

**SUPREME COURT OF NIGERIA**  
14TH MAY, 2010, S.C. 57/2003  
**CORAM:- N. TOBI, A. M. MUKHTAR, I. F. OGBUAGU,**  
**I. T. MUHAMMAD, J. A. FABIYI, JJSC**

BALIOI NIGERIA LTD. .... APPELLANT  
AND  
NAVCON NIGERIA LTD. .... RESPONDENT

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CONTRACTS - Binding nature - Price of chemicals - Whether agreed  
- Contrary to the submission of respondent - There was a binding  
agreement as to the price of the chemicals - In respect of the agree-  
ment dated 7th Oct. 1994 (H1)

CONTRACTS - Variation - By subsequent agreement - Requirements  
- The latter agreement must be written - If the original is of such a  
nature as required to be in writing - And must be under seal in the  
absence of consideration (H2)

CONTRACTS - Rescission by plaintiff - Proof - As defendant failed to  
tender the letter by which it claimed the agreement was rescinded -  
Trial court rightly held that it was not rescinded - Court of appeal  
was therefore wrong to hold otherwise (H3)

JUDGMENTS - Action for damages - Failure to make monetary award  
- Whether fatal - Such failure is at most an irregularity which could  
be cured - As it did not occasion a miscarriage of justice (H4)

**FACTS**

The Plaintiff/appellant sued defendant / respondent before the  
High court of Lagos State claiming the sum of N9 million naira as  
damages for breach of contract, or alternatively as its anticipated  
profit under an agreement dated 7th October 1994 ("the contract")  
made between the parties hereto, or yet alternatively for injunction  
and specific performance of the said contract by the respondent.  
The case of appellant was that after it had obtained a local purchase  
order ("LPO") from PZ industries Ltd ("PZ") to supply PZ with 2000  
metric tons of sodium sulphate at the price of N43.5 million naira, it

had approached respondent to execute the LPO by importing the chemical and supplying same to PZ at the price of N17,500 per metric ton amounting to N35million naira for the 2000 metric tons.

Though the contract - Exhibit B - was stated to be irrevocable, respondent failed to perform its obligations under the contract. It claimed that appellant had rescinded the contract subsequently by a letter addressed to it, yet respondent failed to put the said letter in evidence. After hearing, the learned trial judge found for appellant and held that respondent was "liable to pay damages in form of the anticipated profit". As such the judgment did not make a specific monetary award in favour of appellant. Aggrieved, respondent appealed to Court of Appeal which court held *inter alia* that there was no valid contract between the parties for the supply of the said chemical. Accordingly, it allowed the appeal. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal.

### **ISSUES FOR DETERMINATION**

*"(1) Whether the Court of Appeal was correct in its view that there was no valid contract between the Plaintiff/Appellant and the Defendant/Respondent for the supply of Sodium Sulphate in spite of the evidence on the record before it.*

*(2) Whether it was right for the Court of Appeal to hold that the contract between, the Appellant and the Respondent, which was expressly referred to be an "Irrevocable Agreement", was a Sale of Goods Agreement.*

*(3) Whether the Court of Appeal in coming to its decision, which is the subject matter of this appeal, did not re-write the agreement of the parties contrary to established principles of law.*

*(4) Whether the vagueness, omission or mistake of the learned trial judge to make a specific monetary award at the end of her judgment in favour of the Plaintiff/Appellant was such a grave error of law which occasioned a miscarriage of justice as to render the whole judgment of the trial court a nullity or was it no more than a mere irregularity which the Court of Appeal could have cured in the interest of justice?"*

**HELD** (Unanimously allowing the appeal per **OGBUAGU JSC**)  
**Price of chemicals - Whether agreed**

1. It seems to me the said Agreement between the parties, cannot

and could not be described as one covered by Sales of Goods. In fact, there are two Agreements in this matter. One being the one between the parties to this appeal dated 7<sup>th</sup> October, 1994 and the other, being the one between the Appellant and the Company evidenced by the LPO No. 607451 dated 20<sup>th</sup> September, 1994. In the Agreement dated 7<sup>th</sup> October, 1994, there was a binding agreement or contract as regards the price of the chemicals.

In the instant case, I with respect, do not agree with the Respondent in its submission in its Brief that since there was no agreement on the price to be paid for the Sodium Sulphate or the price the Respondent could be held bound to and liable, that there was not and there could not be any binding contract. (p. 1709 D)

***CONTRACTS - Variation - By subsequent agreement***

2. Now, Exhibit B is in writing. It is now settled that a contract which must in law be in writing, can only be varied by an agreement in writing. In other words, where a contract is in writing, any agreement which seeks to vary the original agreement, must itself be in writing. The law is also well settled that a latter agreement by parties to an original contract to extinguish the rights and obligations that the original contract created, is itself a binding contract, but the latter agreement, must either (a) be made under seal or (b) be supported by consideration. (p. 1710 B)

***CONTRACTS - Rescission by plaintiff - Proof***

3. The learned trial court at page 133 of the Record, made findings of fact, At page 135 thereof, it stated inter alia, as follows:

*“Defendant failed to tender the letter by which it claimed plaintiff rescinded the agreement. Plaintiff on the other hand said he wrote a letter of protest when he realised Defendant was already offering the goods to Lever Brothers at a higher price. I am unable to come to no other decision than that Defendant when offered higher price than agreed with plaintiff opted to sell to Lever Brothers as early as 22<sup>nd</sup> February, 1995. I accept Plaintiff’s evidence and find Defendant liable to pay damages in form of the anticipated profit”.*

The above is borne out from the Records. The court below by its holding, was with respect re-writing or making another Agreement for the parties. It was not entitled to do so. (p. 1711 A/C/E)

***Failure to make monetary award - Whether fatal***

4. In the final result, I find and hold as a fact, that there is merit in this appeal. It succeeds and I therefore, allow the appeal. I hereby and accordingly, set aside the said Judgment of the court below and in its  
B stead, the Judgment of the trial court is hereby and accordingly restored by me. That it did not make specific monetary award in favour of the Appellant, was at most, an irregularity which did not occasion a miscarriage of justice. I so hold. (p. 1711 H)

C **REPRESENTATION**

A. O. Ajisegiri, Esqr., for the Appellant with him, Adewole Adeleke Esqr.

Emmanuel Achuku, Esqr., for the Respondent.

D **CASES REFERRED TO**

Morris v. Baron & Co. (1918) A.C. 1 @ 39

Ogundele v. Agiri (2010) All FWLR 1 at page 31

Emegokwe v. Okadigbo (1973) All NLR 314 at 317

E Alli & anor. v. Chief Alesinloye & 8 ors. (2000) 6 NWLR (Pt.660) 177@ 212

Kraus Thompson Organisation Ltd. v. University of Calabar (2004) 4 SCNJ. 101 @ 133

F Royal Exchange Nig. Ltd. & 4 ors. v. Aswani Textile Industries Ltd. (1991) 2 NWLR (Pt. 176) 639 @ 765 C.A.

**LEAD JUDGMENT BY OGBUAGU JSC**

This is an appeal against the Judgment of the Court of Appeal,  
G Lagos Division (hereinafter called “the court below”) delivered on 17<sup>th</sup> December, 2002 allowing the appeal of the Respondent and setting aside, the Judgment of the Lagos State High Court delivered on 26th October, 2000 - per Fafiade, J. and dismissing the Suit filed by the Plaintiff/Appellant.

H Dissatisfied with the said Judgment, the Appellant has appealed to this Court on four (4) grounds of appeal with the leave of this Court. It has formulated four (4) issues for determination, namely;

“(1) *Whether the Court of Appeal was correct in its view that there was no valid contract between the Plaintiff/Appellant and the*

*Defendant/Respondent for the supply of Sodium Sulphate in spite of the evidence on the record before it.*

(2) *Whether it was right for the Court of Appeal to hold that the contract between the Appellant and the Respondent, which was expressly referred to be an “Irrevocable Agreement”, was a Sale of Goods Agreement.* B

(3) *Whether the Court of Appeal in coming to its decision, which is the subject matter of this appeal, did not re-write the agreement of the parties contrary to established principles of law.*

(4) *Whether the vagueness, omission or mistake of the learned trial judge to make a specific monetary award at the end of her judgment in favour of the Plaintiff/Appellant was such a grave error of law which occasioned a miscarriage of justice as to render the whole judgment of the trial court a nullity or was it no more than a mere irregularity which the Court of Appeal could have cured in the interest of justice?”* C D

I note as rightly stated in paragraph 5.0 of the Respondent’s Brief at page 7 that it is not stated in the Brief under which ground or grounds of Appeal the above issues are distilled from. It is now firmly settled in a plethora of decided authorities by this Court that any issue or issues which is or are not formulated from a ground of appeal, is incompetent and must be ignored or discountenanced and struck out. See the cases of Management Enterprises v. Olusanya (1987) 2 NWLR (Pt.55) 179; (1987) 4 SCNJ. 110 and Alli & anor. v. Chief Alesinloye & 8 ors. (2000) 6 NWLR (Pt.660) 177@ 212; (2000) 4 SCNJ. 264. In other words, the Court lacks the power to deal with an issue or issues not formulated or distilled from any ground, of appeal. See the cases of Kraus Thompson Organisation Ltd. v. University of Calabar (2004) 4 SCNJ. 101 @ 133 and Mojekwu v. Mrs. Iwuchuhwu (2004) 4 SCNJ. 180. E F G

On its part the Respondent has formulated three (3) issues for determination, namely,

“(i) *Was the agreement between the Appellant and the Respondent a Sale of Good Agreement.* H

(ii) *Were the Learned Justices of Court of Appeal (sic) right in holding that paragraph 1 of the Amended Statement of Defence did not constitute an admission of the irrevocability of the agreement of 7<sup>th</sup> October, 1994.*

*(iii) Were the Learned Justices of the Court of Appeal right in holding that had they found that there was a binding agreement between the parties, they would have awarded to the Plaintiff (now Appellant) only N1,409, 080.00".*

I note that it is stated in the said Brief of Argument that the above issues are formulated from grounds 1, 2 and 3 of the Grounds of Appeal.

When this Appeal came up for hearing on 5<sup>th</sup> February, 2010, both learned counsel for the parties, adopted their respective Brief. While the leading learned counsel for the Appellant - Ajisegiri, Esqr., urged the Court to allow the appeal, Achuku, Esqr.,- the learned counsel for the Respondent, urged the Court to dismiss the appeal in its entirety. Judgment was thereafter reserved till to-day.

The facts briefly stated are that the Appellant, had sued the Respondent in Suit No. LD/130/95 at the Lagos High Court claiming the sum of N9,000,000.00 (Nine Million Naira) as damages for breach of contract or as its anticipated profit under an Agreement dated 7<sup>th</sup> October, 1994 made between the Appellant and the Respondent and alternatively for injunction and specific performance. The parties filed and exchanged pleadings. After the hearing, the learned trial Judge - Fafiade, J. found in favour of the Appellant Dissatisfied, the Respondent appealed to the court below which allowed the appeal, set aside the said Judgment of the trial court and dismissed the Appellant's suit, hence the instant appeal.

The Appellant demanded for an upward review due to the downward slide of the Naira and wrote letters to this effect. Exhibit B, is the Agreement, which speaks for itself. The Respondent contend that since there was no agreement, there was no enforceable contract. I note that the learned trial Judge held that the Agreement, was irrevocable. Exhibit B is the written contract. I see no document whatsoever in the Records evidencing the alleged or subsequent oral agreement ever produced by the Respondent.

It may be necessary for me to state that from the Records, the Appellant; had obtained a Local Purchase Order (LPO) from Messrs PZ Industries Ltd. (hereinafter called "the Company") to supply to it, two thousand: (2000) Metric Tones of Sodium Sulphate at the cost of N43,500.00 (forty-three Million five hundred thousand Naira). The Appellant approached the Respondent to execute the said LPO

by importing thy said Chemicals and supply them to the said Company. This approach, eventually led or brought about the said Agreement of 7<sup>th</sup> October, 1994 which was said to be irrevocable. It is noted by me that the Company, refused the Appellant's demand for an upward review of the LPO's price value to accommodate the increase in the landing or landed cost of the said chemicals due to the said downward slide in the value of the Naira to the U.S. Dollars. The Appellant, eventually or subsequently, sued the Respondent claiming as above stated. The anticipated profit of N9,000.00 is alleged or claimed by the Appellant, as the sum it would have earned had the aforesaid LPO been executed still insisting, that the said Agreement was irrevocable. The Appellant submitted the landing/landed cost of the said chemicals, which eventually, came to the sum of N21,045.10 as against the sum of N17,250.00 which the trial court upheld.

The court below - per Oguntade, JCA (as he then was before becoming a JSC but now retired) at pages 201, 201 (*sic*) and 204 made some findings of fact and holdings. ***It seems to me the said Agreement between the parties, cannot and could not be described as one covered by Sales of Goods. In fact, there are two Agreements in this matter. One being the one between the parties to this appeal dated 7<sup>th</sup> October, 1994 and the other, being the one between the Appellant and the Company evidenced by the LPO No. 607451 dated 20<sup>th</sup> September, 1994. In the Agreement dated 7th October, 1994, there was a binding agreement or contract as regards the price of the chemicals.***

***In the instant case, I with respect, do not agree with the Respondent in its submission in its Brief that since there was no agreement on the price to be paid for the Sodium Sulphate or the price the Respondent could be held bound to and liable, that there was not and there could not be any binding contract.*** The Agreement is clearly stated to be "irrevocable", as that position had not been altered in writing and therefore, there is/was a final and binding contract in respect of which, the Respondent, was clearly in breach of as rightly found and held by the trial court.

The court below stated at page 204 of the Records, inter alia, as follows:

*"In contracts for sale of goods it is of the utmost importance*

*that parties to the contract come to an agreement as to the price of the goods being sold. In this cause there was no such agreement. The conclusion to be arrived at is that there was no enforceable contract entered between the parties”.*

With the greatest respect, Exhibit B has nothing to do with  
 B Sales of Goods or the Act in respect thereto.

**Now, Exhibit B is in writing. It is now settled that a contract which must in law be in writing, can only be varied by an agreement in writing.** See the case of Morris v. Baron & Co. (1918) A.C. 1 @ 39. **In other words, where a contract is in writing, any agreement which seeks to vary the original agreement, must itself be in writing.** See the cases of John Holt Ltd. v. Stephen Lafe (1938) 15 NLR 14 and Bjou (Nig.) Ltd. v. Osidorowo (1992) 6 NWLR (Pt.249) 463 @649. **The law is also well settled**  
 D **that a latter agreement by parties to an original contract to extinguish the rights and obligations that the original contract has created, is itself a binding contract, but the latter agreement, must either (a) be made under seal or (b) be supported by consideration.** See the case of Graver v. I.T.I. Ltd. (1976)  
 E 11 S.C. 19 @ 27 - 28. Where however, the contract is still executory, that is enough consideration. See the case of Mercantile Bank of Nigeria Ltd. v. Adalma Tanker & Bunkering Services Ltd. (1990) 5 NWLR (pt.153) 747 @ 1765 C.A. A court cannot write a new contract for the parties. See the case of Aoyad v. Kessrawani (1956) SCNLR 83;  
 F (1956) 1 FSL 35.

A concluded contract such as in Exhibit “B”, resiling from it, will amount to a Novation. So, where a parole agreement has been reduced into writing, the best evidence is the production of the document itself. See the case of NEPA v. Elfandi (1986) 3 NWLR (pt. 32) 884; Da Rocha v. Hussain (1958) SCNLR 280. The Respondent has not produced any document in respect of the alleged latter agreement.

The law is trite that where a document is clear and unambiguous, parole evidence cannot be led to contradict it. In other words, extrinsic evidence is basically inadmissible to add to or alter the contents of a document. See the cases of Okpanku v. Amachi (1956- 84) SCNR. 75 and Royal Exchange Nig. Ltd. & 4 ors. v. Aswani Textile Industries Ltd. (1991) 2 NWLR (Pt. 176) 639 @ 765 C.A.



***The learned trial court at page 133 of the Record, made findings of fact,*** inter alia, as follows:

*"find that there was a fixed price of N17,500 per metric ton of the sodium sulphate and the Defendant is bound by that agreement which agreement it failed to execute. I find that on the failure of Defendant to supply PZ Industries as per Exhibit B, Defendant had breached the agreement. See cases of Orji v. Anyaro (2000) 2 NWLR Part 643 Page 1 Ratio 9, Anyaegbunam v Osake (2000) 3 NWLR Pan 657 Page 386 Ratio 6 and 9, Oyebadego v. Okeniyi (2000) 5 NWLR Part 657. It is well settled in law that oral evidence cannot be allowed to contradict documentary evidence. See also Section 132 of the Evidence Act Laws of the Federal Republic of Nigeria".*

I agree and this is the settled law which I have also stated in this judgment.

***At page 135 thereof, it stated inter alia, as follows:***

*"There is evidence that the exchange rate changed from 75% to 82% and defence witness tendered a costing Analysis which gave the landing cost as N21,000 plus. Defendant admitted it showed Plaintiff an LPO for N35,000. From all angles, I find Defendant breached Exhibit B, first on its failure to deliver by the end of October".*

It continued inter alia, as follows:

***"Defendant failed to tender the letter by which it claimed plaintiff rescinded the agreement. Plaintiff on the other hand said he wrote a letter of protest when he realised Defendant was already offering the goods to Lever Brothers at a higher price. I am unable to come to no other decision than that Defendant when offered higher price than agreed with plaintiff opted to sell to Lever Brothers as early as 22<sup>nd</sup> February, 1995. I accept Plaintiff's evidence and find Defendant liable to pay damages in form of the anticipated profit".***

The above is borne out from the Records. The court below by its holding, was with respect re-writing or making another Agreement for the parties. It was not entitled to do so.

***In the final result, I find and hold as a fact, that there is merit in this appeal. It succeeds and I therefore, allow the appeal. I hereby and accordingly, set aside the said Judgment of the court below and in its stead, the Judgment of the trial court is hereby and accordingly restored by me. That it did not***

**make specific monetary award in favour of the Appellant, was at most, an irregularity which did not occasion a miscarriage of justice. I so hold.** I therefore make the following orders;

“(i) that there was an Irrevocable Agreement between the parties and the Respondent breached the said Irrevocable Agreement by not supplying the Sodium Sulphate it agreed to supply particularly by the end of October 1994 and later on 22<sup>nd</sup> February 1995 and

“(ii) that such a breach leads to the appellant sustaining a loss/damages of N7,019,840.00 which is the difference between contract value of L.P.O.- Exhibit A and the Landing cost for the delivery of the Sodium Sulphate which was N17,250.00 per metric ton as in Exhibit B, as well as the new anticipated profit when the landing cost was N21,045.16 per ton at the exchange rate of N82.00 to a Dollar less N500,000.00 (loan); that is between when Exhibit B was signed and when the Sodium Sulphate arrived in Nigeria less N500,000.00 (loan) = N7,019,840.00”

Appellant is entitled to costs in the court below which I assess and fix at N5,000.00 (five thousand naira) and in this Court, I award N50,000.00 (fifty thousand naira) costs in its favour payable to it by the Respondent.

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### **TOBI JSC**

I have read the judgment of my learned brother, Ogbuagu, JSC, and I agree with his reasoning and conclusion that this appeal has merit and should be allowed. I set aside the Judgment of the court below and accordingly restore the Judgment of the trial court. I therefore adopt all the consequential orders contained in the lead judgment including that relating to costs.

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### **MUHAMMAD JSC**

I read before now the judgment of my brother, Ogbuagu, JSC. I agree with him that the appeal has merit and should be allowed. I allow the appeal and abide by orders made in the lead judgment including order as to costs.

**FABIYI JSC**

I agree with the judgment just delivered by my learned brother, Ogbuagu, JSC. I am at one with the reasons therein advanced to arrive at the conclusion that the appeal is meritorious and should be allowed.

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I wish to chip in a few words of my own in support. Exhibit B is the agreement between the parties. It clearly states that the agreement is irrevocable. The appellant, as plaintiff at the trial court, pleaded same and it was admitted by the respondent who was the defendant thereat. The court below found as such but proceeded to hold that the admission was not absolute and that the agreement was revocable.

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It is not the duty of a court to re-write an agreement for the parties. The express intention of the parties, as contained in Exhibit B, must be maintained. When parties have used clear and unambiguous words, such words must be given their plain interpretation. See: *Tukur v Government of Gongola State* (1989) 4 NWLR (pt. 117) 517; *Chime v. Ude* (1996) 7 NWLR (Pt. 461) 379.

Let me further state it that a court should not set up for parties a case different from the one set up by the parties in the pleadings. See: *Ogundele v. Agiri* (2010) All FWLR 1 at page 31; *Oniah v. Onyiah* (1989) 1 NWLR (Pt. 99) 514.

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Further, it goes without saying that parties as well as the court are bound by pleadings. Any evidence that is at variance with same must be disregarded by the court. See: *Kalio v. Daniel Kalio* (1975) 2 SC 15 at 21; *Emegokwe v. Okadigbo* (1973) All NLR 314 at 317.

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With all the above in view, it is clear to me that the court below was not on a firm ground when it found that the agreement in Exhibit B, is revocable despite the fact that the parties expressly stated that the agreement is irrevocable. Such is tantamount to re-writing the agreement for the parties based on extrinsic evidence. It cannot be allowed to stand.

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I note from the record of appeal that the trial court did not make any specific monetary award in favour of the appellant. Such a goof is not enough to up turn the judgment of the trial court. This court is eminently in a position to make a proper award as dictated by the evidence on record under section 22 of the Supreme Court

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Act. My learned brother, in the lead judgment, has adequately taken care of same. I keep my peace on the point.

It is for the above reasons and the fuller ones contained in the judgment of my learned brother that I, too, find that the appeal is meritorious and should be allowed. I order accordingly. I endorse all  
B the consequential orders therein contained; that relating to costs inclusive.

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