

SUPREME COURT OF NIGERIA
4TH FEBRUARY, 2011. SC. 217/2004
**CORAM:- W. S. N. ONNOGHEN, J. A. FABIYI, O. O. ADEK-
EYE, S. GALADIMA, B. RHODES-VIVOUR, JJSC**

CAMEROON AIRLINES	APPELLANT
AND		
MR. MIKE E. OTUTUIZU	RESPONDENT

CONTRACTS - Agency - Contract on behalf of principal - Liability for breach - Where an agent makes a contract on behalf of a principal - Such agent may be held liable for the breach of that contract (H1)

PLEADINGS - Averments - Bad traverse - Defendant's averment to put the plaintiff to the strictest proof without more is a bad defence - And is deemed an admission by inference - In the absence of a clear denial (H2)

CONTRACTS - Aviation - Alteration of route - Effect on contract - Where the agreed route is altered - It amounts to a breach of contract - Unless there is a justification for such alteration (H3)

CARRIAGE BY AIR - Rights and liabilities of carriers - Applicable law - The Warsaw Convention is the applicable law - Having been incorporated into Nigerian law in 1953 - It is an existing law under the Constitution (H4)

CARRIAGE BY AIR - Limitation of Liability - Effect of wilful misconduct - Where the breach occasioning loss is as a result of wilful misconduct by a carrier - It loses its entitlement to rely on statutory limitation of liability (H5)

CONTRACTS - Breach - Quantum of damages - Justification - Damages are awarded to restore plaintiff - To where he would have been if there were no breach - So N500,000 general damages is justified in this case (H6)

DAMAGES - Quantum - Sustainability - \$20,000 special damages - The award is correct in the circumstances - Appellant having lost its statutory protection - By reason of its wilful misconduct (H7)

EVIDENCE - Courts - Evaluation of unchallenged evidence - Where evidence given by a party is not challenged by the adverse party - Who had opportunity to do so - The court ought to act positively thereon (H8)

PARTIES - Agency - Failure to join the principal - Effect on suit - Nonjoinder of a disclosed principal will not defeat a person's suit - So long as such principal's agent is made a party thereto (H9)

APPEALS - Reply brief - Purpose of - It is usually filed when an issue of law or argument raised in respondent's brief - Calls for a reply - It is not meant to extend the scope of appellant's brief per se (H10)

FACTS

The plaintiff/respondent sued defendant/appellant before the Federal High Court, holden at Lagos, claiming special and general damages for breach of contract of carriage by air. Among respondent's heads of special damages was a claim for the sum of \$20,000.00 (twenty thousand US dollars), lost as a result of the appellant's breach of contract. The facts of the case are largely undisputed. Respondent, a businessman, had an appointment in Manzini, Swaziland. When he went to appellant's office in Lagos, he was told that appellant's aircraft flies to Manzini. Respondent bought two tickets, Exhibits A and B, to cover his trip from Lagos to Manzini and back to Lagos. Exhibit A was routed thus: Lagos to Doula, Cameroon, to Harare, Zimbabwe and back to Lagos through the same route. Exhibit B was routed thus: Harare, Zimbabwe, to Manzini, Swaziland and back to Harare. It was respondent's case that upon their arrival at Harare, he was kept in the transit hall and, on the next morning flown to Johannesburg, South Africa, instead of Manzini.

On arrival at Johannesburg, the respondent was arrested and his personal effects and briefcase, containing \$20,000.00, were removed from him and were not returned. He was thereafter deported to Zimbabwe, where he spent seven days in jail before being flown to

Nigeria. The reason for respondent's arrest in Johannesburg was that he had no transit visa, which fact he maintains he brought to the attention of appellant at the time of buying Exhibits A and B, and was assured that they would stick to the agreed route. At the trial, appellant not only denied knowing that respondent had no transit visa but also tried to invoke the provisions of the Warsaw Convention of 1955, to limit its liability for the injuries suffered by the respondent, in the event of court's finding that it had breached its contract with the respondent. Trial court eventually gave judgment to the respondent but refused the claim for \$20,000.00. Aggrieved, appellant appealed to the Court of Appeal while the respondent cross-appealed against court's refusal to award the claim of \$20,000.00. The Court of Appeal dismissed the appeal and allowed the cross-appeal. Still dissatisfied appellant has come on a further and final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the subject matter of this action, being one of international carriage of passengers and goods by air, is not exclusively governed by the Warsaw Convention, 1955, applicable in Nigeria by virtue of the (Colonies Protectorates and Trust Territories) Order, 1953, Vol. XI of the 1958 Laws of the Federation of Nigeria.

2. Whether the award of N500,000.00 as general damages upheld by the learned Justices of the Court of Appeal is sustainable, having regard to the provisions of the Warsaw Convention (as amended at the Hague, 1955), the findings of the trial judge and the evidence adduced at the trial.

3. Whether the learned Justices of the Court of Appeal could rightly award a common law remedy of special damages in the sum of US \$20,000.00 to the respondent, when the said remedy is already covered by the statutory provision of the Warsaw Convention.

4. Whether the award of \$20,000.00 as special damages by the learned Justices of the court of Appeal is supportable in law, having regard to the evidence adduced at the trial and the findings of the trial judge.

5. Whether the learned Justices of the Court of Appeal were right in discountenancing the Appellant's reply brief, for allegedly containing further arguments in respect of the appellants main appeal.

HELD (Unanimously dismissing the appeal per **RHODES-VIVOUR JSC**)

CONTRACTS - Agency - Contract on behalf of principal

1. On the purchase of airline tickets, Exhibits A and B, by the respondent, a contract between the parties was established, and in the Exhibits can be found the contract of the parties: By the terms in Exhibit A & B the appellant agreed to fly the respondent from Lagos to Harare and back to Lagos, and as agent of “ZC”, the carrier on the second leg of the outward journey from Harare to Manzini and back to Harare. The appellant was responsible for the respondent being flown to Manzini, Swaziland.

In view of the contents of clauses 4 and 5 of Exhibit B, the authority of the appellant to enter into contract on behalf of “ZC” is implied from the circumstances of the case, consequently, the agent (the appellant) is liable, and clearly responsible for the breach of contract. (p. 386 E)

PLEADINGS - Averments - Bad traverse

2. On the route agreed by the parties, the respondent averred in paragraph 5 of the statement of claim thus:

5. the plaintiff accepted the defendants offer aforesaid and paid the defendant the sum of 923 US Dollars, being the cost of the defendants ticket to Swaziland. The defendant represented that the established route aforesaid shall strictly be followed. The plaintiff contended that the defendant informed him that a transit visa is required for passage through the Republic of South Africa and as such the defendant would not make a stop over at South Africa enroute Swaziland, the plaintiff’s destination. The plaintiff accepted the arrangement as he did not have a South African transit visa.

In reply, paragraph 6 and 7 of the further amended statement of defence reads:

6. the defendant denies paragraph 5 of the statement of claim, save for the averment that the plaintiff paid the sum of 923 US Dollars as the cost of the defendant’s ticket, and the defendant puts the plaintiff to the strictest proof of all the other averments in the said paragraph.

7. In further reply to paragraph 5 of the statement of claim,

the defendant states that it is not the responsibility of the defendant under the contract for carriage of goods and passengers by air as governed by the Warsaw Convention as amended at the Hague, 1955, to obtain transit or any other regular visa for passengers or to guarantee that the passenger would be granted entry into the country of transit by the government thereof. B

On the close of pleadings, material facts were averred by the plaintiff and denied by the defendant. That the defendant will put the plaintiff to the strictest proof (as averred in paragraph 6 of the further amended statement of defence) is bad. There must be a clear denial or non admission. C

There is an admission by inference that the plaintiff was told that he did not need a South Africa transit visa because the plane would not stop over in South Africa. In the circumstances, the facts stated in paragraph 5 of the statement of claim, are conclusive against the defendant. (pp. 386 H/388 E) D

Aviation - Alteration of route - Effect on contract

3. I must at this stage refer to the provisions of article 3 (i) (c) of the Convention. It reads: E

(i) For the carriage of passengers, the earner must deliver a passenger ticket which shall contain the following particulars:-

(c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the carriage of its international character. F

My Lords, Exhibits A and B are the passenger tickets. On them can be seen the agreed stopping places. The tickets were/are routed as follows: Exhibit A. The flight shall commence from Lagos, Nigeria, with stops in Doula, Cameroon, and then on to Harare, Zimbabwe. Exhibit B is from Harare to Manzini and back to Harare. G

There was no evidence before the learned trial judge that there was any reason to deviate from the agreed stopping places.

In the absence of justification for flying to Johannesburg, South Africa, there is a clear breach of contract since the respondent was never flown to Manzini, Swaziland. The appellant is responsible for all that happened to the respondent in South Africa, and so concurrent findings by the two courts below that the appellant was in breach H

of contract is affirmed. (p. 389 A)

CARRIAGE BY AIR - Rights and liabilities of carriers

4. The Warsaw Convention as amended at the Hague, 1955, is the relevant legislation in this case. It is applicable in Nigeria by virtue of the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953. It came into operation on the 1st day of January, 1954, and it can be found in the Laws of the Federation of Nigeria and Lagos 1958, Vol. XI.
- In view of the provisions of section 315 of the Constitution, it is an existing law. The Convention as incorporated in Nigerian law, has the force of law in relation to matters which relate to the rights and liabilities of carriers. (p. 389 G)

CARRIAGE BY AIR - Limitation of Liability

5. The object of the convention is to provide a uniform international code in the areas which it covers. All countries that are signatories to it, apply it without recourse to their respective domestic law.
- A close examination of issues 2 to 4 for determination, questions when an award of damages in action for breach of contract of international carriage by air, can be made.
- The act of the appellant, flying the respondent to South Africa with no justifiable reason for doing so and knowing fully well that the respondent did not have a transit visa, apart from being a clear breach of the agreed route, it amounts to a negligent breach of contract. A wilful misconduct in the extreme.

- By the provision of article 25 of the convention, a carrier (the appellant) loses its entitlement to rely on the limit set on its liability by article 22 (1), where a briefcase containing \$20,000 and valuables of the respondent is taken away (and never returned) by South African Immigration officials, as a result of the wilful act by the appellant, in flying the respondent to South Africa, when it knew that the respondent did not have a South African transit visa. When the carrier commits wilful misconduct, the respondent is entitled to more damages than the limit set in article 22 of the Convention. (p. 391 F/ H)

CONTRACTS - Breach - Quantum of damages

6. Damages are awarded to restore the plaintiff as far as money can,

to the position he would have been, if there had been no breach. That is to say to compensate the plaintiff for the loss.

Evidence before the trial judge justifies an award of general damages. The respondent was never flown to Manzini, Swaziland and so he was unable to keep his business appointment. Instead, he was flown to South Africa, where his brief case and valuables were taken from him and never returned. He was put in jail twice, for a night in South Africa and seven nights in Zimbabwe, where he was deported to Lagos, Nigeria. The above paints a harrowing and traumatic experience for the respondent. I find the award of N500,000 adequate in the circumstances and it is sustainable in view of article 25 of the Convention, which removes the limit of the carriers liability. (p. 394 A)

DAMAGES - Quantum - Sustainability

7. On issue 2, the submission of learned counsel for the appellant that where a common law relief is enshrined in a statute, resort must be had only to the statute, is correct. Article 22 of the Convention makes provision for limitation of the carrier (appellant) in damages to 125,000 francs. Article 25 of the same Convention is clear that the carrier would not be entitled to avail itself of article 22, if the claim arose from wilful misconduct of the carrier. In view of the fact that the appellant did not comply with the provision of article 3 (i) (c) of the Convention earlier alluded to and explained, the award of \$20,000 as special damages was correct.

In the circumstances, the award of \$20,000 was made in accordance with the provisions of article 25 of the Convention, because the appellant's act, flying to South Africa, amounts to wilful misconduct, a breach of contract. The award was made in accordance with the Convention (a statute). (p. 395 C)

Courts - Evaluation of unchallenged evidence

8. In evidence in chief, the respondent said:

"I lost my \$20,000 and the ticket I bought from them, which did not serve me any purpose and the important documents I had with me, including my passport...."

Cross-examination is on pages 47 to 48 of the record of appeal. The respondent was not cross-examined on the loss of \$20,000. The

position of the law is well settled that where a party testifies on a material point in this case, the loss of \$20,000, the appellant ought to cross-examine him, or show that his testimony is untrue. Where as in this case, neither was done, the court would readily conclude that the adverse party, in this case the appellant, does not dispute the fact.

B The sole witness for the defendant's (appellant's) evidence is on pages 50 to 51 of the record of appeal. Nowhere in the testimony did the witness deny the loss of the plaintiff's/respondent's \$20,000.

C My Lords, it is well settled that where evidence given by a party in proceedings is not challenged by the adverse party who had the opportunity to do so, the court ought to act positively on the unchallenged evidence before it. (p. 397 B/H)

PARTIES - Agency - Failure to join the principal

D 9. Finally, the reasoning of the learned trial Judge, that the award of \$20,000, cannot be made because the South African immigration officials were not made parties, is strange in view of the fact that non-joinder of a party cannot defeat a claim. It is well settled that, it is the duty of the plaintiff to sue all relevant or interested parties, but if the plaintiff fails to do so, it does not mean that his action would fail.

E The learned trial judge rightly held that the appellant, as agent, is responsible for the acts of a disclosed principal (Airline designated ZC) for the flight from Harare to Manzini and back to Harare. The appellant is a relevant and necessary party, in the absence of the principal. There was thus no need to make South African immigration officials parties in this case. (p. 398 C)

APPEALS - Reply brief - Purpose of

G 10. There are a plethora of cases which explain when a reply brief should be filed, but I shall restrict myself to the recent decision of this court on that issue, as all the decisions are saying the same thing.

In Longe v. First Bank of Nig. PLC. 2010 2-3 SC p. 61. It was held inter alia that:

H “....A reply brief is necessary and usually filed, when an issue of law or argument raised in the Respondents brief calls for a reply. Where a reply brief is necessary, it should be limited to answering new points arising from the Respondent's brief. Although, an Appellant's reply brief is not mandatory, where a Respondent's brief

raises issues or points of law not covered in the Appellant's brief, an Appellant ought to file a reply brief. It is not proper to use a reply brief to extend the scope of the Appellant's brief or raise issues not dealt with in the Respondent's brief." (p. 399 F)

NOTABLE POINT OF INTEREST **RHODES-VIVOUR JSC**

1. Appeals - Absence of Respondent - Appellant must prove his case

By virtue of order 6 rule 9 of the Supreme Court Rules, this court will proceed with the hearing of the appeal, if the respondent failed to file his respondent's brief and also failed to appear in court on the hearing date (as is the case in this appeal). Not filing respondent's brief in no way, puts the appellant at an advantage, since the judgment of the Court of Appeal is in favour of the respondent. The appellant still has to show that the judgment of the Court of Appeal was wrong. (p. 384 G)

REPRESENTATION

A. A. Agbabiaka SAN, with him, A. I. Ogbuabia for the Appellant. No appearance for the respondent who is reportedly served on 28/3/2010 and on 1/11/2010.

CASES REFERRED TO

Onuaguluchi v. Ndu 2000 11 NWLR Pt. 679 p. 519
Okongwu v. N.N.P.C. (1989) 4 NWLR pt. 115 pg. 296
Okonkwo v. Okonkwo 1998 10 NWLR Pt. 571 p. 554
Harka Air Services v. Keazor 2006 1 NWLR Pt. 960 p. 60
Kindley v. M G of Gongola State 1988 2 NWLR Pt. 77 p. 473
Cameroon Airlines v. Abdul Kareem 2003 11 NWLR Pt. 830 p. 1
Oshevire v. British Caledonia Airways Ltd. 1990 7 NWLR p. 507
Osin & Oshin Ltd. v. Livestock Feed Ltd. (1997) 2 NWLR pt. 486 pg. 162

STATUTES REFERRED TO

Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953, Warsaw Convention as amended at the Hague, 1955.
Constitution of the Federal Republic of Nigeria, 1999, s. 251

LEAD JUDGMENT BY RHODES-VIVOUR JSC

The Respondent as plaintiff sued the appellant, as defendant in the Federal High Court, Lagos Division, claiming in paragraph 15 of his statement of claim thus:

B 15. WHEREFORE the plaintiff claims the sum of N5,000,000.00 (five million Naira) from the Defendant being general and special damages as follows:

(A) SPECIAL DAMAGES:

C Particulars of special damages:

(i) Cost of ticket i.e. 923 US Dollars or its Naira equivalent - N80,000.00

(ii) The sum of 20,000.00 US Dollars or its Naira equivalent, removed from the Defendant and unrefunded till date.....
D N1,800,000.00

(iii) Cost of sundry personal effect removed by the Defendant from Plaintiff - - - N200,000.00

(B) General Damages - - - N2,920,000.00

Total - - - N5,000,000.00

E The Plaintiff gave evidence in support of his case and tendered three exhibits, viz Exhibits A and B, airline tickets issued by the Defendant. Exhibit C, receipt for foreign currency, \$20,000.00.

An employee of the defendant gave evidence for the defendant.
F

In a considered judgment delivered on the 23rd of June 2000, the learned trial judge, Sanyaolu J. (as he then was) concluded thus:

“In conclusion, I hereby enter judgment for the Plaintiff against the Defendant in the sum of N580,000.00 (Five Hundred and Eighty
G Thousand Naira) made up as follows:

i. N80,000.00 being the cost of ticket

ii. N500,000.00 as general damages Total N580,000.00

The defendant appealed, and the plaintiff cross appealed to the Court of Appeal. In the Court of Appeal, the defendant in the trial court
H was the appellant/cross respondent; while the plaintiff was the respondent/cross appellant. The appellant/cross respondent formulated two issues. They are:

1. Whether the learned trial Judge was right in awarding general damages of N500,000.00, having regard to the nature of the

plaintiffs/ respondents claim in the court below (being one of carriage by air) and having regard to his earlier findings in the same judgment.

2. Whether the award of special damages of N80,000.00 by the court below, as the refund of the cost of the Plaintiff/respondents airway ticket was right, having regard to the weight of evidence adduced before the court below and the provisions of the Warsaw Convention 1929, as amended at the Hague, 1955. B

The respondent/cross appellant filed a lone issue for consideration. It reads;

1. Whether the trial court was right, against the background of the evidence adduced at the trial and all applicable laws, in awarding N80,000.00 and N500,000.00 respectively as special and general damages in favour of the Respondent against the appellant. C

As regards the Cross appeal, the respondent/cross Appellant D formulated two issues. Both issues were adopted by the appellant/cross respondent. The issues are:

1. Whether the respondent at the trial proved his claim for the sum of \$20,000 or its Naira equivalent, to be entitled to judgment on that sum. E

2. Whether it was legally mandatory on the Respondent, having regard to the nature of the Respondent's claim, to join the South African Authorities as party to this suit, to succeed in the claim for \$20,000 or its naira equivalent of N1,800,000. F

The Court of Appeal dismissed the appeal and in the penultimate paragraph of the judgment found for the cross appellant as follows:

"The cross appeal having succeeded, the appellant/cross respondent is accordingly ordered to pay the cross/appellant respondent \$20,000, a category of special damages claimed against the former by the later, which claim has been proved to have naturally stemmed from the breach of the contract between the two and on costs, the appellant/cross respondent was ordered to pay N10,000 to the respondent/cross appellant." G H

This appeal is from that judgment. Briefs were filed and exchanged in accordance with rules of this court. The appellant filed its brief on the 3rd of October, 2006. The respondent did not file a brief, and was absent and unrepresented at the hearing of this ap-

peal on the 9th of November, 2010.

Learned counsel for the appellant, Mr. A. A. Agbabiaka, SAN formulated five issues for determination. They are:

1. Whether the subject matter of this action, being one of international carriage of passengers and goods by air, is not exclusively governed by the Warsaw Convention, 1955, applicable in Nigeria by virtue of the (Colonies Protectorates and Trust Territories) Order 1953, Vol. XI of the 1958 Laws of the Federation of Nigeria.

2. Whether the award of N500,000.00 as general damages upheld by the learned Justices of the Court of Appeal is sustainable, having regard to the provisions of the Warsaw Convention (as amended at the Hague, 1955), the findings of the trial judge and the evidence adduced at the trial.

3. Whether the learned Justices of the Court of Appeal could rightly award a common law remedy of special damages in the sum of US \$20,000.00 to the respondent, when the said remedy is already covered by the statutory provision of the Warsaw Convention.

4. Whether the award of \$20,000.00 as special damages by the learned Justices of the court of Appeal is supportable in law, having regard to the evidence adduced at the trial and the findings of the trial judge.

5. Whether the learned Justices of the Court of Appeal were right in discountenancing the Appellant's reply brief, for allegedly containing further arguments in respect of the appellants main appeal.

In deciding this appeal, I shall consider the 2nd to 5th issues formulated by the appellant, more so as the respondent did not file a brief, and was absent and unrepresented at the hearing of the appeal on the 9th November, 2010. By virtue of order 6 rule 9 of the Supreme Court Rules, this court will proceed with the hearing of the appeal, if the respondent failed to file his respondents brief and also failed to appear in court on the hearing date (as is the case in this appeal). Not filing respondent's brief, in no way puts the appellant at an advantage, since the judgment of the Court of Appeal is in favour of the respondent. The appellant still has to show that the judgment of the court of Appeal was wrong. Before going any further, I must determine if concurrent findings of fact by the two courts below, that there was breach of contract by flying the respondent to South Africa

instead of to Manzini, Swaziland, is correct.

The Facts:

The facts are as plain as plain can be: The respondent is a business man. He had a business appointment in Manzini Swaziland, and so he went to the appellant's office at Oko Awo Close, Victoria Island, Lagos. There he was told that the appellant flies to Manzini, Swaziland. Two tickets, Exhibits, A and B were sold to the respondent by agents of the appellant. The tickets were routed as follows: Exhibit A - Lagos to Doula, Cameroon to Harare, Zimbabwe, return on the same route to Lagos. Exhibit B - Harare, Zimbabwe to Manzini, Swaziland, and back to Harare.

The respondent purchased both tickets for the sum of 923 (United States Dollars). According to Exhibits A and B, the flight was scheduled to depart Lagos on 27/2/96 to Manzini, Swaziland by way of Cameroon, Zimbabwe. On arrival in Zimbabwe, the respondent was kept in the transit hall and the next morning flown to Johannesburg South Africa, instead of Manzini, Swaziland. On arrival in Johannesburg, the respondent was arrested and his personal effects and briefcase containing \$20,000.00 removed from him and never returned to him. He was deported to Zimbabwe, where he spent seven days in jail before he was flown to Nigeria.

Was there breach of contract?

The learned trial judge examined the evidence. His Lordship said:

"Looking at Exhibit A, the Defendant aircraft is indicated therein with the symbols "UY" and the Defendant thereon undertook to transport the plaintiff by air from Lagos to Doula to Harare, Doula to Lagos.

Again, on Exhibit B, the aircraft indicated with the symbols "ZC" undertook to transport the plaintiff from Harare to Manzini, to Harare. DW1, who gave evidence on oath, stated that the symbol "ZC" does not belong to the Defendant aircraft and that the carrier on the second leg of the outward journey routed Harare - Manzini - Harare, is not their responsibility, although the ticket was issued by the Defendant."

In finding if there was breach of contract by the appellant, the learned trial judge examined clauses 4 and 5, on conditions of contract in Exhibit B. Clause 4 states that carriage to be performed by

several successive carriers, is regarded as a single operation.

Clause 5 states that an air carrier issuing a ticket for carriage over the lines of another air carrier, does so as its agent.

The learned trial judge then concluded that since the respondent was never flown to Swaziland, the final destination of the respondent on the outward journey on Exhibit B, the appellant was in breach of contract. The Court of Appeal agreed with the learned trial judge. There are thus concurrent findings of fact that the appellant was in breach of contract to fly the respondent from Lagos to Manzini and back to Lagos. It is very well settled, that concurrent findings by the trial court and the court of Appeal would not be disturbed by the Supreme Court except there has been exceptional circumstances to disturb those findings such as:

1. The findings cannot be supported by evidence, or are per-verse.
2. There is miscarriage of justice or violation of law or procedure.

See: Okonkwo v. Okonkwo 1998 10 NWLR Pt. 571 p. 554; Ogbu v. State 1992 8 NWLR Pt. 259 p. 255; Igago v. State 1999 14 NWLR Pt. 637 p. I

On the purchase of airline tickets, Exhibits A and B, by the respondent, a contract between the parties was established, and in the Exhibits can be found the contract of the parties: By the terms in Exhibit A & B the appellant agreed to fly the respondent from Lagos to Harare and back to Lagos, and as agent of "ZC", the carrier on the second leg of the outward journey from Harare to Manzini and back to Harare. The appellant was responsible for the respondent being flown to Manzini, Swaziland.

In view of the contents of clauses 4 and 5 of Exhibit B, the authority of the appellant to enter into contract on behalf of "ZC" is implied from the circumstances of the case, consequently, the agent (the appellant) is liable, and clearly responsible for the breach of contract. Before I draw the curtains on breach of contract by the appellant, I must examine the pleadings.

On the route agreed by the parties, the respondent averred in paragraph 5 of the statement of claim thus:

5. the plaintiff accepted the defendants offer aforesaid

and paid the defendant the sum of 923 US Dollars, being the cost of the defendants ticket to Swaziland. The defendant represented that the established route aforesaid shall strictly be followed. The plaintiff contend that the defendant informed him that a transit visa is required for passage through the Republic of South Africa and as such the defendant would not make a stop over at South Africa enroute Swaziland, the plaintiff's destination. The plaintiff accepted the arrangement as he did not have a South Africa transit visa.

In reply, paragraph 6 and 7 of the further amended statement of defence reads:

6. the defendant denies paragraph 5 of the statement of claim, save for the averment that the plaintiff paid the sum of 923 US Dollars as the cost of the defendant's ticket, and the defendant puts the plaintiff to the strictest proof of all the other averments in the said paragraph.

7. In further reply to paragraph 5 of the statement of claim, the defendant states that it is not the responsibility of the defendant under the contract for carriage of goods and passengers by air as governed by the Warsaw Convention as amended at the Hague, 1955, to obtain transit or any other regular visa for passengers or to guarantee that the passenger would be granted entry into the country of transit by the government thereof.

The material issue for determination in the pleadings laid out above, is whether the appellant informed the respondent that he did not need a South Africa transit visa because the appellant would not fly to South Africa. In evidence in chief the respondent said:

"..... We did not agree to be taken to Johannesburg....."

And in cross examination he said:

".....South Africa was never mentioned to me so the issue of passing through South Africa does not arise...."

In evidence in chief DW1, Rose Jumbo said:

"It is not correct that we did not inform him of the transit visa to South Africa, we informed the plaintiff about the issue of transit visa before he boarded the aircraft. It is the duty of the passenger to get a transit visa. We go to South Africa."

Under cross-examination DW1 said:

“The final destination of the plaintiff was Johannesburg. There is no Johannesburg in Exhibit A and B..... I would not know whether the problem of the plaintiff arose in Johannesburg”

In one breath, DW1 says the respondent was informed that he needs a transit visa to South Africa, while in the next breath she says the destination of the respondent is Johannesburg. A transit visa is issued to a passenger by a country through which a plane would fly/land, enroute the final destination. Transit visa is not issued by the country in which the passengers journey terminates. It is true that it is the duty of the passenger to get a transit visa, and it is also the duty of the airline to refuse to take a passenger on board who has not got a transit visa.

Documentary evidence always serves as a hanger from which to assess oral testimony. See:

Kindley v. M G of Gongola State 1988 2 NWLR Pt. 77 p. 473
Omoregbe v. Lawani 1980 3- 4 SC Pt. 17

Exhibits A and B are the airline tickets bought by the respondent. The final destination of the respondent is Manzini in Swaziland. The said exhibit exposes oral testimony of DW1 as unreliable. It was never agreed by the parties that the appellant would fly the respondent to Swaziland, through South Africa. The agreement was as in exhibits A and B.

On the close of pleadings, material facts were averred by the plaintiff and denied by the defendant. That the defendant will put the plaintiff to the strictest proof (as averred in paragraph 6 of the further amended statement of defence) is bad. There must be a clear denial or non admission.

There is an admission by inference that the plaintiff was told that he did not need a South Africa transit visa because the plane would not stop over in South Africa. In the circumstances, the facts stated in paragraph 5 of the statement of claim, are conclusive against the defendant.

Furthermore, airlines insist on passengers having transit visas, but that only applies if the airline informs the passenger on the stops that would be made before the final destination of the aircraft, (and in effect the passenger). The respondent was never told by the appellant that he needs a transit visa for South Africa. This was so because the appellant was not going to stop over in South Africa enroute

Swaziland (see Exhibits A and B).

I must at this stage refer to the provisions of article 3 (i) (c) of the Convention. It reads:

(i) For the carriage of passengers, the earner must deliver a passenger's ticket which shall contain the following particulars:- B

(c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the carriage of its international character. C

My Lords, Exhibits A and B are the passenger tickets. On them can be seen the agreed stopping places. The tickets were/are routed as follows: Exhibit A. The flight shall commence from Lagos, Nigeria, with stops in Doula, Cameroon, and then on to Harare, Zimbabwe. Exhibit B is from Harare to Manzini and back to Harare. D

There was no evidence before the learned trial judge that there was any reason to deviate from the agreed stopping places. Flying to Johannesburg, South Africa amounts to wilful misconduct that the appellant has been unable to explain. The appellant was in breach of contract and created the situation which led to the loss of the respondent's briefcase, and his deportation to Nigeria after spending eight nights in jail. In the absence of justification for flying to Johannesburg, South Africa, there is a clear breach of contract since the respondent was never flown to Manzini, Swaziland. The appellant is responsible for all that happened to the respondent in South Africa, and so, concurrent findings by the two courts below that the appellant was in breach of contract is affirmed. E F G

The Warsaw Convention as amended at the Hague, 1955, is the relevant legislation in this case. It is applicable in Nigeria by virtue of the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953. It came into operation on the 1st day of January, 1954, and it can be found in the Laws of the Federation of Nigeria and Lagos 1958, Vol. XI. In view of the provisions of section 315 of the Constitution, it is an existing law. The Convention as incorporated in Nige- H

rian law, has the force of law in relation to matters which relate to the rights and liabilities of carriers.

The Federal High Court has exclusive jurisdiction over aviation related causes of action. See section 251 (1) k of the Constitution; and a plaintiff, claimant would have a valid claim, if his suit is commenced within two years from the date of arrival at his destination or from the date on which the aircraft ought to have arrived or from the date the flight ended. See article 29 of both Legislations.

The Nigeria Legislation, is Ipsissima verba the convention, so all reference to the legislation shall be to the Convention. Chapter III of the Nigerian Legislation is titled “Liability for the carrier” and it contains articles 17 to 30.

A brief summary is necessary at this stage.

Article 17 deals with liability for death or injury suffered by the passenger.

Article 18 deals with the carriers liability for destruction, loss, or damage to registered baggage or cargo.

Article 19 reads:

The carrier is liable for damage occasioned by delay in the carnage by air of passengers, luggage or goods. Article 20 provides that:

“The carrier is not liable if he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures”

Article 21 deals with cases where the damage was caused or contributed to by the injured person’s negligence.

Article 22 makes provision for the limitation of the liability of the earner for each passenger and for registered baggage and cargo.

It reads:

(1) In the carriage of passengers, the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the courts seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall, not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the carriage of registered luggage and of goods the liability of the carrier is limited to the sum of 250 Francs per kilogram,

unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case, the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery. B

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 Francs per passenger,

(4) The sums mentioned above shall be deemed to refer to the French Franc consisting of 65” milligrams gold of millesimal fineness 900. These sums may be converted into any national currency in round figures. C

Article 23 provides:

Any provision tending to relieve the earner of liability or to fix a lower limit than that which is laid down in this convention, shall be null and void. D

Article 25 states that:

(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as in accordance with the law of the court seized of the case, is considered to be equivalent to willful misconduct. E

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment. F

The object of the convention is to provide a uniform international code in the areas which it covers. All countries that are signatories to it, apply it without recourse to their respective domestic laws. G

A close examination of issues 2 to 4 for determination, questions when an award of damages in action for breach of contract of international carriage by air, can be made.

It is well settled that the appellant was in breach of contract as principal and agent in not flying the respondent to Manzini, Swaziland. (Exhibits A and B). It is reasonably foreseeable that a passenger (the respondent) arriving in South Africa without a transit visa would be arrested, with grave consequences for the passenger. Consequently, ***the act of the appellant, flying the respondent to South Africa*** H

with no justifiable reason for doing so and knowing fully well that the respondent did not have a transit visa, apart from being a clear breach of the agreed route, it amounts to a negligent breach of contract and wilful misconduct in the extreme.

By the provision of article 25 of the convention, a carrier (the appellant) loses its entitlement to rely on the limit set on its liability by article 22 (1), where a briefcase containing \$20,000 and valuables of the respondent is taken away (and never returned) by South African Immigration officials, as a result of the wilful act by the appellant, in flying the respondent to South Africa, when it knew that the respondent did not have a South African transit visa. When the carrier commits wilful misconduct, the respondent is entitled to more damages than the limit set in article 22 of the Convention.

D Oshevire v British Caledonia Airways Ltd. 1990 7 NWLR p. 507 presents similar reasoning. In that case it was held that, where a parcel containing valuable cargo, is stolen as a result of concerted action taken within the scope of their employment by one or more employees of the carrier, who also most probably stole the documents, the plaintiff would be entitled to more, damages than the limit in article 22 Supra, since the carrier had committed wilful misconduct, I am highly swayed by this reasoning. Indeed in all other cases spelt out in the Convention, the limits on liability must be followed but where there is breach of contract of such a magnitude that it amounts to a wilful act, a wilful misconduct, the limits are no longer applicable. In my view there was no justification whatsoever for flying the respondent to South Africa.

G In view of my line of thought issues 2, 3, 4 and 5 would now be considered: Issue, one has in effect been answered. Further comments on it would amount to repetition.

ISSUE 1

H Whether the award of N500,000 as general damages upheld by the Learned Justices of the Court of Appeal is sustainable having regard to the provisions of the Warsaw Convention (as amended at the Hague 1955), the findings of the trial judge and the evidence adduced at the trial. Learned counsel for the appellant observed that his submissions are not on whether the sum of N500,000 general damages is adequate, but whether the sum is justified under the pro-

visions of the Warsaw Convention, and evidence led in court. He submitted that the provisions of article 25 of the Convention does not apply because the act of the appellant flying to South Africa, does not amount to wilful misconduct. Reference was made to:

Oshevire v. British Caledonian Airways Ltd. 1990 7 NWLR pt. 163 p 507

B

Harka Air Services v. Keazor 2006 1 NWLR Pt. 960 p. 60.

In conclusion, learned counsel observed that before the trial court, there was insufficient evidence to support the award of N500,000 as general damages, and the affirmation of the award by the Court of Appeal, amounts to a travesty of justice.

C

He urged us to determine this issue in favour of the appellant. In arriving at the award of N500,000, the learned trial judge said:

"Based on the authorities which I have earlier referred to in this judgment and coupled with the facts of the present case, I hold that the plaintiff is entitled to some compensation as general damages.

In the circumstances, I make an award of N500,000 as general damages in favour of the Plaintiff".

The Court of Appeal agreed with the learned trial judge's reasoning and observed that the Court of Appeal would not interfere with a trial court's order for damages that had not been shown to have proceeded upon a wrong principle of law. The court went on:

E

"N500,000 compensation to the Respondent for the trauma of his arrest and detention by the South African Authorities and for the loss of earning because of such incarceration, is manifestly neither too small nor too big to be revisited by this court. The award does not constitute a further compensation to one accommodated by other reliefs....."

F

G

Once breach of contract is established, damages follow. General damages are thus losses that flow naturally from the adversary and it is generally presumed by law, as it need not be pleaded or proved. See UBN Ltd. v Odusote Bookstores Ltd. 1995 9 NWLR Pt. 421 p. 558

H

General damages is awarded by the trial court to assuage a loss caused by an act of the adversary. An appeal court is always loath to interfere with such award, but will be compelled to do so:

(a) Where the trial judge acted under a misapprehension of

facts, or law;

- (b) Where he failed to take into account relevant matters;
- (c) Where the amount awarded is too low or too high;
- (d) where failing to interfere would amount to injustice.

Damages are awarded to restore the plaintiff as far as money can, to the position he would have been, if there had been no breach. That is to say to compensate the plaintiff for the loss. See:

Shell DP v. Jammal Engineering Ltd. 1994 4 SC p. 33.

Evidence before the trial judge justifies an award of general damages. The respondent was never flown to Manzini, Swaziland and so he was unable to keep his business appointment. Instead, he was flown to South Africa, where his brief case and valuables were taken from him and never returned. He was put in jail twice, for a night in South Africa and seven nights in Zimbabwe, where he was deported to Lagos, Nigeria. The above paints a harrowing and traumatic experience for the respondent. I find the award of N500,000 adequate in the circumstances and it is sustainable in view of article 25 of the Convention, which removes the limit of the carriers liability.

Issues 3 and 4, now renumbered 2 and 3 would be taken one after the other.

ISSUE 2

Whether the learned Justices of the Court of Appeal could rightly award a common law remedy of special damages in the sum of \$20,000 to the respondent, when the said remedy is already covered by the statutory provision of the Warsaw Convention.

ISSUE 3

Whether the award of \$20,000 as special damages by the learned Justices of the Court of Appeal is supportable in law, having regard to the evidence adduced at the trial and the findings of the trial judge.

On issue 2, learned counsel for the appellant observed that where a common law relief is enshrined in a statute, resort must be had only to the statute and not the appropriate legal remedy/relief. Relying on:

Patkum Industries Ltd. v. Niger Shoes Ltd. 1988 5 NWLR Pt

93 p. 138.

Cameroon Airlines v. Abdul Kareem 2003 11 NWLR Pt. 830 p

1

contending that the award of \$20,000 special damages was wrong in view of the limits spelt out in article 22 of the Convention.

On issue 3, he observed that the loss of \$20,000 was not established by the trial court. He argued that the respondent has to prove his actual loss of the said sum notwithstanding that a breach of contract was established, contending that special damages must be proved by credible and compelling evidence. Concluding, he urged this court to decide this issue in favour of the appellant, since the respondent did not prove that the sum was lost by credible and compelling evidence.

On issue 2, the submission of learned counsel for the appellant that where a common law relief is enshrined in a statute, resort must be had only to the statute, is correct. Article 22 of the Convention makes provision for limitation of the carrier (appellant) in damages to 125,000 francs. Article 25 of the same Convention is clear that the carrier would not be entitled to avail itself of article 22, if the claim arose from wilful misconduct of the carrier. In view of the fact that the appellant did not comply with the provision of article 3 (i) (c) of the Convention, earlier alluded to and explained, the award of \$20,000 as special damages was correct.

In the circumstances, the award of \$20,000 was made in accordance with the provisions of article 25 of the Convention, because the appellant's act, flying to South Africa, amounts to wilful misconduct, a breach of contract. The award was made in accordance with the Convention (a statute).

On Issue 3, evidence led in the trial court by the respondent in support of his claim of \$20,000 as special damages runs as follows:

".....the Security officers came in and took me to a room. They asked for my luggage and my briefcase containing my wrist watch. I was told that as a Nigerian, I was unwanted in South Africa...."

His Lordship reasoned thus:

It follows from the evidence before the court that the plaintiff's briefcase containing his wrist watch and money were removed by

South African Immigration authorities who have not been made parties to this case. This was also confirmed by PW1 under cross examination. I therefore cannot make an award on this head of claim.

The Court of Appeal thought differently. That court said:

*“Since breach of the contract between him and the appellant
B had successfully been proved, the court on the authorities cannot
justly decline redressing any wrong that directly and reasonably
stemmed from the breach. The trial courts refusal to accede to the
respondents prayers regarding the \$20,000, it held established and
C flowing from the breach is indeed baffling. Such a decision is unten-
able in law. This conclusion determines the Court of Appeal which
invariably has to and is determined in favour of the cross-appellant”.*

And with that, the cross appeal succeeded. The sum of \$20,000 was
D ordered to be paid to the respondent. It is important at this stage that
I examine pleadings and evidence led to see if the court of Appeal
was correct, but I must observe that special damages are for a fixed
sum, unlike general damages which are at large, and awarded en-
tirely at the discretion of the Judge. To succeed in a claim for special
damages, a party must plead particularise, or itemise it. It must be
E claimed specially and proved strictly. The respondent pleaded special
damages and particularised it in paragraph 15 (A) of his pleadings. In
support of the claim for \$20,000, the respondent averred in para-
graph 9 of his pleadings thus:

9. The Plaintiff further avers that to his shock and chagrin, the
F defendant instead of flying him to his destination conspired with South
African officials and got his travelling papers his travellers cheques
and cash amounting to \$20,000 seized and converted. The plaintiff
was detained by the defendant and its collaborators and was flown to
G Lagos, Nigeria after several days of detention at Harare, Zaire and
Cameroon.

Paragraphs 17 and 18 of the further amended statement of
defence is the response. It reads:

17. the Defendant denies paragraph 9 of the statement of claim
H and puts the plaintiff to the strictest proof of all the averments therein.

18. further to paragraph 17 above and in further reply to para-
graph 9 of the statement of claim, the defendant states that it has no
business with and did not conspire with the South African officials
and/or South Africa Immigration services of Johannesburg airport or

any other airport whatsoever, it being a carrier and could therefore not have had any authority to impound and/or convert the plaintiff travelling papers, travellers cheques and cash as alleged or at all.

Averments in pleadings are facts as perceived by the party relying on them. There must be oral or/and documentary evidence to show that the facts pleaded are true. Consequently, pleadings without evidence to support it, are worthless. B

In evidence in chief, the respondent said:

“I lost my \$20,000 and the ticket I bought from them, which did not serve me any purpose and the important documents I had with me, including my passport....” C

Cross-examination is on pages 47 to 48 of the record of appeal. The respondent was not cross-examined on the loss of \$20,000. The position of the law is well settled that where a party testifies on a material point in this case, the loss of \$20,000, the appellant ought to cross-examine him, or show that his testimony is untrue. Where as in this case, neither was done, the court would readily conclude that the adverse party, in this case the appellant, does not dispute the fact. The sole witness for the defendant’s (appellant’s) evidence is on pages 50 to 51 of the record of appeal. Nowhere in the testimony did the witness deny the loss of the plaintiff/respondent \$20,000. D
or support its averments in paragraph 18 of its statement of defence. Since no evidence was led in support of the averments in paragraph 18 of the further amended statement of defence, the entire paragraph is abandoned. E F

Furthermore, I must state that after pleadings are settled, a material fact is affirmed by one of the parties, but denied by the other. The question raised between the parties is an issue of fact. To raise an issue of fact, there must be a proper traverse. That is to say, traverse must be made either by a denial or non admission either expressly or by necessary implication. See: G

Lewis and Peat Ltd. v. Akhimen 1976 1 ANLR Pt. 1 p. 469
A feeble denial by the appellant in its pleadings was not supported by compelling evidence or any evidence. H

My Lords, it is well settled that where evidence given by a party in proceedings is not challenged by the adverse party who had the opportunity to do so, the court ought to act posi-

tively on the unchallenged evidence before it.

Odulaja v. Haddad 1973 11 SC p. 35

Nwabuoku v. Ottih 1961 2 SC LR p. 232

Decisions of this court are clear on this point. The unchallenged testimony of the respondent, not challenged by the appellant, that his briefcase containing \$20,000 and some valuable items was taken away from him by South African Immigration Officials and never returned to him is affirmative evidence that respondents claim for special damages for \$20,000 is justified, since the appellants act of flying the respondent to South Africa without justification was responsible for the loss.

Finally, the reasoning of the learned trial Judge, that the award of \$20,000, cannot be made because the South African immigration officials were not made parties, is strange in view of the fact that non-joinder of a party cannot defeat a claim. It is well settled that, it is the duty of the plaintiff to sue all relevant or interested parties, but if the plaintiff fails to do so, it does not mean that his action would fail.

See:

M. Onayemi v. O. Okunubi & Anor. 1966 NMLR p. 50

The learned trial judge rightly held that the appellant, as agent, is responsible for the acts of a disclosed principal (Airline designated ZC) for the flight from Harare to Manzini and back to Harare. The appellant is a relevant and necessary party, in the absence of the principal. There was thus no need to make South African immigration officials parties in this case. The respondent has proved by unchallenged evidence which I find very credible and compelling, that he lost \$20,000 when the appellant made a detour to Johannesburg, South Africa in unexplained circumstances. The act of the appellant flying the respondent to South Africa was responsible for the loss. The award of \$20,000 by the Court of Appeal was correct.

ISSUE 4.

Whether the learned Justices of the Court of Appeal were right in discountenancing the Appellant's reply brief for allegedly containing further arguments in respect of the Appellant's main appeal.

The grievance of the appellant arose from the findings of the court below when it said:

Before going into the merits or demerits of the appeal and/or cross appeal, be it observed that Appellant/Cross Respondent's brief, apart from containing arguments in respect of the cross appeal, also contains further arguments in respect of the main appeal. These arguments are not in respect of such new matters adduced in the Respondent's/Cross Appellant's brief in relation to the main appeal, which arguments appellant never had the opportunity of addressing in his brief. No. These are further argument to those already made and contained in Appellant's brief regarding his appeal. Reply brief must not provide such a facility and arguments of this type must be discountenanced. It is so done here. See order 6 rule 5 of the Court of Appeal Rules 1981 as amended and Iso v. Eno 1999 2 NWLR Pt. 590 p. 204 Onuaguluchi v. Ndu 2000 11 NWLR Pt. 679 p. 519 ACB Ltd. v. Apygo 1995 6 NWLR Pt. 399 p. 65

Learned counsel for the appellant observed that his reply brief was divided into two sections, to wit:-

Section A - Containing Appellant's reply to Respondent's brief on the main appeal.

Section B - Containing the Cross-Respondent's brief in the cross appeal.

He argued that what the Court of Appeal discountenanced are issues (i), (ii) and (iii) in this appeal, contending that the court below denied themselves the benefit of arguments on those issues. Order 6 rules 5 of the Court of Appeal Rules provides for the filing of reply brief. ***There are a plethora of cases which explain when a reply brief should be filed, but I shall restrict myself to the recent decision of this court on that issue, as all the decisions are saying the same thing.***

In Longe v. First Bank of Nig. PLC. 2010 2-3 SC p. 61. It was held inter alia that:

"....A reply brief is necessary and usually filed, when an issue of law or argument raised in the Respondents brief calls for a reply. Where a reply brief is necessary, it should be limited to answering new points arising from the Respondent's brief. Although, an Appellant's reply brief is not mandatory, where a Respondent's brief raises issues or points of law not covered in the Appellant's brief, an Appellant ought to file a reply brief. It is not proper to use a reply brief to extend the

scope of the Appellant’s brief or raise issues not dealt with in the Respondent’s brief.”

Reply brief is only necessary when an issue of law or argument in the respondent’s brief calls for a reply.

B Before the Court of Appeal were two appeals, the main appeal and a cross-appeal. Parties on appeal present their respective cases by filing an Appellant’s brief and a Respondent’s brief. The Appellant files a Reply brief when an issue of law or argument in the respondent’s brief calls for a reply.

C The role of the respondent in an appeal is to defend the judgment of the trial court, but where the respondent is not comfortable with a finding (not the entire judgment) in the judgment which he considers fundamental he can only do so by filing a cross-appeal. The respondent in the main appeal for the purposes of the cross-appeal, files a D Respondent/Cross appellant’s brief. The appellant in the main appeal must respond, and so he files an Appellant/cross respondent’s brief. If the Respondent/cross appellant seeks to respond to an issue of law or argument on the Appellant/Cross Respondent’s brief, he files a Respondents/Cross appellant’s reply brief. It is only after these E processes are properly before the court, that the appeal can be heard. Processes before the Court of Appeal were:

1. Appellants Brief (on page 91 of the Record of Appeal).
2. Respondent Brief (on page 146 of the Record of Appeal)
3. Cross Appellant Brief (on page 153 of the Record of Appeal);
4. Appellant/Cross respondent’s Reply Brief (on page 164 of the Record of Appeal.

In the Appellant’s brief, two issues were formulated. They are:

- G 1. Whether the trial judge was right to award N500,000 general damages.
2. Whether the award of N80,000 (cost of respondents airway ticket) was correct.

H The respondent joined issues in his respondent’s brief. No new issues or point of law was raised and so the appellant did not file a Reply brief. In the respondent’s/cross-appellant’s brief, two issues were formulated. They are:

1. Whether the respondent proved his claim for \$20,000 special damages;

2. Whether the respondent ought to join the South African authorities before its claim for \$20,000 can succeed.

Rather than file an appellant/cross respondent's brief, an appellant/cross respondent's reply brief was filed. The legal argument in the brief is on pages 168 to 178 of the record of appeal.

Pages 168 to 172 contain arguments that are for the sole purpose of extending the scope of the appellant's brief. It is only arguments on pages 173 -178 that answer the cross-appellant and the Court of Appeal considered arguments on the issue of \$20,000 special damages and the non joinder of South African Authorities before making a finding.

The appellant used his appellant's/cross respondent's reply brief to extend the scope of his appellant's brief," a situation of having two bites at the appeal.

D

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother, RHODES-VIVOUR, JSC just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed.

I order accordingly and abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal dismissed.

F

FABIYI JSC

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

This matter touches on contract of carriage by air simpliciter. The respondent desired to travel from Lagos to Manzini, Swaziland on a business trip. The appellant issue two return tickets - Exhibits A and B. The route therein in Lagos-Harare - Manzini. Contrary to the agreed route, the appellant carried the respondent though South Africa. As he had no visa for South Africa to the knowledge of the appellant, he was arrested and detained. His \$20,000 was taken by

Immigration Officials. He was subsequently deported to Lagos. The respondent was not carried to Manzini as agreed.

B The trial court found that breach of contract was established by the respondent who was awarded the sum of N80,000.00, being the value of the tickets and N500,000.00 general damages but declined to award the sum of \$20,000.00 claimed by the respondent. The Court of Appeal confirmed the awards made by the trial court and in its wisdom, awarded the respondent the sum of \$20,000.00 as claimed by him.

C The appellant appealed to this court and desires to take cover under the provisions of the Warsaw Convention 1955, as amended. The respondent attempted to cling on article 22 which makes provision for the limitation of liability of the carrier for each passenger and for registered baggage and cargo. But article 22 is subject to article 25 D which states that -

E *“(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as in accordance with the law of the court seized of the case, is considered to be equivalent to wilful misconduct.*

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.”

F The trial court as well as the Court of Appeal rightly found that there was a breach of contract to carry the respondent to Manzini. The appellant wrongly carried the respondent to South Africa where he was manhandled and he incurred a loss of \$20,000.00. The action of the appellant equates with wilful misconduct and such caused G damages to the respondent, who adequately proved same. It is clear to me that the appellant cannot take cover under article 22 of the stated Convention. It will be unreasonable to find otherwise. The case of Cameroon Airlines v. Abdul Kareem (2003) 11 NWLR (Pt. 308) 1, is here in point. Liability is not excluded if damages are caused H by wilful misconduct, as herein. I endorse same. See: also Oshevire v. British Caledonian Airways Ltd. (1990) 7 NWLR (Pt. 163) 507.

I do not for one moment see how the appellant can exculpate itself from blame in the circumstance of this matter. The Court of Appeal was on a firm ground in the stance taken by it.

For the above reasons and the fuller ones carefully set out in the lead judgment, I too feel that the appeal lacks merit. I hereby dismiss it and endorse all consequential orders contained in the lead judgment, that relating to costs inclusive.

B

ADEKEYE JSC

I was privileged to read before now the judgment just delivered by my learned brother O. Rhodes-Vivour JSC.

The facts of this case are as narrated by my Lord in his lead judgment. My Lord had exhaustively considered all the issues raised for consideration in the appeal and cross-appeal. I wish to add by way of emphasis that there was a binding contract of carriage by air between the appellant and the respondent. By the terms of the contract, the respondent was to be transported by air from Lagos, Nigeria to Manzini, Swaziland in February, 1996, on a business trip. He paid a sum of \$923 United States Dollars for the trip and he was issued with two airline tickets for the journey. The respondent's grouse was that he was transported to Manzini through Johannesburg, South Africa, when he was not informed so as to enable him to obtain the necessary visa for South Africa. On his arrival at South Africa without a visa, he was subjected to shabby treatment by South African Officials at the airport, who seized his travelling documents, traveller's cheques and cash amounting to \$20,000 US dollars. He spent several days in detention at Harare, Zaire and Cameroon before he was eventually brought back to Lagos.

The court rightly decided that there was a flagrant breach of contract by the appellant amounting to willful misconduct for which there is no hiding place under article 22 (1) of the Warsaw Convention 1955. Generally speaking, where there is a concluded binding contract, there is liability if it is terminated without justification - as it would amount to a breach of the contract. A breach of contract means that the party in breach has acted contrary to the terms of the contract, in the instant case, by performing a contract negligently and not in accordance with its terms.

Pan Bisbilder (Nigeria) Ltd. v. First Bank of Nigeria Ltd. (2000) 1 SC 71.

In awarding damages in an action founded on breach of con-

tract, the rule to be applied is restitutio in intergnum that is, in so far as the damages are not too remote, the plaintiff shall be restored as far as money can do it, to the position in which he would have been if the breach had not occurred.

Okongwu v. N.N.P.C. (1989) 4 NWLR pt. 115 pg. 296.

B Osin & Oshin Ltd. v. Livestock Feed Ltd. (1997) 2 NWLR pt. 486 pg. 162.

Udeagu v. Benue Cement Co. Plc. (2006) 2 NWLR pt. 965 pg. 600.

C I share the view expressed in the lead judgment that the \$20,000 awarded by the lower court in the cross-appeal is impeccable. With the fuller reasons given in the lead judgment, I also dismiss the appeal and abide by the consequential orders.

D

GALADIMA JSC

I have had the advantage of reading in advance the lead Judgment just delivered by my learned brother, RHODES-VIVOUR, JSC. I agree with his reasoning and conclusion that this appeal lacks merits and should be dismissed.

The central issue revolves around the legal effect of issuance of Exhibits A and B by the Appellant to the Respondent enroute Lagos - Harare, Manzini, Swaziland. But that there was breach of contract by flying the Respondent to Johannesburg, South Africa, where he was arrested on arrival, and his personal effects and brief case containing U 5 \$20,000.00 was removed from him by the Immigration Officials and was deported to Zimbabwe where he spent 7 days in jail before he was deported to Nigeria. He was not flown to Manzini as agreed by the Appellant.

At the trial Federal High Court Lagos Division, it was found that the claim by the Respondent for breaching contract was established and he was awarded the sum of N80, 000.00 being the value of the ticket and N500, 000.00 general damages but the court declined to award the sum of \$20,000 claimed by the Respondent.

On Appeal, the Court of appeal confirmed the awards made at the trial court and awarded the respondent the sum of \$20,000 as claimed.

The appellant was aggrieved by this decision and further ap-

pealed to this court. Relying on a number of authorities, the Appellant took cover under article 22 of the Warsaw Convention 1955, as amended, which limits liability of the carrier for each passenger and for registered baggage and cargo. I too find the award appropriate as it is sustainable in view of article 25 of the Convention, which removes the limit of the carrier's liability.

B

The conduct of the Appellant amounts to wilful misconduct which caused damages to the Respondent, Liability is not excluded if damages are caused by wilful misconduct. See OSHEVIRE v. BRITISH CALEDONIAN AIRWAYS LTD. (1990) 7 NWLR (Pt. 163) 507.

C

In view of the foregoing and the fuller reasoning set out in the lead judgment, I too find that this appeal is lacking in merit and it is dismissed. I abide by all consequential orders including costs.

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