, 1993, (when the Statement of Claim was dated) it did not contrarily state what bank interest rate was but agreed *inter alia* that there was a fluctuation in the bank rate.

It was appellant's argument that the case did not go to full trial by oral evidence but upon an application for summary judgment based upon documentary admission and under the then Order 10 procedure of the High Court of Lagos State (Civil Procedure) Rules, 1972. The appellant, it was submitted, caused an affidavit to be deposed to in support of the application wherein evidence was proffered in support of the appellant's pleadings. Learned counsel cited the provision of paragraph 17 of the said affidavit. Learned counsel stated that the attention of the lower court was drawn to the said

affidavit in support, yet concluded that there was no proof to justify the claim of 35% rate of interest, by the appellant.

The learned counsel for the appellant made reference to the deposition in paragraph 5 of the counter-affidavit of the defendant and submitted that in a situation where the appellant's case or pleading was supported by categoric affidavit evidence that the prevailing bank rate was about 35% but the fact asserted by the appellant could neither be admitted nor denied, the Court of Appeal should have upheld the judgment of the High Court which awarded 35% interest claimed and proved by the appellant. In other words, it was further argued, the Court of Appeal should have held that the fact of 35% interest rate pleaded and claimed was established by balance of probability or preponderance of evidence. The cases of Mogaji & Ors. v. Odofin & Ors. (1978) 4 S.C. (Reprint) 53 at 65; (1978) NSCC 275, Olayinka v. Adeagbo (1988) 1 NSSC 625, 636, were cited and relied upon. Learned counsel argued further that the one-sided evidence given by the appellant on bank interest rate was worthy of belief as not only was the fact notorious at that time, the pleading to the effect was not contradicted by the respondent suggesting another prevailing bank interest. And that by the provision of Section 155(1) of the Evidence Act, all persons except those exempted by the court are competent to testify, including a court clerk especially when he was not an under age nor of unsound mind. Learned counsel urged us to hold that nowadays it is not only bankers who could know about bank interest rate, others, including court clerks, could and that we should hold that the appellant proved that 35% bank rate of interest.

In his submissions, learned counsel for the respondent argued on issue (1) that recourse must be had to what the plaintiff claimed in its writ and Statement of Claim vis-a-vis the evidence adduced in proving them as to be entitled to judgment on the claim. It was submitted further that the proceedings at the court of first instance was heard under Order 10 of the High Court of Lagos State (Civil Procedure) Rules of 1972 and Rule 1 (a) of that Order stipulates how the plaintiff must prove its claim so as to be entitled to judgment without having to go through the rigours of trial. The plaintiff was obliged to place before the court a verifying affidavit which must positively set out the facts founding and proving the claim. The plaintiff placed

before the court an affidavit deposed to by one Mr. Emmanuel Edokpolor in his capacity as a clerk in the office of the solicitors to the plaintiff as intended proof of the averments in paragraphs 3 and 12 of the Statement of Claim relating to the claim for interest. He challenged the judgment of the court of first instance that it did not adduce any reason. He added that the decision of the court awarding separate rates of interests for the period from judgment until payment is however, indicative that the award of 35% as pre-judgment interest was as specified damages. Further, that an averment in a pleading is not proved in a summary judgment by merely repeating it without more. A law clerk must disclose how he came about the information founding his evidence on the bank interest rate as per Sections 86, 88 and 89 of the Evidence Act. Evidence must be direct, cogent and not speculate. Emmanuel Edokpolor's depositing to the effect that the applicable bank interest rate was about 35%. was vague, uncertain and speculative. He ought to have stated precisely what the interest rate was and whether it was daily, weekly, monthly or annually. The learned trial Judge did not at all, appraise the affidavit evidence placed before him vis-a-vis the claim for interest at the rate of 35% per annum.

Further, no evidence was placed before him to explain 35% rate claimed but went ahead to award pre-judgment interest of the claimed rate as if it was a matter of course. And, that on the authority of *Ekwunife v Whane* (1989) 12 S.C. 92; (1989) 5 NWLR (Pt.122) 422, *Ishola v. Society General Bank Nig. Ltd.* (1997) 2 NWLR (Pt.488) 405, the Court of Appeal rightly set aside the decision of the court of first instance on the ground that it was evidentially unfounded. Learned counsel urged us to resolve issue No. 1 in favour of the respondent.

In his arguments on issue No.2, the learned counsel for the appellant submitted that not only the Court of Appeal found that ante-judgment interest was claimed but it held that payment of the same (at bank rate) was agreed even though it also held (though not conceded by learned counsel) that the 35% rate awarded was not proved. He argued further that in the circumstance, having regard to the demand of justice (the fact that the respondent had unjustly withheld the appellant's money and benefited therefrom to the fact that

the naira has notoriously drastically declined in value) the Court of Appeal should have applied its inherent or discretionary power to substitute the rate of interest even if lower than 35% claimed but not lower than 21% which the respondent had conceded on record. It was naked injustice for the Court of Appeal, says learned counsel for the appellant, for the Court of Appeal not to award interest at all. He urged this court to award substantial interest even if the 35% rate claimed was not proved.

Still under issue No.2, learned counsel for the appellant acknowledges the decision of this court in the case of Ekwunife v. Wayne (West Africa) Ltd. (1989) 12 S.C. 92; (1989) 3 NSCC 352 at 339, which was followed by the Court of Appeal in arriving at its decision. Learned counsel invited this court to reverse or depart from its decision in Ekwunife's case (supra). Learned counsel acknowledged as well the existing law in Nigeria on the award of pre-judgment interest in that, the courts will not award such interest on a debt or damages unless it is claimed and proved as of right or it is permitted by Statute. Learned counsel, referred, analyzed and contrasted some of the cases decided on interest by the court. They include Ekwunife v. Wayne (supra), Jalico Ltd. v. Owoniboyi Ltd. (1995) SCNJ 25. Learned counsel stated his reasons why this court should overrule itself or reverse its previous decision. He summarised the reasons as follows:-

“(a) If such decision is inconsistent with the provisions of the Constitution.

(b) If the decision was erroneously reached per incuriam and will, if followed or continued to be followed perpetuate hardship and considerable injustice or it will cause temporary disturbance of rights acquired under it.

(c) If it will continue to fetter the exercise of judicial discretion of a court.

(d) Where there have been developments which rendered the previous decision no longer good law or which would render the application of the ratio therein oppressive.”

Learned counsel concluded his argument by comparing and copiously quoting the law and practice relating to interest in England which were also reformed.

Learned counsel for the respondent adopted his argument on

issue No. 1 in his treatment of issue No. 2 and submitted some five reasons why issue No.2 should be determined in favour of the respondent. These reasons are as follows:-

“(1) The second ground of appeal is misconceived because the particulars of error supplied in its support have no bearing with the reasons for the judgment. B

(2) An appellate court has no jurisdiction to consider grounds which have not been brought either by an appeal, cross-appeal or by notice of intention to vary or affirm. He referred to the case of Eyesan v. Sanusi (1984) 1 SCNLR 353; Order 3 Rule 14(1) and (2) of Court Appeal Rules. C

(3) Even if the appellant had cross-appealed or filed a notice of intention to vary or confirm before the lower court, that court would still have had to overturn the judgment of the court of first instance as regards the award of interest and consequently dismiss the claim thereto because the plaintiff did not claim the interest as general damages but as contracted, special and liquidated damages at bank rate of interest. The Court of Appeal as an appellate court, can neither grant what has not been specifically claimed nor give judgment on a ground not relied upon at the court of first instance. The case of Obioma v. Olomu (1978) 3 S.C. 1; (1978) 3 S.C. (Re-print) 1, was cited. D E

(4) The question whether interest could have been awarded on the basis of general damages is being raised for the first time. That was not the claim before the court of first instance. And that did not emanate from the appeal considered and determined by the Court of Appeal as to warrant its being made the subject of a further appeal to this court.” F

Responding to the invitation to this court by the appellant to G reverse or depart from its decision in Ekwunife v. Wayne (West Africa) Ltd. (supra), learned counsel for the respondent submitted that that would amount to proceeding on a frolic. There is nothing in the present proceedings warranting such a voyage. He urged this court to determine the second issue in favour of the respondent by affirm- H ing the decision of the court below.

Learned counsel for the appellant filed a Reply Brief in answer to some new points raised by the respondent’s Brief. Among the

important points he answered are that the proceedings were heard not only under Order 10 but also under Order 28 Rule 6 on admissions. A claim for interest is not necessarily treated as claim for special damages as it may in fact be treated as general damages. He referred to several foreign cases including a Nigerian case of Kano Textile Printers Plc. v. Tukur (1999) 2 NWLR (Pt.589) 78 at 84 C-D. On issue No.2, learned counsel replied that he regrets the error in the statement of particulars of error on ground 2. He went on to reply that the 2nd ground of appeal has gone beyond the reasons given by the Court of Appeal or the specific reason why the Court of Appeal dismissed the claim for pre-judgment interest. Interest could still be awarded in the interest of justice.

I think the word “interest” is of significance here. If it is used in the ordinary sense, the word is capable of bearing variegated meanings and concepts. In financial transactions however, with which we are minded here, “interest” connotes a compensation allowed by law or fixed by the parties for the use or forbearance of borrowed money. It is that payment a borrower pays a lender for the use of the money sought and obtained by the borrower from the lender. In other words, it is the cost of using credit or funds of another. Even here, interest is in categories: there is the accrued interest, which is an interest earned but not yet paid; accumulated interest, that is the one on bonds and other debts which is due or overdue but not yet paid; compound interest, i.e. interest paid on principal sum plus accrued interest; simple interest, i.e. one which is paid for the principal or sum lent, at a certain rate or allowance, made by law or agreement of parties. It connotes an interest calculated on principal lent as distinguished from compound interest; conventional interest; i.e. the one in which the rate thereof is agreed upon and fixed by the parties themselves as distinguished from that which the law would prescribe in the absence of an explicit agreement. “Interest rate,” on the other hand, refers to the percentage of an amount of money which is paid for its use for a specified time. This is far from exhaustion of the definition and types of interest and its rates in a financial transaction involving the concepts. Suffice

it to say however, my consideration of this appeal may be centred on some of the concepts shown above and many others.

From the outset of this judgment, it has been shown that the trial court's judgment was given in default of defence. The learned trial Judge while concluding held, *inter alia*:

"A careful scrutiny of the defence filed in view shows it is a defence put up to defence (sic) the plaintiff and the court should not encourage it. It is a worthless defence. In the circumstances, I do hereby enter judgment for the plaintiff for the sum of N553,316.08 less N40,000.00 paid to the plaintiff with interest at the rate of 35% per annum with effect from 24/02/92, to the date of this judgment, that is 20/02/95. Thereafter interest is to run at the rate of 60% (sic) until the total judgments debt is finally liquidated. Accordingly, I so rule."

The court below, on the other hand, per Ogebe, JCA . (as he then was), held *inter alia*, as follows:-

"It is however trite law that a party who claims interest has a duty to plead and proffer credible evidence in proof thereof. See the case of Ishola v. S. G. P. Nig Ltd. (1997) 2 NWLR (Pt.488) 405 at page 433. The only evidence offered by the respondent in respect of bank interest rate did not come from a witness working in a bank but was the affidavit evidence of one Emmanuel Edokpolor, a law clerk in the office of the respondent's counsel. Paragraph 5 of his affidavit reads:

'that the claim of the applicant against the respondent as stated in the Writ of Summons together with the Statement of Claim is for the sum of N553,316.08 (Five Hundred and Fifty-Three Thousand, Three Hundred and Sixteen Naira, Eight Kobo) with interest at the rate of 35% per annum from the 24th of February, 1992, till the date of judgment in this case and thereafter at the same rate of interest until the total debt is finally and fully settled.'

This paragraph merely stated the claim of the respondent against the appellant. The deponent did not aver anywhere in the affidavit that the prevailing bank rate was 35% per annum. There was therefore no proof of the rate of interest before the trial court to support its award of 35%. In other words, the interest awarded was not based on any evidence of the rate of interest claimable as at the

time of the suit.”

Earlier on, the plaintiff/appellant in its Statement of Claim before the trial court, averred as follows:-

“3. *The defendant was one of the plaintiff’s various customers buying the plaintiff’s products in very large quantities at most times on credit basis with the agreement that bank rate of interest will be paid on invoices not settled within 30 days of supply or delivery.*

12. *The plaintiff further pleads that between 1992 and now especially, bank interest rate has fluctuated around 35% ”*

The plaintiff then made the following claim:

“13. *WHEREOF the plaintiff claims the sum of N553,316.08 (Five Hundred and Fifty-Three Thousand. Three Hundred and Sixteen Naira, Eight Kobo) with interest at the rate of 35% per annum from 24th of February, 1992, to the date of judgment in this case and thereafter at the same rate of interest until the total debt is finally and fully liquidated.*”

(Underlining supplied for emphasis)

In our adversarial system of litigation in this country, the law places the burden of proving an existing fact which is claimed by a party who would otherwise fail if no evidence at all were given on either side (Sections 135-137 of the Evidence Act, Cap.112, LFN, 1990). The Evidence Act, requires further that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that, proof of that fact shall lie on any particular person. (Section 139 of the Evidence Act, op.cit). Another situation which calls for no proof is where, in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings (Section 75 of the Evidence Act). See: Aromalan v. Oladele (1990) 5 S.C. (Pt.II) 111; (1990) 7 NWLR (Pt.162) 359, Din v. African Newspapers (1990) 3 NWLR (Pt.139) 392, Finnih v. Imade (1992) 1 NWLR (Pt.219) 511.

The trial court decided the matter on hand under Order 10

Rule 1A of the Lagos State High Court (Civil Procedure) Rules, 1972. That Order provides as follows:-

“Where the defendant appears to a Writ of Summons specially indorsed with or accompanied by a Statement of Claim under Order 3 Rule 4, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed) and stating that in his behalf there is no defence to the action except as to the amount of damages claimed, if any, apply to a Judge in chambers for liberty to enter judgment for such remedy or relief as upon the Statement of Claim, the plaintiff may be entitled to.”

(Underlining supplied for emphasis)

The only affidavit evidence laid before the trial court in respect of the rate of interest claimed by the plaintiff is the one deposed to by one Emmanuel Edokpolor, a solicitor’s clerk in the office of plaintiff’s counsel. Mr. Edokpolor averred to the following facts:-

“5. That the claim of the applicant against the respondent as stated in the Writ of Summons together with the Statement of Claim is for the sum of N553,316.08 (Five Hundred and Fifty Three Thousand, Three Hundred and Sixteen Naira, Eight Kobo) with interest at the rate of 35% per annum from the 24th of February, 1992, till the date of judgment in this case and thereafter at the same rate of interest until the total debt is finally and fully settled.

17. That the applicant is in dire need of its fund to pay its mounting debt to its creditors and the prevailing bank rate is about 35%.”

(Underlining supplied for emphasis)

Looking at the above depositions and not any other in the affidavit evidence of the plaintiff I agree with the court below that the paragraphs merely stated the claim of the plaintiff against the defendant. The deponent therein, Mr. Edokpolor, did not aver anywhere in his affidavit in support of the Motion on Notice that the prevailing bank rate was 35% per annum. There was therefore no proof of the rate of interest before the

trial court to support the 35% rate.

Where a matter is decided under a motion or an application, the depositions in affidavit take the place of averments in a pleading. And, it is elementary in the law of pleadings that an averment is not proved by merely repeating it without more in the affidavit of the party on whom lies the burden of proof. Pleadings is not evidence. It is the pivot upon which evidence will find a resting place.

A careful perusal at the preamble to the averments, paragraphs 1, 2, 5, 10 and 17 of the plaintiff's affidavit in support of his application for entering judgment in default of defence, portrays the deponent, Mr. Edokpolor as someone who works with a bank and has evidence of bank rates on interest. But that assumption had already been controverted by the same deponent when in paragraph 17 of the supporting affidavit he confirmed his ignorance and speculation that "the prevailing bank rate is about 35%. **"The prefix about, no doubt connotes something 'near to' in number, time, place, quality, size, quantity or degree. If it is related to number, it means the exact number is not known. If it relates to size, it means the exact size is not known. If it relates to time, it means the exact time is not known, etc. So it is a word which comes with uncertainty or speculation. Rate of interest of any bank cannot be treated with levity or uncertainty. Speculation will not help to arrive at the exact bank rate.**

Thus, any claim on a rate of interest, except where concrete agreement between the parties is owned up by them or where there is positive and unequivocal admission by a party, that rate of interest has to be proved by admissible evidence. It is naive for any court of law to simply believe that a clerk in a counsel's chamber is truly and professionally discharging the responsibility of a banker on mere verbal information. A certified document from that bank in whose favour the interest, is to be paid, or any of its authorized officers can more competently be a reliable source for such information. In the case of National Bank of Nigeria v. Hotch Ors. (1967-1975) 2 NBLR, a decision of Lagos State High Court delivered on 14th July, 1967, the plaintiff claimed against the defendants, jointly and severally, prin-

cipal and interest on an overdrawn account. The plaintiff (bank) granted overdraft facilities to the defendant company based on a certain type of mandate contract. The plaintiff could not prove the interest payable on the overdraft and could not prove the mandate contract with the customer. The court held, per Alexander, J., as follows:- B

“First of all, although the account is clearly admissible in evidence, it is not, in my opinion, sufficient proof per se of the claim which, as already stated includes interest. There is no evidence of the rate of interest charged from time to time or of the manner in which the sums charged as interest were arrived at. C

There is also no evidence as to whether the interest is simple or compound and whether it is in accordance with the custom of bankers in Nigeria or fair and reasonable. In Pappoe v. Bank of British West Africa (1933) 1 WACA 287, it was held that a charge of 10% compound interest with monthly rests on an overdrawn current account was fair and reasonable, and in accordance with the well recognized custom of bankers in England and the Gold Coast and that such custom had been proved to be well known to the plaintiff who acquiesced in the rate of interest charged against him. There is in the present suit no evidence on which any such or similar findings may be made. E

In view of the numerous entries relating to interest (about 151) and the very substantial sums of interest involved, I consider essential that the rate of interest charged from time to time and the type of interest, whether simple or compound, should be disclosed by admissible evidence to make it possible for the court to ascertain and verify the correctness of the charges on account of interest and consequently, the correctness of the total amount claimed in the Writ of Summons.” F

I agree with this formulation of the law by Alexander, J., (as he then was). G

On the issue on hand, all the law requires from Mr. Edokpolor was to disclose his source of information of how he came about the facts he founded his evidence on i.e. the rate of interest of 35%. That is the requirement of Section 86 of the Evidence Act. Further, when a person deposes to his belief in any matter of fact, as did Mr. Edokpolor, and his belief H

is derived from any source other than his own personal knowledge, he is required to set forth explicitly the facts and circumstances forming the ground of his belief (Section 88 of the Evidence Act). There is no scintilla of evidence linking up Mr. Edokpolor’s belief that the prevailing bank rate of interest was 35%. Thus, as the decision of the trial court was based on no evidence regarding the interest rate claimed by the plaintiff, the court below, rightly in my view, set aside the trial court’s decision.

On the submission of learned counsel for the appellant that the respondent averred in its counter-affidavit that it was not in a position to deny or admit the correctness of the evidence. This, I think refers to paragraph 5 of the counter-affidavit filed by the defendant. That paragraph states as follows:-
“5. That the defendant/respondent is not in a position to either admit or deny paragraphs 2, 3 and 17 of the affidavit in support of motion.”

Although, it has generally been held to be an insufficient traverse in effectively denying essential and material allegation of fact and a bad pleading, it does not amount to an admission where the pleadings of the defendant goes further in other paragraphs to state his case in his Statement of Defence that he intends to deny the particular averment in the Statement of Claim. In the counter-affidavit of the defendant, paragraph 8 states:-

“That the defendant/respondent vehemently denies paragraph 10 of the affidavit in support of motion. The transactions between the parties were devoid of interest payments.”

In view of paragraphs 3, 9, 10, 12 and 15 of the counter-affidavit, which deny any indebtedness to plaintiff including those that accrue by way of interest, it is difficult to read admission of liability by the defendant as held by the trial court.

In Atolagbe v. Shorun (1985) 4 S.C. (Pt .I) 250 at p.253, Obaseki, JSC., had this to say:-

“Unless a specific allegation of fact is denied specifically, a pleading that the defendant is not in a position to admit or deny is likely to be construed as placing no burden of proof on the plaintiff unless by

implication from the other paragraphs of the Statement of Defence the averment can be taken as having been denied."

(Underlining supplied for emphasis)

See further: *Ohiaeric v. Akalaeze* (1992) 2 NWLR (Pt.221) 1 at page 30, *Omorhirhi v. Enatevwere* (1988) 1 NWLR 746 at page 761.

On the second issue by the appellant that the Court of Appeal could have awarded interest on the pre-judgment debt even if 35% was not proved. I must honestly say my main difficulty in finding myself agree with the learned counsel for the appellant in his submission on the Issue is that from the reliefs prayed for before the trial court, (reproduced earlier in this judgment), there is no relief which asks for an alternative rate of interest, in the event the 35% rate claimed by the appellant failed. It is the law that a court of law has no right to act outside the four walls of the record of appeal place before it.

See: *Funduk Eng. Ltd. v. McArthus* (1995) 4 NWLR (Pt.392) 640.

Again, it is the duty of a court not to grant a relief not sought.

See: *Ugo v. Obiekwe* (1989) 2 S.C. (Pt.II) 41; (1989) 2 S.C. (Pt.II) 41, *Makanjuola v. Balogun* (1989) 5 S.C. 82, *Nneji v. Chukwu* (1988) 3 NWLR (Pt.81) 184, *Okeowo & Ors. v. Migliore & Ors.* (1979) 11 S.C. (Reprint) 87; (1979) NCSC (Vol.12) 210. ***If a court of law would grant to a party that which the party has not asked for, then the court is turning itself into a charitable organization or a father xmas, which, in reality, it is not.***

Any claim or defence not made or raised, by or against a party is equivalent to not giving him a hearing at all and that may amount to a denial of justice. See: *Esso Petroleum Co. Ltd. v. Sourtport Corporation* (1956) AC 218; *Ebba v. Ogodo* (1984) 1 SCNLR 372. ***It is my observation on this issue also that the question whether or not the court below could have awarded a lower rate of interest after its finding that the plaintiff at the trial court did not establish its claim of 35% interest rate never formed part of the proceedings had before the court below and or its decision. An appeal therefore, cannot legitimately be made to this court on a point that did not form part of the case argued and decided by the court below. This is because a point not canvassed before it cannot be entertained without the requisite leave of court sought and***

obtained. See: Jaffar v. Ladipo (1969) All NLR 160; Dweye & Ors. v. Lyomahan (1983) 8 S.C 76 at 83.

I would have dismissed this issue at this stage but I find it necessary to make some further observations. The appellant has invited this court to depart from its earlier decision in the case of
 B Ekwunife v. Wayne (West Africa) Ltd. (1989) 12 S.C. 92; (1989) 5 NWLR (Pt.22) 42. In a summary form, what this court held in Ekwunife's case is that interest may be awarded in a case either as of right or pursuant to the provisions of a Statute. That interest may be
 C awarded as a right where it is contemplated by the agreement between the parties or under a merchantile custom, or under a principle of equity such as a breach of a fiduciary relationship. Where interest is being claimed entitlement to it on the writ and pleaded facts which show an entitlement in the Statement of Claim.

D In the instant appeal as already seen, the appellant made its claim of 35% interest. It however, failed to adduce any credible evidence in proof of what the prevailing bank rate of interest said to be applicable to the transaction was. It is thus, a real hurdle for the appellant to convince this court to depart from its earlier decision in
 E Ekwunife's case (supra). The law and practice have been made clear for this court to depart from its earlier decision.

In Long-John v. Blakk (1998) 5 S.C. 83; (1998) 5 SCNJ 68 a p.86, Iguh, JSC. (as he then was), did observe as follows:-

F *"I find it necessary to stress in very clear terms that this court has no power, extra-judicially, to overrule, reverse or nullify its previous decisions whether on questions of substantive or procedural law. Such previous decisions may inter alia only be annulled by legislation or by a Judicial decision of the court, given intra-Judicially when
 G it is satisfied, again inter alia that the previous decision was given per incuriam or would perpetuate injustice. See Bucknor-Maclean v. Inlaks Ltd. (1980) 8-11 S.C. 1; (1980) 8-11 S.C. (Reprint) 1.*

H This court has neither overruled, reversed or nullified its previous or pre-1982 decisions on the issue of the court's exercise of discretion whether on questions of substantive or procedural law. These decisions have neither been annulled by legislation nor by a judicial decision of this court given intra-judicially. It therefore seems to me clear that the said recognized principles upon which applica-

tion for extension of time were granted prior to the issuance of the Practice Directions of 1989, remain good law and applicable. Indeed, in the University of Lagos case Obaseki, JSC., commented *inter alia* as follows:-

"I do not think that the court today will depart from the course of justice if culpable negligence or inadvertence of counsel is established by any litigant. That amounts to exceptional circumstances deserving of the court's most sympathetic consideration."

The appellant in this appeal with due respect, has failed to show us that the decision in Ekwunife (supra), was reached per incuriam or that it perpetuated any injustice or that it has been annulled by legislation or by a judicial decision of this court given intra-judicially. Learned counsel for the appellant has himself recognized that fact where he said in his Brief:-

"My Lord, the decision is Ekwunife v. Wayne (supra), is probably not inconsistent with the Constitution, neither was it erroneously reached per incuriam, it is, but not so much about fettering the judicial discretion of the Court of Appeal or of any other court, it is mainly that continuing to follow it is perpetuating injustice and also that there have been developments which the Supreme Court did not advert to and which were not brought to the attention of the court while deciding the case which render the decision therein, I submit with the greatest respect no longer good law, and, or oppressive in its application."

I do not think following the decision in Ekwunife's case will perpetuate injustice unless injustice is understood only in the way learned counsel for the appellant epitomized it. The law as espoused in Ekwunife's case is still good and shall continue to have binding force until when it is departed from judicially by this court. I find no merit in appellant's issue No.2. I dismiss same.

Finally, I find no merit in this appeal. I dismiss the appeal. I affirm the lower courts decision. I order the appellant to pay costs of ₦50,000.00 to the respondent in this appeal.

ONU JSC

Having been privileged to read before now the judgment of my learned brother, Muhammad, JSC., I am in agreement with him that the appeal lacks substance and must perforce fail.

Accordingly, I too dismiss the appeal and have nothing more to add thereto.

TOBI JSC

The appellant was the plaintiff in the High Court. The respondent was the defendant. The appellant claimed from the respondent the sum of N553,316.08 with interest at the rate of 35% per annum from 24th February, 1992, till judgment, being sum for unsettled bills of polypropylene products sold to the respondent at its request. The appellant claimed that the respondent was one of the appellant's various customers buying the appellant's products in very large quantities most times on credit basis with the agreement that bank rate of interest will be paid on invoice not settled within 30 days of supply or delivery.

The learned trial Judge gave judgment to the appellant. In his judgment, the Judge said at pages 85 and 86 of the record:

"A careful scrutiny of the defence filed in view shows it is a defence put up to defence (sic) the plaintiff and the court should not encourage it. It is a worthless defence. In the circumstances, I do hereby enter judgment for the plaintiff for the sum of N553,316.08 less N40,000.00 paid to the plaintiff with interest at the rate of 35% per annum with effect from 24/2/92, to the date of this judgment, that is, 20/2/95. Thereafter, interest is to run at the rate of 60% until the total judgment debt is finally liquidated. Accordingly I so rule."

On appeal, the Court of Appeal allowed the appeal. The court said at page 128 of the Record:

"Consequently, I see merit in this appeal and I allow it. I set aside the award of 35% interest made by the trial court and in its place dismiss the respondent's claim as regarding pre-judgment interest."

Dissatisfied, the appellant has come to the Supreme Court. Briefs were filed and duly exchanged. The appellant also filed a Reply Brief. Both parties formulated two issues each for determination.

While the issue No.2 in each Brief is the same, the first two issues are almost the same. The crux of the matter boils down to the 35% rate of interest awarded by the learned trial Judge and refused by the Court of Appeal. The four issues formulated by the parties dovetail into the 35% interest. That is the real quarrel between the parties.

It is the case of the appellant that the learned trial Judge rightly awarded 35% interest. It is the case of the respondent that the Court of Appeal rightly rejected the award of 35% interest by the learned trial Judge. And so, while the respondent stoutly defends the judgment of the learned trial Judge, so is the appellant in respect of the judgment of the Court of Appeal.

What did the Court of Appeal say about the 35% rate of interest? The Court of Appeal dealt with the issue from two angles, viz: that the rate was not contained in the affidavit and that it was not proved. The court said at page 127 of the record:-

"This paragraph merely stated the claim of the respondent against the appellant. The deponent did not aver anywhere in the affidavit that the prevailing bank rate was 35% per annum. There was therefore no proof of the rate of interest before the trial court to support its award of 35%. In other words, the interest awarded was not based on any evidence of the rate of interest claimable as at the time of the suit.

The court relied on paragraph 5 of the affidavit. It reads:

"That the claim of the applicant against the respondent as stated in the Writ of Summons together with the Statement of Claim is for the sum of N553,316.08..... with interest at the rate of 35% per annum from the 24th of February, 1992, till the date of judgment in this case and thereafter at the same rate of interest until the total debt is finally and fully settled."

I do not agree with the Court of Appeal that paragraph 5 of the affidavit did not aver that the prevailing bank rate was 35%. Paragraph 5 avers that the debt carried an interest of 35% per annum. Is it because the averment did not contain the word "prevailing" that gave rise to the conclusion of the Court of Appeal? If so, that is rather too technical and abstract for my liking. The paragraph, without the word "prevailing" is clear that the 35% is the prevailing bank interest. That is unnecessary hair splitting and semantics. It does not carry the

matter anywhere other than mere technicality. And I am not for that.

I do not also agree with the Court of Appeal on the issue of proof. It is the law that what is admitted need not be proved. In paragraph 4 of the counter-affidavit, the respondent averred as follows:-

B *“That the defendant/respondent admits paragraphs 4, 5, 9 and 10 of the affidavit in support dated 1st November, 1993.”*

As paragraph 4 of the counter-affidavit admitted paragraph 5 of the affidavit in support, proof is no more necessary. I should say C that the admission in paragraph 4 of the counter-affidavit in respect of paragraph 5 of the affidavit in support does not affect the live issue in the matter. I say this because the respondent denied paragraph 6 of the affidavit in support which, in my view, is the live issue. Paragraph 6 of the affidavit in support averred:-

D *“That the indebtedness of the respondent to the applicant arose out of the unsettled bill of polyethylene and/or polypropylene product supplied by the applicant to the respondent at the respondent’s request on credit basis.”*

E The respondent materially denied paragraph 6 of the affidavit in support in the same paragraph 6, this time, of the counter-affidavit. It reads:-

F *“That the defendant/respondent, while admitting paragraph 6 of the affidavit in support of motion that there was a transaction between it and the plaintiff/applicant, avers that there was no indebtedness to the plaintiff/applicant as all reconciled invoices had been paid by the defendant/respondent.”*

That is the crux of the dispute. That is, the centre pin of the dispute. It is the turntable. This appeal revolves or rotates around it. G The burden of proof is on the appellant. Did the appellant discharge the burden? That is my next focus. Learned counsel for the respondent said at pages 7 and 8 of the respondent’s Brief:-

H *“(1) An averment in a pleading is not proved, in a summary judgment proceeding (such as under Order 10 of the High Court of Lagos State (Civil Procedure) Rules, 1972, by merely repeating it, without more, in the affidavit of the party on whom lies the burden to prove it. Pleading is not evidence; it is that which has to be established by evidence. In this case, the mere repetition of paragraphs 3*

and 12 of the Statement of Claim in paragraphs 5 and 17 of the affidavit of Mr. Emmanuel Edokpolor does not amount to evidence.

(2) A deponent who by his own admission is a law clerk, even if competent to give evidence on bank interest rate, must at least disclose how he came about the information founding his evidence (Sections 86, 88 and 89 of the Evidence Act), It is not for the court (as heavily canvassed by the appellant in paragraph 3.15(e) and (f) of its Brief) to help the witness to fill-in-the -gaps by speculating on how the witness came about his knowledge. In this case, Mr. Emmanuel Edokpolor did not state how he came to know what the applicable bank interest rate was, and the court cannot perform that function for him.

(3) Evidence must be direct and cogent, not vague and speculative. Mr. Emmanuel Edokpolor's deposition to the effect that the applicable bank interest rate was "about 35%" was vague, uncertain and speculative. He ought to have stated precisely what the interest rate was, and whether it was daily, weekly, monthly or annually. He did not and could not because he did not know what he was talking about."

Learned counsel for the appellant, in his Reply Brief, submitted that the proceedings were heard not only under Order 10 but also under Order 28 Rule 6 of the High Court of Lagos State (Civil Procedure) Rules, on admissions notwithstanding that the defendant/respondent had categorically denied in the Statement of Defence that it was indebted to the appellant. Counsel referred to the Notice of the Motion for judgment and paragraph 3 of the Statement of Defence.

He submitted also that the standard of proof required in a proceeding under Order 10 of the Rules above, is not higher than in any civil proceedings and it is a standard based on a balance of probability. He argued that in a situation where the appellant gave, even if a little evidence, but the respondent gave none at all, and rather deposed to the fact that it was "not in the position to either admit or deny" the deposition that interest rate was about 35%, the learned trial Judge did not have any choice but act upon the evidence available before him, in so far as that evidence was credible. He cited Olujinle v. Adeagbo (1988) 1 NSCC 625 at 636.

Learned counsel submitted in his Reply Brief that a claim for interest is not necessarily treated as a claim for special damages as it may in fact be treated as general damages. He cited Jefford v. Gee (1970) 1 NWLR 702 at 707, Chairman Motors Ltd. v. Fidelity and Casualty Insurance Co. of New York Putnam. Third Party 53 O.R. (2d) p.581 and Kano Textile Printers Plc. v. Tukur (1999) 2 NWLR (Pt.589) 78 at 84.

By the submission of learned counsel for the appellant, he concedes that the proceedings were also under Order 10. The new twist he has is that they were also under Order 28 Rule 6. The issue is whether the appellant satisfied the burden of proof placed on it in Order 10 proceedings of Lagos State? If the case of the appellant is that the appellant proved its case in accordance with Order 28 Rule 6 did it satisfy the burden of proof in Order 10 proceedings? That is the point being made by learned counsel for the respondent in the submission above when he said that proceedings under Order 10 are not proved by merely repeating an averment in a pleading without more, in the affidavit of the party on whom lies the burden to prove it. I entirely agree with learned counsel.

There is one other issue. What does learned counsel for the appellant mean by "little evidence". In his submission in the Reply Brief, he seems to be involved in what economists call "division of labour" when he said that in a situation where the appellant gave even if a little evidence but the respondent gave none at all", the learned trial Judge did not have any choice but act upon the evidence available before him. I do not know of such division of responsibility in the giving of evidence by parties in our adjectival law. The only one I know is that the plaintiff has the burden to prove his case and the burden is on the balance of probability or the preponderance of evidence. By the submission of "little evidence" on the part of the appellant and no evident on the part of the respondent, counsel is shifting the burden proof on the respondent. Similarly, by his submission, counsel is saying that the appellant can rely on a possible weakness of the case of the respondent. Both are clearly outside the Law of Evidence. I should not forget to ask learned counsel how his "little evidence" will be measured and by whom? I was almost thinking that the little evidence cannot satisfy the balance of

probability or the preponderance of evidence test. I say this because the word “little” in the context means small. It also means less, or least. The word connotes the smallness of something or a thing as a mother can say of her child: “he eats very little everyday”. It is the smallest aggregate that exists. If the above meanings I have given to the word are correct (and I think they are), then I ask, how can such evidence pass the evidential test of balance of probability or preponderance of evidence? The submission itself has clearly defeated the case of the appellant. It has clearly put an end to the appellant’s case. B

Let me take very briefly the invitation of learned counsel that this court should overrule its earlier decision in Ekwunife v. Wayne (1989) 12 S.C. 92; (1989) 5 NWLR (Pt.22) 422. He submitted that as the position he has taken in the case is contrary to the decision of the Supreme Court in Ekwunife, this court should reverse its decision to fall in line with that position. This court takes most seriously the invitation by counsel to overrule its earlier decision because so much is involved in the exercise. Because a reversal of the earlier of this court can give rise to instability of the judicial precedent, particularly those governing stare decisis, this court must be convinced that its decision was clearly and patently wrong. In considering that, this court will closely examine the facts of the decision it is called upon to reverse in the light of facts of the case calling for the reversal. This is because facts are the fountain head of the law and case are not decided in a vacuo or in a vacuum but in relation to the particular facts of the case before the court. I have carefully examined the decision in Ekwunife and I do not see my way clear in overruling it. D E F

I do not think I will go any further. I can stop here. It is for the above reason and the more detailed reason given by my learned brother, Muhammad, JSC., that I too dismiss the appeal. I abide by the costs awarded by my learned brother. G

MUSDAPHER JSC

I have had the honour to read before now the judgment of my Lord, Muhammad, JSC., just delivered with which I respectfully agree. For the same reason eloquently canvassed therein, which I adopt as mine, I too dismiss the appeal as unmeritorious. I affirm the decision of the court below. I abide by the order for costs pro- H

posed in the aforesaid judgment.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the leading judgment by my learned brother, Muhammad, JSC. He has shown that the appellant did not show his entitlement to 35% interest on the principal sum claimed against the respondent. There was no evidence to justify the award of 35% made by the trial court. The court below was correct in its decision to allow the appeal against the award of interest at 35% per annum.

I would also dismiss this appeal as in the leading judgment of my learned brother, Muhammad, JSC. I abide by his order on costs.

AKINTAN JSC

The dispute between the parties in appeal is over claim for payment of interest on a debt claimed by the appellant who was the plaintiff at the trial court. The appellant, as plaintiff, had in its writ claimed against the respondent, as defendant, inter alia, as follows:-

“The sum of N553,316.08 with interest at the rate of 35% per annum from the 24th of February, 1992, till judgment in this case and thereafter at the same rate of interest until the total debt is finally and fully settled.”

The learned trial Judge entered judgment for the plaintiff in default of defence “in the sum of N553,316.08 less N40,000 paid to the plaintiff with interest at the rate of 35% per annum with effect from 24/02/92, to the date of this judgment that is 20/02/95. Thereafter interest is to run at the rate of 60% until the total judgment debt is finally liquidated.” The defendant was dissatisfied with the award of interest made by the learned trial Judge. He filed an appeal against it to the court below. The appeal was allowed. The present appeal by the plaintiff/appellant is from the judgment of the court below.

The main issues canvassed in this court are that the court below was wrong in setting aside the award of interest made by the trial court and a request was made that this court should depart from its earlier decision in Ekwunife v. Wayne (West Africa) Ltd. (1989) 12 S.C. 92; (1989) 5 NWLR (Pt.122) 422.

The main reason given by the court below for refusing the

awards made in respect of the interest claimed was that that aspect of the claim was not proved. It may be mentioned that the plaintiff had pleaded in paragraph 12 of its Statement of Claim that:-

"The plaintiff further pleads that between 1992 and now especially, bank interest rate has fluctuated around 35%".

But no credible evidence was led as to the exact prevailing rate of interest. The trial court was therefore wrong to have awarded 35% interest as such award was not premised on any credible evidence led before the court and since such matters could not come within those for which the court could take judicial notice.

The Court of Appeal was therefore right in setting aside that award.

On the request that this court should depart from the principle of law established in the Ekwunife case, (supra), the position of the law is that ordinarily this court adheres to the principle of stare decisis. It will therefore hold itself bound by its previous decisions. But where it is satisfied that any of its previous decisions is erroneous or was reached per incuriam and will amount to injustice to perpetuate the error by following such decision, it will overrule if or depart from it. This power of the Supreme Court is predicated on the fact that it is better to admit an error than to persevere in error: See *Adesokan v. Adetunji* (1994) 5 NWLR (Pt.346) 540, *Johnson v. Lawanson* (1971) 1 All NLR 56, *Odi v. Osafire* (1985) 1 NWLR (Pt.I) 17 *Adegoke Motors Ltd. v. Adesanya* (1989) 5 S.C. 113; (1989) 3 NWLR (Pt. F 109) 250, *Ishola v. Ajibore* (1994) 6 NWLR (Pt.352) 506 *Akinsanya v. U.B.A.* (1986) 4 NWLR (Pt.33) 273 and *Bucknor-Maclean v. Inlaks Ltd.* (1980) 8-11 S.C. 1; (1980) 8-11 S.C (Reprint) 1.

It is necessary to say that a party in an appeal before the Supreme Court desirous of the court departing from its previous decision must, in accordance with Order 6 Rule 4(4) of the Supreme Court Rules (1999 as amended), invite the court to depart from that previous decision before the question of such departure will arise in the appeal before the court. See *Adesokan v. Adetunji* (supra), 540 at 562. In the present appeal, the appellant gave the necessary notice as prescribed by the aforementioned rule of this court. But it failed to establish that any of the conditions that must exist before the request to depart from or overrule the principle of law established in

the case as enunciated above, was in- existence. The request can therefore not be granted.

In the result and for the reasons I have stated above and the fuller reasons given in the leading judgment written by my learned brother, I. T. Muhammad, JSC., the draft of which I have read. I also
B dismiss the appeal with costs as assessed in the leading judgment.

TABAI JSC

At the Ikeja Division of the High Court of Lagos State, the
C appellant who was plaintiff claimed against the defendant/respon-
dent the sum of N553,316.08 with interest at the rate of 35% per
annum from 24/2/92, till judgment in this case and thereafter at the
same rate of interest until the total debt is finally and fully settled. On
the 20/2/95, the trial court entered judgment for the appellant in the
D following terms:

*“It is a worthless defence. In the circumstances, I do hereby
enter judgment for the plaintiff for the sum of N553,316.08 less
N40.000.00 paid to the plaintiff with interest at the rate of 35% per
annum with effect from 24/2/92, to the date of this judgment that is
E 24/2/95. Thereafter interest is to run at the rate of 60% until the total
judgment debt is finally liquidated.....”*

The respondent herein was not satisfied with the award of costs
and therefore went on appeal to the court below. The appeal was
F allowed. The appellant has thus come on appeal before this court.

On this issue of the rate of interest, the problem was created by
the appellant. In the supporting affidavit he put the interest rate at
about 35%. About 35% is vague and merely speculative. He had a
duty to state precisely what the rate of interest was. There was there-
G fore no basis for the trial court’s award of 35% interest. The lower
court was, in the circumstances entitled to interfere with the award of
the trial court. In the circumstances this court has no choice than to
endorse the judgment of the court below.

For the foregoing and the fuller reasons set out in the leading
H judgment of my learned brother, Muhammad, JSC., I also dismiss
the appeal. I abide by the award on costs in the leading judgment.