

SUPREME COURT OF NIGERIA
29TH JANUARY, 2010. SC. 114/2002
CORAM:- M. MOHAMMED, W. S. N. ONNOGHEN,
C. M. CHUKWUMA-ENEH, M. S. MUNTAKA-COOMASSIE,
O. O. ADEKEYE, JJSC

1. IMONYAME HOLDINGS LTD
2. APOSTLE S.E.K. OBRUTSE APPELLANTS
AND
1. SONEB ENTERPRISES LTD
2. CHIEF SAM BASSEY RESPONDENTS
3. INTERNATIONAL
POLYMER SYSTEMS LTD
-

ACTIONS - Undefended list procedure - Affidavits - Purpose of filing
- Is for the court to decide whether defendant has any defence - Not
that the case may be heard on affidavit evidence (H1)

ACTIONS - Commencement - Undefended list procedure - Purpose
- It is used to obtain quick judgment - In clear cases where defendant
has no defence - To claim of debt - Or liquidated sum by plaintiff
(H2)

PRACTICE & PROCEDURE - Undefended list procedure - Duty of
court - Where defence is disclosed - Court is to transfer case to gen-
eral cause list - And not to enter judgment for defendant (H3)

FACTS

The plaintiffs/respondents brought this action against defen-
dants/appellants, before the High Court of Cross River State, under
the undefended list procedure. Respondents' claim was for the sum
of N8,125,000.00 (eight million, one hundred and twenty five thou-
sand naira) being money allegedly owed and due for the supply of
rubber lumps/lease rentals for Oban Rubber Estate Limited as well
as interest on the sum. Upon services of the processes on the them,
appellants entered a conditional appearance and filed the necessary
processes to indicate an intention to defend the action.

Trial court thereafter considered the facts disclosed in the affi-

davits filed by the both parties and, in its ruling, held that appellants' notice of intention to defend has not disclosed any real defence on the merit. Accordingly, it entered judgment for respondents under the undefended list. Aggrieved, appellants appealed to Court of Appeal praying the court *inter alia* to strike out their names from the action. Court of Appeal allowed the appeal, set aside the judgment of trial court and ordered that the suit be transferred to the general cause list for hearing by another judge of the High Court of Cross-River State. It did not strike out the names of appellants. Still dissatisfied, appellants have brought this appeal against the judgment of Court of Appeal contending that it ought to have struck out their names from the action, having held that the notice of intention to defend disclosed a defence on the merit.

ISSUE FOR DETERMINATION

Whether the lower court was right in not striking out the names of the appellants from the suit having regards to the evidence before the court.

HELD (Unanimously dismissing the appeal per **ONNOGHEN JSC**) **Undefended list procedure - Affidavits - Purpose of filing**

1. This is an action commenced under the Undefended List procedure where judgment can be entered if the trial Judge is satisfied from the affidavit filed by the defendant along with his notice of intention to defend the action, that no defence has been disclosed on the merit, without calling on the plaintiff to call evidence or tender any document(s). The case is not 'tried' on affidavit evidence neither are the affidavits considered or regarded as pleadings unless so ordered by the court after transferring the matter to the general cause list. The purpose for the filing of the affidavit by the parties is not to take the place of pleadings as thought by the counsel for the appellants but intended simply for the court to decide whether the defendant has any defence to the action of the plaintiff in relation to the debt or liquidated money demand. (p. 138 B)

Undefended list procedure - Purpose

2. The purpose of the Undefended List procedure is to enable a plaintiff obtain quick judgment in clear cases where the defendant has no defence to the claim of debt or liquidated sum by the plaintiff.

The procedure is not intended to be adopted in proceedings where the facts or issues are contentious and will throw doubt on the claim of the plaintiff. In such a circumstance, the proper procedure is by ordinary writ of summons followed by pleadings that is why such a matter, though commenced under the Undefended List, must be transferred to the General Cause List to be dealt with appropriately, as was done in the instant case on appeal. (p. 139 D)

Undefended list procedure - Duty of court

3. The issue as to whether the lower court ought to have struck out the names of the appellants in the circumstance was rightly ignored by the lower court because it is not its duty to decide the merit of the case which was instituted under the Undefended List where the rules clearly say that if a defendant discloses a defence to the action the trial court is to transfer the case from the Undefended List to the General Cause List to be dealt with appropriately. The rules do not authorise the trial court to enter judgment for the defendant at that stage if it finds that the affidavit of the defendant discloses a defence on the merit to the claim of the plaintiff. (p. 139 G)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

1. Respondent's brief should defend judgment an appeal

The 3rd respondent filed no appeal before this Court neither did it join the appellants in filing and prosecuting this appeal. What learned counsel for the 3rd respondent has done is clearly to abuse the purpose of a respondent's brief by converting it to an appellants' brief. If learned counsel for a respondent has nothing to urge on an appellate court in support of a judgment on appeal, all he has to do is to appear at the hearing of the appeal and inform the court that he has nothing to urge in defence of the judgment or take appropriate steps contained in the Rules of the court concerned and applicable to the circumstance of the appeal. He is not to file a 'respondents' brief in which he calls on the court to allow the appeal when he is not an appellant!! (p. 140 F)

REPRESENTATION

Dafe Diegbe Esq. for the appellants with him Udu Diegbe Esq.

Osahon Ihenyen Esq. for 1st and 2nd respondents.

Chief O. O. Obono-Obla for the 3rd respondent with him, J. O. Obono-Obla (Mrs.)

B

CASES REFERRED TO

Nishizanta Ltd vs Jethwani (1984) 1 S.C 234

Kabiru Ibrahim (2004) 2 NWLR Pt 857 Pg 326

C Jiprze V Okonkwo (1987) 3 NWLR Pt. 62 Pg 737

Amadi vs NNPC (2000) 6 S.C (pt.1) 66 at 98 - 99

Benue State vs. Devcon Ltd (1988) 3 NWLR (pt. 83) 407 at 420

Denning L. J., in Errington v. Errington (1953) 1 K.B. 290 at 300

Macaulay V NAL Merchant Bank Ltd (1990) 4 NWLR Pt 144 pg 283

D Brifina Ltd v Intercontinental Bank Ltd (2003) 5 NWLR Pt 814 Pg 540

Eastern Plastics Ltd V Synco (WA) Ltd (1999) 1 NWLR Pt. 587 Pg 456

E Cookery Traders Ltd v General Motors Co Ltd (1992) 2 NWLR Pt 222, Pg 132

JOHN HOLT & CO. (LIVERPOOL) LTD. V. FAJEMIROKUN (1961) 1 ANLR 492

STATUTE & RULES REFERRED TO

F High Court Law of Cross-River State, s. 19 (2)

High Court (Civil Procedure) Rules of Cross-River State, O. 11 rr. 3 & 5, O. 23 r . 3

Court of Appeal Act, s. 16

G Supreme Court Act, s. 22

Supreme Court Rules, O. 8 r. 2

LEAD JUDGMENT BY ONNOGHEN JSC

H On the 13th day of January 2000, the respondents, as plaintiffs, instituted suit NO. HK/3/2000 at the Akamkpa Division of the High Court of Cross River State under the Undefended List, claiming the following reliefs against the present appellants, who were the defendants therein:-

“The Plaintiffs claim against the Defendants jointly and sever-

ally is for the sum of Eight Million, One Hundred and Twenty Five Thousand Naira only (N8,125,000.00) being money owed and due from the supply of rubber lumps/lease rentals at Oban Rubber Estate Limited in Akamkpa Local Government Area with interest at the rate of 21% from January, 1999 till judgment and 10% from judgment until liquidation of the entire judgment debt." B

The writ of summons is supported by an affidavit of 24 paragraphs to which certain documents are exhibited. By an order of the trial court made on the 24th day of January, 2000, the matter was entered for hearing under the undefended list procedure.

Upon service of the processes, the present appellants entered a conditional appearance and filed the necessary processes to indicate intention to defend the action. C

The trial court thereafter considered the facts disclosed in the affidavits filed by both parties in a ruling delivered on the 28th day of March, 2000 and held, inter alia, as follows at page 84 of the record:

"In the result, I hold that the affidavit in support of the defendant's notice of intention to defend has not disclosed any real defence or indeed any defence on the merit. The affidavit is merely intended to dribble everyone and frustrate the plaintiffs and cheat them out of the judgment they are legitimately entitled to when they (the defendants) have no real defence to the action. I will therefore not give the defendants leave to defend this action." E

Accordingly, I will and hereby enter judgment in favour of the plaintiffs and against the defendants jointly and severally in the N8,125,000.00 (Eight million, one hundred and twenty five thousand naira) only being money owed and due from the supply of rubber lumps) lease rentals at Oban Rubber Estate Limited in Akamkpa Local Government Area with interest thereon at the rate of 21% from January, 1999 till today plus interest on the judgment debt at the rate of 10% per annum from tomorrow (29/3/2000) until the judgment debt is completely liquidated...." F G

The present appellants, then defendants, were dissatisfied with that judgment and appealed to the Court of Appeal, Holden at Calabar in appeal NO. CA/C/42/2000. The Court of Appeal in a judgment delivered on the 11th day of July, 2001, allowed the appeal, holding at page 118 of the record, inter alia, as follows: - H

"It appears to me that the major defences of the appellants are

contained in paragraphs 16, 17, 19, 20, 21, 23 and 26 of their said affidavit. It cannot be easily argued that those paragraphs of the affidavit contain fanciful defences. In my view, they contain contentious matters which can only be resolved by allowing oral evidence and cross-examination of witnesses. For this reason, it becomes mandatory that the suit should be transferred to the general Cause List for hearing. It is clear that the purport of the Undefended List procedure is to obtain a quick judgment for the plaintiff in clear cases where the defendant has no defence to the plaintiff's claim, and not where there are contentious matters in the defendant's affidavit which will throw some doubt on the plaintiff's claim.....

From the foregoing therefore, it is my considered view that in the instant case the Learned Trial Judge was in a serious error when he entered judgment for the respondents under the Undefended List. In the result, therefore, I hold that the appeal has merit and it is hereby **ALLOWED** by me It is hereby ordered that the suit be remitted to the court below for trial *de novo* by another judge upon pleadings to be filed by the parties.... "

It is against the above judgment that the appellants, who were successful in the lower court, have now further appealed to this Court.

In the appellants' brief of argument filed on the 27th day of September, 2002, learned counsel for the appellants, DAFE DIEGBE ESQ, identified the following issues for the determination of the appeal:

"2.1 Whether or not there existed sufficient materials upon which the Court of Appeal could have relied upon to strike out the names of the Appellants from suit NO. HK/3/2000 instead of ordering a retrial involving them?"

2.2 Whether or not the issues as formulated by the Court of Appeal took into cognizance, crucial grounds of appeal and issues connected therewith, their resolution which would have led to a verdict striking out Appellants' names from the aforesaid suit?"

It is very important at this stage to remember that the action was instituted under the Undefended List procedure and that no evidence other than the affidavit evidence intended to show that in the opinion of the plaintiffs, the defendants have no defence to the action and that of the defendants intended to disclose any defence thereto on the merit is allowed by the rules of court. What the trial

court is required to do at that stage is simply to consider the affidavits and decide whether the affidavit of the defence discloses any defence to the action, not a resolution of the conflicts or contending positions of the parties so as to arrive at a judgment as to which of the parties is right or entitled to judgment on the merit. The court can only enter judgment for the plaintiffs if it comes to the conclusion that the affidavit of the defendants has disclosed no defence to the action. Where it discloses a defence, the court is not to proceed to determine the case on the affidavit evidence as filed but enjoined by law to remove the suit from the Undefended List and enter same in the general cause list to be dealt with accordingly i.e. by pleadings and calling of evidence, addresses etc., before judgment is entered either way. The importance of the above becomes apparent when the issues raised in this appeal are considered. B C

The second point to note is the fact that the appellants, at page 157 of the record, in their reply brief filed in respect of the appeal at the lower court, the portion headed, CONCLUSION, urged the lower court thus:- D

“For the above reasons and those stated in the Appellants’ Brief, the court will be urged to allow the appeal, set aside the decision of Ogar, J and in its stead enter judgment dismissing Respondents Claims in their entirety or strike out the names of 1st and 3rd Appellants and remit the case to another judge of the Cross River State High Court for trial on the merit as between the 2nd Appellant and the Respondents.” E F

When one looks at the grounds of appeal arising from the decision of the lower court, it is clear that only one issue calls for determination to wit:

Whether the lower court was right in not striking out the names of the appellants from the suit having regards to the evidence before the court. G

In arguing the appeal, learned counsel for the appellants referred to some paragraphs of the supporting affidavit and submitted that since the affidavits of the parties under the Undefended List procedure are analogous to pleadings, the 1st and 2nd respondents were bound by what he calls *“the averments in their affidavit”* and ought not to make a case against the appellants contrary the averments,” relying on the case of Commissioner for Works, Benue State vs. H

Devcon Ltd (1988) 3 NWLR (pt. 83) 407 at 420. Learned Counsel then proceeded to argue the merit of the claim before the trial court based on the documents exhibited to the affidavits and submitted that “*There was thus, available documentary evidence from which the irresistible inference could be drawn by the High Court that what*
 B *was claimed related to lease rentals;*” that there was no evidence disclosing a cause of action arising from non payment for rubber lumps as claimed in the writ; that evidence rather disclosed that the claim is for lease rentals.

C Proceeding further, learned counsel agrees that the trial court has the vires under the provisions of Order 23 Rule 3(2) of the High Court (Civil Procedure) Rules of the Cross River State to transfer a cause from the Undefended to the General Cause List where it grants leave to defend an action but that the said provision does not deroga
 D gate from the powers conferred on the court under section 19(2) of the High Court Law of Cross River State, which that court ought to have employed to strike out the names of the appellants from the suit for being improperly joined; that the trial court could also strike out the names of the appellants *suo motu* under Order 11 Rules 3
 E and 5(2) of the High Court (Civil Procedure) Rules. Learned Counsel submitted further that by the provisions of section 16 of the Court of Appeal Act, the lower court ought to have struck out the names of the appellants. Learned Counsel then made submissions on circum-
 F stances where an appellate court may or should order a retrial which is irrelevant to the issue before the court as what the lower court did was not to order a retrial but a transfer of the matter from the Undefended List to the General Cause List to be dealt with according to law. The two are not the same by any stretch of imagination.

G However Learned Counsel referred to section 22 of the Supreme Court Act and order 8 Rule 2(2) of the Rules of this Court and urged the court to invoke its powers therein to draw the inference from the evidence to the effect that the appellants were sued for a non existent cause of action and strike out their names from the
 H suit.

It is the contention of Learned Counsel for the appellants that the lower court failed to consider a crucial issue submitted to it for determination, to wit: “*whether or not the appellants were indebted, however to the respondents in relation to rubber lumps?*” And that

the non consideration has resulted in a miscarriage of justice, relying on *Amadi vs NNPC* (2000) 6 S.C (pt.1) 66 at 98 - 99 and urged the court to allow the appeal.

Learned Counsel for the 1st and 2nd respondents filed a preliminary objection to the appeal, which was argued in their brief filed on 22nd June, 2007. The objection concerns the issue as to leave to appeal on facts or mixed law and fact, which has been adequately dealt with in the reply brief filed on 7th May, 2007 and the contents of the Supplementary Record filed on 20/7/07. I therefore need not waste further time on the matter, as the objection is misconceived.

On the merit of the appeal, Learned Counsel submitted that the appellants were joined in the suit because of their overwhelming participation in the transaction leading to the action making it necessary for them to react to the allegations of the 1st and 2nd respondents against their conduct and alleged liability as disclosed in the affidavit evidence and that the lower court was right in not striking out their names from the proceedings.

Finally, Learned Counsel for the 1st and 2nd respondents submitted that the issues formulated by the lower court sufficiently dealt with the issues in controversy between the parties and urged the court to dismiss the appeal.

Order 23 Rule 1 of the Cross River State High Court (Civil Procedure) Rules 1987 provides as follows:-

“Whenever application is made to a court for the issue of a writ of summons in respect of a claim to recover a debt or liquidated money demand and such is supported by an affidavit setting forth the grounds upon which the claim is based and stating that in the deponent’s belief there is no defence thereto, the court shall, if satisfied that there are good grounds for believing that there is no defence thereto, enter the suit for hearing in what shall be called the “Undefended List”, and mark the writ of summons accordingly and enter thereon a date for hearing suitable to the circumstance of the particular case.”

Order 23 Rule 3(1) of the said High Court Rules provides thus:

“If the party served with the writ of summons and affidavit delivers to the Registrar a notice in writing that he intends to defend the suit, together with an affidavit disclosing a defence on the merit, the court may give him leave to defend upon such terms as the court

may think just."

Where the court gives the defendant leave to defend the action, the action is removed from the "Undefended List" and placed on the General Cause List - see order 23 Rule 3(1) & (2) of the High Court (Civil Procedure) Rules, 1987.

- B It is very clear that this appeal is very much unnecessary and misconceived, having regards to the facts of the case and the procedure adopted in its commencement. ***This is an action commenced under the Undefended List procedure where judgment can be entered if the trial Judge is satisfied from the affidavit filed by the defendant along with his notice of intention to defend the action, that no defence has been disclosed on the merit, without calling on the plaintiff to call evidence or tender any document(s). The case is not 'tried' on affidavit evidence neither are the affidavits considered or regarded as pleadings unless so ordered by the court after transferring the matter to the general cause list. The purpose for the filing of the affidavit by the parties is not to take the place of pleadings as thought by the counsel for the appellants but intended simply for the court to decide whether the defendant has any defence to the action of the plaintiff in relation to the debt or liquidated money demand.***
- E The trial court is not to decide whether the defence put forward by the defendant in the affidavit succeeds or will ultimately succeed at that stage of the proceeding - see *Nishizanta Ltd vs Jethwani* (1984) 1 S.C 234. The facts to be stated in the affidavit of the defendant must be such that will require the plaintiff to offer explanation for matters involved in his case or seriously question or challenge the claim of the plaintiff. Where such a situation arises, we say that the defendant has disclosed a defence on the merit to the claim of the plaintiff and the trial court is by the rules duty bound to allow or admit the defendant to defend the action by granting him leave to do so and consequently transfer the case from the Undefended List to the General Cause List to be dealt with by the filing of pleadings or
- G the court may even order that the affidavits filed should serve as pleading for the trial of the matter. The rule does not authorize the court, at that stage, to go into the merit of the case by making findings of facts to arrive at any conclusion, as the appellants appeared to be arguing.
- H

The object of the affidavit of the defendant under the Undefended List procedure is therefore that of disclosing the ground for asking the court to be allowed in to defend the suit - it is to disclose or show a dispute between the parties which needed to be tried.

From the position of the law, it is very clear that the argument that the lower court ought to have invoked its powers under section 16 of the Court of Appeal Act to strike out the names of the appellants having regards to the facts disclosed in the affidavits is clearly misconceived. The above argument is the basis of this appeal as this Court has also been invited to invoke its similar powers under section 22 of the Supreme Court Act. I had earlier reproduced the judgment of the lower court which overruled the trial court and found that appellants' affidavit of defence "*disclosed contentious matters which can only be resolved by allowing oral evidence and cross examination of witnesses.*" The holding by the lower court *supra*, as well as the subsequent order transferring the case from the Undefended List to the General Cause List is sound in law and mandatorily follows the relevant provisions of the Rules of court.

It should constantly be kept in view that ***the purpose of the Undefended List procedure is to enable a plaintiff obtain quick judgment in clear cases where the defendant has no defence to the claim of debt or liquidated sum by the plaintiff. The procedure is not intended to be adopted in proceedings where the facts or issues are contentious and will throw doubt on the claim of the plaintiff. In such a circumstance, the proper procedure is by ordinary writ of summons followed by pleadings that is why such a matter, though commenced under the Undefended List, must be transferred to the General Cause List to be dealt with appropriately, as was done in the instant case on appeal.***

The issue as to whether the lower court ought to have struck out the names of the appellants in the circumstance was rightly ignored by the lower court because it is not its duty to decide the merit of the case which was instituted under the Undefended List where the rules clearly say that if a defendant discloses a defence to the action the trial court is to transfer the case from the Undefended List to the General Cause List to be dealt with appropriately. The rules do not

authorise the trial court to enter judgment for the defendant at that stage if it finds that the affidavit of the defendant discloses a defence on the merit to the claim of the plaintiff.

Before concluding this judgment, I have to comment on a matter which is very disturbing. It concerns the brief filed by the
 B Learned Counsel for the 3rd Respondent, CHIEF OKOI O. OBONO-OBLA on the 9th day of June, 2009 which he ‘adopted’ in argument of the appeal on the 2nd day of November, 2009.

Learned Counsel for the 3rd respondent concluded his brief
 C thus:

“CONCLUSION.

We respectfully invite your Lordships to allow this appeal because:

1. *The court below was wrong to order a retrial of the case
 D involving the Appellants and the 1st and 2nd Respondents on one hand and the 3^d Respondent on the other hand in view of the fact that there was ample evidence that the Appellants were never a party to the transaction between the 1st and 2nd Respondents and the 3^d Respondent as embodied in the Technical Partnership Agreement.*

2. *The court below was wrong to have refrained and condensed the issues formulated by the Appellants into two leaving the question or issue which is crucial to the determination of whether the Appellants were (sic) the rightful persons to be sued for alleged of
 E (sic) breach to pay for rentals lapse.”*

The 3rd respondent filed no appeal before this Court neither did it join the appellants in filing and prosecuting this appeal. What
 learned counsel for the 3rd respondent has done is clearly to abuse the purpose of a respondent’s brief by converting it to an appellants’
 G brief. If learned counsel for a respondent has nothing to urge on an appellate court in support of a judgment on appeal, all he has to do is to appear at the hearing of the appeal and inform the court that he has nothing to urge in defence of the judgment or take appropriate steps contained in the Rules of the court concerned and applicable to
 H the circumstance of the appeal. He is not to file a ‘respondents’ brief in which he calls on the court to allow the appeal when he is not an appellant!!

In any event, the 3rd respondent’s ‘brief’ is not relevant to the determination of the issues in this appeal as the same is grossly mis-

conceived, incompetent, and is consequently struck out.

In conclusion I find no merit whatsoever in this appeal which is a total waste of the precious time of this Court and is consequently dismissed with N50,000.00 costs against the appellants, and in favour of the 1st and 2nd respondents.

The judgment of the lower court delivered on the 11th day of July, 2001 is hereby affirmed.

Appeal dismissed.

MOHAMMED JSC

The judgment just delivered by my learned brother Onnoghen, JSC in this appeal was read by me before today. I entirely agree with him that this is one the frivolous appeals that find their way to this Court and which this Court ought not to waste its precious time to hear and determine under the Constitution which gives the parties the right to appeal to this Court against any decision of the Court of appeal which a party is not satisfied with. It is perhaps in the exercise of this unbridled right that even the 3rd Respondent in this appeal who filed no cross-appeal, decided to throw away his appropriate role under the law to support the judgment of the Court of Appeal being appealed against and instead teamed up with the Appellants in order to see the tearing and setting aside of the decision. This is certainly not the natural role of a Respondent in an appeal under our laws and various rules of Court where a Respondent is expected to do everything to support the judgment which is the subject of appeal. See Denning L. J., in Errington v. Errington (1953) 1 K.B. 290 at 300.

With these short comment, I also dismiss this appeal and abide the order on costs in the lead judgment of my learned brother Onnoghen, JSC with which I completely agree.

CHUKWUMA-ENEH JSC

I have read in draft the judgment prepared by my learned brother Onnoghen JSC, in this matter and I agree with his reasoning and conclusion that the appeal has no merit and should be dismissed.

However, there can be no doubt that a community reading of Rules 1 and 3(1) of Order 23 of the Cross River State High Court (Civil Procedure) Rules 1987 which provisions are set out below (i.e. as regards the pre- conditions for transferring a matter from the Un-
 B defended list to the general cause list) is quite plain and unambigu-
 ous i.e. with regard to more particularly the duty of the trial court in
 the circumstance. On having placed a matter in the undefended list,
 a trial court is enjoined upon the defendant having filed a written
 notice of his intention to defend coupled with an affidavit disclosing a
 C defence on the merit to grant leave to defend upon such terms as the
 court may think just - invariably this process culminates in the trial
 court transferring the matter to the general cause list and ordering of
 pleadings to be filed and exchanged between the parties. Meaning in
 effect that Order 23 does not contemplate transferring a matter
 D marked "Undefended List" to the "General Cause List" without the
 defendant's depositions in the defence affidavit showing a good de-
 fence to the plaintiffs' claim. See. JOHN HOLT & CO. (LIVERPOOL)
LTD. V. FAJEMIROKUN (1961) 1 ANLR 492. By the provisions of
 Order 23 it is clear that they do not contemplate enabling the court
 E to go into the merits of the whole case at this point.

Order 23 Rule 1 of the Cross River State High Court (Civil Procedure) Rules 1987 provides as follows:

*"Whenever application is made to a court for the issue of a writ
 F of summons in respect of a claim to recover a debt or liquidated
 money demand and such is supported by an affidavit setting forth
 the grounds upon which the claim is based and stating that in the
 deponent's belief there is no defence thereto, the court shall, if satis-
 fied that there are good grounds for believing that there is no de-
 G fence thereto enter the suit for hearing in what shall be called the
 "Undefended List", and mark the writ of summons accordingly and
 enter thereon a date for hearing suitable to the circumstance of the
 particular case."*

Order 23 Rule 3(1) of the said High Court Rules provides thus:

H *"If the party served with the writ of summons and affidavit
 delivers to the Registrar a notice in writing that he intends to defend
 the suit, together with an affidavit disclosing a defence on the merit,
 the court may give him leave to defend upon such terms as the court
 may think just."*

At that juncture as provided by the said Rules, the trial court is simply preoccupied with determining whether the defence affidavit has raised serious contentious matters tantamount to a good defence on the merit vis-a-vis the plaintiff's case as deposed to in his affidavit in support of the claim and these ought to be resolved by way of testimonial evidence at a full dressed trial. The trial Court has no option in that case but to transfer it to the general cause list for hearing against the background of the pleadings filed and exchanged in the claim, that is to say, once it is showed that the defendant has raised a good defence on the merit. Where, however, the defendant has failed to proffer in that regard a good defence on the merit, the plaintiff is entitled to a summary judgment. The foregoing scenarios encompass the familiar proceedings peculiar to this form of action.

In this case, the trial court notwithstanding the clear and weighty depositions in paragraphs 16, 17, 19, 20, 21, 23 and 26 of the defence affidavit has found no merit in the same and it has proceeded to enter summary judgment in favour of the plaintiffs. I cite with approval BANQUE DE L'AFRIQUE OCCIDENTALE V. BABA SHAAFADI & ORS. (1963) NNLR 21 in support. On appeal to the court below, it rightly has found no basis enabling the trial court to reach that conclusion; the trial court has therefore erred in that regard hence the court below has allowed the appeal from that decision, transferred the matter to the general cause list and remitted the case to the trial court for pleadings and hearing to follow. And I agree with that conclusion as it cannot be flawed.

It seems to me that the appellants' two issues for determination raised in their brief of argument and fully set out in the lead judgment in this matter appear to have been identified on matters upon which issues would have been properly joined upon the parties having filed and exchanged their respective pleadings and thus join issues in that regard. The said issues are not matters that the court below could have pronounced upon peremptorily without more or taken in its stride in determining whether or not the defence affidavit in this suit has disclosed a good defence on the merit as proved under the rules in order to translate the instant suit to the general cause.

Secondly, I couldn't agree more with the conclusion reached in the lead judgment with regard to the 3rd Respondent's position in submitting that the appeal be allowed when the 3rd respondent ought

to be defending the decision before this court thus standing the whole purport of a respondent's brief argument on its head.

This appeal is resoundingly unmeritorious and a sheer waste of the time of court. In the circumstances, I also dismiss the appeal and endorse order on the costs as in the lead judgment.

B

MUNTAKA-COOMASSIE JSC

I read before now a copy of the lead judgment of my learned brother, Walter Onnoghen, JSC, I entirely agree with the reasoning and conclusion relied upon by my learned brother, Onnoghen, JSC in dismissing the appeal.

A close perusal of the judgment of the lower court will depict a very sound legal analysis of the appeal before it. My learned brother also has meticulously considered the issues presented to us during the hearing of the appeal. It is my candid view that his Lordship has calmly and correctly arrived at a right decision. I do not intend to add anything other than to state that I concur. I too see no merits in the appeal. Same is therefore dismissed. I endorse the orders as to costs.

E

ADEKEYE JSC

I was privileged to read in draft the judgment just delivered by my learned brother W. S. N. Onnoghen JSC. I agree entirely with his reasoning and conclusion that there is no merit in the appeal to this court. I share his opinion that this appeal is a waste of precious litigation time. My learned brother had meticulously dealt with the issues arising for determination. I shall add a few words by way of emphasis. The suit was commenced before the trial court under the undefended list.

The claim before the court reads as follows:-

"The Plaintiffs claim against the defendants jointly and severally is for the sum of Eight Million, One Hundred and Twenty Five Thousand Naira (N8, 125,000.00) only being money owed and due from the supply of rubber lumps/lease rentals at Oban Rubber Estate Limited in Akamkpa Local Government Area with interest at the rate of 21% from January 1999 till judgment and 10% from judgment until Liquidation of the entire judgment".

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At the trial court, and thereafter at the appellate level- the question which called for resolution was whether the suit should be tried under the undefended list or the general cause list. In doing substantial justice, the crucial factor to guide the court is whether or not the appellants were indebted to the respondents in relation to the rubber lumps. B

The issue for determination is thereafter simple and straight forward. The undefended list procedure now well established under our Civil Legal System, is defined in the High Court Civil Procedure Rules and numerous decided authorities by our courts of record. It is made in respect of a claim to recover a debt or a liquidated money demand. The applicable Law here is Order 23 Rules 1, 3(1) and (2) Cross River State High Court Civil Procedure Rules 1987. Proceedings under these rules are conducted on affidavit evidence. C

The court must first scrutinize the affidavit evidence of the defendant attached to the notice of intention to defend and come to the conclusion that a defence had been disclosed on the merit and thereafter transfer the Suit to the general cause list. It is not necessary for the court to decide at that stage whether a defence has been established in order to determine whether a defendant has a good defence on the merit to an action on the undefended list. What the court has to decide is whether or not a defence had indeed been made out prima facie on the affidavit evidence. It is only in the absence of compelling facts that triable issue or bonafide issue for trial has been made out in the defendants affidavit in support of his notice of intention to defend, or in the absence of any such notice of intention to defend that a trial court can enter judgment in favour of the plaintiff on the undefended list. As rightly observed by the lower court paragraphs 16, 17, 19, 20, 21, 23 and 26 of the affidavit in support of the notice of intention to defend filed by the defendants/appellants disclosed triable issues. Once a triable issue has been raised in the notice to defend the court must transfer the case to the general cause list for trial on the merit. The chance of success of the defence on its merit is immaterial. The nature of the complaints in the affidavit evidence of the defendants/appellants could not have been resolved on affidavit evidence. It is trite that when affidavit evidence placed before the court by both parties to an action conflict on material facts, oral evidence must be called to resolve the conflict. D E F G H

In this case the trial court should have allowed the matter to go on full trial considering the issues raised.

Jiprize V Okonkwo (1987) 3 NWLR Pt. 62 Pg 737

Eastern Plastics Ltd V Synco (WA) Ltd (1999) 1 NWLR Pt. 587 Pg 456

B Macauly V NAL Merchant Bank Ltd (1990) 4 NWLR Pt 144 pg 283

Kabiru Ibrahim (2004) 2 NWLR Pt 857 Pg 326.

C The trial court has wrongly exercised its discretionary power in determining whether to place this case on the undefended list or transfer same to the general cause list.

Brifina Ltd v Intercontinental Bank Ltd (2003) 5 NWLR Pt 814 Pg 540.

D Cookery Traders Ltd v General Motors Co Ltd (1992) 2 NWLR Pt 222, Pg 132.

Like my brother in his leading judgment, I find it extremely absurd that a party who filed a Respondents brief in an appeal would conclude his argument and submission in the brief by urging that the appeal be allowed in favour of the Appellant.

E The traditional role of a respondent in an appeal is to do everything to support the judgment. He is not supposed to attack the judgment except he had filed, a cross-appeal. The respondents brief should answer all material points of substance contained in the appellants brief. The brief must reflect all the points which the respondent wishes to concede as well as reasons why the appeal ought to be dismissed.

The posture of the 3rd respondent's counsel is inconsistent with his traditional role as a respondent.

G With fuller reasons ably considered in the leading judgment, I also dismiss the appeal as lacking in merit. I abide the consequential orders made by my learned brother including the order of costs.

H