

**SUPREME COURT OF NIGERIA**  
6TH FEBRUARY, 2009. SC. 134/2003  
**CORAM:- N. TOBI, M. MOHAMMED, W. S. N. ON-  
NOGHEN, F. F. TABAI, C. M. CHUKWUMA-ENEH, JJSC**

SERGIUS ONYEKWELU ..... APPELLANT  
(Trading under the name  
and style of COMPET NIG.  
ENTERPRISES)

AND

ELF PETROLEUM NIG. LTD ..... RESPONDENT

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APPEALS - Issues - Incompetence - Effect of - Where an issue as formulated does not arise from the grounds of appeal - It is incompetent and liable to be struck out - Or discountenanced in the determination of the appeal (H1)

JUDICIAL PRECEDENTS - Distinguishing - Evidence on facts not pleaded - Applicability of Anyanwu v. Iwuchukwu - The principle is totally inapplicable to the instant case as the fact of respondent's rejection of the good supplied was properly pleaded - In line with the evidence led (H2)

EVIDENCE - Expert witness - Necessity of - Where the evidence already before the court sufficiently proves a party's case without reliance on an expert opinion - The exercise of calling an expert witness may be avoided as unnecessary - As observed by the Court of Appeal (H3)

APPEALS - Findings of fact - Not supported by record - Fate of - As there was ample evidence in support of the rejection of the goods supplied by the appellant contrary to the finding of the trial court - Court of Appeal was right to have set aside the finding (H4)

CONTRACTS - Breach - Sale of goods - Rejection of supplied goods - Both the terms of contract and provisions of sale of goods law - Empower a buyer to reject goods for nonconformity with specifications - Respondent was therefore not in breach (H5)

EVIDENCE - Evaluation - By appellate court - Propriety of - Where trial court fails to properly evaluate the evidence before it - Appellate court may evaluate same to make proper findings (H6)

### **FACTS**

The plaintiff / appellant sued the defendant / respondent claiming damages for breach of contract. Appellant's case was that he had a contract for sale of goods with the respondent, but that the respondent was in breach of the contract in that he rejected the goods supplied without regards to the terms thereof. The response of the respondent was that it rejected the goods in accordance with the terms of the contract which provided for rejection in the event of noncompliance with specifications.

At the end of trial, the learned trial judge found for the appellant and awarded him damages accordingly. Aggrieved, the respondent appealed to the Court of Appeal, which allowed the appeal, set aside the judgment of the trial court, and instead dismissed the action of the appellant. Dissatisfied, the appellant has brought this appeal against the judgment of the Court of Appeal.

### **ISSUES FOR DETERMINATION**

*"1. Whether the Court of Appeal was right when it set aside the judgment of the trial Court on the ground that the Plaintiff failed to challenge or contradict the evidence of DW2 to the effect that he (DW2) and the Plaintiff/Appellant had once discussed the fact that the Defendant had rejected the goods when such evidence or facts on such evidence were not pleaded by the Defendant?"*

*2. Whether the learned Justices of the Court of Appeal were right when they held that it was not the duty of the Defendant/Respondent to call an expert witness to compare the signatures on EXHIBITS 'L', 'M' and 'H'?"*

**HELD** (Unanimously dismissing the appeal per **MOHAMMED JSC**)  
**APPEALS - Issues - Incompetence**

1. It is elementary that issues formulated for determination in an appeal must arise from the grounds of appeal filed by the Appellant. Where such issues as formulated do not arise from the grounds of appeal, as is the case with the Respondent's lone issue formulated in this appeal, the issues will be deemed irrelevant and disregarded in

the determination of the appeal or struck out. Applying the law, I shall ignore the irrelevant issue raised in the Respondent's brief and proceed to determine this appeal on the two issues for determination raised in the Appellant's brief of argument which issues clearly arose from the two grounds of appeal filed by the Appellant. (p. 508 G/509 A )

### ***JUDICIAL PRECEDENTS - Distinguishing***

2. Close examination of the above paragraphs quoted from the amended Statement of Defence of the Defendant/Respondent, shows quite clearly that the complaint of the Appellant in his issue number one that the facts in support of the evidence of the Defendant/Respondent on the rejection of the goods supplied by him were not pleaded, is not only unfounded but rather frivolous to the extreme. The facts relating to the rejection of the goods supplied by the Appellant have not only been pleaded but the grounds for such rejection as that the goods on inspection were found unacceptable not having conformed to the quality required under the contract were also pleaded. The only case of *Anyanwu v. Iwuchukwu* (supra) cited and relied upon by the Appellant in support of the argument on this issue of treatment of evidence led on facts not pleaded, is totally inapplicable in the present case on the face of the pleaded facts quoted above in paragraphs 6, 9 and 10 of the Amended Statement of Defence. (p. 512 H)

### ***Expert witness - Necessity of***

3. As for the second issue of the Appellant regarding on whom the burden of proof lies in calling an expert witness to prove that he signed the Respondent's Rejection/Returned Way Bills exhibits 'L' and 'M', the need to have embarked on this exercise as found by the learned trial Judge was quite unnecessary as rightly observed by the Court below, taking into consideration of the overwhelming evidence of the witnesses called by the Defendant/Respondent, DW1 and DW2 whose evidence was not dislodged by the Appellant under cross-examination. (p. 513 D)

### ***APPEALS - Findings of fact - Not supported by record***

4. It should be noted that it is not only the signature of the Appellant

on Exhibits 'L' and 'M' that confirmed that the Respondent had in fact rejected the goods supplied by the Appellant. The action of the Respondent in intimating the Appellant that it had rejected the goods, coupled with its refusal to deal with the goods supplied inconsistent with the ownership of the goods by the Appellant and most importantly, the direct oral evidence of DW1 and DW2, are enough credible and overwhelming evidence in support of the act of rejection. The Court below was therefore right in its decision, contrary to the erroneous finding of the trial Court, that there was ample evidence before the trial Court in support of the rejection of the goods supplied by the Appellant, justifying the setting aside of the finding of the trial Court. (p. 513 F)

***CONTRACTS - Breach - Sale of goods***

D 5. The contract between the parties being one for the supply of goods for payment on acceptance of the supply, is clearly governed by the terms of the contract, namely the terms contained in the L.P.O. and the law governing the transaction between the parties on the subject of sale of goods under the Sale of Goods Law of Rivers State of Nigeria in Edict No. 5 of 1988. In the present case the L.P.O. under which the Appellant supplied the goods gave the Respondent, as the buyer of the goods, the right to reject the goods supplied in condition 3 of the contract document.

F Guided by this term of the contract which no doubt is binding between the parties and having regard to the evidence of the Respondent based on the pleaded facts, the Respondent having inspected the goods supplied and found them not conforming to the specification under the contract, particularly when the items supplied were found to have been refurbished rather than being new, rightly exercised its right in rejecting the goods supplied. On the same evidence, this same right of rejection is also available to the Respondent under the Rivers State Sale of Goods Law 1988 in Sections 43, 44 and 45. (p. 514 D/G)

H

***EVIDENCE - Evaluation - By appellate court***

6. It is also trite law that if a trial Court fails to exercise properly its powers as a trial Court to consider and evaluate the evidence adduced by both parties on certain relevant issues, as happened in the

instant case on the issue of the rejection of the goods by the Respondent, it is the duty of the appellate Court, if it does not involve credibility of witnesses to consider and evaluate such evidence and to make proper findings. In the present case therefore, the setting aside of the judgment of the trial Court and replacing the same with the order of dismissal of the Appellant's action by the Court below, was quite in order and I see no reason to interfere with that decision. (p. 516 A) B

**REPRESENTATION**

K. C. Nwugo for the Appellant C  
Sylvia Ogwemoh for the Respondent

**CASES REFERRED TO**

Okonkwo v. Okolo (1988) 2 N.W.L.R. (Pt.97) 632 D  
Oniah v. Onyia (1989) 1 N.W.L.R. (Pt. 99) 514  
Ugo v. Obiekwe (1989) 1 N.W.L.R (Pt. 99) 566  
Sanusi v. Ayoola (1992) 9 N.W.L.R. (Pt. 265) 275 at 291  
Damian Anyanwu v. Brenda M. Iwuchukwu (2000) 12 S.C.N.J. 168 at 174 - 175 E  
Nelson Olorunimbe Gbafé v. Prince Frank Gbafé & 3 Ors. (1996) 6 S.C.N.J. 167 at 183  
Felix Okoli Ezeonwu v. Chief Charles A. Onyechi & 2 Ors. (1996) 2 S.C.N.J 250 at 264  
United Bank for Africa Plc. v. B.T.L. Industries Ltd. (2006) 19 N.W.L.R. (Pt. 1013) 61 at 137 F  
Akeredolu v. Akinremi (1989) 3 N.W.L.R. (Pt. 108) 164  
Olowosaga v. Adebajo (1988) 4 N.W.L.R. (Pt. 88) 275  
Imah v. Okogbe (1993) 9 N.W.L.R. (Pt. 316) 159 at 178 G

**STATUTE REFERRED TO**

Sale of Goods Edict, No. 5 of 1988, of Rivers State, ss. 43, 44 and 45

H

**LEAD JUDGMENT BY MOHAMMED JSC**

Sergius Onyekwelu, trading under the name and style of Compet Nigeria Enterprises who is the Appellant in this appeal, was the Plaintiff at the trial High Court of Justice of Rivers State sitting at

Port Harcourt where he instituted an action against Elf Petroleum Nigeria Limited, the Respondent in this Court and claimed thus:

“*WHEREOF the Plaintiff claims against the Defendant the sum of N1,000,000.00 (One Million Naira) being and representing special and general damages for breach of contract contained in L.P.O. No. 301164/TNN dated 27th May, 1993.*

*SPECIAL DAMAGE*

	<i>“1. Total value of contract executed -</i>	<i>N218,800.00</i>
C	<i>Interest for the Month of August 1993 at 15% of N65,000.00 -</i>	<i>N24,750.00</i>
	<i>3. Charge rate of 20% of the N165,000.00 for the month of September, October and November, 1993 -</i>	<i>N99,000.00</i>
D	<i>Total -</i>	<i>N342,550.00</i>
	<i>GENERAL DAMAGES -</i>	<i>657,450.00</i>
	<i>GRAND TOTAL -</i>	<i>N1,000,000.00</i>
E	<i>4. An interest rate of 20% of N165,000.00 per month representing 33,000.00 pending the final determination of this suit.”</i>	
F		

The facts leading to the Appellant’s claim are straightforward. The contract between the parties in this appeal is contained in a Local Purchase Order usually referred to as L.P.O. dated 27th May, 1993, by which the Appellant agreed to supply the Respondent some items of goods listed therein valued at N218,800.00 on or before 15th June, 1993. Payment for the goods supplied was to be made by the Respondent 30 days after the receipt of the invoice confirming the delivery. Some of the conditions agreed between the parties in the L.P.O. include that the order was subject to cancellation if delivery was not made within the time specified; that the Respondent as the purchaser of the items ordered, reserved the right to reject the items supplied at the expense of the Appellant if such items did not conform to the specification under the contract among others. The goods supplied by the Appellant and received by the Respondent’s

receiving Clerk, were later rejected by the Respondent after inspection mainly on the ground that the goods supplied were not new and therefore refused to pay for the goods. The Appellant who regarded the action of the Respondent in rejecting the goods supplied under the L.P.O. as a breach of contract, headed for the trial High Court seeking redress in damages because he had to take a loan of N165,000.00 from a finance Company in order to execute the contract. B

The action of the Appellant was duly heard on pleadings duly exchanged between the parties. At the hearing, the Appellant as the Plaintiff was the only witness who testified in support of his claims. In the course of his evidence, a number of documents were tendered and received in evidence. These relevant documents comprising the L.P.O. and the Way Bills in particular, were marked as exhibits A - K respectively by the trial Court. The Respondent in its defence to the action against it by the Appellant, called two witnesses. One witness was the Clerk of the Respondent who received the goods supplied by the Appellant while the second was the Branch Manager of the Finance Company that gave the Appellant the loan with which the supply contract was executed. Exhibits L' and , 'M' were tendered and received in evidence as part of the case of the Defendant/Respondent. After considering the evidence before him adduced by the parties, the learned trial Judge found for the Appellant as Plaintiff and awarded him the sum of N700,000.00 as special and general damages together with interest of 33,000.00 per month from 15th February, 1996, until the judgment debt is finally paid. The Respondent as the Defendant was not happy with the judgment of the trial Court and therefore appealed against it to the Court of Appeal which after hearing the appeal, allowed it, set aside the judgment of the trial Court and replaced it with a judgment dismissing the action of the Appellant who was the Respondent in that Court. In challenging that decision of the Court of Appeal, the Appellant who was aggrieved by it, has now appealed against it to this Court. In the Appellant's brief of argument filed on his behalf by his learned Counsel, the Appellant has identified two issues from the two grounds of appeal filed. The issues are:- C D E F G H

*"1. Whether the Court of Appeal was right when it set aside the judgment of the trial Court on the ground that the Plaintiff failed*

*to challenge or contradict the evidence of DW2 to the effect that he (DW2) and the Plaintiff/Appellant had once discussed the fact that the Defendant had rejected the goods when such evidence or facts on such evidence were not pleaded by the Defendant?*

2. *Whether the learned Justices of the Court of Appeal were right when they held that it was not the duty of the Defendant/Respondent to call an expert witness to compare the signatures on EXHIBITS 'L', 'M' and 'H'?"*

However, learned Counsel to the Respondent in the Respondent's brief of argument saw only one single issue for the determination of this appeal. The issue states :-

*"Whether the decision of the learned Justices of the Court of Appeal Port Harcourt Division delivered on the 23rd day of May, 2002, setting aside the judgment of the Honourable Justice T. K. Osu of the trial Court was founded on clear and sound reasoning and established principles of law?"*

The above issue formulated by the Respondent has no link whatsoever with the two grounds of appeal filed by the Appellant to question the decision of the Court of Appeal against him in this Court. None of the two grounds of appeal raised any complaint that the judgment being appealed against was not founded on clear and sound reasoning and established legal principles of law. Rather, ground one of the grounds of appeal is complaining that the evidence of DW2 relied upon in support of the judgment of the Court of Appeal was not supported by pleadings, while the second ground is a clear complaint on the evidence in support of the rejection of the goods supplied by the Appellant contained in exhibits 'L,' 'M' and 'H'. It is not difficult therefore to see that the lone issue formulated by the Respondent and the Appellant's two grounds of appeal from which the issue is supposed to emerge, are in fact poles apart. ***It is elementary that issues formulated for determination in an appeal must arise from the grounds of appeal filed by the Appellant. Where such issues as formulated do not arise from the grounds of appeal, as is the case with the Respondent's lone issue formulated in this appeal, the issues will be deemed irrelevant and disregarded in the determination of the appeal or struck out.*** See Okonkwo v. Okolo (1988) 2 N.W.L.R. (Pt.97) 632; Oniah v. Onyia (1989) 1 N.W.L.R. (Pt. 99) 514; Ugo v. Obiekwe (1989) 1



N.W.L.R (Pt. 99) 566 and Sanusi v. Ayoola (1992) 9 N.W.L.R. (Pt. 265) 275 at 291. ***Applying the law, I shall ignore the irrelevant issue raised in the Respondent's brief and proceed to determine this appeal on the two issues for determination raised in the Appellant's brief of argument which issues clearly arose from the two grounds of appeal filed by the Appellant.*** B

The two issues for determination in the Appellant's brief of argument have been quoted earlier in this judgment. I must observe however, that both issues are rooted in the challenge of the evidence in support of the delivery and the rejection of the goods supplied by the Appellant to the Respondent. I shall therefore take the two issues together. On the first issue, learned Counsel to the Appellant is of the view that the Court below erred in law in setting aside the judgment of the trial Court on the ground that the Appellant as the Plaintiff, had failed to challenge or contradict the evidence of DW2 on the rejection of the goods supplied, when such evidence or facts on such evidence, were not pleaded in the Amended Statement of Defence and as such the evidence goes to no issue being immaterial that the evidence was unchallenged or not contradicted having regard to the decision of this Court in Damian Anyanwu & Anor. v. Brenda M. Iwuchukwu (2000) 12 S.C.N.J. 168 at 174 - 175. Oniah v. Onyia (1989) 1 N.W.L.R. (Pt. 99) 514; Ugo v. Obiekwe (1989) 1 N.W.L.R (Pt. 99) 566 and Sanusi v. Ayoola (1992) 9 N.W.L.R. (Pt. 265) 275 at 291. Applying the law, I shall ignore the irrelevant issue raised in the Respondent's brief and proceed to determine this appeal on the two issues for determination raised in the Appellant's brief of argument which issues clearly arose from the two grounds of appeal filed by the Appellant. C D E F

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evidence, were not pleaded in the Amended Statement of Defence and as such the evidence goes to no issue being immaterial that the evidence was unchallenged or not contradicted having regard to the decision of this Court in *Damian Anyanwu & Anor. v. Brenda M. Iwuchukwu* (2000) 12 S.C.N.J. 168 at 174 -175

B On the second issue, learned Counsel to the Appellant submitted that the decision of the Court below that it was not the duty or obligation of the Respondent as the Defendant in the action to call an expert witness to compare the signatures on Exhibits 'L', 'M' and 'H', was unfounded in law because the law places the burden on the Respondent who alleged that the Appellant had signed the Exhibits to prove the fact as laid down in the cases of *Nelson Olorunimbe Gbafe v. Prince Frank Gbafe & 3 Ors.* (1996) 6 S.C.N.J. 167 at 183 and *Felix Okoli Ezeonwu v. Chief Charles A. Onyechi & 2 Ors.* (1996) 2 S.C.N.J 250 AT 264. Learned Appellant's Counsel therefore argued that the trial Judge was right when he found and held that the Appellant as Plaintiff, did not sign Exhibits 'L1 and 'M1 and as such the Court below was wrong in disturbing the judgment of the trial Court. Counsel pointed out that it was only Exhibit 'H' that was received by the Appellant 90 days after the delivery of the goods to the Respondent and by conditions 4 of the L.P.O. being the contract document, the Appellant ought to have been paid the contract sum within 30 days of the delivery of the goods, thereby making the Respondent's rejection of the goods 90 days after delivery, rather unreasonable even under Sections 43, 44 and 45 of Rivers State Sale of Goods Edict No. 5 of 1988, relied upon by the Respondent in asserting the rejection of the goods within reasonable time.

In his response to the first issue for determination, learned Counsel to the Respondent quoted paragraphs 6, 9 and 10 of the Amended Statement of Defence and submitted that the paragraphs show clearly that the Respondent at all times had made the fact of rejection of the goods supplied by the Appellant an issue in the dispute between the parties leading to the revocation of the contract; that neither on pleadings nor in the evidence at the trial, did the Appellant make any attempt to dislodge the evidence of DW1 and DW2 on the issue of the rejection of the goods supplied particularly when the action of the Respondent in rejecting the goods supplied was within the terms and conditions of the contract contained in the

L.P.O. which was in evidence as Exhibit B. Learned Counsel concluded on this issue that the Court below was right in finding from the oral and documentary evidence before the trial Court that the conditions of contract in Exhibit B the L.P.O., gave the Respondent the right to examine the goods after delivery and reject the same if found not to have conformed to the specifications of the goods ordered under the contract. Reliance was placed on the cases of United Bank for Africa Plc. v. B.T.L. Industries Ltd. (2006) 19 N.W.L.R. (Pt. 1013) 61 at 137; Akeredolu v. Akinremi (1989) 3 N.W.L.R. (Pt. 108) 164 and Olowosaga v. Adebajo (1988) 4 N.W.L.R. (Pt. 88) 275. B C

On the second issue arising from the dispute over the alleged signature of the Appellant on Exhibits 'L', 'M' and 'H', the learned Respondent's Counsel argued that since the documents were in evidence before the trial Court, the burden was on the Appellant to prove that the signature of the Appellant shown on the documents were not his signature. This was so according to the learned Counsel, when the nature of the evidence of the Appellant denying signing the documents seemed to have imputed allegation of fraud on the Respondent as having forged the said signatures thereby requiring proof beyond reasonable doubt on the part of the Appellant. Section 138 of the Evidence Act and the case of Agbi v. Ogbeh (2006) 11 N.W.L.R. (Pt. 990) 65 at 133 - 134 was cited and relied upon in support of this submission. D E

Starting with the complaint of the Appellant that the relevant facts supporting the evidence that the goods supplied by him were rejected by the Respondent were not pleaded in the Amended Statement of Defence, the answer lies in paragraphs 6, 9 and 10 of the Amended Statement of Defence at pages 41 - 42 of the record where it was pleaded as follows: F G

*6. The Defendant vehemently denies the averments contained in paragraphs 13, 14 and 15 of the statement of claim. In further answer to those paragraphs, Defendant avers as follows:-*

*(i.) That the Defendant requested the Plaintiff to supply it the following goods vide its Local Purchase Order (L.P.O) No. 0/1164 H dated 27th May, 1993 viz:*

- (a.) 4 main water pump shaft PN629080*
- (b.) 4 auxiliary water pump shaft PN3N7717*
- (c.) 8 main water pump Rebuilt kit PN852432*

(d.) 42432 Trower PN3N7327 part of 6L8357 Crankshaft group 5N4 ac498-up.

(e.) 3 pipes for exhaust mounting PN544172 part of 7L34S8 Turbo Group, for contract sum of N218,800.00.

B (ii.) That the said goods were meant to have been supplied on 15th June, 1993.

(iii.) That the Plaintiff supplied the goods on 12th July, 1993. The goods were inspected and found not acceptable and accordingly rejected. Plaintiff consented to sign and did sign a Rejection/Returned way Bill on or about 22nd July, 1993.

C (iv.) The Plaintiff re-supplied the said rejected goods though this time repainted and without the last item on the Local Purchase Order (L.P.O). These were again rejected and Plaintiff signed another Rejection/Returned Way Bill on or about 2nd August 1993.

D (v.) That at the trial the Defendant will rely on all relevant documents which are hereby pleaded and in particular the following: -

(i.) Defendant's L. P. O. 0/1164/TNN dated 27/5/93

(ii.) Defendant's Rejection/Returned way Bill (Freight way Bill No. 6062) dated 22/7/93

E (iii.) Defendant's Rejection/Returned way bill (Freight way bill No. 6063) dated 2/8/93 xxxxxxxxxxxxxxxx

9. Defendant vehemently denies paragraph 21 of the Statement of claim. In further answer to the said paragraph, Defendant avers that no sums were paid to Plaintiff as no sums were due to him. F Defendant will at the trial rely upon its well known business practice not to pay nor bear the costs of any rejected Local Purchase Order (L. P. Os).

G 10. Paragraph 22 of the Statement of claim is admitted only to the extent that the Defendant caused the letter dated 6th October, 1993, canceling the job order to be written to Plaintiff.

H In further answer to the said paragraph, Defendant repeats paragraph 6 above and would contend that the letter was a natural follow-up to the inability of Plaintiff to supply the quality of goods demanded by Defendant after several failed attempts."

**Close examination of the above paragraphs quoted from the amended Statement of Defence of the Defendant/Respondent, shows quite clearly that the complaint of the Appellant in his issue number one that the facts in support of the evi-**

**dence of the Defendant/Respondent on the rejection of the goods supplied by him were not pleaded, is not only unfounded but rather frivolous to the extreme. The facts relating to the rejection of the goods supplied by the Appellant have not only been pleaded but the grounds for such rejection as that the goods on inspection were found unacceptable not having con- B**  
**formed to the quality required under the contract were also pleaded. The only case of Anyanwu v. Iwuchukwu (supra) cited and relied upon by the Appellant in support of the argument on this issue of treatment of evidence led on facts not pleaded, C**  
**is totally inapplicable in the present case on the face of the pleaded facts quoted above in paragraphs 6, 9 and 10 of the Amended Statement of Defence.** In other words, the relevant facts in support of the evidence, both oral and documentary led by the Respondent in support of the rejection of the goods supplied by the Appellant, have indeed been plainly pleaded by the Respondent. D

**As for the second issue of the Appellant regarding on whom the burden of proof lies in calling an expert witness to prove that he signed the Respondent's Rejection/Returned Way Bills exhibits 'L' and 'M', the need to have embarked on this exercise as found by the learned trial Judge was quite unneces- E**  
**sary as rightly observed by the Court below, taking into consideration of the overwhelming evidence of the witnesses called by the Defendant/Respondent, DW1 and DW2 whose evidence F**  
**was not dislodged by the Appellant under cross-examination. It should be noted that it is not only the signature of the Appellant on Exhibits 'L' and 'M' that confirmed that the Respon- G**  
**dent had in fact rejected the goods supplied by the Appellant. The action of the Respondent in intimating the Appellant that it had rejected the goods, coupled with its refusal to deal with the goods supplied inconsistent with the ownership of the goods by the Appellant and most importantly, the direct oral H**  
**evidence of DW1 and DW2, are enough credible and overwhelming evidence in support of the act of rejection. The Court below was therefore right in its decision, contrary to the erroneous finding of the trial Court, that there was ample evidence before the trial Court in support of the rejection of the goods supplied by the Appellant, justifying the setting aside of the**

**finding of the trial Court.** I am quite aware that it is not always right for the appellate Court to disturb the findings of fact by trial Court but this is a rule with exceptions. If the findings of the trial Court on the plain facts or the facts as admitted in evidence at the trial are inadmissible under the law as in *Balogun v. Labiran* (1988) 3 N.W.L.R. (Pt. 80) 66 at 68 and *Ebba v. Ogodo & Anor.* (1984) 1 S.C.N.L.R. 392; (1984) 4 S.C. 84 at 98, the appellate Court may interfere. Also when the evidence is legally inadmissible, the appellate Court shall set aside any decision based on that evidence relied upon by the trial Court. See *Umar v. Bayero University* (1988) 4 N.W.L.R. (Pt. 86) 85. The situation where, as in the instant case, the trial Court refused to act on the plain facts found by it as admissible evidence, also in my view, comes within the exception justifying the intervention of the appellate Court.

***The contract between the parties being one for the supply of goods for payment on acceptance of the supply, is clearly governed by the terms of the contract, namely the terms contained in the L.P.O. and the law governing the transaction between the parties on the subject of sale of goods under the Sale of Goods Law of Rivers State of Nigeria in Edict No. 5 of 1988.*** The law is well settled that where there is a contract by which one party undertakes to supply the other with goods at a stipulated price, the seller is bound to deliver the goods, and the buyer, upon accepting the delivery of the goods, is bound to pay the purchase price of the goods. See *Clement Horst Co. v. Biddel Bros.* (1912) A.C. 18. That is to say, parties are bound by the terms of their contract. This means that if any dispute should arise with respect to the contract, the terms in any documents which constitute the contract, are invariably the guide to its interpretation. ***In the present case the L.P.O. under which the Appellant supplied the goods gave the Respondent, as the buyer of the goods, the right to reject the goods supplied in condition 3 of the contract document*** which states -

“3. We reserve the right to reject at supplier’s expense any items not confirming to specification on the L.P.O.”

**Guided by this term of the contract which no doubt is binding between the parties and having regard to the evidence of the Respondent based on the pleaded facts, the Respon-**

**dent having inspected the goods supplied and found them not conforming to the specification under the contract, particularly when the items supplied were found to have been refurbished rather than being new, rightly exercised its right in rejecting the goods supplied. On the same evidence, this same right of rejection is also available to the Respondent under the Rivers State Sale of Goods Law 1988 in Sections 43, 44 and 45** which state -

*“43. The buyer is deemed to have accepted the goods when he intimates to the sellers that he has accepted them, or (except when Section 44 of this Edict otherwise provides) when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller; or when after lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.”*

*44(1.) When goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.*

*(2.) Unless otherwise agreed, when the seller tenders deliver of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.*

*45. Unless otherwise agreed, where goods are delivered to the buyer and he refused to accept them, having a right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.”*

From the above provisions of the law on the sale of goods of Rivers State which also governed the transaction between the parties in this case, there is no doubt at all on the evidence on record regarding the circumstances surrounding the rejection of the goods which from the list in the L.P.O. Exhibit ‘B’, are spare parts of machines, the Respondent rightly exercised its right of examination of the items supplied before exercising its right to reject them as found by the Court below. This is because the conduct of the trial Court in refusing to act on the oral and documentary evidence before it, particularly Exhibits B, H, L and M in its judgment in favour of the Appellant,

had resulted in making that decision of the trial Court perverse for not having been based on the evidence before that Court thereby justifying the setting aside of that judgment by the Court below. See *Karibo v. Grend* (1992) 3 N.W.L.R. (Pt. 230) 426. Furthermore, **it is also trite law that if a trial Court fails to exercise properly its powers as a trial Court to consider and evaluate the evidence adduced by both parties on certain relevant issues, as happened in the instant case on the issue of the rejection of the goods by the Respondent, it is the duty of the appellate Court, if it does not involve credibility of witnesses to consider and evaluate such evidence and to make proper findings.** See *Ogunleye v. Oni* (1990) 2 N.W.L.R. (Pt. 135) 745 and *Imah v. Okogbe* (1993) 9 N.W.L.R. (Pt. 316) 159 at 178. **In the present case therefore, the setting aside of the judgment of the trial Court and replacing the same with the order of dismissal of the Appellant's action by the Court below, was quite in order and I see no reason to interfere with that decision.**

In the result, this appeal fails and the same is hereby dismissed. There shall be N50,000.00 cost to the Respondent.

### **TOBI JSC**

The appellant was the plaintiff in the High Court. The respondent was the defendant in the High Court. By a Local Purchase Order (LPO) No. 0116/TNN of 27/5/93 (Exhibit B) the respondent issued to the appellant for the supply of some goods. The appellant supplied the goods to the respondent, vide Waybill No. 110 dated 12/7/93 and Bill/Cash Invoice No. 0307 dated the same date. They were marked Exhibits F and F1 respectively. The respondent refused to pay for the goods, in a letter dated 6/10/93, the respondent rejected the goods supplied and cancelled the order. The letter was marked Exhibit H. The usual solicitor's letter of threat of action (Exhibit J) followed.

The appellant sued. He asked for special and general damages of N1,000,000 and interest of 20% of N165,000.00 per month representing N33,000.00 pending the final determination of the suit.

The learned trial Judge gave the appellant judgment in the following terms:



*"I award the sum of N700,000.00 (seven hundred thousand Naira) in favour of the plaintiff against the Defendant for special and general damages. I also award an interest of 2% on N165,000.00 per month representing N33,000.00 until the judgment debt is paid."*

The Court of Appeal set aside the judgment of the High Court. The Court did not find that there was a breach of contract on the part of the respondent. Ikongbeh, JCA in his judgment said at page 235:

*"All things considered, I think that the Senior counsel on behalf of the appellant has persuaded me to resolve this issue in his favour. I so resolve it. On the evidence before the trial court the Judge was not justified in holding the appellant liable to the respondent in breach of contract. Exh. B entitled the appellant to reject the goods if on inspection it found them not to conform to specification. The evidence showed that the appellant acted timeously by informing the respondent by Exhs. L and M that it rejected the goods. There was clear evidence before the court that the respondent acknowledged this fact by signing the two documents. The appellant produced evidence to this effect. The respondent did not effectively challenge the evidence. The Judge did not reject it."*

This is an appeal to set aside the judgment of the Court of Appeal. Briefs were filed and duly exchanged. The appellant formulated two issues for determination:

*"(i) Whether the Court of Appeal was right when it set aside the judgment of the trial court on the ground that the Plaintiff failed to challenge or contradict the evidence of the DW2 to the effect that he (DW2) and the Plaintiff/Appellant had once discussed the fact that the defendant had rejected the goods, when such evidence or facts on such evidence were not pleaded by the Defendant?"*

*"(ii) Whether the learned Justices of the Court of Appeal were right when they held that it was not the duty of the Defendant/Respondent to call an expert witness to compare the signatures on EXHIBITS 'L', 'M' and 'H'?"*

The respondent formulated one issue for determination:

*"Whether the decision of the learned Justices of the Court of Appeal Port Harcourt Division delivered on the 23rd day of May 2002, setting aside the judgment of the Honourable Justice T. K. Osu*

*of the Trial Court was founded on clear and sound reasoning and established principles of law?"*

Learned counsel for the appellant submitted that the Court of Appeal erred in law when they set aside the judgment of the trial court on the ground that the appellant failed to challenge or contradict the evidence of DW2 to the effect that he (DW2) and the appellant had once discussed the fact that the respondent had rejected the goods when such evidence or facts on such evidence were never pleaded by the respondent in the Amended Statement of Defence. Counsel also submitted that the decision of the Court of Appeal that it was the duty or obligation of the respondent to call an expert to compare the signatures on Exhibits L, M and H was unfounded in law. He urged the court to allow the appeal.

Counsel for the respondent submitted that the judgment of the Court of Appeal was founded on clear and sound reasoning and established principles of law. He urged the court to dismiss the appeal.

Counsel for the appellant in his Reply Brief touched the issue of the evidence of DW1 and DW2, the person who signed Exhibit M and whether Exhibits L and M were to serve as authority to the security at the respondent's gate to allow the appellant remove the goods from the premises of the respondent.

Let me deal with whether the respondent pleaded the facts on which DW2 gave evidence to the effect that DW2 and the appellant had once discussed the fact that the respondent had rejected the goods. Counsel for the appellant submitted that such evidence was not pleaded. Counsel for the respondent submitted that the evidence was pleaded. Who is correct?

I think learned counsel for the respondent is correct. Paragraph 6(iii), (iv), (v) and (vi) of the Amended Statement of Defence justify the submission of learned counsel for the respondent. I read them for ease of reference:

*"(iii) That the Plaintiff supplied the goods on 12/7/93. The goods were inspected and found not acceptable and accordingly rejected. Plaintiff consented to sign and did sign a Rejection/Returned Waybill on or about 22/7/93.*

*(iv) That Plaintiff re-supplied the said rejected goods though this time repainted and without the last item on the Local Purchase*

*Order (LPO). These goods were again rejected and Plaintiff signed another Rejected/Returned Waybill on or about 2/8/93.*

*(v) That Plaintiff however refused to remove the said rejected goods from Defendant's Procurement Department in spite of several appeals to remove them.*

*(vi) That at the trial the Defendant will rely on all relevant documents which are hereby pleaded and in particular the following:*

*(i) Defendant's LPO 0/1164/TNN dated 27/5/93.*

*(ii) Defendant's Rejection/Returned Waybill (Freight Waybill No. 6062) dated 22/7/93.*

*(iii) Defendant's Rejection/Returned Waybill (Freight Waybill No. 6063) dated 2/8/93."*

I realize that learned counsel for the appellant changed gear in his Reply Brief by submitting that the evidence of DW1 and DW2 to the effect that the respondent was entitled to reject the goods supplied by the appellant when they were allegedly found not to have conformed to specifications on the LPO and were not controverted by the appellant, is misconceived. Which of the two submissions will this court take: the one that the evidence was not pleaded in the main Brief or the one of misconception in the Reply Brief. It is elementary law that a party must consistently make his case and not change like the weather cock in climatology. I resolve the issue against the appellant.

I take the second issue on the signatures on Exhibits L, M and H. The Court of Appeal said on the issue at page 235 of the Record:

*"With all due respect, on the state of the pleadings and the evidence before the court, the appellant had no obligation to call a handwriting expert. All that he had to do was to produce evidence to show on a balance of probabilities that the respondent signed Exhs. L and M. The appellant testified unchallenged to this effect, as did DW2. The Judge did not say he did not accept their testimony. He did not act on it because he erroneously believed that the evidence of an expert was a sine qua non. The learned Judge's argument that because the appellant had not demonstrated the process by which it had examined the goods it could not claim to have carried such an examination is, with respect, misconceived. In the first place, that was not the respondent's case, in the second place, it did not arise. The appellant did not have to explain to the respondent how it had gone*

*about examining the goods before it could exercise its powers under Exh. B of rejecting the goods. The respondent had no power under Exh. B to challenge the appellant's decision that the goods did not meet the specifications stipulated by it. Whether or not it accepted the goods was entirely within its discretion. The only obligation on it*  
 B *was to act timeously in notifying the respondent of its decision."*

I entirely agree with the Court of Appeal. In the determination of the burden of proof, the court will carefully examine the pleadings before it. As the respondent established by documentary evidence  
 C that the appellant signed Exhibits L, M and H, the burden shifted on the appellant to prove the contrary. By the denial of the appellant, an element of criminality is introduced and the burden is on the appellant to prove that the signatures were forged. There is no such evidence. I think the appellant is expecting too much from the re-  
 D spondent to call evidence of handwriting experts. The second issue also fails.

It is in the light of the above and the more detailed reasons given by my learned brother Mohammed, JSC in his judgment that I too dismiss the appeal. I abide by his order as to costs.  
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### **ONNOGHEN JSC**

I have had the opportunity of reading in draft the lead judgment of my learned brother MOHAMMED, JSC just delivered.  
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I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

The case of the respondent was that the goods supplied by the appellant under the LPO were found not to be in conformity with  
 G the conditions in the contract and were consequently rejected according to the terms and conditions of the contract between the parties - the LPO. The above case was made out both in the pleading and evidence of the respondent but the trial court closed its eyes to same and went on to enter judgment for the plaintiff/appellant. I am  
 H of the firm view that the lower court is right in setting aside the judgment of the trial court and dismissing the claim against the respondent.

In the circumstance, I too dismiss the appeal for lack of merit and abide by the consequential orders contained in the lead judgment.

ment of my learned brother MOHAMMED, JSC including the order as to costs.

Appeal dismissed.

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***TABAI JSC***

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I was privileged to read, in draft, the lead judgment of my learned brother Mahmud Mohammed, JSC and I agree entirely with him that the appeal be dismissed for lack of merit. I also agree on the issue of costs contained in the lead judgment.

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***CHUKWUMA-ENEH JSC***

I have had the advantage of reading before now the judgment in this case prepared and delivered by learned brother, Mohammed, D JSC with which I couldn't agree more. The appeal should be dismissed and I dismiss it with N50,000.00 costs to the Respondents.

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