

SUPREME COURT OF NIGERIA
5TH MARCH, 2010 SC. 153/2006
CORAM:- N. TOBI, A. M. MUKHTAR, I. F. OGBUAGU,
J. O. OGBE, J. A. FABIYI, JJSC

G. M. O. NWORAH &
SONS CO. LTD. APPELLANT
AND
AFAM AKPUTA ESQ. RESPONDENT

WORDS & PHRASES - Contracts - Damages - Liquidated sum - Meaning - It means a fixed or ascertainable amount mutually agreed on by parties to contract - As payable on breach thereof - Which amount must be known prior to breach (H1)

ACTIONS - Bill of charges - Recovery under undefended list - Propriety - As the bills relied on by respondent - Were not based on any mutually agreed ascertainable standard - The claim is for unliquidated sum and ought not to be by undefended list (H2)

ACTIONS - Undefended list - Triable issue - Whenever a triable issue comes into existence - As a result of the facts deposed to by defendant - The case ought to be transferred to the general cause list (H3)

FACTS

The plaintiff/respondent sued defendant/appellant before the High Court of Enugu State sitting at Enugu claiming the sum of N7,555,000 (seven million five hundred and fifty five thousand naira) as professional fees for services allegedly rendered to appellant. The suit was brought under the undefended list procedure. Upon being served with the writ of summons, appellant filed a notice of preliminary objection challenging the *locus standi* of respondent to institute and maintain the action.

Trial court heard the preliminary objection and respondent's motion for judgment under the undefended list together. After hearing, it dismissed the preliminary objection and gave judgment to respondent, awarding him the sum of N800,000 (eight hundred thousand naira) which it felt to be a reasonable sum for the services alleg-

edly rendered. Aggrieved, appellant appealed to Court of Appeal. Respondent also cross-appealed on the amount awarded by trial court. Court of Appeal dismissed appellant's appeal but allowed the cross-appeal by respondent, awarding him the full sum he claimed. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal. It is appellant's contention that the claim before the trial court did not satisfy the necessary conditions for a suit that could be heard under the undefended list.

ISSUE FOR DETERMINATION

Whether the claim at the trial court satisfied the necessary conditions for a suit that ought to be placed under the undefended list.

HELD (Unanimously allowing the appeal per **FABIYI JSC**)

Contracts - Damages - Liquidated sum - Meaning

1. It is clear and beyond tenable argument that the factors for determining a liquidated sum are as follows:-

(a) The sum must be arithmetically ascertainable without further investigation.

(b) If it is in reference to a contract, the parties to the contract must have mutually and unequivocally agreed on a fixed amount payable on breach.

(c) The agreed and fixed amount must be known prior to the breach. (p. 903 H)

Bill of charges - Recovery under undefended list - Propriety

2. I have taken a careful look at the affidavit in support of the respondent's claim under the undefended list.

To say the least, the various heads of amount in Exhibit F, the 'Bill of Charges' relied upon by the respondent, were estimates arrived at by the unilateral opinion of the respondent which were not based on any mutually agreed ascertainable standard. There was no fixed amount known to the parties prior to the alleged breach of the oral agreement which the respondent said he had with the appellant. The claim of the respondent, in the circumstance can only be categorised as unliquidated damages. It ought not to have been placed and determined under the undefended list in the first instance. (p. 904 A/C)

Undefended list - Triable issue

3. If a defendant's affidavit in support of the notice of intention to defend, where one is filed, or an affidavit to prop a preliminary objection as in this case raises an issue where the plaintiff will be required to explain certain matters with regard to his claim or where the affidavit throws a doubt on the plaintiff's claim, such brings the parties within the concept of 'joining issues'.

In such a situation, a triable issue comes into existence. Whenever a bona fide issue or a triable issue comes into existence, the case ought to be entered in the general cause list. The court has a duty to ensure fair hearing even in cases under the undefended list procedure.

(p. 904 F/H)

NOTABLE POINTS OF INTEREST***FABIYI JSC******1. Undefended List action could be challenged by objection***

I note that the appellant herein, as defendant at the trial court, filed a preliminary objection challenging the *locus standi* of the respondent as plaintiff instead of the usual notice of intention to defend as dictated by the Rules of the trial court. There appears to be no big deal in this point. The action could validly be challenged other than by filing a notice of intention to defend and an affidavit disclosing a defence on the merit. (p. 905 D)

OGBUAGU JSC***2. Rules of court must be obeyed till nullified by court***

With respect, when the Respondent in his paragraph 4.01 of his Brief, declared the Rule in Order 34 Rule 5 a nullity and as being a violation of the Legislative limit of the said rule, I hold that on the decided authorities above referred to, until a rule is declared a nullity by a competent court with jurisdiction, it must be obeyed as it is in the nature of subsidiary legislation and have the force of law. To disobey such a rule or ignore it by the Appellant, with respect, amounts to "rascality" to put it mildly. (p. 914 D)

3. Contracts - Interest rates must be based on the terms or on law

Before concluding this Judgment, I wish to comment briefly on the respective sums awarded in favour of the Respondent by each of the

courts. The Respondent claimed 5% interest on the judgment sum. The two lower courts in effect, found that there was contract between the parties - i.e. in respect of professional services by the Respondent. It is now firmly settled that in a contract between parties, only such interest as made recoverable by the terms of the contract or the operation of law, that would or should be awarded.(p. 919 H)

REPRESENTATION

C. Ezugwu (with him H. A. Eze, Esq.) for the Appellant
C Afam Akputa appears in person.

CASES REFERRED TO

Maja v. Samouris (2002) 7 NWLR part 765 page 78
Ehimare v. Emhonyon (1985)1 NWLR (Pt. 2) 177
D Jipreze v. Okonkwo 1987 2 NWLR part 62, page 737
Ajadi v. Okenihun (1995) 1 All NLR (Pt. 1) 213 @ 217
Maja v. Samouris (2002) 7 NWLR (Pt. 765) 78 at page 102
Akinnuli v. Odugbesan (1992) 8 NWLR (Pt 258) 172 at 188
Sodipo v. Lemminkainen OY (1986) 1 NWLR (Pt. 15) 220 at 231
E Afri Bank (Nig.) PLC v. Akwara (2006) 5 NWLR (Pt.974) 619 @ 646
Olubusola Stores v. Standard Bank Nig Ltd. (1975) 4 SC 51 at 55-56
U.T.C. (Nig.) Limited v. Pamotei (1989) 2 NWLR (Pt. 103) 244
F University of Nigeria v. Onuzulike Trading Co. (1989) 5 NWLR (Pt. 119) 19 @ 29

RULES REFERRED TO

Anambra State High Court (Civil Procedure) Rules, 1988, O. 24 r. 9
G

BOOK REFERRED TO

Black's Law Dictionary (6th Edition) page 391

LEAD JUDGMENT BY FABIYI JSC

H This is an appeal against the judgment delivered by the Court of Appeal, Enugu Division (court below for short) on 19th June, 2006 in respect of an appeal and cross appeal by the parties against the judgment of Ozoemena, J. of the High Court of Justice, Enugu delivered on 19th April, 2004.

The case at the trial court was a suit filed in the undefended list by the respondent as plaintiff thereat. He claimed the sum of N7,555,000.00 against the appellant as professional fees for services allegedly rendered for the benefit of the defendant-appellant herein.

Upon being served with the writ of summons, the defendant filed a notice of preliminary objection challenging the locus standi of the plaintiff to institute and maintain the action. The trial judge was addressed by counsel on the preliminary objection and application for judgment under the undefended list. In his judgment handed out on 19th April, 2004, he dismissed the preliminary objection. As a follow up, he granted in part the plaintiff's application under the undefended list by awarding him N800,000.00 with 2% interest out of the N7,555,000.00 as he felt that the fees to be paid must be reasonable in the circumstances.

Both parties felt unhappy with the stance posed by the trial judge. The defendant appealed and the plaintiff, as well, cross-appealed to the court below. On 19th June, 2006, the court below dismissed the appellant's appeal and allowed the respondent's cross-appeal. The court below awarded the respondent the sum of N6,750,000.00 with 3% interest being the remainder or part of the cross-appellant's claim at the trial court which was not granted thereat.

The appellant felt irked with the decision of the court below and has appealed to this court. He sought the leave of this court to raise new issues and filed four (4) additional grounds of appeal in respect of same.

On 7th December, 2009 when this appeal was heard, briefs of argument were adopted by both sides of the divide. The three (3) issues couched for determination of the appeal by the appellant read as follows:-

"ISSUE NO. 1

Whether the respondent has the locus standi to institute the action at the High Court of Enugu State so as to confer the court with the jurisdiction to hear and determine the claim.

ISSUE NO. 2

Whether, in all the circumstances of this case the suit filed by the respondent at the trial court satisfied necessary conditions of a suit that can be placed and determined, under the undefended list.

ISSUE NO. 3

Whether the court below was right in an undefended list claim for N7,555,000.00 to set aside the award of N800,000.00 with 2% interest granted respondent by the trial court and substitute same with an award of N6,750,000.00 with 3% interest as remainder of the sum not granted by the trial court. ”

B The respondent also distilled three issues for determination of the appeal. They read as follows:-

“1. Must respondent comply with Order 34 Rule 5 of the High Court of Anambra State (Civil Procedure) Rule 1988, applicable in Enugu State in Order to establish the requisite locus standi necessary to sustain the claim herein?”

2. *Whether the claim at the trial court satisfied the necessary conditions for a suit that ought to be placed and determined under the undefended list.*

D 3. *Whether the court below was right to have awarded N6,750,000.00 (Six Million Seven Hundred and Fifty Thousand Naira) with 3% interest to the respondent. ”*

E At this point, it is apt to start with the consideration of issue 2 as decoded by both parties. They both agree that this issue is whether the claim at the trial court satisfied the necessary conditions for a suit that ought to be placed under the undefended list.

F On behalf of the appellant, learned counsel submitted that if the respondent has the requisite *locus standi* to initiate the suit at the trial court, the suit, as constituted, ought not to have been heard and determined under the undefended list. Learned counsel contended that the respondent’s claim as contained in Exhibit F, his ‘Bill of charge’ was not for liquidated debt, money demand or damages. He cited the case of *U.T.C. (Nig.) Limited v. Pamotei (1989) 2 NWLR (Pt. 103) 244 at 299.*

G The respondent felt that since he worked for the appellant, the sum claimed by him was for a ‘debt’ and such liability need not be arithmetically ascertained. He maintained that he was entitled to apply to the court for recovery of the ‘debt’ under the undefended list procedure. He cited the case of *Akinnuli v. Odugbesan (1992) 8 NWLR (Pt. 258) 172 at 188.*

H Let me say it here pointedly that the, undefended list proceeding is meant to shorten the hearing of a suit where the claim is for a liquidated sum. It is designed to avoid the intricacies of pleadings in a

normal hearing in our trial courts. In recent times, its employment has been subject of abuse. Such should not be the case.

What then is a liquidated 'sum' or 'damages'. Blacks Law Dictionary (6th Edition) at page 391 says that 'damages is said to be liquidated when a specific sum of money has been expressly stipulated by the parties to a bond or other contract as the amount of damages to be recovered by either party for a breach of the agreement by the other side. Stein v. Bruce 366 S. W. 2d 732, 735. The term is applicable when the amount of the damages has been ascertained by the judgment in the action.

In *Maja v. Samouris* (2002) 7 NWLR (Pt. 765) 78 at page 102, this court by Iguh, JSC pronounced thus:-

"A liquidated demand is a debt or specific sum of money usually due or payable and its amount must be already ascertained or capable of being ascertained as a matter of arithmetic without any other or further investigation. Whenever therefore the amount to which plaintiff is entitled can be ascertained by calculation or fixed by any scale of charges or other positive data, it is said to be liquidated or made clear. Again, where the parties to a contract as part of the agreement between them fix the amount payable on the default of one of them or in the event of breach by way of damages such sum is classified as liquidated damages where it is the nature of genuine pre-estimate of the damage which would arise from breach of the contract so long as the agreement is not obnoxious as to constitute a penalty and it is payable by the party in default."

Earlier on, in the case of *Eko Odume v. Ume Nnachi* (1964) 1 All NLR 324 at page 328, this court per Idigbe, JSC pronounced thus:-

"Whenever the amount to which the plaintiff is entitled can be ascertained by calculation or fixed by any scale or other positive data it is said to be liquidated or made clear. But when the amount to be recovered depends on all the circumstances of the case and on the conduct of the parties and is fixed by opinion or by an estimate the damages are said to be unliquidated."

It is clear and beyond tenable argument that the factors for determining a liquidated sum are as follows:-

(a) The sum must be arithmetically ascertainable without further investigation.

(b) If it is in reference to a contract, the parties to the

contract must have mutually and unequivocally agreed on a fixed amount payable on breach.

(c) The agreed and fixed amount must be known prior to the breach.

I have taken a careful look at the affidavit in support of the respondent's claim under the undefended list. I cannot see any averment therein which shows that there was an agreement, written or otherwise between him and the appellant, at any material point in time pointing to the direction that the appellant would pay the respondent the sum of N7,555,000.00 contained in the writ of summons or any other particular sum of money for that matter.

To say the least, the various heads of amount in Exhibit F, the 'Bill of Charges' relied upon by the respondent, were estimates arrived at by the unilateral opinion of the respondent which were not based on any mutually agreed ascertainable standard. There was no fixed amount known to the parties prior to the alleged breach of the oral agreement which the respondent said he had with the appellant. The claim of the respondent, in the circumstance can only be categorised as unliquidated damages. It ought not to have been placed and determined under the undefended list in the first instance.

Further, learned counsel for the appellant submitted that the case was not qualified to be placed and determined under the undefended list because the respondent's suit, as formulated and presented before the trial court, was not only contentious but also raised a number of friable issues.

What then amounts to a triable issue in the context of an undefended list proceeding? **If a defendant's affidavit in support of the notice of intention to defend, where one is filed, or an affidavit to prop a preliminary objection as in this case raises an issue where the plaintiff will be required to explain certain matters with regard to his claim or where the affidavit throws a doubt on the plaintiff's claim, such brings the parties within the concept of 'joining issues'** as explained in *Graham v. Esumai* (1984) 15 NSCC 733, 743 and *Ehimare v. Emhonyon* (1985) 1 NWLR (Pt. 2) 177; (1985) 16 NSCC (Pt. 1) 163, 169. **In such a situation, a triable issue comes into existence. Whenever a bona fide issue or a triable issue comes into existence, the**

case ought to be entered in the general cause list. The court has a duty to ensure fair hearing even in cases under the undefended list procedure.

Let me point it out that although the procedure under the undefended list has the advantage of speedy and quick dispensation of justice, it has its limitation in that it is not an appropriate procedure in complex cases with controversial triable issues. It is the duty of a trial court to first certify that the case is a proper one to be placed on the undefended list. For guidance on the procedure for summary judgment on the undefended list action, See: *UAC (Tech) Ltd. v. Anglo Canadian Cement Ltd.* (1966) NWLR 349; *Olubusola Stores v. Standard Bank Nig Ltd.* (1975) 4 SC 51 at 55-56; *Okambah Ltd. v. Sule* (1990) 7 NWLR (Pt. 160) 1; (1990) 11 SCNJ 1; *Adebisi Macgregor Associates Ltd. v. Nigerian Merchant Bank Ltd.* (1996) 2 NWLR (pt. 431) 378; (1996) 2 SCNJ 72.

I note that the appellant herein, as defendant at the trial court, filed a preliminary objection challenging the *locus standi* of the respondent as plaintiff instead of the usual notice of intention to defend as dictated by the Rules of the trial court. There appears to be no big deal in this point. The action could validly be challenged other than by filing a notice of intention to defend and an affidavit disclosing a defence on the merit. See; the case of *Sodipo v. Lemminkainen OY* (1986) 1 NWLR (Pt. 15) 220 at 231; *Nishizawa Limited v. Jethwani* (1984) 12 SC 234 at 257; *U.T.C Nig. Ltd v. Pamotei (supra)* at page 284.

In short, the trial court and the court below had a duty to consider the preliminary objection and the affidavit in support of same. The respondent maintained that he had an oral agreement to 'work' for the appellant. On the other hand, the appellant said it had no contract or oral written with the respondent. The appellant said it had dealings with one Joe Akputa and attached an agreement between them marked Exhibit 'A' to its affidavit. It is the said Joe Akputa that the respondent said introduced him to the appellant. There is no doubt in my mind that a triable issue has arisen in respect of the standing of the respondent. The two courts below appeared to have brushed the issue aside. But it has refused to be swept under the carpet. It requires to be cleared in a full blown trial.

Again, to justify the sum of N2,000,000.00 in Exhibit F as the

fee for representing the appellant at the Supreme Court, the respondent averred in paragraph 4 of the affidavit in support of his application under the undefended list that he filed a brief of argument on behalf of the appellant at the Supreme Court. But in paragraph 15, the respondent averred that he drafted the brief of argument and

B When he asked the appellant for money to file same, the appellant debriefed him by directing him to hand over the brief argument to one Chief Ifeanyichukwu Okonkwo. There is nothing to show that a Notice of Appeal was filed at the Supreme Court as contained in

C paragraph 14 of his affidavit. As well, there is no evidence that the respondent filed a brief of argument on behalf of the appellant; at least for now.

To my mind, there exists a material conflict or contradiction in the affidavit of the respondent which requires explanation. In this

D regard, the respondent himself on page 11 of his brief of argument states as follows:-

"In the unlikely event of your Lordships agreeing with the appellant that there exists a material conflict or contradiction in the affidavit evidence of the respondent as contended in the appellant's

E *brief argument, I must however point out that the effect thereof will only be restricted to the sum of N2 million claimed in regard to the Supreme Court proceedings and thus only that aspect of the claim may be affected, whilst the reminder thereof should be upheld by this Honourable Court."*

F From the above, the respondent appears to have thrown in the towel in respect of the N2 million claimed for 'work done' for the appellant in respect of the alleged Supreme Court proceedings. However, for now, I take it that a serious triable issue has been raised and

G same should be investigated at a full blown trial of this matter at the High Court.

At this point, the provision of Order 24 Rule 9 (5) of the trial court's Rules to wit: Anambra State High Court (Civil Procedure) Rules, 1988, as applicable to Enugu State, is of moment. It provides

H as follows:-

"R. 9(5). Nothing herein shall preclude the court from making an order, should it so think fit at any stage of the proceedings for the suit to be transferred to the general list on the ground that the suit is not suitable for placement in the undefended list."

I am of the considered view that this is a case that ought not to be placed in undefended list in the first instance. It does not relate to a claim for liquidated sum agreed to at the material time by the parties. There are contentious issues that should be investigated through *viva voce* evidence.

Since an order transferring the matter to the trial court for hearing in the general cause list is warranted, I wish to keep my peace in respect of other issues. The appeal is hereby allowed. The judgment of the court below is hereby set aside. The case is remitted to the trial court to be heard on the general cause list by another Judge other than Ozoemena, J. Pleadings shall be ordered accordingly. No costs awarded.

TOBI JSC

I have read in draft the judgment of my learned brother, Fabiyi JSC and I agree with him. Matters on the undefended List do not routinely find themselves there. They find themselves there when the adjectival law says so.

As rightly pointed out by my learned brother, the undefended procedure is invoked where the claim is for liquidated damage. My learned brother has adequately explained which constitutes liquidated damages in law and I will not bother myself.

Like my learned brother, I have examined the affidavit and I do not agree that it deposes to liquidated damages warranting the undefended list procedures. I think I can stop here. I order that the matter should be heard by the learned trial Judge on the general cause list. I also make no order as to costs.

MUKHTAR JSC

The respondent in this appeal, as plaintiff in the High Court of Enugu State instituted an action against the appellant and/or the undefended list making the following claim.

"Wherefore, the plaintiff claims from the defendant the sum of N7,555,000.00 (Seven million five hundred and fifty five thousand) as full professional fees for handling the afore stated matter from the High Court to the Supreme Court with interest at the rate of 5% from judgment until paid."

In support of the claim are the following salient depositions in the affidavit sworn to by the plaintiff:-

B “(17) That on the 1st of April, 2003 I drew up a bill of charges in the Grand total sum of N7,555,000.00 (Seven million five hundred and fifty five thousand naira) covering our representing the defendant in the aforesaid claim against the African International Bank from High Court to the Supreme Court. Annexed herewith as Exhibit ‘F’ is the Bill of charges.

C (18) That aforesaid grand total sum of N7,555,000.00 (Seven million five hundred and fifty five thousand naira) in our bill of charges is broken down as stated hereunder:-

(a) Total fee charged for High Court proceedings - N3,045,000 (three million and forty five thousand naira).

D (b) Total fee charged for post judgment proceedings (One hundred and ten thousand naira) 110,000.00.

(c) Total fee charged for Supreme Court proceedings (Two million naira)- N2m.

E (19) That I sent the above stated bill of charges to the defendant on 4/4/03. Annexed herewith as Exhibit ‘G’ is the E.M.S. speed Receipt issued to us upon registering the bill of charges for onward transmission to the defendant.

F (20) That the defendant received the aforesaid bill of charges on 4/4/03. Annexed herewith as Exhibit ‘H’ is the E. M. S. speed post receipt showing the defendant received the bill of charges.

(21) That ever since receipt of the bill of charges the defendant has not in any way denied the liability contained therein.

(22) That the defendant has failed and/or neglected to pay the above stated professional fees.

G (23) That the defendant has no defence whatsoever to this suit.”

Rather than file a notice of intention to defend, the defendant filed and moved a motion for an order striking out this suit as same is incompetent, the grounds for the application being:-

H (1) That there is no contractual relationship between the defendant (G.M. Nworah & Sons co. Ltd.) and the purported plaintiff to this suit and the plaintiff lacks the locus standi to institute this suit, having failed to state or establish his capacity to institute this suit.

(2) The Honourable court lacks the jurisdiction to entertain

this suit.

(3) This suit is an abuse of court process.”

In support of the objection are the following depositions in the affidavit:-

“5. To my knowledge, there exists no contractual relationship between the so called plaintiff and the Defendant/Applicant. B

6. That about the year 1993, the Defendant entered into a written contract with one Mr. Joe to help it with sorting out its problem with African International Bank. A photocopy of the written agreement is hereto annexed as Exhibit ‘A’.

7. That the Defendant is not indebted to Afam Akputa Esq. C

8. That the plaintiff instituted this suit to embarrass the Defendant and gain from a contract that never existed between him and the Defendant.”

When one reads the above depositions side by side the supporting depositions to the claim, what emerges are conflicting facts, which the learned trial judge should have viewed seriously enough to resort to certain procedure. He however entered judgment for the plaintiff. Aggrieved by this decision, the parties appealed to the Court of Appeal, Enugu Division. The appeal by the defendant was dismissed, but the cross-appeal was allowed. Again the defendant was dissatisfied with the judgment of the appeal court, and so appealed to this court. Briefs of argument were exchanged by both parties, and adopted at the hearing of the appeal. Three issues for determination were raised in the appellant’s brief of argument. The issues are:- D E F

“1. Whether the respondent has the locus standi to institute the action at the High Court of Enugu State so as to confer the court with the jurisdiction to hear and determine the claim? G

2. Whether in all circumstances of this case the suit filed by the respondent at the trial court satisfied the necessary conditions of a suit that can be placed and determined under the undefended list?

3. Whether the court below was right, in an undefended list claim for N7,555,000.00 to set aside the award of N800,000.00 with 2% interest granted respondent by the trial court and substitute same with an award of N6,750,000.00 with 3% interest as remainder of the sum not granted by the trial court?” H

The issues raised in the respondent’s brief of argument are

virtually the same as the above issues. Issues (2) above is the issue I will highlight in this judgment. It is on record that the plaintiff's claim under the undefended list was predicated on Exhibit 'F', the bill of charges exhibited to the affidavit in support of the claim. The bill of charges, which is exhibit 'F' contains a table of various fees and mon-
 B eys expended on certain actions taken. The suit was brought under the undefended list pursuant to Order 24 Rule 9 of the Anambra State High Court Civil Procedure Rules, 1988. A claim under the undefended list comes in the form of the recovery of debt or liqui-
 C dated sum of money demanded, and that is the position of the law. See U.T.C. (Nig) Ltd. v. Pamotei 1989 2 NWLR part 103 page 244, relied upon by learned counsel for the appellant. The pertinent ques-
 D tion here is does Exhibit 'F' contain a debt or liquidated sum? I think not, because the various amounts in Exhibit 'F' are disputable. They
 D are subject to scrutiny and acceptance to determine whether the claim qualifies to be under the undefended list i.e. whether it is a debt or a demand for liquidated sum. See Bank of the North v. Intrabank S.A. 1969 1 All N.L.R. 91 and Maja v. Samouris 2002 7 NWLR part 765 page 78.

E As I have stated earlier on, the step taken by the defendant was to file a motion raising objections on the claim, and I have repro-
 duced the grounds and the salient facts disclosed in the supporting affidavit. I believe this action could be saved by the provision of Or-
 F der 24 Rule 9 (5) of the Anambra Civil Procedure Rules supra, which reads thus:-

"(5) Nothing herein shall preclude the court from making an order, should it so think fit at any stage of the proceedings, for the suit to be transferred to the general list on the ground that the suit is
 G *not suitable for placement in the undefended list."*

In the event that the defendant raised the objection at the stage it did, and disclosed facts that challenged the facts disclosed in the affidavit in support of the claim under the undefended list, the case becomes contestable. In fact the very subject matter the claim
 H was predicated on was disputed and by so doing issues were joined, and by implication evidence was necessary for the just determination of the case. See Jipreze v. Okonkwo 1987 2 NWLR part 62, page 737, and Atilade v. Atilade 1968 1 All NLR 27.

In this light I do not subscribe to the following pronouncement

of the lower court, as per Bada JCA:-

“In the instant case, a perusal of the entire affidavit in support of the claim under the undefended list procedure as well as Exhibits ‘A’ to ‘H’ annexed hereto showed in detail the case of the plaintiff and how he arrived at his claim whereas the affidavit in support of the motion and exhibit ‘A’ annexed thereto filed by the appellant did not controvert any fact contained in the affidavit in support of the claim under the Undefended List Procedure filed by the Defendant/Respondent/Cross Appellant.....”

The Court of first instant should to my mind have transferred the case to the general cause list. Having dealt with this issue and come to the conclusion I reached in respect of the argument thereof, I am of the view that I need not go further with the treatment of the appeal. This is more so, as the lead judgment has thoroughly treated the other issues for determination. I have read in advance the lead judgment delivered by my learned brother Fabiyi JSC. I entirely agree with the reasoning and conclusion reached that the appeal has merit, and should succeed. I also allow the appeal, and agree with the consequential orders made in the lead judgment.

OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Enugu Division (hereinafter called “the court below”) delivered on 19th June, 2006, dismissing the appeal of the Appellant to it and allowing the Cross-Appeal of the Respondent. I note however, that while the trial court awarded the sum of N800,000.00 (Eight Hundred Thousand Naira) and two per cent (2%) interest on the judgment debt in favour of the Respondent. With no order as to costs, the court below awarded in favour of the Respondent, the sum of N6,750,000.00 (Six Million, Seven Hundred and Fifty Thousand Naira) with three per cent (3%) interest on the Judgment sum “being the remainder or part of the Cross Appellant’s claim at the trial court which was not granted”. It also awarded in favour of the Respondent and against the Appellant, costs of N7,500.00 (Seven Thousand Five Hundred Naira).

Dissatisfied with the said decision, the Appellant has appealed to this Court on Six (6) grounds of appeal as appear in his Amended Notice of Appeal. It has formulated three (3) issues for determina-

tion, namely,

ISSUE NO. 1

“Whether the respondent has the locus standi to institute the action at the High Court of Enugu State so as to confer the court with the jurisdiction to hear and determine the claims?”

B ISSUE NO. 2

Whether, in all the circumstances of this case the suit filed by the respondent at the trial court satisfied the necessary conditions of a suit that can be placed and determined under the undefended list.

C ISSUE NO. 3

Whether the court below was right, in an undefended list claim for N7,555,000.00 to set aside the award of N800,000.00 with 2% interest granted respondent by the trial court and substitute same with an award of N6,750,000.00 with 3% interest as remainder of the sum not granted by the trial court?”

On his part, the Respondent, has also formulated three (3) issues for determination which read as follows:

E *“1. MUST RESPONDENT COMPLY WITH ORDER 34 RULE 5 OF THE HIGH COURT OF ANAMBRA STATE (CIVIL PROCEDURE) RULES 1988, APPLICABLE IN ENUGU STATE IN ORDER TO ESTABLISH THE REQUISITE LOCUS STANDI NECESSARY TO SUSTAIN THE CLAIM HEREIN.*

F *2. WHETHER THE CLAIM AT THE TRIAL COURT SATISFIED THE NECESSARY CONDITIONS FOR A SUIT THAT OUGHT TO BE PLACED AND DETERMINED UNDER THE UNDEFENDED LIST.*

G *3. WHETHER THE COURT BELOW WAS RIGHT TO HAVE AWARDED N6,750,000.00 (SIX MILLION SEVEN HUNDRED AND FIFTY THOUSAND NAIRA WITH 3% INTEREST TO THE RESPONDENT”.*

H The facts of the case leading to the instant appeal briefly stated are that the Respondent (a legal practitioner) as plaintiff in the trial court, claimed from the Appellant, the sum of N7,555,000 (Seven million, five hundred and fifty-five thousand naira) as “full professional fees for handling” a suit E/324/92 from the High court to this Court with interest at the rate of 50% from judgment until paid. There is an affidavit in support of the claim missing which was placed on the undefended list. The appellant upon being served with the writ

together with the said affidavit, filed a motion on Notice (not a Preliminary Objection) for the striking out of the Suit as being incompetent on the ground that there is no contractual relationship between the Appellant and “the purported plaintiff” in this suit and that the Plaintiff/Respondent, lacked the locus standi to institute the suit having failed to state or establish his capacity to institute the suit. The motion was/is supported by an affidavit and an Exhibit. The Respondent filed a further affidavit. The learned trial Judge- Ozoemena, J. after listening to the argument from both learned counsel for the parties, awarded to the Respondent, the sum of N800,000.00 (Eight hundred Thousand Naira) and interest of two (2%) on the judgment debt. Dissatisfied with the said Judgment, both parties, appealed to the court below as noted by me earlier in this Judgment. B
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I will take Issue 1 of the Respondent first because, it touches on the effect of Rules of Court. It is now firmly established that Rules of court, must be followed strictly, unless the court is given a discretion under them. In other words, Rules of court, are meant to be obeyed and the said Rules, bind all parties before the court. See the cases of *The Hon. Mr. Justice Kalu Anyah v. African Newspapers of Nig. Ltd.* (1992) 7 SCNJ. (Pt. 1) 47 @ 58; *Ajayi & anor. v. Umorogbe* (1993) 7 SCNJ. (Pt. 1) 168.; *Malgwi v. Gadzama* (2000) 11 NWLR (Pt. 678) 258 @ 268 C.A. and *Miss Ezeanah v. Alhaji Atta Mamoud* (2004) 7 NWLR (Pt. 873) 468 & 502; (2004) 2 SCNJ. 200 - per Pats-Acholonu, JSC (of blessed memory). It must be stressed that Rules of court are not mere rules, but they partake of the nature of subsidiary legislation by virtue of Section 18(1) of the Interpretation Act and therefore have the force of law. See the case of *Akanbi & ors. v. Alao & anor.* (1989) 5 SCNJ. 10 @ 13. It must also be borne in mind that Rules of Court, are rules of Procedure. They do not by themselves and of themselves alone, confer jurisdiction. They merely regulate the exercise of jurisdiction conferred allude. In other words, a Rule of court, cannot confer jurisdiction as such a rule, regulates the practice of the court in the exercise of a power derived allude and does not confer power. But it must be obeyed strictly, see the cases of *Ogunremi v. Dada* (1962) 1 ANLR 663; 2 SCNLR 417; *Mrs. Clement & anor. v. Mrs. Iwuanyanwu & anor.* (1989) 4 SCNJ 213 at 217; (1989) 3 NWLR (pt. 107) 39; *Ojugbele Lamidi V. Lamidi & ... ors* (1999) 10 NWLR (Pt. 621) C.A; *Afri Bank (Nig.) PLC v. Akwara* (2006) 5 D
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NWLR (Pt. 974) 619 @ 646 - per Niki Tobi, JSC, 655,- per Ogbuagu, JSC. (2006) 1 *SCNJ* 223 (the last three cases, cited in the Appellant's Brief.) and *Atanda & 3 ors. v. Ajani & 4 ors. (1989) 3 NWLR (Pt. III) 511 @ 545.*

Order 34 Rule 5 of the Anambra State High Court (Civil Procedure) Rules (hereinafter called "the rules"), provides as follows:

"Notwithstanding any authorized scale of fees, it shall be lawful for any legal practitioner to enter into an agreement with a client to act for him and conduct his case in connection with any cause or matter in the court for an amount, to cover all fees for his services as legal practitioner up to final judgment, provided that:

Rule 5 a. every such agreement shall be in writing and signed by the legal practitioner and the client".

[the underlining mine]

So With respect, when the Respondent in his paragraph 4.01 of his Brief, declared the Rule in Order 34 Rule 5 a nullity and as being a violation of the Legislative limit of the said rule, I hold that on the decided authorities above referred to, until a rule is declared a nullity by a competent court with jurisdiction, it must be obeyed as it is in the nature of subsidiary legislation and have the force of law. To disobey such a rule or ignore it by the Appellant, with respect, amounts to "rascality" to put it mildly. The Respondent, describes the said Rule as purporting to prescribe the basis on which Jurisdiction can be conferred on courts. For purposes of emphasis, the rule, does not confer jurisdiction, it merely regulates the practice in the court. Period! The purpose of Rules of court, is also to ensure that the affairs of court, are carried out in an orderly fashion. See the case of *FSB International Bank Ltd. v. Imano Nig. Ltd. & Anor. (2000) 7 SCNJ. 65; (2000) FWLR (Pt. 19) 392.* My answer therefore, to the said issue is YES or in the Affirmative/Positive. This brings me to Issue 2 of the parties.

ISSUE 2 OF THE PARTIES

The questions I or one may ask the Respondent, are (a) If the rule is a nullity, why did he apply to the court to have the trial court place the suit under the Undefended List? (ii) Why did he depose in paragraph 23 of his affidavit in support of this suit, *"that the defendant has no defence whatsoever to this suit"*? I note that he did not even use the words that he believed the said averment.

It is noted by me, that it is/was under the same Rules of Court i.e. under the same Order 34 Rule 5 Provisos 1), 2) and 3), that the trial court, entered Judgment in favour of the Respondent (although for a lesser amount) relying on the case of Ben (spelt as San) *Thomas Hotels Ltd v. Sebi* (spelt as Sobi) *Furniture Co. Ltd.* (the Report is not stated but it is (1989) 12 SCNJ. 171 @ 175; (1989) 5 NWLR ^B (Pt. 119) 523 and *Chief B.C. Agueze v. Pan African Bank Ltd.* [1992] 4 NWLR (Pt. 233) 76 C.A. to the effect firstly, when a case entered on the undefended list, comes up for hearing on the return date, the court has one and only duty namely, to see whether the defendant, ^C has filed a Notice of Intention to defend the suit with a supporting affidavit and if no notice is filed within five days before the return date, the court has no choice in the matter, but to proceed to judgment i.e. enter judgment for the plaintiff. Secondly, that a judgment so entered, is one on the merits which can only be set aside only on ^D appeal or by another action in the case of fraud.

The learned trial Judge held that the Preliminary Objection, lacked merit although he referred to two cases by the Court of Appeal - i.e. *Chiedozie v. Onosewun* (1999) 1 NWLR (pt. 586) 317 - ^E per Akpabio, JCA where it was held that counsel can raise a Preliminary Objection in an Undefended List and that a trial Judge, can put the substantive suit aside and dispose first, the Objection. The other case is *Abdulkadir v. Usman* (2002) FWLR (pt. 92) 1736 @1747-1748- ^F per Onnoghen, JCA (as he then was) who held that even though under the Undefended List procedure, a defendant who intends to defend together with an affidavit disclosing such a defence, that in an appropriate case where he fails to, do so, but files a motion by way of Preliminary Objection on grounds of lack of jurisdiction together with an affidavit deposing to facts showing the absence of ^G jurisdiction, that it can or could be sufficient defence under the Rules of that court and that such a defence, ought to be considered by the court since, the aim of the court, is presently to do substantial justice between the parties.

^H I am not aware that any of the above cases, came to this Court on appeal and that it pronounced on the above said views of the Court of Appeal or the Justices. However, in a plethora of decided cases by this Court and in fact by the Court of Appeal, the procedure under the Undefended List in any of the Rules of different State

High Courts, is now settled. In the case of *U.T.C. Nig. Ltd. v. Chief Pamotei & 4 ors.* (1989) 2 NWLR (Pt. 103) 244 @ 299; (1989) 3 SCNJ 79, - per Belgore, JSC (as he then was and later CJN) in his contribution, dealt perhaps, extensively with when a matter or suit, should be heard under the Undefended List or be transferred to the General Cause List for hearing. The court can refuse to let in a defendant to defend a suit, when once it is satisfied that the defendant's affidavit, does not disclose a good defence on the merit, or where the ground of defence, is not clear and reasonable or it is flimsy or vague. It must be stressed that the object in the Undefended List, procedure, is to prevent unnecessary delay in proper cases or where the claim of the plaintiff from the affidavit evidence, is unassailable. See the cases of *Macaulay v. Nal Merchant Bank Ltd.* (1990) 4 NWLR (Pt. 144) 283 @324 325; (1990) 6 SCNJ. 117; *Agwunedo v. Eze* (1990) 3 NWLR (Pt. 137) 242 @ 255 C.A.; *Okamba Ltd v. Alhaji Sule* (1990) 7 NWLR (Pt. 160) 1 @ 13; (1990)11 SCNJ. 1 @7.

In other words, the court will enter judgment in favour of a plaintiff, where there is a sham defence raised in order to gain time or for the elongation of the litigation or where assuming all the facts are in favour of the defendant, but they do not amount to a defence in law or where it is shown that on the date fixed for hearing, no notice of intention to defend is filed or there is no application for extention of time to do so. See the cases of *Olubusola Stores v. Standard Bank of (Nig.)Ltd.*(1975) 4SC 51 at 65; (1975) NSCC 137; *Jipreze v. Okonkwo* (1987) 3NWLR (Pt. 62) 737; *Franchal Nig. Ltd. v. Nigeria Bank* (1995) 8 NWLR (Pt. 412) 176 @ 188 and *Jos North Local Government v. Daniyan* (2000) 10 NWLR (Pt. 675) 281 just to mention but a few.

On the other hand, a defendant will be let in to defend, where among other things, there are disputed facts or that there is a dispute between the parties or a defendant, shows that he has a fair case for determination. See the cases of *National Bank of Nigeria Ltd. v. Weide & Co. Nig. Ltd. & 3 ors.* (1996) 9- 10 SCNJ 147 @ 155 - 156 and *V.S. Steel (Nig.) Ltd. v. Government of Anambra State* (2001) 8 NWLR (Pt. 715) 454 C.A. just to mention but a few.

Generally, on this issue, see the cases of *Nishiziwu Ltd. v. Jethwani* (1984) 12 S.C. 234 @ 246; *U.T.C. Nig. Ltd. v. Chief Pamotei & ors.* (supra); *Adebisi Macgregor Associates Ltd. v. Nigeria Merchant*

Bank Ltd. (1996) 2 NWLR (Pt. 431) 378; (1996) 2 SCNJ. 72 @ 79 - 80 and Ataguba & Co. v. Gura Nig. Ltd. (2005) 2 SCNJ. 139 @ 147, 150, 157; (2005) 2 S.C. (Pt. 1) 101 - per Edozie, JSC.

In the instant case, from the Records, the Appellant, was “fighting” or challenging the said claim of the Respondent albeit with a wrong procedure. I note that the Respondent, even filed a further affidavit. It seems to me that the said claim of the Respondent, became very contentious. In such a situation, it has been held that it calls, for a measure of liberation when viewing the affidavit of the defendant in Order to determine whether or not, a defence on the merit is disclosed. See the case of *Takun Local Government v. United Community Bank (Nig.) Ltd. (2003) 16 NWLR (Pt. 846) 288 @ 301-302*. So also, where there is a defence which calls for investigation, the suit should and ought to be transferred to the General Cause List for hearing. See also the cases of *Calvan Ply Ltd. & 2 ors. v. Pekab International Ltd. (2001) FWLR (Pt. 51) 1655 @ 1657 & 1664; Igwe Stephen Ofomata v. Emmanuel Onwuzuligbo (2002) 8 NWLR (Pt. 769) 298 & 301, 312 - 313 and Thor Ltd. v. First City Merchant bank Ltd. (2005) All FWLR (pt. 274) 217 @ 227, 229, 230, 232, 237; (2005) 14 NWLR (pt. 946) 696*.

In the case of *University of Nigeria v. Onuzulike Trading Co. (1989) 5 NWLR (Pt. 119) 19 @ 29*, it was held that where a defendant raises a substantial question of fact (as in the instant case) which ought to be tried, leave should be granted to him to defend. See also the cases of *Saw v. Hakim (1889) 5 TLR. 72; Ward v. Plumbley 6 TLR 198; Ray v. Baker 4 Ex D. 279* referred to in *Adebisi Macaregor Associates Ltd. v. Nigeria Merchant Bank Ltd. (supra)* and *NAB Ltd. v. Fetty Kene Nig. Ltd. (1995) 4 NWLR (Pt. 357) 100*. Even in the case of *UTC v. Chief Pamotei & ors. (supra)*, the following inter alia, appear,

“Even where a defendant neglects (I will add fails) to deliver a notice and an affidavit as required by the rules, may on an affidavit disclosing a defence on the merits and satisfactorily explaining his neglect, be let in to defend on terms”.

Not that the above was the case in the instant case leading to this appeal, but it seems to me in my respectful view, that the Appellant supplied to his learned counsel materials which should have been incorporated in his Notice of his Intention to defend the suit, but his

said counsel, instead of going by the rules as relates to a Suit on the Undefended List, decided or opted to rely on a Preliminary Objection understandably based on jurisdiction and the competence of the trial court to entertain the suit in the first place. Undoubtedly, issue as to jurisdiction, goes to the root of a case or matter in court. Where it is upheld, that is the end of the matter. As can be seen from the written Reply or Address of the Appellant's learned counsel at pages 46 to 53, they were seriously, challenging the *locus standi* of the Respondent. It boils down that the procedure adopted by the said counsel, was his own fault. But even at that, I have referred to earlier in this Judgment, the view of two learned Justices of the Court of Appeal on those occasions. As I said, I am not aware or has my attention been drawn, to any contrary pronouncement by this Court if ever the two judgments came on appeal to it. In the case of *Okamba Ltd. v. Alhaji Sulle (supra)*, this Court, held that the purpose of the procedure, is not designed to shut out a defendant who can show that there is a triable issue. It referred to the case of *Nishiziwa v. Jethwani (supra)* on further stated that in determining whether a defendant has a good defence to the claim or has disclosed such facts as may be deemed sufficient to entitle him to defend, it is not necessary for a trial Judge, to decide at that stage, whether the defence, has been established. That what is required, is simply to look at the facts deposed to or averred and see if they can prima facie afford a defence to the action. See the case of *The Federal Military Government of Nigeria & 3 ors. v. Sani (1990) 7 SCNJ. 159 at 164* -per Uwais, JSC. (as he then was but later CJN.). Thus, as a general principle, I note that even at page 187 of the Records, the court below, recognised and even stated this fact or principle of the law. It even cited or referred to the cases of *Olubusola Stores v. Standard Trust Bank Nig. Ltd [supra]* and *Ezuma v. Nkwo Market Community Bank Ltd. (2000) 10 NWLR (Pt. 676) 628*. For purposes of emphasis, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence (as was *prima facie* shown by the Appellant), he ought to and should have leave to defend.

In conclusion, in my respectful but firm view, there is a conflict in the affidavit evidence of the parties as borne out in the Records. The attitude of this Court, is that in such circumstance, oral evidence

must be called and heard from the parties, In the case of FSB. *International Bank Ltd. v. Imano Nig, Ltd. & anor. (supra) & 180*, it was held inter alia, as follows:

“Conflicts in affidavit evidence on fundamental issues in the matter in controversy must be attended to and not just glossed over. A court of law - be it trial or appellate is not imbued with divine or magical powers in the sense that it can divinely or magically resolve conflicts in factual matters which may only be done, in certain circumstances, by dispassionate and painstaking evaluation of the facts or evidence placed before the court”.

I note that in effect, there are concurrent findings of facts by the two lower courts except in the respect costs awarded. The attitude of this court, however, is that where such findings, are wrong in law or not supported by the peculiar circumstances and facts as are manifest in or from the Records (*as in* the instant case) especially, where it leads to a miscarriage of justice, it will interfere. See the cases of *Kate v. Coker (1982) 12 S.C. 252 @ 271* citing some other cases therein; *Omega Bank Nig. PLC. v. O.B.C. Ltd. (2005) 1 SCNJ. 150; (2005) 1 S.C. (pt. 1) 19; Daniel Holdings Ltd. v. United Bank for Africa PLC (2005) 7 SCNJ. 243; (2005) 7 S.C. (pt. II) 18 @ 22; (2005) All FWLR (Pt. 277) 895 @ 902*. In other words, it is settled that findings of fact(s) or even inferences, from time to time, may be questioned in certain circumstances. See the cases of *Benmax v. Austin Motors Co. Ltd. [1955] A.C. 370; Akinola & 2 ors. v. Fatoyinbo Oluwo & 3 ors. [1962] All NLR 224; Awobiyi & Sons v. Igbolaiye Brothers (1965) 1 ALL NLR 163; Chief Fabumiyi & anor. v. Obaje & anor. (1968) NMLR 242; Chief Kakarah & anor. v. Chief Imonikhe & 2 ors. (1974) 4 S.C. 15 and Adewunmi v. Aduroja (1975) (1) NMLR 125 @ 127*.

It must be borne in mind always and this is settled that Appellate courts, do not enquire into disputes, but on how or the ways the disputes have been tried or settled. See the cases of *Ajadi v. Okenihun (1995) 1 All NLR (Pt. 1) 213 @ 217* and *Layinka & anor. v. Makinde & ors. (2002) 10 NMLR (Pt. 775) 358; (2002) 5 SCNJ 1 @ 77*.

Before concluding this Judgment, I wish to comment briefly on the respective sums awarded in favour of the Respondent by each of the courts. The Respondent claimed 5% interest on the judgment sum. The two lower courts in effect, found that there was contract between the parties - i.e. in respect of professional services by the

Respondent. It is now firmly settled that in a contract between parties, only such interest as made recoverable by the terms of the contract or the operation of law, that would or should be awarded. See the cases of *Data Processing Maintenance & Services Ltd. v. Larmie* (2005) NWLR (Pt. 655) 138 @ 155 and *Jallco Ltd. & anor. v. Owoniboy Technical Services Ltd.* (1995) 4 NWLR (Pt. 391) 534; (1995) 4 SCNJ. 256. In any case, it is the duty of a court, to assist litigants, to minimise expenses. See the case of *Giwa-Amu v. Dipeolu & anor.* (1968) NMLR 59 at 64.

C It is from the foregoing *and* the *fuller* reasoning and conclusion in the lead Judgment of my learned brother, Fabiyi, JSC, just delivered and which I agree with, that I too, invoke the provisions of Order 24 Rule 9(5) of the Rules of the Anambra State High Court which provide as follows:

D “(5) *Nothing herein shall preclude the court from making an order, should it so think it any stage of the proceedings, for the suit to be transferred to the general list on the ground that the suit is not suitable for placement in the undefended list*”.

E I also allow the appeal and I hereby set aside the said decision of the court below. I also order that the suit/case be remitted to the former Anambra State High Court (now Enugu) for it to be heard *de novo* by any Judge that the Hon. Chief Judge may wish to assign the same to for hearing on pleadings to be filed and exchanged by the parties. No order as to costs.

F

OGEBE JSC

I read in advance the lead judgment of my learned brother Fabiyi, JSC just delivered and I agree with his reasoning and conclusion. Both the trial court and the Court of Appeal wrongly treated the claim as liquidated damages. The claim was highly contentions and should never have been placed on the undefended list. Accordingly, I allow the appeal, set aside the judgments of the two lower courts and remit the case to High Court for retrial on pleadings before another judge. I make no order as to costs.

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