

**SUPREME COURT OF NIGERIA**

9TH JULY, 2010 SC. 288/2005

**CORAM:- A. M. MUKHTAR, M. MOHAMMED,  
I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH,  
O. O. ADEKEYE, JJSC**

NIGERIA SOCIAL INSURANCE TRUST  
FUND MANAGEMENT BOARD ..... APPELLANT  
(FORMERLY, NATIONAL PROVIDENT  
FUND MANAGEMENT BOARD)  
AND  
KLIFCO NIGERIA LIMITED ..... RESPONDENT

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EVIDENCE - Words & Phrases - "Person interested" - S. 91(3) of Evidence Act - Meaning - A person who is performing an act in his official capacity - Cannot be a person interested under the section (H1)

STATUTES - Interpretation - Principles - No court ought to be seen to defeat - The clear intendment of an enactment - By its interpretation of its provisions (H2)

ACTIONS - Competence - Recovery of debts - Applicability of limitation period - Though it applies to actions for recovery of debt - A subsequent acknowledgment of the debt by the debtor - Revives statute barred right of action (H3)

**FACTS**

The plaintiff/appellant sued defendant/respondent before the Federal High Court, Port Harcourt, claiming the sum of N38,431.75 (thirty eight thousand, four hundred and thirty one naira, seventy five kobo) representing alleged arrears of contribution and interest which respondent, as employer of labour within the meaning of the National Provident Fund Act, 1961, failed to pay despite repeated demands by appellant. During the trial certain documents were received in evidence as exhibits amongst which were Exhibits J and L. Exhibit J is a letter written on 2nd March 1989 by respondent to appellant. It was written in reaction to one of the demand letters

written by appellant to respondent and was merely denying the sum said to be owing and not the existence of a debt. Exhibit L is a certificate of indebtedness issued by a director of appellant in his official capacity certifying the sum to which respondent was indebted to appellant. Respondent on his part contended that the debt was statute barred.

After hearing, the trial court, in reliance on Exhibits J and L among others, gave judgment to appellants as it held that even if the debt had been statute-barred, the right of action had been revived by Exhibit J which amounted to an acknowledgment of the debt after it was statute-barred. Aggrieved respondent appealed against the judgment to Court of Appeal which court allowed the appeal. Court of Appeal held that Exhibit J was a denial of the debt and not an acknowledgment of it. It also held that Exhibit L was made by a party interested during the pendency of the action and was as such inadmissible under section 91 (3) of the Evidence Act. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal.

### **ISSUES FOR DETERMINATION**

*“(a) Whether the Court of Appeal was right in holding that Exhibit “L” was made by a party interested in the proceedings.*

*(b) Whether the contents of Exhibit “J” could be taken as a specific denial of the appellant’s claim as held by the Court of Appeal.”*

**HELD** (Unanimously allowing the appeal per **CHUKWUMA-ENEH JSC**)

### ***“Person interested” - S. 91(3) of Evidence Act - Meaning***

1. Normally, a person who is performing an act in his official capacity cannot be a person interested under Section 91(3). I think the phrase “a person interested” ever more so has been quite definitively put in the case of *HOLTON V. HOLTON* (1946) 2 AER 534 at 535 to mean *“a person who has a pecuniary or other material interest in the result of the proceeding - a person whose interest is affected by the result of the proceedings, and, therefore, would have a temptation to pervert the truth to serve his personal or private ends. It does not mean an interest in the sense of intellectual observation or an interest purely due to sympathy. It means an interest in the legal sense, which im-*

*ports something to be gained or lost".* (p. 2263 E)

### ***STATUTES - Interpretation - Principles***

2. On the question of the Director having certified Exhibit "L" when proceedings are pending or anticipated; again, Section 38 (supra) carefully examined has showed that Exhibit "L" cannot be defeated by taking a superficial view of that point.

In this regard I buy the appellant's submission that it will make no sense when considered against the irregular manner and the times by which employers pay their contributions to the Fund under the Act as epitomized by the facts of the instant case. And even then, that to prepare such extracts of employers' indebtedness to the Fund before hand and then retain them for use whenever Court action has arisen for failing to remit any contributions to the appellant, firstly, falls outside the letter and spirit of the Act as such document will definitely fall foul of the principle against gathering of evidence in anticipation of Court action, again, contrary to Section 91(3) of the Evidence Act; and more so as no Court ought by its interpretation to be seen to defeat the clear intendment of an enactment as here. (p. 2265 H)

### ***Recovery of debts - Applicability of limitation period***

3. I must recapitulate that this being a simple debt the period of limitation is 6 years. What seems to emerge from the opposing contentions of the parties here is whether by the above underlined phrase i.e. the acknowledgment as in the extract of Exhibit "J" is a sufficient and clear acknowledgment of the Defendant's Indebtedness that a promise to pay is inferable from it and so take this matter outside the operation of the limitation law.

The words used by the debtor to recognize the existence of the instant debt are "that our computation of our indebtedness differs from yours ....." These words having been construed in the context of the letter couldn't be more absolute and unconditional as to the acknowledgment of indebtedness of the defendant to the plaintiff. (pp. 2268 G/2269 A)

**NOTABLE POINT OF INTEREST**

**ADEKEYE JSC**

*1. The act of certification was ministerial*

B The duty undertaken by the Director is purely statutory or a ministerial act.

C *“A ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. Where a duty of an administrative officer in a particular situation is so plainly prescribed that it is free from doubt and equivalent to a positive command, it is so far “ministerial”.*

D *Fawehinmi v. I. G. P. (2002) 7 NWLR pt. 767 pg. 606.*  
(p. 2274 A)

**REPRESENTATION**

Nnamonso Ekanem Esq. for the appellant

E C. A. N. Nwokeukwu with L. T. C. Eluba for the Respondent

**CASES REFERRED TO**

ITA V. EKPENYONG (2001) 1 NWLR (Pt. 695) 587

Oforlete v. State 2000 12 NWLR part 681, page 415

F Fawehinmi v. I. G. P. (2002) 7 NWLR pt. 767 pg. 606

Republic Bank Ltd. v. CBN (1998) 13 NWLR pt. 581 pg. 306

H. M. S. Ltd. Vs. First Bank (1991) NWLR (Pt. 167) 290 at 312-313

Amasike v. Registrar-General CAC (2006) 3 NWLR pt. 968 pg. 462

G Glorylux ass. Ind. V N. P. F. M. B. (1993) 7 NWLR (Pt. 305) 341 at 349

Okenwa v. Military Governor of Imo State (1997) 6 NWLR pt. 507 pg. 136

**STATUTES REFERRED TO**

H Evidence Act, s. 91(3)

National Provident Fund Act, Cap 273, L.F.N. 1990, ss. 38 and 39

**LEAD JUDGMENT BY CHUKWUMA-ENEH JSC**

The plaintiff's claim in the Port Harcourt Federal High Court is for the sum of N38,453.13 (thirty eight thousand, four hundred and fifty three naira, thirteen kobo) later amended to N38,431.75k "representing arrears of contribution and interest which the defendant as employer of labour within the meaning of the National Provident Fund Act, 1961, failed and or neglected to pay despite repeated demands by the plaintiff."

In the matter, pleadings had been filed and exchanged by the parties and evidence called on both sides. The trial Court in a considered judgment had entered judgment in favour of the plaintiff. The defendant being dissatisfied with the decision had appealed to the Port Harcourt Division of the Court of Appeal, which again after a considered judgment unanimously allowed the appeal. Aggrieved by the decision the plaintiff has now appealed to this court upon a Notice of Appeal as at pages 112 to 115 of the record containing two grounds of appeal from which the plaintiff has distilled two issues for determination. The defendant has adopted the said two issues. The plaintiff and defendant respectively are the appellant and respondent in this appeal.

The two issues for determination distilled by the plaintiff/appellant in this matter are as follows:

*"(a) Whether the Court of Appeal was right in holding that Exhibit "L" was made by a party interested in the proceedings.*

*(b) Whether the contents of Exhibit "J" could be taken as a specific denial of the appellant's claim as held by the Court of Appeal."*

Reviewing the appellant's case the major contention here is whether Exhibit "L" a Certificate of Indebtedness received in evidence by the trial court has been rightly declared by the lower court as inadmissible in evidence, because, besides having been made during the pendency of the instant proceedings the person who has certified it has been a person interested in the instant proceedings. The appellant has challenged the above findings of the lower court as regards Exhibit "L" s inadmissibility by contending that upon having satisfied the conditions stipulated in Section 38 of the National Provident Fund Act Cap. 273 of the Laws of the Federation of Nigeria 1990, (NPF

Act 1990) in pari materia with Section 39 of NPF Act of 1961 and also not having been caught by section 91 (3) of the Evidence Act, the findings are perverse, that is to say, in holding that Exhibit “L” is inadmissible.

As regards the weight to be attached to Exhibit “L” the appellant has posited that it is the same as in the cases of Cominco Ltd. Vs. National Provident Fund Management Board as per Suit No.CA/B/32/87 as per the pronouncement of Ogundare J.C.A. (as he then was) therein and H. M. S. Ltd. Vs. First Bank (1991) NWLR (Pt. 167) 290 at 312-313 paragraph C-D per Karibi-Whyte, JSC. The point has been made that notwithstanding these challenges the respondent has not all the same, disputed the debt and the amount contained in Exhibit “L” but that the claim is statute-barred.

On Issue 2 - the question here is whether Exhibit “J” i.e. a letter of 2<sup>nd</sup> March 1989 written by the respondent to the appellant constituted a specific denial of the appellant’s claim; in other words, does it amount to an acknowledgment of the respondent’s indebtedness to the appellant? The appellant answering the poser in the affirmative also has submitted that by the phrase “that our computation of our indebtedness ....” as contained in Exhibit “J”, the respondent has put it beyond dispute admitting the debt even though the figures contained in Exhibit “J” of the indebtedness may be different. The court is urged to hold that Exhibit “J” constitutes an acknowledgment of the respondent’s indebtedness to the appellant; in the result to allow the appeal and set aside the decision of the lower court and restore the decision of the trial court.

The respondent in his brief of argument has in connection with Section 91(3) of the Evidence Act raised two pertinent questions to wit:

*“(a) Was the document Exhibit “L” made when this suit was pending or anticipated.*

*(b) Was the Director i.e. certifying officer, in certifying same, a person interested at the time when proceedings were going on or anticipated question one relates to Exhibit ‘L’ while question two relates to exhibit ‘J’.”*

In addressing these questions, the respondent has relied on the appellant’s assertion that Exhibit “L” has been certified during pendency of the instant suit to submit that the certifying officer i.e.

the Director of the appellant company is a person interested in making Exhibit “L” even though it has been made in the course of his employment, as he has an interest to serve and has referred to EVON V. NOBLE (1949) 1 KB 222 at page 225. And that Exhibit “L” is also caught by Section 91(3) (supra).

The respondent has attempted to distinguish this case from the facts in H. M. S. Ltd. V. First Bank (supra) and has also alluded to the inference of real bias or likelihood of bias on the part of the Director in certifying Exhibit “L”. He has posited under Section 91(3) (supra) that admitting exhibit “L” in the trial court should not ground admitting inadmissible evidence in law. See: ITA V. EKPENYONG (2001) 1 NWLR (Pt. 695) 587 and that Section 38 (supra) and Section 91(3) (supra) are not inconsistent but have to co-exist and read together.

On Issue 2: it is submitted that the claim being a simple debt is recoverable within 6 years otherwise it has become statute barred; and that exhibit “J” as it stands has denied the claim and so cannot be construed as an acknowledgment of the said debt already statute barred even more so as here that the debt has not been quantified in figures and so not ascertainable without further agreement between the parties. See: GOOD V. PARRY (1963) 2 WLR pages 846 -849 per LORD DENNING M.R. AND SKEET V. LINDSAY (1877) 2 EX.D. 34 79 LQR pages 328-329. The respondent has opined that having pleaded that the debt is irrecoverable by law, the onus is on the appellant on the principle of KODILINYE V. ODU (1935) 2 WACA 337 to prove the acknowledgment of the debt and submits in that regard that it has failed to do so.

On the whole, the court is urged to dismiss the appeal and affirm the decision of the lower court.

As can be gathered from the foregoing the facts of this matter are not disputed. The plaintiff/appellant has by this action sought to recover the sum of N38,453.13 later amended to read N38,431.75k being arrears of contributions and Interests which the Defendant/Respondent as an employer of labour within the meaning of the National Provident Fund Act 1961 (NPF 1961), has failed to pay despite repeated demands by the plaintiff/appellant. Pleadings, if I may repeat, have been filed and exchanged at the trial Court.

I now come to issue one on whether the lower Court rightly

has found that Exhibit “L” has been wrongly admitted in evidence under Section 91(3) of the Evidence Act. Exhibit “L” that is, the instant “Certificate of Indebtedness” has been challenged on two grounds thus, that Exhibit “L” has been certified by a person who as at the time the instant proceeding has been on-going or anticipated is a person interested under Section 91(3) of the Evidence Act and secondly that Exhibit “L” has been made when the instant suit is pending or anticipated.

To resolve these questions I think it is right at the onset to set out the pertinent and important enactments and also the contents of Exhibit “L” very much in controversy here for ease of reference:

Section 91(3) of the Evidence Act provides

*“Nothing in this Section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to or to any fact which the statement might tend to establish”*

Apart from Section 91(3) above it is appropriate to set out Section 38 of the National Provident Fund Act Cap. 273 Laws of the Federation of Nigeria 1990 in pari material with the provisions of Section 39 of the National Provident Fund 1961 in order to appreciate the conditions under which the Court may receive a document as the instant Certificate of Indebtedness (i.e. in this case Exhibit “L”) as prima facie evidence of the truth of its contents.

It provides as follows:-

*“A copy of an entry in the accounts of the Fund or other extract from the records of the Fund shall, when certified by the Director or as the case may be by the deputy of the director, be received in all Courts as prime facie evidence of the truth of the contents thereof and, as the case may be, of the debt due to the Fund by any person”*

Clearly from the immediate foregoing provision it requires that a copy of an entry in the accounts of the Fund as the Certificate of Indebtedness in this case must be made from the entries in the accounts of the Fund vis-a-vis the contributions from employers and must be certified by the Director or his Deputy before the document can be received as a prima facie evidence of the truth of its contents as regards to employer’s statement of indebtedness to the Fund. Although from the language of the provision it is rebuttable as the onus has then shifted to the employer to disprove the debt. Fortunately,



that question is not in issue here as all that the Respondent appears to be contending is a clear-cut case of the debt being irrecoverable and being a simple debt has been statute-barred after 6 years. See *Glorylux ass. Ind. V N. P. F. M. B.* (1993) 7 NWLR (Pt. 305) 341 at 349.

Coming to the first question of whether Exhibit “L” has wrongly being admitted in evidence when the instant suit is pending or anticipated. I must say the provision of Section 91(3) of Evidence Act bears very strongly on this question and it is clear, plain and unambiguous and so has to be literally construed by giving the words therein their ordinary grammatical meaning. In the circumstances of this question I think that in resolving this matter one has to examine the provision of Section 91(3) (supra) in the context of two crucial phrases, i.e. who is, “a person interested” and “when proceedings were pending or anticipated”. As regards the phrase “a person interested” I agree with the Respondent that the phrase has been examined in the case of *EVAN V. NOBLE* (1949) 1 KB 222 at 225 where a person not interested in the outcome of an action has been described as, “a person who has no temptation to depart from the truth on one side or the other, a person not swayed by personal interest but completely detached, judicial, impartial, independent”. In other words, it contemplates that the person must be detached, independent and non-partisan and really not interested which way in the context the case goes. ***Normally, a person who is performing an act in his official capacity cannot be a person interested under Section 91(3). I think the phrase “a person interested” ever more so has been quite definitively put in the case of HOLTON V. HOLTON (1946) 2 AER 534 at 535 to mean “a person who has a pecuniary or other material interest in the result of the proceeding - a person whose interest is affected by the result of the proceedings, and, therefore, would have a temptation to pervert the truth to serve his personal or private ends. It does not mean an interest in the sense of intellectual observation or an interest purely due to sympathy. It means an interest in the legal sense, which imports something to be gained or lost”.***

I think that nothing will be gained by way of further commenting on the above self explanatory and very comprehensive definition

covering of “a person interested” in the outcome of any suit excepting to say in regard to the instant Director that he has not been shown as one having other interest to serve either financially or materially but as one discharging his ministerial duty of certifying the statement of accounts of the debts owed by the defendant/respondent.

B The director who has certified the Certificate of Indebtedness  
Exhibit “L” has only performed a statutory duty enjoined on to him  
by Section 38 of the NPF Act 1990. Clearly one of the official func-  
tions of the Director under the NPF Act is to certify such documents  
C as Exhibit “L”. In other words, he has acted in his office in this respect.  
Section 38 has prescribed certain conditions to be satisfied by the  
director or his deputy under Section 38 (supra) before he can prop-  
erly certify a copy of entries in the accounts of the Fund as represent-  
ing the indebtedness to the Fund by employers. Once the copy is so  
D certified as the Certificate of Indebtedness here barring any other  
legal inadequacies it has to be received by the Court as the prima  
facie evidence of the truth of the contents. However, it is not in any  
doubt that Exhibit “L” must also meet the conditions prescribed in  
Section 91(3) (supra) otherwise it remains inadmissible in spite of  
E Section 38 (supra). It therefore cannot be correct for the Appellant  
to insinuate that having met the provisions of Section 38 (supra) only  
that Exhibit “L” is admissible i.e. without any further consideration of  
Section 91(3) (supra). The certifier of the Certificate of Indebtedness  
F in this instance is the Director in the plaintiff’s employ as prescribed  
by Section 38 (supra). Despite that fact the Respondent has alleged  
that the Director is a person interested in the outcome of the suit,  
hence the Director has certified Exhibit “L”. If by this assertion it is  
being remotely suggested of their financial interests being identical in  
G the said debt, then it is being asserted without any factual support  
and cannot stand in vacuo, it is therefore unacceptable.

The contention has been taken further that the Director has  
certified Exhibit “L” even then when the instant suit is pending or  
anticipated. To resolve this question has called for a combined read-  
H ing of the provisions of Section 38 (supra) on the backdrop of Sec-  
tion 91(3) of the Evidence Act. The Director, it must be noted has in  
the circumstances discharged a statutory duty. Unless the defendant  
is able to show that the Director has acted personally and so is im-  
bued with bias or likelihood of bias in discharging this statutory duty,

I do not see in what sense the Director has to be taken as a person interested in the proceedings particularly as it has not been showed that his interest in the suit as a servant is in a substantial respect congruous with that of his employer (i.e. the plaintiff) in this case. Again, following the trial Court's findings, the Director by certifying Exhibit "L" has not done any act outside his statutory function under the Act, in other words, he has showed ostensible detachment and impartiality and has acted without putting those attributes in issue. The admission of Exhibit "L" without objection in a way settles these issues as the time to take objection for admitting a document is at the tendering of the same; that is not to say that the Court cannot expunge an inadmissible evidence wrongly admitted in evidence even at the time of judgment. That is not the case here.

I think that the Respondent's argument that the appellant has failed to show that the Director is reliable and a person detached has ignored the state of the parties' pleadings. In paragraph 19 of the Statement of Claim the plaintiff has pleaded the certificate of Indebtedness as signed by the director under the Act. The Defendant in paragraph 9 simply said that paragraphs 16 to 20 of the Statement of Claim are denied and no more. Apart from the general traverse as per its paragraph 9 of the Statement of Defence simply denying the facts alleged in the Statement of Claim what the defendant/respondent has done here is how not to conduct pleadings in a matter. There is no specific averments denying each and every allegation of facts as contained in the plaintiff's paragraphs 16 to 19 of the Statement of Claim. It is poor pleading to say the least. Perhaps in an apparent attempt not to give anything away visa-vis what might tend to revive the said debt, the defendant/respondent has been too economical with putting its case here to its detriment i.e. as the defendant/respondent is the person on whom rests the onus of showing that the Director is not independent, reliable and detached from the outcome of the suit. It stands to lose the case for so defaulting. Those conclusions cannot be reached without supporting facts which are not there.

***On the question of the Director having certified Exhibit "L" when proceedings are pending or anticipated; again, Section 38 (supra) carefully examined has showed that Exhibit "L" cannot be defeated by taking a superficial view of that point.***

The Director and ***in this regard I buy the appellant's submission that it will make no sense when considered against the irregular manner and the times by which employers pay their contributions to the Fund under Act as epitomized by the facts of the instant case. And even then, that to prepare such extracts of employers' indebtedness to the Fund before hand and then retain them for use whenever Court action has arisen for failing to remit any contributions to the appellant, firstly, falls outside the letter and spirit of the Act as such document will definitely fall foul of the principle against gathering of evidence in anticipation of Court action, again, contrary to Section 91(3) of the Evidence Act; and more so as no Court ought by its interpretation to be seen to defeat the clear intendment of an enactment as here.*** I find the case *H. M. S. LTD V FIRST BANK* D (1991) 1 NWLR (Pt. 167) 290 at 312 - 313 as being very apt in the circumstances and I quote per Karibi-Whyte, JSC as follows:-

*"It seems to me the provision excludes documents made in anticipation of litigation by a "person not personally interested" in the results of the Litigations. Thus the general principal is that the document made by a party to a Litigation or person otherwise interested when proceedings are pending or is anticipated is not admissible... The disqualifying interest is a personal not merely interest in an official capacity .... Where however the interest of the maker is purely official or as a servant without a direct interest of a personal nature, there are decided cases that the document is not thereby excluded ..."*

*The nature of the disqualifying interest will depend upon the nature of duty undertaken by the servant. Where from the nature of the duty he can be relied upon to speak the truth, and that he will not be adversely affected thereby, the document has always been admitted in evidence. This is because the rationale of the provision is that he must be "a person who has no temptation to depart from the truth on one side or the other - a person not swayed by personal interest, but completely detached judicial, impartial, independent"*

Of course, before there will exist a disqualifying interest, or a person will be regarded as *"a person interested"* there must exist a real likelihood of bias. Hence where an official is discharging a ministerial duty, which does not involve any personal opinion, the ques-

tion of bias will not be in issue. Such document will be admissible under S. 90(3) of the Evidence Act.

The facts in this case have not disclosed that any of the witnesses for the respondents had a personal interest in the result of the litigation. The Court below was therefore right to have admitted and acted on Exhibits 13 and 14.” B

In the light of the above cited case upon which I heavily rely, the lower Court’s findings that the instant Director who has certified Exhibit “L” is a person interested within the meaning of Section 91(3) (supra) is unsustainable and therefore unacceptable. I find that Exhibit “L” is well founded under Section 38 (supra) that is to say it is properly certified by the Director as I have found herein and properly admitted by the trial Court as Exhibit “L”, under Section 91(3) of the Evidence Act. And so the contents are prima facie true and receivable in evidence by the Court. The respondent’s case that the Director who certified Exhibit “L” is an interest person when the suit has been pending or anticipated is totally misconceived and is therefore rejected. C D

On issue two it has been contended that Exhibit “J” having been carefully construed constitutes a specific denial of the plaintiff’s claim and so cannot in the circumstances revive the indebtedness already statute barred. The plaintiff has challenged the contention. The relevant part of Exhibit “J” reads as follows: E

*“We refer to your letter NPFR VS COMPI/1516/66 of 2<sup>nd</sup> March, 1989 and reply as follows:* F

*(1) that our computation of our indebtedness differs from yours and we have therefore gone back to recreate our figures. As soon as we conclude this exercise we shall let you know”*

(underlining supplied for emphasis). G

In my review of the cases of the parties herein the opposing stance of the parties on this question has been central to this matter. The simple issue in this matter is whether the above underlined phrase (i.e. “that our computation of our indebtedness”) in the said Exhibit “J” as understood in its correct import has revived the Indebtedness of the Defendant to the plaintiff. Meaning that there must have been an initial indebtedness which according to the Limitation law is statute barred arising after a lapse of a period of years from the accrual of cause of action in the case. The limitation law here is a period of 6 H

years being a simple debt. However, where there is acknowledgment of the debt, the right to recover by action is revived and it is the crux of matter in this case. It must be noted that what constitutes acknowledgment is a matter of fact depending on each case. See THADANT AND ANOR V NATIONAL BANK OF NIGERIA (1967 - 1975) 2 NBLL.

B 383 per COKER, JSC. What I must further state as settled law is that the Law of Limitation here has not extinguished the right to the debt; the instant debt has not been extinguished but it merely bars the right to recover the debt because of lapse of specified period of time in the law of Limitation from the accrual of cause of action. However, C where there is acknowledgment of debt, which must be in writing signed by the party that is liable, the right to recover the debt by action is revived and what constitutes acknowledgment in such cases is a matter of fact in each case, if I may repeat. In other words, what D constitutes acknowledgment will depend on the construction placed on the words by the Court in ascertaining what the words mean. See SPENCER V HEMMERDE (1922) A.C. 519 at 5264 THADANT AND ANOR V NATIONAL BANK OF NIGERIA LTD (supra). As rightly held in the Spencer case (supra) at p. 526 the question is “what the E debtor’s words mean; and not what he meant when he wrote them”. Thus making the debtor’s motive for the acknowledgment most irrelevant in the matter. The defendant has inter alia alleged that the revived debt in this matter not having been quantified that further F agreement will be required and so that the alleged acknowledgment, if at all, as per Exhibit “J” is insufficient to revive the debt. Let me observe pre-emptorily, that I take the view that the quantification in figures of the outstanding amount of the debt is capable of ascertainment by mere calculation without further evidence.

G ***I must recapitulate that this being a simple debt the period of limitation is 6 years. What seems to emerge from the opposing contentions of the parties here is whether by the above underlined phrase i.e. the acknowledgment as in the extract of Exhibit “J” is a sufficient and clear acknowledgment of the Defendant’s Indebtedness that a promise to pay is inferable from it and so take this matter outside the operation of the limitation law; see AJIKE V CARDOSO (1939) WACA 134.*** H

I have above set out an abstract of Exhibit “J” - the acknowledgment letter from the defendants and to observe that the Court

has to satisfy itself that by construing the words from the acknowledgment letter it can be inferred as a matter of fact if I may come again, a promise by the debtor to pay the debt. By a line long of decided cases acknowledgment of debt owed to a Creditor has to be unconditional and unequivocal. ***The words used by the debtor to recognize the existence of the instant debt are “that our computation of our indebtedness differs from yours .....” These words having been construed in the context of the letter couldn’t be more absolute and unconditional as to the acknowledgment of indebtedness of the defendant to the plaintiff.*** Nothing could be more positive than the said phrase i.e. underlined words in acknowledging of the said debt. There is no doubt of their being absolutely and unconditionally unequivocal on the indebtedness. It is not required as espoused in many cases that the precise amount i.e. figures of the debt must be stated, in this case in Exhibit “L” and as I said above the amount here is ascertainable without any difficulty and without further evidence. In AJIKE V CARDOSO AND ANOR (supra) this point has been highlighted and if I may restate, it has held that it is not necessary to set out the precise amount of the debt. See also THADANT AND ANOR V NATIONAL BANK OF NIGERIA (supra) Having carefully considered this case, there is no doubt in my mind that Exhibit “J” having satisfied the requirements I have adumbrated above is an absolute and unconditional acknowledgment of indebtedness by the Defendant to the plaintiff as per the claim and that in consequence thereof has taken the instant suit out of the Limitation Act. I find that there is merit in the appeal.

For all this, the appeal succeeds and is hereby allowed. The judgment of the lower Court is hereby set aside and the judgment of the trial Court is hereby restored with N50,000.00 to the appellant

### **MUKHTAR JSC**

The appellant who was the plaintiff in the Federal High Court, Port Harcourt Division succeeded in its claim against the respondent for the sum claimed in the plaintiff's statement of claim i.e. N38,431,57. The defendant was not satisfied with the decision of the trial court, so he appealed to the Court of Appeal which allowed the appeal in part and dismissed the plaintiff's claim in part as follows:-

*"In my view and I so rule the learned trial court was in error, and had a misconception of the impact of Section 38 of the NPF Act. The document prescribes a prima facie evidence, which rebut table (sic) if the document was not made during the pendency of a proceeding in court, then the document may be admissible. The provisions of Section 38 National Provident Fund Act does not and should not have been viewed by the learned trial judge as defeating the provisions of the Evidence Act on admissibility of evidence. I find nothing to disparage in the admissibility of exhibit "C - C1". Plaintiffs claim is founded on it. Exhibit "M - M1" does not reflect correctly the plaintiffs claim. In sum, the appeal succeeds in part and the plaintiffs claim in the court below is dismissed in part."*

The plaintiff became aggrieved by the above decision, and appealed to this court on three grounds of appeal from which the following issues were distilled:-

"(a) Whether the Court of Appeal was right in holding that Exhibit 'L' was made by a party interested in the proceedings.

(b) Whether the contents of Exhibit 'J' could be taken as specific denial of the Appellant's claim as held by the Court of Appeal.

These issues were adopted by the learned counsel for the respondent in its brief of argument. The briefs of argument that were exchanged were adopted by the learned counsel at the hearing of the appeal.

On the admissibility of Exhibit 'L', by virtue of section 38 of the National Provident Fund Act, Cap. 273, the law of the Federation of Nigeria 1990:-

*"A copy of an entry in the accounts of the fund or other extract from the records of the fund shall, when certified by the Director or as the case may be, by the deputy of the Director, be received in all courts as prima facie evidence of the truth of the contents thereof and as the case may be, of the debt due to the fund by any person."*

Exhibit 'L' has met the requirement stated above, and its admission by the learned trial judge was in order, for it was properly pleaded in paragraph 19 of the plaintiff's statement of claim, and it was not denied by the defendant in its statement of defence. Moreover when it was tendered there was no objection from the defendant. The learned trial judge was therefore in order and did not err when he held that Exhibit 'L' was admissible by virtue of Section 39



of the 1961 Act ( a provision that is in pari materia with the provision of section 38 in the laws of the Federation reproduced supra. In addition the evidence was not controverted in any form whatsoever, so the learned trial judge was on firm ground to rely on it and ascribe probative value to it. The law is settled that evidence that directly affects the matter in contrary and that is neither attacked nor successfully discredited is good and credible evidence that can be relied upon by the court. See *Omoregbe v. Lawani* 1980 3-4 SC 108, *Bello v. Emeka* 1981 1 SC 101, and *Oforlete v. State* 2000 12 NWLR part 681, page 415. B

It is instructive to note that the maker of Exhibit L and its certification did it in his official capacity, and had no interest to derive from it, be it financial or personal. C

As for Exhibit "J", I fail to see that it constitutes a specific denial of the appellant's claim. It is pertinent that I look at the content of the said Exhibit J which I will reproduce hereunder. It reads inter alia thus:-

*"We refer to your letter NPF R Vs COMP/1516/66 of 2<sup>nd</sup> March, 1989 and reply as follows: that our computation of our indebtedness differs from yours and we have therefore gone back to recreate our figures. As soon as we conclude this exercise we shall let you know."* E

As a matter of fact I would say that by the above reproduced excerpt of Exhibit J, the defendant accepted its indebtedness to the plaintiff, but disagreed with the exact amount claimed. The bone of contention there is what the debt should be, and not that the debt did not exist. There was definitely an admission of liability and the court below erred in its finding on this. In the light of the discussions above, I resolve the above issues in favour of the appellants. F

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Chukwuma Eneh JSC. I am in full agreement with him that the appeal has merit, and deserves to succeed. I also allow the appeal, and set aside the judgment of the Court of Appeal. I abide by the consequential orders made in the lead judgment. G H

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**MOHAMMED JSC**

Having have had the advantage before today of reading the

judgment of my learned brother, Chukwuma-Eneh, JSC just delivered, I completely agree with him that this appeal has merit. Accordingly I too allow it and make the same consequential orders as contained in the lead judgment including the order on costs.

B

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**MUHAMMAD JSC**

I have had the advantage of reading in draft, the judgment just delivered by my learned brother, Chukwuma-Eneh, JSC. I am in agreement with his conclusion wherein he allowed the appeal. I, too, allow the appeal and abide by the orders made in the lead judgment including order as to costs.

D

**ADEKEYE JSC**

I had previewed in draft, the judgment just delivered by my learned brother C. M. Chukwuma-Eneh, JSC.

The claim before the High Court by the plaintiff/appellant is the sum of N38,453.13 representing the arrears of contribution and interest on the demand notes sent to the defendant as employers of labour within the meaning of the National provident Fund Act 1961.

In the considered judgment of the Federal High Court delivered on the 22<sup>nd</sup> of November 1991- the court had this to say -

*“In the final analysis, the conclusion I reach from all I have been saying is that the plaintiff has proved its case on the balance of probabilities and on the preponderance of evidence before me and so is entitled to judgment. I therefore hereby enter judgment in favour of the plaintiff in the sum of N38,431.57 with N500 costs in its favour.”*

The defendant appealed to the Court of Appeal, Port Harcourt Division, where the court allowed the appeal.

The appellant who was originally the plaintiff in the suit appealed to this court. The germane issue for determination by this court is the admissibility of Exhibits L and J. Exhibit L is the certificate of indebtedness to be issued by Nigeria Social Insurance Trust Fund Management Board to any employer of labour who has defaulted as subscriber to the fund.

The respondent at the time of filing this action defaulted to the tune of N38,453.13. The appellant had to resort to civil action to

recover the outstanding amount before the Federal High Court.

In order to prove any indebtedness to the Board, the appropriate and statutory method is Section 38 of the National Provident Fund Act Cap 273 Laws of the Federation of Nigeria 1990 now in pari materia with section 34 of the National Provident Fund Act No. 20 of 1961 which stipulates that -

*"A copy of an entry in the accounts of the fund shall, when certified by the Director or as the case may be, by the deputy of the Director, be received in all courts as prima facie evidence of the truth of the contents thereof and as the case may be, of the debt due to the fund by any person."*

This foregoing statutory provision must be complied with by the Director or Deputy Director of the appellant in any process of litigation. The grouse of the appellant is that Exhibit L cannot be admissible in view of the provision of section 91 (3) of the Evidence Act.

Section 91 (3) of the Evidence Act provides as follows -

*"Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."*

The pertinent question to ask relating to this case is whether Exhibit L was made by a person interested when proceedings were pending or anticipated. Certification of Exhibit L was made by a Director of the Board, on behalf of the employer in the course of the performance of his official duties in compliance with section 38 of the National Provident Fund Act. The Director had no personal or financial interest to derive therefrom.

In the case of *H. M. S. Ltd. v. First Bank* (1991) 1 NWLR pt. G 167 pg. 290 at page 312 my lord Karibi-Whyte JSC held as follows:

*"It seems to me the provision excludes documents made in anticipation of litigation by a person not personally interested in the results of the litigations. Thus the general principal is that the document made by a party to a litigation or person otherwise interested when proceedings are pending or is anticipated is not admissible. The qualifying interest is a personal not merely in an official capacity. Where however the interest of the maker is purely official or as a servant without direct interest of a personal nature, there are decided*

*cases that the document is not thereby excluded. The nature of disqualifying interest will depend upon the nature of duty undertaken by the servant."*

The duty undertaken by the Director is purely statutory or a ministerial act.

- B *"A ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. Where*  
 C *a duty of an administrative officer in a particular situation is so plainly prescribed that it is free from doubt and equivalent to a positive command, it is so far "ministerial".*

Fawehinmi v. I. G. P. (2002) 7 NWLR pt. 767 pg. 606.

- Amasike v. Registrar-General CAC (2006) 3 NWLR pt. 968  
 D pg. 462.

Where the law prescribes a particular method of exercising a statutory power, such power must be exercised accordingly and no other method is permissible.

- Ogualayi v. A-G Rivers State (1997) 6 NWLR pt. 508 pg. 209.  
 E Furthermore where public officers are under a duty to exercise their powers within the precinct of an enabling law or statute?????

Okenwa v. Military Governor of Imo State (1997) 6 NWLR  
 pt. 507 pg. 136.

- Republic Bank Ltd. v. CBN (1998) 13 NWLR pt. 581 pg. 306.  
 F

- Though certification of Exhibit L was done during the pendency of this suit, it was however in compliance with a statutory method in the performance of a statutory duty. This surely is not the type of situation envisaged by section 91 (3) of the Evidence Act. Exhibit L is  
 G not rendered inadmissible by the provision of section 91 (3).

- Another crucial issue for determination is the effect of the Statute of Limitation on the indebtedness of the respondent and whether Exhibit J can be seen as an acknowledgment of the demand of the appellant. The Court of Appeal held that Exhibit J constituted a specific denial of the claim of the appellant and could not in the circumstance resuscitate the claim of the appellant if same had become irrecoverable by Statute of Limitation.  
 H

Exhibit J is a letter to the appellant by the respondent and it reads as follows: -

*“We refer to your letter NPF 21 Comp 1/1516/66 of 2<sup>nd</sup> March 1989 and reply as follows that our computation of our indebtedness differs from yours and we have therefore gone back to recreate our figures. As soon as we conclude this exercise we shall let you know.”*

The words of the foregoing letter are clear and unambiguous. They admit of no other interpretation than that the respondent admitted that they are indebted to the appellant but what is in dispute is computation of the amount. Exhibit J in my view has the effect of reviving the debt which otherwise was extinct by operation of law. The law provides for six years period of limitation. The outstanding debt covered the period 1980-1998. The appellant came to court in 1990. The amount of indebtedness has not been ascertained due to Exhibit J from the respondent.

With fuller reasons given by my learned brother in the leading judgment, I agree that there is merit in the appeal and it is allowed. The judgment of the Court of Appeal is set aside. I adopt the consequential orders made in the leading judgment as mine.

E

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