

SUPREME COURT OF NIGERIA
10TH JULY, 2009. SC. 177/2005
CORAM:- N. TOBI, A. M. MUKHTAR, I. F. OGBUAGU,
J. O. OGBE, J. A. FABIYI, JJSC

G. K. F. INVESTMENT NIGERIA LTD PLAINTIFF/APPELLANT
AND
NIGERIA TELECOMMUNICATIONS
PLC DEFENDANT/RESPONDENT

EVIDENCE - Reevaluation - By Court of Appeal - Propriety - As parties' briefs centred on the evidence at trial - Court of Appeal could not have ignored this aspect of the argument - Without causing miscarriage of justice (H1)

CONTRACTS - Breach - Resultant injury - Proof - Weekly loss of profit was not proved - As appellant did not provide previous sales figure - To aid Court in making deduction - Nor was the expense on prepaid phone cards proved (H2)

EVIDENCE - Damages - Proof - Concession - Effect - Concession by counsel is relevant only where the law allows it - Respondent's counsel's concession can not make claim for damages recoverable - Without proof (H3)

ACTIONS - Claims - Made as alternatives - Effect - The law permits the court to consider only one of the claims - And base its damages on it - Arguments in respect of the other claim - Are of no moment (H4)

JUDGMENTS - Judgment sum - Post judgment interest - Entitlement - Where rules of court provides for recovery of interest on judgment sum - It automatically carries interest at prescribed rate - Unless otherwise ordered (H5)

FACTS

The plaintiff/appellant sued defendant/respondent claiming damages for breach of contract. In the alternative, appellant claimed

for the damages in negligence. Appellant's case was that respondent had negligently disconnected his telephone line in the erroneous belief that it owed the respondent when in fact it did not owe the respondent. For this, appellant claimed both general and special damages totalling thirty million naira (N30m). Among the heads of special damages claimed were weekly loss of profits and expenses on prepaid phone recharge cards.

After hearing, the learned trial judge found for the appellant, having held that respondent was liable for breach of contract. He however awarded a total sum of two hundred thousand naira (N200,000.00) in damages, as he held *inter alia* that the claims for weekly loss of profits and expenses on recharge cards were not proved. Aggrieved, appellant appealed against the quantum of damages to the Court of Appeal which dismissed the appeal. Still dissatisfied, appellant has brought this further appeal to the Supreme Court. Appellant contends, *inter alia*, that it was erroneous for the court of Appeal to have embarked upon a reevaluation of evidence when that evidence as well as its consequence was unchallenged.

ISSUES FOR DETERMINATION

“1. Whether grounds 4, 6, 7, 8, 10 and 11 of the Appellant’s notice of appeal are competent having been filed without leave of court?

2. Whether the Court of Appeal’s evaluation of evidence and refusal to reverse damages awarded by the trial court is perverse or unreasonable so as to warrant interference by the Supreme Court?

3. Whether the Court of Appeal was right to discountenance the appellant’s claim for negligence for breach of contract?

4. Whether the Appellant is entitled to 21% interest on the judgment sum and if costs of N10,000 awarded against the Appellant are appropriate under the circumstances?”

HELD (Unanimously dismissing the appeal per **MUKHTAR JSC) **EVIDENCE - Reevaluation - By Court of Appeal - Propriety****

1. The argument covering these issues in the parties’ briefs of argument centred on the evidence before the trial court, their credibility, the very nature of their substance and consequence where they were not challenged. In a situation like that the Court of Appeal had no choice than to re-examine the pertinent pieces of evidence, albeit

evaluate them where necessary if that will meet the end of justice, and for the just determination of the appeal. There was no way the lower court could have ignored this aspect of the argument, without occasioning substantial miscarriage of justice, as it was bound to raise the issues it raised, even if suo motu in the circumstance of the appeal.

In this case it is on record that issues were raised in the court vide the appellant's grounds of appeal, issues and the arguments proffered. I refuse to subscribe to the stance of the learned counsel for the appellant that the appellant never raised the issue of finding of facts. (p. 1909 D)

CONTRACTS - Breach - Resultant injury - Proof

2. I endorse the finding of Muhammad JCA in the lead judgment of the lower court which reads as follows:-

"Looking at the findings of the lower court in the context of the pleadings and evidence before it, one is inclined to agree with Respondent's counsel that Appellant's claim for weekly loss of profit as well as that as to the amount it expended in its resort to prepaid phone cards had not been proved for same to attract any award. Appellant did not provide the trial court with its previous sales figure or cash flow to enable the court make necessary deduction therefrom. The total number of the prepaid telephone cards used by the Appellant following the withdrawal of the telephone line installed by the Respondent in spite of the evidence before the court, is not ascertainable. And receipt of purchase to determine the expenditure incurred in that regard has not also, been made available. These specific heads of claim cannot, in the circumstances, be said to have been made out." (p. 1910 E)

EVIDENCE - Damages - Proof - Concession - Effect

3. I endorse the finding of Muhammad JCA in the lead judgment of the lower court which reads as follows:-

It does not matter that Respondent's counsel has in one breath conceded in their brief of argument that the two heads of claim are recoverable. Counsel's submission does not substitute evidence. Concession by counsel is relevant only where the law allows it to be so. The trial court's finding that the special damages claimed has been

proved given the reasonings now advanced is clearly perverse. The inadequacies recounted had made it legally impossible for the damages which relate to these two specific heads of claim to be recovered. (p. 1910 E/H)

B ACTIONS - Claims - Made as alternatives - Effect

4. The appellant by its pleadings sought for damages in respect of breach of contract, or the breach of duty arising from the tort of negligence, and the claims being in the alternative, the law permits the court to consider only one of the claims and base its damages on it. The other arguments of the learned counsel for the appellant are of no moment. My answer to this issue (3) is in the affirmative. The grounds of appeal covering the said issue fail, and they are dismissed. (p. 1913 A)

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Judgment sum - Post judgment interest - Entitlement

5. As one of the grounds of appeal of the appellant in the lower court complained against the failure of the trial court to award interest of 21% per annum before judgment on the damages and 6% per annum thereafter, the lower court was bound to examine and determine the issue married to the ground, which it did, and ordered as per Muhammad JCA in the lead judgment as follows:-

“In the instant case where the rules of court have provided for the recovery of interest on a judgment sum, the entitlement is automatic unless otherwise ordered by the court. Since the lower court had neither ordered the payment of interest to the Appellant nor given a direction to the contrary, the sum of N200,000.00 awarded to the Appellant automatically carries interest at the rate of 7^{1/2} % fixed by order 38 rule 7 of the Lagos State High Court (Civil Procedure) Rules 1994 as amended.”

I endorse the above finding and affirm it. (p. 1913 G)

NOTABLE POINTS OF INTEREST

H MUKHTAR JSC

1. *Success of appeal depends on substance, not number, of grounds*
The appellant's issues for determination are just as prolix and unnecessarily verbose as their grounds of appeal. I find some of them absolutely unnecessary. It was as though the learned counsel for the ap-

pellant wanted to appeal against every point the learned justice made in his lead judgment. That to my mind is poor advocacy, as the success of an appeal is not dependent on the number of the grounds of appeal, but the substantiality and competence of the grounds of appeal. (p. 1906 G)

B

TOBI JSC

2. Special damages - Proof need not be by production of receipts

Although it is most desirable to prove special damages by the production of receipts and the like, failure on the part of the plaintiff to do so in certain circumstances will not defeat the claim of special damages. This is because there are certain trades or transactions that do not readily give rise to the issuance of receipts and courts of law should not insist on receipts in such cases. Where the law insists on the production of receipts in all claims of special damages, the law will be unwittingly promoting the offence of forgery because a party who has no receipt will be tempted to forge one. That is not good in the administration of justice. (p. 1916 A)

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OGBUAGU JSC

3. Grounds of appeal are based on pleadings and evidence

In my respectful view, the crucial issue revolves on the quantum of damages awardable to the Appellant in what amounts to a breach of contract by the Respondent. With respect, it does not and need not involve the framing of fourteen grounds of appeal and formulating fourteen issues as have been done in this appeal. It is now settled that grounds of appeal, are not predicated on matters other than pleadings and evidence or address of counsel. (p. 1918 B)

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4. Exemplary damages are awarded where conduct is malicious

Exemplary, Punitive, vindictive or Aggravated damages where claimed, are usually awarded, whenever the defendant or defendants' conduct, is sufficiently, outrageous to merit punishment as where for instance, it discloses malice, fraud, cruelty, insolence, or flagrant disregard of the law and the like. (p. 1920 B)

H

5. Alternative claim is only considered where main claim fails

Where a claim is in the alternative, the court should first consider

whether the principal or main claim, ought to have succeeded. It is only after the court may have found that it could not, for any reason, grant the principal or main claim, that it would now consider the alternative claim. In other words, where there are alternative reliefs as in the instant case leading to this appeal, once one of the reliefs is granted, the other relief cannot be granted as there would be no need to do so. (p. 1920 F)

FABIYI JSC

6. Contract - Quantum of damages must relate to injury suffered
Let me state it here that damages recoverable against the party in breach are such loss within the reasonable contemplation of the parties. The duty of the court in instances of breach is based on the evidence led by a claimant to restore an injured party as far as it is monetarily practicable to the position he would have been put but for the breach. There must be a conspicuous relation between the award made and the injury suffered by the beneficiary of the award. (p. 1926 H)

7. Contracts - No dichotomy between special and general damages
It must be stressed that in the law of contract, there is no dichotomy between special and general damages as it is the position in tort. The narrow distinction often surmised is one without a difference. In contract, it is damages simpliciter for loss arising from breach. Such loss must be in contemplation of the parties. The loss must be real, not speculative or imagined. (p. 1927 B)

REPRESENTATION

Mr. C. I. Uruakpa for the Appellant.
Mr. Mosediq A. Kazeem, with him M .T. Kura for the Respondent.

CASES REFERRED TO

Sossa v. Fokpo 2001 1 NWLR part 693, 16
Anyaoke v. Adi 1986 3 NWLR part 310 731
Bahegu v. Labiran 1988 3 NWLR part 80 66
Incar v. Adegboye 1985 2 NWLR part 8 453
Fashanu v. Adekoya 1974 1 All NLR part 1 35
A.N.T.S. v. Atoloye 1993 6 NWLR part 298 233

Nwosu v. Mbadugha 2000 1 NWLR part 641 486

Kupoluyi v. Phillips 2001 13 NWLR part 731 736

Oshodi v. Eyifunmi 2000 13 NWLR. part 684 298

Usman v. Abubakar 2001 12 NWLR part 728 685

Olohunde v Adeyeru 2000 10 NWLR part 676 562

Ibhafidon v. Igbinosun 2001 8 NWLR part 716, 653

Lasisi v. Allied Bank (Nig) PLC 2002 7 NWLR part 767 542

Anyah v. Imo Concorde Hotels Ltd 2002 18 NWLR part 799 377

ACB Ltd v. BBB Manufacturing Co. Ltd 1996 4 NWLR part 444 564

STATUTE & RULES REFERRED TO

Court of Appeal Act, Cap 36 L. F. N., s. 16

Lagos State High Court (Civil Procedure) Rules 1994, as amended,
O. 38 r. 7

LEAD JUDGMENT BY MUKHTAR JSC

This is an appeal against the decision of the Court of Appeal, Lagos Division, which affirmed the judgment of the Lagos State High Court in favour of the appellant who was plaintiff in the trial court. The case of the appellant as per its amended statement of claim was that it was allocated a telephone line No. 0012630142 formerly owned by Linx Collavino Nigeria, in April, 1996 on applying to the respondent for one. In September 1996, the telephone services were withdrawn by the respondent, leaving the appellant unable to communicate through the line. As a result of this development, the appellant lodged a complaint to the respondent, and the appellant was informed that the withdrawal was necessitated by the nonpayment of the sum of N23,655.00 which the respondent charged the plaintiff .

According to the appellant it had already paid the said sum vide the Nigeria Arab Bank, and the bank remitted the money to the respondent on 23rd September 1996. In spite of the payment the respondent refused to restore the telephone services, even after several demands. The failure to restore the line has created hardship on the appellant, to wit it claimed the following:-

“(a) The sum of N30,000,000.00 (Thirty million naira) being special Exemplary and general damages from the defendant for breach of the contract between the plaintiff and the Defendant by the defendant or for negligence.

(b) Loss of income/profits at the rate of N500,000.00 per week.

(d) Interest on the above damages and loss of income/profit at the rate of 21% per annum from the 5th day of December, 1996 till final payment, and 6% thereafter until liquidation."

The defendant/respondent denied most of the allegations. On completion of pleadings both parties adduced evidence. The trial court appraised the evidence, and at the end of the day found for the appellant and awarded damages which it was not satisfied with, and therefore appealed to the lower court, which dismissed the appeal. Again it is not satisfied with the judgment, and it has appealed to this court on fourteen grounds of appeal. Briefs of argument were exchanged in compliance with the practice of this court. Fourteen issues for determination were raised in the appellant's brief of argument to relate to the fourteen grounds of appeal which he has filed. The respondent however raised four issues for determination, and the issues are:-

"1. Whether grounds 4, 6, 7, 8, 10 and 11 of the Appellant's notice of appeal are competent having been filed without leave of court?

2. Whether the Court of Appeal's evaluation of evidence and refusal to reverse damages awarded by the trial court is perverse or unreasonable so as to warrant interference by the Supreme Court?

3. Whether the Court of Appeal was right to discountenance the appellant's claim for negligence for breach of contract?

4. Whether the Appellant is entitled to 21% interest on the judgment sum and if costs of N10,000 awarded against the Appellant are appropriate under the circumstances?"

Issues 2 and 3 I have reproduced above are more comprehensive and succinct to the appeal than those raised in the appellant's brief of argument, and so I will adopt them for the treatment of this appeal. The appellant's issues for determination are just as prolix and unnecessarily verbose as their grounds of appeal. I find some of them absolutely unnecessary. It was as though the learned counsel for the appellant wanted to appeal against every point the learned justice made in his lead judgment. That to my mind is poor advocacy, as the success of an appeal is not dependent on the number of the grounds of appeal, but the substantiality and competence of the grounds of appeal. See Sossa v. Fokpo 2001 1 NWLR part 693, page 16, and

Kupoluyi v. Phillips 2001 13 NWLR part 731 page 736.

I will commence the treatment of the appeal with issue (2) supra. The argument of the learned counsel for the appellant is that the appellant's appeal to the Court of Appeal did not raise the issue of findings of facts, credibility of witnesses and evaluation of evidence by the trial court, and so the lower court had no business veering or raising the issues suo motu. He placed reliance on the case of Oshodi v. Eyifunmi 2000 13 NWLR part 684 page 298. In reply, the learned counsel for the respondent argued that the true position is that the appellant in its grounds of appeal and brief of argument before the Court of Appeal severally questioned the basis upon which the trial court awarded N200,000 damages to it. On the other hand the respondent had inter alia contended that the award was proper given the fact that the appellant had failed to properly prove special damages according to the test laid down by a plethora of cases. The learned counsel referred to the cases of ACB Ltd v. BBB Manufacturing Co. Ltd 1996 4 NWLR part 444 page 564 and Incar v. Adegboye 1985 2 NWLR part 8 page 453.

According to him the questioning by the appellant of the basis of the award of damages clearly opened the issue to scrutiny by the Court of Appeal, and this it did. The learned counsel for the respondent further submitted that even though the assessment and evaluation of evidence produced at the trial is within the exclusive power of the court of trial, by virtue of section 16 of the Court of Appeal Act (Cap 36 of the Laws of the Federation of Nigeria), the Court of Appeal in its appellate jurisdiction is in as good a position as the trial court to evaluate such evidence to arrive at its own conclusion where the lower court either fails to evaluate or improperly evaluates evidence. See Fashanu v. Adekoya 1974 1 All NLR part 1 page 35, and Anyaoke v. Adi 1986 3 NWLR part 310 page 731. It is also the submission of learned counsel that the act of the lower court in reviewing the issue of damages would not lead to the disturbance of its decision, and that an appellate court will only intervene on issue of damages where there is clearly a very high or low estimate and same is perverse or appears to have been arrived at on wrong principles. See Usman v. Abubakar 2001 12 NWLR part 728 page 685, Bahegu v. Labiran 1988 3 NWLR part 80 page 66, and Lasisi v. Allied Bank (Nig) PLC 2002 7 NWLR part 767 page 542.

At this juncture I consider it pertinent to look at the record of proceedings in the lower court. In the notice of appeal in the Court of Appeal, (to be found on page 62 of the printed record of appeal), the pertinent grounds of appeal to this discussion read as follows:-

B "1. The learned trial judge erred in law and facts when he failed to award the Appellant the whole amount claimed as special damages when he (learned trial judge) has held same to be unchallenged, believed and as such Appellant entitled to special damages claimed.

C **PARTICULARS OF ERROR**

(a) The Appellant was not challenged, contradicted, or even at all cross examined on the special damages claimed or any of the damages at all.

D (b) There was no iota of evidence that the amount the Appellant is claiming as special damages excessive or any alternative amount suggested by the Respondent. .

(c) The Appellant in spite of being unchallenged as aforesaid led credible and relevant evidence with over two hundred documentary (Exhibits) in support of her claim for special damages.

E (d) By paragraph 1 of the conditions for supply of telephone services contained in the last page of the Agreement for supply of telephone services Exhibit B the Respondent covenanted or agreed to be liable to any damage(s) or loss arising from an interruption of telephone services to Appellant for a continuous period of 14 days
F when such interruption has been acknowledged by the respondent as in Exhibits H1-8.

3. The learned trial judge erred in law when he failed to award a reasonable and substantial amount as special, general and exemplary damages but awarded a paltry sum of N200,000 (Two Hundred Thousand Naira) as special, general and exemplary damages in favour of the Appellant against the respondent.

PARTICULARS OF ERROR

H (a) The Appellant led credible, unchallenged and uncontradicted evidence that she suffered substantial or colossal loss or damage as a result of the respondent's breach of contract for the supply of telephone services.

(b) The learned trial judge failed to take cognizance of or consider the relevance of the value of naira in the award of damages as

enunciated in the case of Onagoruwa vs. I.G.P. (1991) 5 NWLR (part 193, 593 at 621.

(c) The essence of exemplary damages which is to teach a defendant hard lessons and to deter others is lost or unattainable in the above paltry sum awarded.”

These grounds covered the following issues raised in the appellant’s brief of argument. B

“1. Is the learned trial judge right, to have failed to award the whole amount claimed as special damages to the Appellant, when he held evidence on same to be unchallenged, true and as such Appellant entitled to special damages claimed? C

3. Whether having regards to the circumstances, and evidence of the colossal loss incurred by the Appellant in this suit the paltry sum of N200,000.00 (two hundred thousand naira) awarded as special, general, and exemplary damages is reasonable?” D

The argument covering these issues in the parties’ briefs of argument centred on the evidence before the trial court, their credibility, the very nature of their substance and consequence where they were not challenged. In a situation like that the Court of Appeal had no choice than to re-examine the pertinent pieces of evidence, albeit evaluate them where necessary if that will meet the end of justice, and for the just determination of the appeal. There was no way the lower court could have ignored this aspect of the argument, without occasioning substantial miscarriage of justice, as it was bound to raise the issues it raised, even if suo motu in the circumstance of the appeal. E F

In this case it is on record that issues were raised in the court vide the appellant’s grounds of appeal, issues and the arguments proffered. I refuse to subscribe to the stance of the learned counsel for the appellant that the appellant never raised the issue of finding of facts. Although an appellate court is bound by the finding of a trial court, in view of the principle of law that the trial court having seen and heard witnesses is in a better position to make findings of fact, an appellate court is at liberty to interfere with the findings of a trial court when the findings are perverse. The cardinal principle of law is that an appellate court will disturb such findings where they are not supported by evidence, and G H

they are perverse. See *Olohunde v Adeyeru* 2000 10 NWLR part 676 page 562, *Ibhafidon v. Igbinosun* 2001 8 NWLR part 716, page 653, *Woluchem v. Gudi* 1981 5 SC 29, and *Nwosu v. Mbadugha* 2000 1 NWLR part 641 page 486.

B Besides, section 16 of the Court of Appeal Act 1976 vests the court below with wide powers in such a situation to re-appraise evidence, as the provision states inter alia thus:-

C “16. The Court of Appeal may, from time to time make any order necessary for determining the real question in controversy in the appeal,.....

And generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part.....:.....”

D A very careful perusal of the judgment of the lower court does not reveal a departure from the law, and its requirements. An appellate court cannot be put in a straight jacket (so to speak) in the pursuance of its judicial function, and power of ensuring that justice in its undiluted form is arrived at in its judgment. Anything short of that is bound to occasion miscarriage of justice.

In this wise, ***I endorse the finding of Muhammad JCA in the lead judgment of the lower court which reads as follows:-***

F ***“Looking at the findings of the lower court in the context of the pleadings and evidence before it, one is inclined to agree with Respondent’s counsel that Appellant’s claim for weekly loss of profit as well as that as to the amount it expended in its resort to prepaid phone cards had not been proved for same to attract any award. Appellant did not provide the trial court with its previous sales figure or cash flow to enable the court make necessary deduction therefrom. The total number of the prepaid telephone cards used by the Appellant following the withdrawal of the telephone line installed by the Respondent in spite of the evidence before the court, is not ascertainable. And receipt of purchase to determine the expenditure incurred in that regard has not also, been made available. These specific heads of claim cannot, in the circumstances, be said to have been made out. It does not matter that Respondent’s counsel has in one breath conceded in their***

brief of argument that the two heads of claim are recoverable. Counsel's submission does not substitute evidence. Concession by counsel is relevant only where the law allows it to be so. The trial court's finding that the special damages claimed has been proved given the reasonings now advanced is clearly perverse. The inadequacies recounted had made it legally impossible for the damages which relate to these two specific heads of claim to be recovered. The Appellant has also failed to prove malice on the part of the Respondent in the course of breaching the contract."

In the light of the foregoing reasoning, the answer to issue (2) supra is in the negative, and the related grounds of appeal fail, and they are hereby dismissed.

I will now proceed to the treatment of issue (3) supra. It is necessary to reproduce and consider the pleading that is relevant to the argument covering this issue. In its amended statement of claim the appellant averred as follows:-

"22. Further to (sic) in the alternative to the following, the defendant was negligent in respect of handling the said contract of and withdrawal of telephone services to the plaintiff.

PARTICULARS OF NEGLIGENCE:-

(a) The plaintiff after payment of the said sum of N23,655.00 to the bank dropped a duplicate or counterpart of the said bank acknowledging payment into the Defendant's box placed at the said banks premises, however the defendant failed and or refused and or neglected to cross check the said box and the said charge sheet/bill before cutting or withdrawing telephone services from the plaintiff.

(b) The plaintiff pointed out the fact in paragraph A above to the defendant but the defendant refused and or failed and neglected to check same, and to properly handle the said contract and withdrawal of telephone services.

(c)

(d) The defendant would not have withdrawn, telephone services till date from the plaintiff if she had exercised reasonable or due care and diligence paying regards to the above....."

The learned counsel for the appellant in proffering argument under this issue set out the definition of the word 'negligence' as is set out in some Supreme Court judgments, as *Odinaka v. Moghalu* 1992,

4 NWLR part 233 page 1, and A.N.T.S. v. Atoloye 1993 6 NWLR part 298 page 233. In the case of Anyah v. Imo Concorde Hotels Ltd 2002 18 NWLR part 799 page 377 the conditions that have to exist before the claim of negligence can be raised were set down. Kalgó JSC in the lead judgment had the following to say:-

B *“The general principle is that the tort of negligence arises when a legal duty owed by the defendant to the plaintiff is breached and to succeed in action for negligence the plaintiff must prove by the preponderance of evidence or the balance of probabilities that:*

C *“(a) The defendant owed him a duty of care;
(b) the duty of care was breached;
(c) the defendant suffered damages arising from the breach”.*

See Agbonmagbe Bank Ltd v. C.F.A.O. (1966) 1 All N.L.R. 140 at 145.

D The most fundamental ingredient of the tort of negligence is the breach of the duty of care, which must be actionable in law and not a moral liability. And until a plaintiff can prove by evidence the actual breach of duty of care against the defendant the action must fail. See Benson v. Utubor (1973) 3 SC. 19; Okoli v. Nwagu 1960
E SCNLR 48; (1960) 3 FSC 16, Nigeria Airways Ltd. v. Abe 1988 4
NWLR (pt.90) 524.....”

I am fortified by the above.

F The learned counsel has submitted that the respondent was very negligent in the breach of the contract for supply of telephone services to the appellant, having failed in their obligation or duty to supply the appellant with uninterrupted telephone services, which occasioned loss or damages to the appellant.

G It is the submission of the learned counsel for the respondent that the evidence and the present appeal rested squarely on the issue of the quantum of damages and not negligence as contended by the appellant.

H It is a fact that the claim as in the appellant’s pleading was premised on negligence in the alternative, having premised the claim on the breach of contract and the issue of the quantum of damages as the main claim. In a situation like this, the court can adopt only one of the claims for the purpose of the consideration of the case and judgment. In the instant case, the learned trial judge considered and based his judgment on the main claim, rather than the claim in the

alternative, which he was at liberty to do.

The appellant by its pleadings sought for damages in respect of breach of contract, or the breach of duty arising from the tort of negligence, and the claims being in the alternative, the law permits the court to consider only one of the claims and base its damages on it. The other arguments of the learned counsel for the appellant are of no moment. My answer to this issue (3) is in the affirmative. The grounds of appeal covering the said issue fail, and they are dismissed. B

On the last issue, which is in respect of the award of interest, the learned counsel for the appellant has argued that the law is trite that once a party is kept out of his/her money the party is entitled to interest on same. The learned counsel for the respondent, however took solace in a rule of the Lagos State High Court Civil Procedure Rules 1994 as amended, which makes the following provision. C

“The court at the time of making any judgment or order, or at anytime afterwards, may direct the time within which the payment or other act is to be made or done, reckoned from the date of the judgment or order, or from some other point of time, as the court thinks fit, and may order interest at a rate not exceeding seven and a half per centum per annum to be paid upon any judgment, commencing from the date thereof or afterwards.” D

It is the submission of the learned counsel that the provision is mandatory, as such, the entitlement is automatic unless otherwise ordered by court. He referred to the case of DPMS LTD v. Larmie 2005 5 NWLR part 655, page 138. He further submitted that it behoves the appellant to prove its claim of 21% if it wished to claim interest in excess of the statutory provision, which the appellant failed to do. E

The above provision of the Lagos State High Court rules is very clear. The learned trial judge in this case did not make any order on payment of interest to the appellant. However, ***as one of the grounds of appeal of the appellant in the lower court complained against the failure of the trial court to award interest of 21% per annum before judgment on the damages and 6% per annum thereafter, the lower court was bound to examine and determine the issue married to the ground, which it did, and ordered as per Muhammad JCA in the lead judgment as*** F

follows:-

“In the instant case where the rules of court have provided for the recovery of interest on a judgment sum, the entitlement is automatic unless otherwise ordered by the court. Since the lower court had neither ordered the payment of interest to the Appellant nor given a direction to the contrary, the sum of N200,000.00 awarded to the Appellant automatically carries interest at the rate of 7^{1/2}% fixed by order 38 rule 7 of the Lagos State High Court (Civil Procedure) Rules 1994 as amended.”

I endorse the above finding and affirm it. This last issue is resolved in favour of the respondent, and its related ground of appeal fail and it is dismissed. In the final analysis this appeal fails in its entirety, and it is hereby dismissed. The costs of N50,000.00 is awarded to the respondent against the appellant.

TOBI JSC

This appeal originates from telephone services. The appellant as plaintiff entered into an agreement for the supply of uninterrupted telephone services with the respondent who was the defendant in the High Court. The telephone services were for commercial, business and profit purposes. Sometime in September, 1996, the telephone services were withdrawn by the respondent. The appellant sued.

The learned trial Judge awarded the appellant N200,000.00 as damages. The appellant regarded the award as paltry. It appealed. The Court of Appeal allowed the appeal only to the extent of the appellant's claim for 7^{1/2}% on the judgment sum of N200,000.00.

Still dissatisfied, the appellant appealed to the Supreme Court. Briefs were filed and duly exchanged. Appellant has also filed a reply brief. The appellant formulated fourteen issues for determination. The respondent formulated four issues for determination. The crux of the appeal, in my humble view, is raised in Issue No. 4 of the Appellant's Brief. It reads:

“Whether the learned Justices of the Court of Appeal are right when they held at page 134 of the Record of Appeal that the sum of N200,000.00 (Two hundred thousand naira) awarded as damages

by the learned trial Judge is 'very reasonable'."

Although the respondent did not raise an issue specifically on the above, Issue No.2 relates fundamentally to it. The issue reads:

"Whether the Court of Appeal's evaluation of evidence and refusal to reverse damages awarded by the trial court is perverse or unreasonable so as to warrant interference by the Supreme Court." B

Learned counsel for the appellant submitted that the amount of N200,000.00 awarded by the learned trial Judge and affirmed by the Court of Appeal is far from fair, proper, just, moderate and very unsuitable, as it is not reasonable. He cited Sodipo v. Lemminkainen OY (1992) 8 NWLR (Pt. 258) 229 at 232 and Onagoruwa v. IGP C (1991) 5 NWLR (Pt. 193) 593 at 621.

Learned counsel for the respondent submitted on Issue No. 2 that as the Court of Appeal awarded damages according to the evidence before the trial court, this court cannot disturb the award. He D argued that the appellant was merely on a "gold hunt" and that the Court of Appeal was more than charitable in awarding N200,000.00 and 7 1/2% interest as damages for breach of contract even though the special damages were not proved by credible evidence. He cited E a number of cases.

In awarding the damages, the learned trial Judge said at page 61 of the Record:

"... It is clear that the plaintiff suffered loss as a result of the defendant withdrawing the service on the flimsy excuse that the line was withdrawn because payment was not received on time (para. 5 F of the Statement of Defence) a fact not established. The plaintiff is in the circumstances entitled to special and general damages. Exemplary damages is recoverable if the plaintiff is the victim of the punishable behavior of the defendant. Once exemplary damages is G pleaded and proved to the satisfaction of the court the plaintiff is entitled to it. See Odogu v. AG Fed. 1 NWLR Pt. 456 513; Shugaba v. Min. of Internal Affairs 1 983 3 NCLR 915. In sum I hereby order that the defendant pays to the plaintiff the sum of N200,000 representing special, general and Exemplary damages. The defendant is H finally ordered to provide the plaintiff with a fault free line within 7 days from today."

It is elementary law that special damages, unlike general damages, must be proved to the hilt. Damages being special must be

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 specially proved to the satisfaction of the court. Although it is most desirable to prove special damages by the production of receipts and the like, failure on the part of the plaintiff to do so in certain circumstances will not defeat the claim of special damages. This is because there are certain trades or transactions that do not readily give rise to the issuance of receipts and courts of law should not insist on receipts in such cases. Where the law insists on the production of receipts in all claims of special damages, the law will be unwittingly promoting the offence of forgery because a party who has no receipt will be tempted to forge one. That is not good in the administration of justice.

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 Having said that, the point should be made clearly that most trades and transactions produce receipts. In such situations, a plaintiff can only succeed if he produces receipts to back up his claim of special damages.

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 What happened in this appeal? The appellant asked for special, exemplary and general damages for breach of contract which he put at N500,000.00 weekly. As it is, appellant claim three separate categories of damages. Special damages, as the name imply, are damages which must be specifically claimed and described in the pleadings if recovery of them will be ordered by the court. Exemplary damages are damages on an increased scale over and above special or actual or ordinary damages, awarded in aggravated circumstances. They are punitive in nature. General damages are damages which the law presumes to flow naturally from the wrong complained of. They are damages implied by the law and need not be proved specifically. By way of recapitulation, it should be said that while our law of evidence requires special and exemplary damages to be proved, general damages need not be proved.

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 The learned trial Judge awarded a lump sum of N200,000.00 “representing special, general and exemplary damages.” The Court of Appeal affirmed the award of the lump sum covering the three categories of damages. In concluding the judgment, the Court of Appeal said at pages 134 and 135:

“In the instant case where the Rules of Court have provided for the recovery of interest on a judgment sum, the entitlement is automatic unless otherwise ordered by the court. Since the lower court had

neither ordered the payment of interest to the appellant nor given a direction to the contrary, the sum of N200,000.00 awarded to the appellant automatically carries interest at the rate of 7^{1/2}% fixed by Order 38 Rule 7 of the Lagos State High Court (Civil Procedure) Rules 1994 as amended. The appeal has succeeded to this extent.”

I entirely agree with the Court of Appeal. I do not see anything wrong in the award of 7^{1/2}% interest on the sum of N200,000.00 as it is borne out by the Rules of Court. B

It is in the light of the above and the more comprehensive reasons given by my learned brother, Mukhtar, JSC in her judgment that I too dismiss the appeal. I abide by the orders as to costs in the lead judgment. C

OGBUAGU JSC

This is an appeal by the Appellant against the decision of the Court of Appeal, Lagos Division (hereinafter called “the court below”) delivered on 27th April, 2005 affirming the award of N200,000.00 (two hundred thousand naira) as damages for breach of contract. It also awarded interest of 7^{1/2}% on the judgment sum pursuant to Order 38 Rule 7 of the Lagos State High Court (Civil Procedure) Rules, 1994 as amended (hereinafter called “the Rules”). E

Dissatisfied with the said decision, the Appellant, has appealed to this Court on (14) fourteen grounds of appeal. It has also formulated in its Brief (14) fourteen issues for determination. On its part, the Respondent, has formulated (4) four issues for determination, namely, F

“4.1 Whether grounds 4,6,7,8,10 & 11 of the Appellant’s notice of appeal are competent having been filed without leave of court? G

4.2 Whether the Court of Appeal’s evaluation of evidence and refusal to reverse damages awarded by the trial court is perverse or unreasonable so as to warrant interference by the Supreme Court?

4.3 Whether the Court of Appeal was right to discountenance the appellants (sic) claim for negligence for breach of contract? H

4.4 Whether the Appellant is entitled to 21% interest on the judgment sum and if costs of N10,000 awarded against the Appellant are appropriate under the circumstances?

When this appeal came up for hearing on 27th April, 2009 the

learned counsel for the Appellant, Uruakpa, Esqr., adopted both their main and Reply Briefs. He urged the Court to allow the appeal stating that the question of proof of special damages, is not negotiable.

The leading learned counsel for the Respondent - Kazeem, Esq, adopted their Brief. He urged the Court, to dismiss the appeal in its entirety and uphold the Judgment of the court below.

Thereafter, Judgment was reserved till today.

In my respectful view, the crucial issue revolves on the quantum of damages awardable to the Appellant in what amounts to a breach of contract by the Respondent. With respect, it does not and need not involve the framing of fourteen grounds of appeal and formulating fourteen issues as have been done in this appeal. It is now settled that grounds of appeal, are not predicated on matters other than pleadings and evidence or address of counsel. See the case of Oladapo & anor. v. Bank of the North Ltd. & anor. (2001) 1 NWLR (Pt.693) 285 @ 262 C.A.

I need to stress that this Court, discourages the proliferation of issues. See the cases of Ogbuanyinya & 3 ors: v. Okudo & ors. (No.2) (1990) 4 NWLR (Pt.146) 551 @ 556; (1990) 7 SCNJ. 29; Nwobosi v. African Continental Bank Ltd. (1995) 6 NWLR (Pt.404) 658; (1995) 7 SCNJ. 197 and Chief Agbaisi & 3 ors. v. Ebikorefe & 6 ors. (1997) 4 NWLR (Pt.502) 630 @ 650; (1997) 4 SCNJ. 137 @ 157 citing some other cases therein.

I have therefore, deliberately, decided not to go into Issue 1 of the Respondent complaining about the competence of some of the grounds of appeal and which has led to the Appellant, filing on 11th January, 2007, a Reply Brief of (14) fourteen pages. I note that in that Reply Brief, the Appellant submits in support of the competence of the said grounds of appeal, that they are premised on law and not mixed law and facts or facts alone, and therefore, do not require leave of this Court. But in respect of Ground 10 of the grounds of appeal, the following appear inter alia:

“..... is premised on law, though the counsel to the appellant by slip of the pen mistakenly couched it as misdirection or misapplication of law and fact whereas it is purely a misdirection or misapplication of the law to proved facts”.

Now, to the merits of this appeal. In paragraph 25(a) of its Amended Statement of Claim which appears at pages 26 and 27 of

the Records the following appear inter alia:

“Whereas the plaintiff claims as follows:

(a) *The sum of N30,000,000.00 (thirty million naira) being special Exemplary and general damages from the defendant for breach of contract between the plaintiff and the Defendant by the defendant or for negligence.* B

(b) *Loss of income/profits at the rate of N500,000.00 per week*

(c) *An immediate restoration of telephone services to plaintiff by the Defendant.*

(d) *Interest on the above damages and loss of income/profit at the rate of 21% per annum from the 5th day of December, 1996 till final payment and 6% thereafter until liquidation “.* C
[the underlining mine]

I note that the Appellant under its issue No. 3, also reproduced the above. D

It could be seen that from claim (a), there is an “alternative” claim - i.e. the said sum for breach of contract or for negligence. On the claim for breach of contract, the trial court, awarded N200,000.00 (two hundred thousand naira) and made no award of interest. The court below, affirmed the said award of N200,000.00 (which the Appellant describes as paltry) and awarded interest at the rate of 7^{1/2} % pursuant to the Rules of that High Court. It is therefore, clear that the claim for negligence, is in the alternative while the claim for interest is pre and post the judgment as rightly found by the court below. E
 In respect of an award of damages for breach of contract or negligence, it is at the discretion of the court except where special damages, is pleaded and proved to the satisfaction of the trial court. Award of interest, is either based on either prior agreement of the parties as contained in a document to that effect or as provided by a Rule of court. F G

General damages, are such as the law, will presume to be the direct natural or probable consequences of the act complained of. On the other hand, special damages, are such as the law, will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and therefore, they must be claimed specially and proved strictly. There are too many decided authorities in this regard. But see the cases of *Stroms Bruks Aktie Bolag v. Hutchison (1905) A.C. 515 @ 525 - 526-* per Lord H

Machnaghten; Susquehanna (1926) A.C. 615 @ 661 - per Lord Dunedin; Messrs. Dumez (Nig) Ltd. v. Ogboli (1972) 1 All NLR (Pt.1) 241 @ 249 -250; Odulaja v. Haddad (1973) 11 S.C. 357; ACME Builders Ltd. v. Kaduna State Water Board & anor. (1999) 2 NWLR (Pt.590) 288 @ 305 - 306, 309; (1999) 2 SCNJ. 25 and The Shell Petroleum Development Company of Nig. Ltd & 4 ors. v. Chief Trebo VII (2005) 4 SCNJ. 39 @ 57; (2005) 3 - 4 S.C. 137 just to mention but a few.

Exemplary, Punitive, vindictive or Aggravated damages where claimed, are usually awarded, whenever the defendant or defendants' conduct, is sufficiently, outrageous to merit punishment as where for instance, it discloses malice, fraud, cruelty, insolence, or flagrant disregard of the law and the like. See the cases of Ellochin (Nig.) Ltd. & ors. v. Mbadiwe (1986) 1 NWLR (Pt.14) 47; (1986) ANLR 1; Shugaba Abdulrahman Derman v. Minister of Internal Affairs (1981) 2 NCLR 459; (1983) 3 NCLR 915; FRA Williams v. Daily Times of Nig. Ltd. (1990) 1 SCNJ. 1 @ 22 - 23; Odogu v. Attorney-General of the Federation & 6 ors. (1996) 6 NWLR (Pt.456) 508 @ 513; (1996) 7 SCNJ. 132 @ 139, 141 - 142 - per Ogundare, JSC, Allied Bank of Nigeria Ltd v. Akubueze (1997) 6 SCNJ. 116 @ 143 - 144 and Odiba v. Azege (1998) 9 NWLR (Pt.566) 370; (1998) 7 SCNJ. 119 @ 135 - per Iguh, JSC just to mention but a few.

The award made by the trial court, was in its discretion which the court below, did not disturb or interfere with, but affirmed the same.

I will now deal with an alternative claim and the duty of the court in such a claim. Where a claim is in the alternative, the court should first consider whether the principal or main claim, ought to have succeeded. It is only after the court may have found that it could not, for any reason, grant the principal or main claim, that it would now consider the alternative claim. See the case Of Mercantile Bank of Nig. Ltd v. Adalma Tanker & Bunkering Services Ltd. (1990) NWLR (Pt.153) 747. In other words, where there are alternative reliefs as in the instant case leading to this appeal, once one of the reliefs is granted, the other relief cannot be granted as there would be no need to do so. See the cases of William Agidigbi v. Danaha Agidigbi & 2 ors. (1996) NWLR (Pt.454) 303, 313; (1996) 6 SCNJ. 105; Chief Yesufu & anor. v. Kupper International N.V. (1996) 4

SCNJ. 40 and *Gaji & 2 ors. v. Paye (2003) 5 SCNJ. 20*. In other words again, an alternative award, is an award that can be made instead of another. It is a separate claim and a separate award. It is not an additional award otherwise, it would amount to double compensation which must be avoided. See the cases of *The M. V. "Caroline Maersk" etc. & 2 ors. v. Nokoy Investment Ltd. (2002) 6 SCNJ. 208 @, 224; Kaycee v. F.S.C. Ltd (1986) 2 NWLR (Pt.23) 458; Egharevba v. Oruonghae (2001) 11 NWLR (Pt.724) 318 @ 340 C.A. and Ajao v. Adenola (2005) 3 NWLR (Pt.913) 630 @ 660-661 C.A.*

I will add quickly as this is also settled, that there is nothing in a plaintiff or party in an action, to include in his pleadings, two or more inconsistent sets of material facts and claim reliefs thereunder, in the alternative. See the case of *S.C.E.I. v. Odenewu & anor. (1965) 2 ANLR 138*. In other words, it cannot be disputed that either party to a suit may, in a proper case, include in his pleadings, alternative and inconsistent allegations of material facts, as or so long as he does so separately and distinctly. A plaintiff is thus entitled to plead two or more inconsistent sets of material facts and claim relief in the alternative thereunder. He may also rely on several different rights alternatively although they may be inconsistent. So said this Court, - per Iguh, JSC in the case of *Metal Construction (W.A.) Ltd v. Chief Aboderin (1998) 6 SCNJ. 161 @ 170* citing the case of *Phillips v. Phillips (1878) 4 Q.B.D. 127 @ 134*.

The court below - per Musa Dattijo Muhammad, JCA at page 134 of the Records, stated inter alia, as follows: - ,

"In the case at hand there was breach of contract and it is natural to presume an injury which though not readily qualifiable it is all the same recoverable. It is just to see the award made by the lower court in that light without necessarily tying the award to any appellation. It is an award for an injury caused by the Respondent's breach of the contract for the supply of a telephone line for commercial purposes to the Appellant. The award of N200,000.00 for the injury caused the Appellant is very reasonable. It should persist".

I agree. It is also a concurrent/concurring finding of facts and holding which I hold, is not perverse. I even note that the trial court in addition to the said award, granted claim (c) of the Appellant and ordered the Respondent, to provide the Appellant, with a fault free

line within 7 days from the date of the said Judgment. The court below, was absolutely right on the above decided authorities, to discountenance the Appellant's said alternative claim for negligence. Issue 4.3 of the Respondent, is therefore, answered by me in the Affirmative/Positive.

B As to the issue on award of interest, it need be stressed that a Judgment debt, is a debt or damage or other monetary award, which has been pronounced upon by a court of competent jurisdiction. It begins, when the court has pronounced on its judgment in favour of the plaintiff. Interest on a judgment debt, is therefore, interest after adjudication. It cannot be before that incident. So, to award interest on the judgment debt from the date of accrual of the cause of action, is a contradiction in terms. So said this Court in the case of Wayne (West Africa) Ltd. v. Ekwunife (1989) 5 NWLR (Pt. 122) 422; (1989) 12 SCNJ. 99 @ 118.

D In England, Section 17 of the Judgments Act, 1838, is the Statutory authority to award interest on a judgment debt. In this country, the various High Court Rules of each State, make provision for the power to award interest as in the instant case under Order 38 Rule 7. It is not mandatory or obligatory that interest thereunder, must be claimed on the Writ or pleaded in the Statement of Claim. So, it is different from when it is claimed as a right. The implication of the words "unless otherwise ordered by the court", is that the discretion given to the court to order otherwise as appears in the said Rule, is limited to the rate of interest. But before a court can depart from this power and award interest at the rate different from that provided in the Rule per annum, under a discretion envisaged by the opening clause of the Rule, there must be facts and/or circumstances, to justify such a course. See the case of Wayne etc. V. Ekwunife (supra) at 120.

I am aware that in the case of Augustine F.I. Ibama v. Shell Petroleum Development Co. Of Nigeria Ltd (1998) 3 NWLR (Pt.542) 493 @ 500 C.A. - per Uwaifo, JCA (as he then was), it was held that the general rule, is that monetary judgment, attracts appropriate interest even when none is claimed. See also the case of Nigerian General Superintendence Co. Lid. v. The Nigerian Ports Authority (1990) 1 NWLR (Pt.129) 741 @ 748 C.A. But in the case of London Chatham and Dover Railway v. South Eastern Railway (1893) A.C. 429 @ 434, it was held that the general rule at common law, is that interest,

is not payable on a debt or loan, in the absence of express agreement or some course of dealing or custom to that effect. Interest will however, be payable, where there is an express agreement to that effect and such agreement, may be inferred from a course of dealing between the parties. See the case of *Re Duncan & Co. (1905) 1 Ch. 307*, or where an obligation to pay interest, arose from the common or usage of a particular trade or business. B

In the case Of *Himma Merchants Ltd v. Alhaji Aliyu (1994) 5 NWLR (Pt.347) 667; (1994) 6 SCNJ. (Pt.1) 87 @ 94-95, 97* - per Onu, JSC, it was held that there are legally two ways by which a claim for interest on a sum of money claimed as a debt, can arise. Firstly, as of right or secondly, where there is a power conferred by statute to do so in the exercise of the court's discretion. His Lordship referred to *Ekwunife v. Wayne (West Africa) Ltd.* - per Nnaemeka-Agu, JSC and Vice versa Citing *London Chattam & Dover Railway D (supra)*. That the Statutory interest, will only begin to run, from the date of the judgment. That the Statutory interest on a judgment debt, is distinct and separate from the interest which a plaintiff, must include in the Statement of Claim to the writ as being based on a contract or on the statute, as the case may be, before he can hope to recover it. See also the cases of *Ogbu & 4 ors. v. Ani & 4 ors. (1994) 7 NWLR (Pt.355) 129; (1994) 7 SCNJ. 383* and *Jallco Ltd. & anor. v. Owoniboy Technical Services ltd. (1995) 4 NWLR (Pt.391) 534; (1995) 4 SCNJ. 256 @ 274*. In the instant case leading to this appeal as I had noted earlier in this Judgment, award of interest, is clearly and unequivocally, provided in the Rules. C D E F

The court below, at the pages 134 and 135 of the Records, stated inter alia, as follows:

“Ordinarily, Courts enjoy equitable jurisdiction to award interest as an ancillary relief where money was either fraudulently obtained or withheld for no just reason. But where there is a contract between the parties, only such interest as made recoverable by the terms of the contract or the operation of law would be awarded to the judgment creditor. See D.P.M.S. Ltd. V Larmie (2000) 5 NWLR H (Pt.655) 138 at 155; Jallco Ltd, v. Owoniboy Tech. Service (sic) Ltd. (12995) (sic) (meaning 1995) (Pt.391) 534, In the instant case where the, rules of court have provided for the recovery of interest on a judgment sum, the entitlement is automatic unless otherwise ordered

by the Court. Since the lower court had neither ordered the payment of interest to the Appellant nor given a direction to the contrary, the sum of N2,000,000.00 awarded to the Appellant automatically carries interest at the rate of 71/2% fixed by Order 38 Rule 7 of the Lagos State High Court (Civil Procedure) Rules 1994 as amended.....”

[the underlining mine]

See also the case of *Barliet (Nig.) Ltd. v. Alhaji Kachalla (1995) 9 NWLR (Pt.420) 478 @, 490; (1995) 12 SCNJ. 147 @ 156*

Yet, in spite of the Statutory provision which is like a subsidiary legislation and thus, has the force of law and also some of the decided authorities referred to herein in this Judgment, the Appellant, insists that it is entitled to interest of 21% - after judgment. Incidentally, insistence like repetition, does not improve the argument of counsel in a case. The Appellant, even erroneously, with respect, equates the said award for breach of contract as amounting to the Respondent, keeping out its money due to it. My answer to issue 11 (eleven) of the Appellant and issue 4.4 of the Respondent, is rendered in the Negative.

I will finally deal with issue 12 of the Appellant for what it is worth. My simple answer which is also settled, is that the general practice, is that costs follow the event and a successful party, is entitled to costs. See the cases of *The Queen v. The Governor in Council, Western Region, Ex Parte Kasalu Adenaiya (1962) 1 ANLR 300; (1962) 1 SCNLR 442; Lawal v. Ijale (1967) 5 NSCC 94; Obeyegbene v. Obazie (1992) 5 S.C, 241 and Mazin Engineering Ltd. v. Tower Aluminium (Nig.) Ltd. (1993) 6 SCNJ.(Pt.II) 176 @ 190* - per Olatawura, JSC (of blessed memory). The award of costs, is within the discretion of the court and it must be exercised judiciously. See also the case of *Mazin Engineering Ltd. (supra); Union Bank of Nig. Ltd. & anor. v. Nwaokolo (1995) 6 NWLR (Pt.400) 127 @ 149; (1995) 4 SCNJ. 93* and *Mrs. F.K. Douglas v. Dr. M.C.A. Peterside (1994) 3 NWLR (Pt.330) 37 @ 52* C.A. citing some other cases therein, just to mention but a few. By way of emphasis, like the award of general damages, the award of costs, involves the exercise of judicial discretion which is based on settled principles. Award of costs, is not meant or designed to be a bonus to a successful party. My final answer therefore, is rendered in the Affirmative/Positive.

I have deliberately gone this far, because, in spite of the frivolity, with respect, of this appeal and the dissipation of unnecessary energy by the Appellant in its two briefs, it appears to me that the Appellant wants N30,000,000.00 (thirty million naira) with 21% (twenty-one percent) interest on the judgment debt and nothing less. Fortunately, it is now settled, that there must be an end to litigation. B

It is from the foregoing and the reasons and conclusion in the lead Judgment of my learned brother, Mukhtar, JSC, just delivered which I had the privilege of reading before now, that I too, find no merit in this appeal. I too, dismiss the same and hereby affirm the decision of the court below. I abide by the consequential order in respect of costs. C

OGEBE JSC

I read in advance lead Judgment of my learned brother Mukhtar, JSC just delivered and I agree with the reasoning and conclusion. The appeal is frivolous and I also dismiss it with costs as assessed in the lead Judgment. D

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother, Mukhtar, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and should be dismissed. F

I wish to comment briefly on the issue touching the award of damages by the two courts below. The appellant felt that it's contract for the supply of telephone line by the respondent was breached. At the trial court, it claimed as follows;- G

“(a) The sum of N30,000,000.00 (Thirty Million Naira) being special exemplary and general damages from the defendant for breach of the contract between the plaintiff and the defendant by the defendant or for negligence. H

(b) Loss of income/profits at the rate of N500,000.00 per week.

(c) An immediate restoration of telephone services to plaintiff by the defendant.

(d) Interest on the above damages and loss of income/profit at

the rate of 21% per annum from the 5th day of December, 1996 till final payment and 6% thereafter until liquidation."

B After the parties adduced evidence at the trial court, the learned trial judge, Rhodes-Vivour, J. (as he then was) was addressed by learned counsel on both sides of the divide. In his considered judgment delivered on 29th October, 1999, the defendant was found liable for breach of contract. As a follow-up, the defendant was ordered to pay N200,000.00 as damages to the plaintiff and provide it with a fault free line within 7 days from 29/10/99.

C The plaintiff felt unhappy with the sum awarded to it as damages by the learned trial judge. It appealed to the court below which, in its judgment, affirmed the award of the sum of N200,000.00 (Two Hundred Thousand Naira). As a follow-up, it also awarded interest of 7^{1/2} % on the judgment sum vide Order 38 Rule 7 of the Lagos State High Court (Civil Procedure) Rules, 1994 as amended.

D The appellant was still not satisfied and has appealed to this court on 14 grounds of appeal. As well, 14 issues were formulated by the appellant. On its part, the respondent formulated four issues only.

The appellant's issue 4 reads as follows:-

E *"4. Whether the learned justices of the Court of Appeal are right when they held at page 134 of the record of appeal that the sum of N200,000.00 (Two Hundred Thousand Naira) awarded as damages by the learned trial judge is very reasonable."*

F The respondent's issue No. 4.2 reads as follows:-

"4.2 Whether the Court of Appeal's evaluation of evidence and refusal to reverse damages awarded by the trial court is perverse or unreasonable so as to warrant interference by the Supreme Court."

G The court below, per M. D. Muhammed, JCA, rightly in my considered opinion, appraised the award of damages and stated at page 134 of the transcript record of appeal, *inter alia*, as follows:-

H *"In the case at hand there was breach of contract and it is natural to presume an injury which though not readily quantifiable it is all the same recoverable. It is an award for an injury caused by the respondent's breach of the contract for the supply of a telephone line for commercial purposes to the appellant. The award of N200,000.00 for the injury caused the appellant is very reasonable. It should persist."*

Let me state it here that damages recoverable against the party

in breach are such loss within the reasonable contemplation of the parties. The duty of the court in instances of breach is based on the evidence led by a claimant to restore an injured party as far as it is monetarily practicable to the position he would have been put but for the breach. There must be a conspicuous relation between the award made and the injury suffered by the beneficiary of the award. *B* See *Oseyomon v. Ojo* (1993) 6 NWLR (Pt. 299) 344, *Orijv. Anyaso* (2000) 2 NWLR (Pt. 643) 1 at page 32.

It must be stressed that in the law of contract, there is no dichotomy between special and general damages as it is the position in tort. The narrow distinction often surmised is one without a difference. In contract, it is damages simpliciter for loss arising from breach. Such loss must be in contemplation of the parties. The loss must be real, not speculative or imagined. See *Barau v. Cubitts (Nig.) Ltd.* (1990) 5 NWLR (Pt. 152) 630; *P.Z Co. Ltd. v. Ogedengbe* (1972) 1 D All NLR 202 at page 210. *C*

Perhaps I should further state it that the award of damages is at the discretion of a judge. Such discretion must be exercised with considerable degree of circumspection. Discretion must not only be exercised judicially but judiciously as well. Judicious means to be discreet and circumspect in balancing two competing interests in a given situation. See *Eronini v. Iheuko* (1989) 2 NSCC (Pt. 1) 503 at page 513, (1989) 3 S.C (Pt.1) 30. *E*

The appellant who laid claim to exemplary damages was not able to show that the respondent's conduct was sufficiently outrageous to warrant such an award. He failed to disclose malice against the respondent. The learned trial judge properly exercised his discretion in the award made to the appellant. I note that the same was followed up by an order that the appellant should be supplied with a functioning line within 7 days. The court below found that the sum of N200,000.00 for the injury caused the appellant is very reasonable and should persist. In the prevailing circumstance of the matter, I say it without any hesitation that I agree with the rationale which led to the award made by the trial court and confirmed by the court below. *F* To say the least, the claim of the appellant for the sum of N30,000,000.00 (Thirty Million Naira) in my considered opinion, appears as a desire for gold digging. 'Prospective gold diggers' should have no place in courts of law as well as that of equity. A judge should *G* *H*

be wary of them. A party who is ordinarily entitled to a pound of flesh should not run after one hundred of same.

The award of N200,000.00 as damages awarded to the appellant by the trial judge at his discretion; affirmed by the court below, is in order. I endorse same.

B It is for the above remarks and the reasons well adumbrated in the lead judgment that propelled me to feel that the appeal is devoid of merit and should be dismissed. I order accordingly and endorse all consequential orders contained in the lead judgment; that relating to costs inclusive.

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