

**SUPREME COURT OF NIGERIA**

17TH JUNE, 2011. SC. 177/1996

**CORAM:- W. S. N. ONNOGHEN, F. F. TABAI, J. A. FABIYI,  
O. O. ADEKEYE, B. RHODES-VIVOUR, JJSC**

BILANTE INTERNATIONAL LTD. .... APPELLANT  
AND

NIGERIA DEPOSIT INSURANCE ..... RESPONDENT  
CORPORATION

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APPEALS - Notices of Appeal - Multiple filing - Effect on competence - Appellant can file two Notices of Appeal - But must choose which of them he intends to rely upon (H1)

CONTRACTS - Definition & meaning - It is an agreement between two or more persons - Which creates an obligation to do or not to do a particular thing (H2)

CONTRACTS - Establishment - Ingredients - Offer and acceptance - An offer matures to a contract - Where the offeree signifies a clear and unequivocal intention to accept an offer (H3)

CONTRACTS - Acceptance - Terms and conditions - Duty to comply - Offeree has a duty to comply with the stipulated mode of acceptance - Otherwise it may amount to a counter offer or a rejection (H4)

CONTRACTS - Nonexistent contract - Binding nature - It is not binding on the parties - And there can be no breach of same - Appellant in this instance failed to prove any enforceable contract (H5)

ACTIONS - Counterclaim - Features - It is a separate and independent action in its own right - Respondent ought to have adduced oral evidence in support of its claim (H6)

**FACTS**

Defendant/respondent/cross-appellant made an offer vide exhibit 4 to plaintiff/appellant/cross-respondent. It also stipulated the

condition it wants appellant to indicate its (appellant's) acceptance of the offer. However, appellant on its own set out other terms for its acceptance of the offer from respondent. It impliedly made a counter offer vide exhibit 5 to respondent. Dissatisfied with the action of respondent, appellant filed this action against respondent before the High Court of Enugu State, Enugu. It claimed the sum of N95,684,741.57 (Ninety Five Million, Six Hundred and Eighty Four Thousand, Seven Hundred and Forty One Naira Fifty Seven Kobo) as special and general damages for breach of contract to lend money for her road construction project. Respondent filed a counterclaim thereat for outstanding and unpaid overdrafts made to appellant amounting to N13,050,002.79 (Thirteen Million, Fifty Thousand and Two Naira Seventy Nine Kobo) as at 29th February, 1992.

At the end of the trial, the court awarded the sum of N75,684,741.57 (Seventy Five Million, Six Hundred and Eighty Four Thousand, Seven Hundred and Forty One Naira Fifty Seven Kobo) as damages against respondent. It also dismissed respondent's counterclaim. Aggrieved, respondent appealed to Court of Appeal, Enugu division against the whole judgment. Thereupon, appellant made a contention that there is no proper notice of appeal at the court to activate the hearing of the appeal. The Court set aside judgment of the High court in respect of the stated damages awarded. However, it upheld dismissal of the counterclaim by the High Court. Aggrieved, appellant appealed to Supreme Court. Appellant filed the main appeal while respondent cross-appealed.

### **ISSUES FOR DETERMINATION (MAIN APPEAL)**

*(1) Whether the Court of Appeal was competent to exercise jurisdiction in respect of the respondent's appeal.*

*(2) Whether, having regard to all the documentary evidence, the Court of Appeal was right in holding that there is no contract between the parties by which the respondent was to advance overdraft facilities to the appellant for the execution of the road contracts during the twelve months duration of those contracts.*

*(3) Whether the Court of Appeal was right in setting aside the judgment given in favour of the appellant in respect of the de-fixing' of its fixed deposit accounts.*

*(4) Whether the Court of Appeal was right in dismissing the entirety of the appellant's claim and setting aside the sum of*

*N75,684, 741.57 awarded in the appellant's favour by the High Court of Enugu State.*

### **CROSS APPEAL**

*(5) Did the plaintiff in its defence to the counter-claim specifically deny the fact of obtaining loans from the defendant?*

*(6) Did the production by the plaintiff of the statement of account supplied to it by the defendant which it did not dispute and which showed an indebtedness not prove the debt owed?*

**HELD** (Unanimously dismissing the main appeal and cross-appeal per **FABIYI JSC**)

### **APPEALS - Multiple filing of Notice - Effect on competence**

1. There is no dispute on the point that the appeal at the court below was heard upon the bundle of documents filed by the respondent sequel to the leave granted by the court below on 22nd November, 1995. The 2nd notice of appeal filed within time on 8th January, 1996 at the Registry of the High Court was relied upon. The first notice of appeal was withdrawn in consonance with the course approved by this court in *Tukur v. Government of Gongola State* (supra). Therein, the issue that fell for determination was whether an appellant can file two Notices of Appeal. The answer is in the affirmative. But the appellant must choose which of them he intends to rely upon.

It must be pointed out here that the appeal at the court below proceeded upon the leave granted to depart from the Rules in the preparation of the bundle of documents for the appeal. I am of the view that an entry of the appeal was not, *stricto sensu*, made as envisaged by the provisions of Order 9 Rule 13(1) of the Court of Appeal Rules 1981. The defendant as appellant at the court below was at liberty to file all relevant documents and have same duly brought to the attention of the court with the opposing party duly served. The plaintiff as respondent at the court below was duly served with the 2nd Notice of Appeal and its brief was filed with reliance placed on it.

The stand point of the appellant on this issue borders on technicality. The appeal before the court below was competent. The issue is resolved against the appellant. (p. 1904 C)

***CONTRACTS - Definition & meaning***

2. Issue 2 has to do with whether or not there was any enforceable contract between the parties. In its real essence, the law of contract at this point requires elucidation. Contract is defined as an agreement between two or more persons which creates an obligation to do or  
B not to do a particular thing. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement and mutuality of obligation. (p. 1905 A)

***CONTRACTS - Establishment - Ingredients***

C 3. To constitute a binding contract between parties, there must be a meeting of the mind often referred to as consensus ad idem. The mutual consent relates to offer and acceptance. An offer is the expression by a party of readiness to contract on the terms specified by  
D him which if accepted by the offeree gives rise to a binding contract. The offer matures to a contract where the offeree signifies a clear and unequivocal intention to accept the offer. (p. 1905 C)

***CONTRACTS - Terms and conditions - Duty to comply***

E 4. It should be reiterated that in order to establish that parties have formed a contract, there must be evidence of consensus ad idem between them. Then if there is a stipulated mode for acceptance of the offer, the offeree has a duty to comply with same.

F The acceptance must correspond with the term of the offer. If it purports to qualify the offer, it may amount to a counter-offer and not an acceptance. It may amount to rejection of the offer. It also destroys that offer so that it cannot subsequently be accepted.

G It goes without any modicum of reservation that by its letter in Exhibit 5 above, the appellant set out other terms for the loan which it sought from the respondent. Such a ploy equates with a counter-offer and not an acceptance. It amounts to a rejection of the offer in Exhibit 4. To put it bluntly, it destroys the offer and cannot subsequently be accepted or reactivated. The above apart, the stipulated  
H mode of acceptance requested by the respondent in Exhibit 4 to sign a duplicate of same and return it was not complied with by the appellant to its detriment. See: Afolabi v. Polymera Industries (Nig) Ltd. (supra) which is apt on this point. The required mode of acceptance as requested by the offeror must be complied with by the offeree.

See Halsbury's Law of England 3rd Edition Volume 8 at page 74. This common Law stance has been codified by the Contract Law, Cap. 30 Laws of Anambra State 1986. Section 109(1) provides as follows :- "Where an offeror prescribes a method by which acceptance of his offer is to be communicated to him, that method shall be adopted by the offeree, and acceptance which fails to comply with such requirement shall be ineffective." (p. 1905 D/1908 A) B

***CONTRACTS - Nonexistent contract - Binding nature***

5. The trial court held 'that the de-fixturing of the plaintiff's fixed deposit was a breach of contract by the defendant to de-fix without the agreement or concurrence of the plaintiff'. But the contrary is extant in Exhibit 22A written by the plaintiff to the defendant which gave it a 'temporary instruction to de-fix our fixed deposit account to the tune of N28m' and same stated to be 'in accordance with the agreed de-fixing arrangement' as pleaded in paragraph 21 of reply to statement of defence. Senior counsel for the respondent submitted that no arrangement was pleaded or given in evidence to show how the defendant acted contrary to the arrangement. He felt that it was wrong for the trial Judge to hold in effect that the de-fixturing was the unilateral act of the defendant. The appellant had no answer to same in its reply brief. The submission of the senior counsel in respondent's brief can well be put on its mettle. The plaintiff did not prove that de-fixturing was a unilateral act of the defendant. The plaintiff had no cause of action for damages or loss of interest from the fixed deposit account. C  
D  
E  
F

The plaintiff who is the appellant herein did not prove any enforceable contract which is binding on the defendant/respondent. There can be no breach of a non-existent contract. I cannot surmise any plausible reason for an award of general damages in the circumstance of this matter. G

I resolve the two issues against the appellant and in favour of the respondent.

I come to the conclusion that the main appeal is devoid of merit. It must be, and is hereby dismissed. (p. 1908 G) H

***ACTIONS - Counterclaim - Features***

6. A counter-claim is said to be a separate and independent action in

its own right.

In this matter, the plaintiff filed a Reply to the counter-claim and joined issues with the defendant. The defendant merely tendered Exhibit 12 series- the statement of Account but did not adduce oral evidence to put same in proper perspective so as to establish the claim. The case of John Orekie Anyakwo v. African Continental Bank Ltd cited by the learned counsel for the cross-respondent is on all fours with the instant appeal. Therein, the plaintiffs tendered Exhibit C Statement of Account therein and called a witness who did not know anything about the transaction. Fatayi-Williams, JSC (as he then was) pronounced that they know or ought to have known right from the beginning that in order to succeed, they had to prove how the debit balance claimed from the defendant was arrived at.

The appellant disputed the alleged indebtedness and maintained that on the contrary, there should be a credit balance of N800,000.00 in its accounts. The respondent Bank ought to know that in order to succeed, they had to demonstrate through oral evidence by an official who is familiar with the accounts how the debit balance claimed was arrived at. The court below was correct in the stance taken by it. I do not see any merit in the cross-appeal. I affirm the judgment of the court below in respect of the cross-appeal. (p. 1910 A)

**NOTABLE POINTS OF INTEREST**  
**ONNOGHEN JSC**

*1. Plaintiff must adduce relevant evidence to establish his claim*

The same applies to the cross appeal where no evidence exists on record to establish the counter claim of the respondent/cross appellant. The duty is on a plaintiff to establish his claim against a defendant by calling evidence relevant to the facts pleaded. Where no evidence is called, the facts pleaded are deemed abandoned and cannot ground any claim in law. (p. 1911 H)

**ADEKEYE JSC**

*2. Court is not to make contract for the parties*

It is not the function or duty of the court to make contracts between the parties. The court's duty is to construe the surrounding circumstances including written and oral statements so as to determine the

intention of the parties. Hence in order to create a binding contract, the parties must express their agreement in a form which is sufficiently certain for the courts to enforce. (p. 1912 D)

*3. Counter claim cannot be predicated on nonexistent contract*

In the cross-appeal, the respondent/cross-appellant cannot predicate a counter claim on a non-existing contract. It is trite law that you cannot build something on nothing. (p. 1916 F)

**REPRESENTATION**

Adegbonmire Joke Aliu (Miss) with M. Mohammed, for Appellant  
Dr. A.J.C. Mogbana with B. E. Nkegbu, Esq. for Respondent

**CASES REFERRED TO**

U.A.C. v. Macfoy (1961) WLR 1405  
Oyegbola v. Esso W.A. (1966) 1 All NLR 170  
Afolabi v. Polymera Industries (1967) 1 All NLR 144  
Union Bank Nig. Ltd v. Ozigi (1994) 3 NWLR Pt.333 Pg.385  
Tukur v. Government of Gongola (1988) 1 NWLR (Pt. 68) 63  
Nneji v. Zakhem Co. (Nig.) Ltd. (2006) 12 NWLR (Pt.994) Pg.297  
Okugbule & Anor. v. Oyagbola & Ors (1990) 4 NWLR (Pt. 147) 723  
Majekodunmi v. National Bank of Nigeria (1978) 3 SC 119 at Pg.129  
Ogbonna v. A.G. Imo State (1992) 1 NWLR (Pt 220) 647  
Gadzama v. Rims Merchant Bank (1997) 4 NWLR (Pt.498) Pg.234  
Omega Bank Plc. v. O.B.C. Ltd. (2005) 8 NWLR (Pt.928) Pg.547  
John Orekie Anyakwo v. A. C. B. Ltd. (1976) 2 SC 41 at pg 46  
Afrotec Tech. Serv. Ltd. v. MIA & Sons Ltd. (2000) 12SC (Pt.11) P1

**STATUTE & RULES REFERRED TO**

Contract Law Cap. 30 Laws of Anambra State 1986, s.109 (1)  
Court of Appeal Rules 1981, O.9 r.13 (1)

**BOOK REFERRED TO**

Halsbury's Laws of England 3rd Edition vol.8 at p.74

**LEAD JUDGMENT BY FABIYI JSC**

The appellant/cross-respondent herein was the plaintiff in the High Court of Enugu State. It claimed the sum of N95,684,741.57

as special and general damages for breach of contract to lend money for its road construction project. The respondent/cross-appellant filed a counter-claim thereat for outstanding and unpaid overdrafts made to the appellant amounting to N13,050,002.79 as at 29th February, 1992. The trial court awarded the sum of N75,684,741.57 damages against the defendant. It also dismissed the defendant's counter-claim.

The defendant appealed to the court of Appeal, Enugu Division ("the court below" for short) against the whole judgment. The court below set aside the judgment of the trial court on 13th January, 1997 in respect of the stated damages awarded. However, it upheld the dismissal of the counter-claim by the trial court.

Both sides have appealed to this court. The plaintiff filed the main appeal while the defendant cross-appealed.

On 21st March, 2011 when the appeal was heard, learned counsel for the appellant moved an application filed on 2nd June, 2010 to substitute Nigeria Deposit Insurance Corporation for the respondent on record. There was no objection raised and same was granted. Thereafter, learned counsel on both sides adopted briefs of argument as exchanged and filed on behalf of the parties.

On page 4 of the appellants' brief four (4) issues were couched for determination of the appeal. They read as follows:-

*"(1) Whether the Court of Appeal was competent to exercise jurisdiction in respect of the respondent's appeal.*

*(2) Whether, having regard to all the documentary evidence, the Court of Appeal was right in holding that there is no contract between the parties by which the respondent was to advance overdraft facilities to the appellant for the execution of the road contracts during the twelve months duration of those contracts.*

*(3) Whether the Court of Appeal was right in setting aside the judgment given in favour of the appellant in respect of the 'de-fixing' of its fixed deposit accounts.*

*(4) Whether the Court of Appeal was right in dismissing the entirety of the appellant's claim and setting aside the sum of N75,684,741.57 awarded in the appellant's favour by the High Court of Enugu State."*

On behalf of the respondent/cross-appellant, four (4) issues were decoded in respect of the main appeal and two (2) issues in respect of the cross appeal at pages 2-3 of the brief of argument.



They read as follows:-

*“(1) Was the defendant’s appeal to the court below competent?”*

*(2) Was the court below right in holding that the plaintiff did not prove any enforceable contract with the defendant as alleged in the statement of claim?* B

*(3) What was the nature of the claim made in respect of the de-fixture of the plaintiff’s fixed deposit?*

*(4) Did the damages claimed by the plaintiff flow naturally from any breach of contract?*

*(5) Did the plaintiff in its defence to the counter-claim specifically deny the fact of obtaining loans from the defendant?* C

*(7) (Sic; in reality (6)) Did the production by the plaintiff of the statement of account supplied to it by the defendant which it did not dispute and which showed an indebtedness not prove the debt owed?”* D

## MAIN APPEAL

Issue 1, put succinctly, is whether or not the defendant’s appeal to the court below was competent. The appellant herein as respondent at the court below canvassed this point relating to the competence of the appeal with fervour. Much fuss was generated on same and there is a carry over to this court. E

The contention of the appellant is that there was no proper notice of appeal before the court below to activate the hearing of the appeal thereat. Notice of appeal dated 10th October, 1995 was filed to activate the appeal at the court below by the respondent which compiled the Records of Appeal. Leave of the court was sought for departure from the Rules to use same for hearing the appeal. The application was granted on 22nd November, 1995. F G

On 8th January, 1996 the respondent herein as appellant at the court below, filed another Notice of Appeal dated 5th January, 1996 at the Registry of the High Court; albeit, within the time permitted by the Rules of court. The respondent, withdrew the earlier Notice of appeal filed by it and relied on the later notice of appeal. H The appellant is still contending, as it did at the court below, that the later notice of appeal is incompetent as the appeal had already been entered at the court below. It was submitted that the case of *Tukur v. Government of Gongola* (1988) 1 NWLR (Pt. 68) 63 is distinguish-

able from the facts in this matter as the two notices of appeal filed therein were filed before the appeal was entered. Learned counsel urged that the appeal should be struck out for want of competence.

Learned counsel for the respondent in this appeal contended that the appeal at the court below was competent. It was observed  
 B that the contention of the plaintiff in the court below was that the notice of appeal dated 5th January, 1996 did not form part of the record of appeal as it came into existence after the appeal was entered in the court below on 22nd November, 1995. It was further  
 C stressed that the plaintiff did not raise any issue of notice of appeal having been filed out of time when it filed its amended brief on 30th May, 1996.

***There is no dispute on the point that the appeal at the court below was heard upon the bundle of documents filed by  
 D the respondent sequel to the leave granted by the court below on 22nd November, 1995. The 2nd notice of appeal filed within time on 8th January, 1996 at the Registry of the High Court was relied upon. The first notice of appeal was withdrawn in consonance with the course approved by this court in Tukur v. Government of Gongola State (supra). Therein, the issue that  
 E fell for determination was whether an appellant can file two Notices of Appeal. The answer is in the affirmative. But the appellant must choose which of them he intends to rely upon. (See: Iteshi Onwe v. The State (1975) 9 - 11 SC. 41. )***  
 F

***It must be pointed out here that the appeal at the court below proceeded upon the leave granted to depart from the Rules in the preparation of the bundle of documents for the appeal. I am of the view that an entry of the appeal was not,  
 G stricto sensu, made as envisaged by the provisions of Order 9 Rule 13(1) of the Court of Appeal Rules 1981. The defendant as appellant at the court below was at liberty to file all relevant documents and have same duly brought to the attention of the court with the opposing party duly served. The plaintiff  
 H as respondent at the court below was duly served with the 2nd Notice of Appeal and its brief was filed with reliance placed on it.***

***The stand point of the appellant on this issue borders on technicality. The appeal before the court below was compe-***

**tent. The issue is resolved against the appellant.**

**Issue 2 has to do with whether or not there was any enforceable contract between the parties. In its real essence, the law of contract at this point requires elucidation. Contract is defined as an agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement and mutuality of obligation.** (Lamoureu v. Burrillville Racing Ass'n 91 R.I.94, 161A. 2d 213, 215.)

**To constitute a binding contract between parties, there must be a meeting of the mind often referred to as consensus ad idem. The mutual consent relates to offer and acceptance. An offer is the expression by a party of readiness to contract on the terms specified by him which if accepted by the offeree gives rise to a binding contract. The offer matures to a contract where the offeree signifies a clear and unequivocal intention to accept the offer.** (See: Okugbule & Anor. v. Oyagbola & Ors (1990) 4 NWLR (Pt. 147) 723.) **It should be reiterated that in order to establish that parties have formed a contract, there must be evidence of consensus ad idem between them. Then if there is a stipulated mode for acceptance of the offer, the offeree has a duty to comply with same.** (See: Afolabi v. Polymera Industries (1967) 1 All NLR 144.)

**The acceptance must correspond with the term of the offer. If it purports to qualify the offer, it may amount to a counter-offer and not an acceptance. It may amount to rejection of the offer. It also destroys that offer so that it cannot subsequently be accepted.** Both parties and the two courts below appear to be at one that Exhibit 4 seems to convey an offer by the respondent to the appellant herein. It reads as follows:-

'3rd December, 1990

Chief A. O. Okoli

Chairman,

Bilante International Ltd.

86, Awolowo Road,

Ikoyi.

Lagos.

Dear Sir,

*APPLICATION FOR A FACILITY OF N18,000,000.00*

We refer to your letter No. B1/EN/OBN/2/Vol. 2/34 dated 30th November, 1990 in connection with your application for a facility of N18,000,000.00 and the contract which you are handling for  
B Anambra State Government.

Management has considered the good relationship which you enjoy with the Bank over the years, and as we consider you a very valuable customer of the bank, we have agreed:

C (1) To pay you 24% (twenty-four percent) for the Fixed Deposit which will be used as collateral for the facility you are asking for;

(2) Management has noted that a total of N13m will be available for the security to cover our exposure which we understand will fluctuate only up to N10m by the end of January, 1991. We have  
D also noted that your request could be reviewed as the need arises, and that an additional N2.9m will be paid before the end of January to reinforce whatever facility would be granted;

(3) As we consider your contract with Anambra State Government a priority commitment, Management has agreed to provide  
E \$300,000.00 (Three Hundred Thousand US Dollars) by middle of January, 1991 to meet your immediate requirement and to enable your contract agreement take off smoothly. It is also our view that after this allocation in January a breathing space will be allowed to  
F enable us handle subsequent foreign exchange need of your Company.

It is our hope that with these concessions the Management magnanimity and understanding would have been recognized. Kindly confirm the above agreement reached at today's meeting by signing  
G and returning the duplicate copy of this letter.

Yours faithfully

ORIENT BANK OF NIGERIA LTD

SGD

E. C. IKE

H MD/CHIEF EXECUTIVE

SGD

I. C. IGBOAMALU

A.G.M BANKING OPERATIONS."

From the above, it is glaring that the respondent herein set out

the terms upon which it would grant the loan to the appellant. The respondent also stipulated how it wants the appellant to indicate its acceptance of the offer. The appellant chose to write Exhibit 5 to the respondent. It reads as follow:-

*"The Managing Director,  
Orient Bank of Nigeria Limited,  
20 Garden Avenue,  
GRA,  
Enugu.  
Sir,*

B

*RE: APPLICATION FOR A FACILITY OF N18,000,000.00*

C

*We refer to your letter OBN/AD.1/27 dated 3rd December, 1990 in respect of our application for a facility of N18,000,000.00 and wish to thank you for your approval for the facility at interest rate of 27-1/2% (TWENTY-SEVEN AND HALF PERCENT).*

D

*We further wish to direct that our total security cover of N13m with your bank comprising -*

*(a) Cash on Fixed Deposit - N11,000,000.00*

*(b) Bank Guarantee - N 2,000,000:00*

*N13,000,000. 00*

E

*be utilized as follows-*

*(1) That the cash on Fixed Deposit N11m which is a merger of the existing Fixed Deposit Account of N1m acting previously as a collateral to Account 2 Account No. (010200374) plus N10m from call Deposit be fixed for one year with effect from today - (4/12/90) at the agreed interest rate of 24% (TWENTY-FOUR PER CENT).*

F

*(2) That the Bank Guarantee of N2m now serves as a direct collateral cover on our Account 4 (Account No. 010200593) where the hitherto existing overdraft facility of N1m on Account 2 (Account No. 010200374) should now be transferred.*

G

*We have already written the Commissioner of Finance, Anambra State Government, requesting him to execute in favour of your bank, the relevant forms for domiciliation of the contract payments.*

H

*We thank you again for your cooperation.*

*Yours faithfully,*

*Bilante International Limited.*

*SGD*

Chief A. O. Okoli (Chairman). ”

***It goes without any modicum of reservation that by its letter in Exhibit 5 above, the appellant set out other terms for the loan which it sought from the respondent. Such a ploy equates with a counter-offer and not an acceptance. It amounts to a rejection of the offer in Exhibit 4. To put it bluntly, it destroys the offer and cannot subsequently be accepted or reactivated. The above apart, the stipulated mode of acceptance requested by the respondent in Exhibit 4 to sign a duplicate of same and return it was not complied with by the appellant to its detriment. See: Afolabi v. Polymera Industries (Nig) Ltd. (supra) which is apt on this point. The required mode of acceptance as requested by the offeror must be complied with by the offeree. See Halsbury's Law of England 3rd Edition Volume 8 at page 74. This common Law stance has been codified by the Contract Law, Cap. 30 Laws of Anambra State 1986. Section 109(1) provides as follows:- "Where an offeror prescribes a method by which acceptance of his offer is to be communicated to him, that method shall be adopted by the offeree, and acceptance which fails to comply with such requirement shall be ineffective."***

The above discussion clinches the arguments of the appellant to the contrary on this issue. This is enough to resolve this issue against the appellant. It failed to establish a binding contract between it and the respondent. The court below was right. I resolve the issue against the appellant and in favour of the respondent.

Issue (3) deals with ‘whether the Court of Appeal was right in setting aside the judgment given in favour of the appellant in respect of the de-fixing of its fixed deposit account’.

***The trial court held ‘that the de-fixture of the plaintiff's fixed deposit was a breach of contract by the defendant to de-fix without the agreement or concurrence of the plaintiff’. But the contrary is extant in Exhibit 22A written by the plaintiff to the defendant which gave it a ‘temporary instruction to de-fix our fixed deposit account to the tune of N28m’ and same stated to be ‘in accordance with the agreed de-fixing arrangement’ as pleaded in paragraph 21 of reply to statement of defence. Senior counsel for the respondent submitted that no arrange-***

**ment was pleaded or given in evidence to show how the defendant acted contrary to the arrangement. He felt that it was wrong for the trial Judge to hold in effect that the de-fixtiture was the unilateral act of the defendant. The appellant had no answer to same in its reply brief. The submission of the senior counsel in respondent's brief can well be put on its mettle. B The plaintiff did not prove that de-fixtiture was a unilateral act of the defendant. The plaintiff had no cause of action for damages or loss of interest from the fixed deposit account.**

**The plaintiff which is the appellant herein did not prove any enforceable contract which is binding on the defendant/ C respondent. There can be no breach of a non-existent contract. (See: Best (Nig.) Ltd. Blackwood Hodge (Nig.) Ltd. & Ors. (2011) 1 SCNJ 282 at 299 - 300.) I cannot surmise any plausible reason for an award of general damages in the circumstance D of this matter.**

**I resolve the two issues against the appellant and in favour of the respondent.**

**I come to the conclusion that the main appeal is devoid of merit. It must be, and is hereby dismissed. E**

#### CROSS APPEAL

The defendant counter-claimed for a sum of N13,050,002.79 being debt outstanding in the plaintiff's accounts with the Bank. The contention of the defendant is that there was no sufficient denial of the defendant's claim to put the debt in issue requiring proof by viva F voce evidence. The defendant placed reliance on Order 9 Rules 9 and 10 of the High Court Rules for the contention.

It was further contended that the Statement of Account - Exhibit 12 series were sufficient to prove the appellant's alleged indebtedness. Learned counsel for the cross-respondent felt that the appellant sufficiently traversed the respondent's counter-claim in paragraphs G 13 and 15 of the Reply to the Defence.

Learned counsel felt that the burden was clearly placed on the respondent to establish the alleged indebtedness that formed the basis H of the counter-claim. Learned counsel for the respondent/cross-appellant felt that the mere tendering of Exhibit 12 series without any viva voce evidence by the appellant was not enough. Learned counsel cited the case of John Orekie Anyakwo v. African Continental

Bank Limited (1976) 2 SC 41 at page 46.

***A counter-claim is said to be a separate and independent action in its own right.*** (See: Oyegbola v. Esso W.A. (1966) 1 All NLR 170; Ogbonna v. Attorney-General Imo State (1992) 1 NWLR (Pt 220) 647.) ***In this matter, the plaintiff filed a Reply to the counter-claim and joined issues with the defendant. The defendant merely tendered Exhibit 12 series- the statement of Account but did not adduce oral evidence to put same in proper perspective so as to establish the claim. The case of John Orekie Anyakwo v. African Continental Bank Ltd cited by the learned counsel for the cross-respondent is on all fours with the instant appeal. Therein, the plaintiffs tendered Exhibit C Statement of Account therein and called a witness who did not know anything about the transaction. Fatayi-Williams, JSC (as he then was) pronounced that they know or ought to have known right from the beginning that in order to succeed, they had to prove how the debit balance claimed from the defendant was arrived at.***

***The appellant disputed the alleged indebtedness and maintained that on the contrary, there should be a credit balance of N800,000.00 in its accounts. The respondent Bank ought to know that in order to succeed, they had to demonstrate through oral evidence by an official who is familiar with the accounts how the debit balance claimed was arrived at. The court below was correct in the stance taken by it. I do not see any merit in the cross-appeal. I affirm the judgment of the court below in respect of the cross-appeal.***

In conclusion, I see no merit in any of the two appeals. Both the main appeal as well as the cross-appeal is hereby dismissed. I make no order on costs in the prevailing circumstance.

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### ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother FABIYI, JSC just delivered.

I agree with his reasoning and conclusion that both appeals lack merit and should be dismissed. The main issue between the parties on which all others depend is whether there was a contract known



to law between the parties. Once it has been determined that no enforceable contract exists between the parties or that what took place between the parties does not translate to a contract between them, the foundation of the reliefs claimed collapses with the absence of a cause of action, which in this case is supposed to be breach of contract. In short you cannot talk of the consequences of a breach of contract when no contract exists. B

The foundation blocks on which a contract is built include the principles of offer and acceptance of the offer as made by the offeror. It is the existence of the two that make us to say that the parties have come to an agreement or that they are at idem. Where an offer is made but is not accepted, there can be no agreement/contract arising therefrom. C

On the other hand, where an offer is made but not accepted in the form it was made or where fresh proposals demanding to be considered by the offeror before agreeing thereto are made by the offeree, then there is no acceptance of the offer as made because what the offeree has done amounts in law to making a counter offer, which does not translate to an acceptance. D

In the instant case, Exhibit 4 contains the offer made by the respondent to the appellant which appellant was called upon to accept by a particular method, as follows:- E

“Kindly confirm the above agreement reached at today’s meeting by signing and returning the duplicate copy of this letter”. The question is whether appellant accepted the offer as made and directed in Exhibit 4? The answer is in the negative, Rather than do so appellant wrote Exhibit 5 which is in effect a counter offer. It is settled law that where an offeror has prescribed a method by which an acceptance of the offer is to be communicated, the offeree must adopt only that method as any other method will render the purported acceptance ineffective. It is for the above reasons and the detailed ones contained in the lead judgment of my learned brother that I too find no merit in the appeal and consequently dismiss same. F

The same applies to the cross appeal where no evidence exists on record to establish the counter claim of the respondent/cross appellant. The duty is on a plaintiff to establish his claim against a defendant by calling evidence relevant to the facts pleaded. Where no evidence is called the facts pleaded are deemed abandoned and can- G

not ground any claim in law.

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

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B

**ADEKEYE JSC**

I have read in draft the judgment just delivered by my learned brother, J.A. Fabiyi, JSC.

C My Lord had given a meticulous consideration to the issues raised for the determination of this court in the main appeal and cross-appeal. I agree that both the appeal and cross-appeal lack substance and merit. The reliefs in the claim of the plaintiff as appellant emanated from the breach of an alleged contract between the parties.

D It is not the function or duty of the court to make contracts between the parties. The court's duty is to construe the surrounding circumstances including written and oral statements so as to determine the intention of the parties. Hence in order to create a binding contract, the parties must express their agreement in a form which is E sufficiently certain for the courts to enforce. (*Omega Bank (Nig.) Plc. v. O.B.C. Ltd.* (2005) 8 NWLR (Pt.928) Pg.547 SC.)

F It is trite that before any contract or agreement can be said to have come into existence in law, there must be an unmistakable and precise offer and unconditional acceptance of the terms mutually agreed upon by the parties thereto. In other words, the parties to the agreement must be in consensus ad idem as regards the terms and conditions freely and voluntarily agreed upon by them. If the terms and conditions of the agreement are uncertain or vague as to defy G ascertainment with reasonable degree of certainty, there can never be a valid agreement known to law which can be said to offer itself for enforceability. (*Odutola v. Papersack (Nig.) Ltd.* (2006) 18 NWLR (Pt.1012) Pg.470.)

H An offer must be accepted in order to crystallize into a contract. (*Nneji v. Zakhem Co. (Nig.) Ltd.* (2006) 12 NWLR (Pt.994) Pg.297.)

An offer may be defined as a definite indication by one person to another that he is willing to conclude a contract on the terms proposed which when accepted will create a binding legal obligation.

Such offer may be verbal, written or even implied from the conduct of the offeror.

(Majekodunmi v. National Bank of Nigeria (1978) 3 SC 119 at Pg.129. Omega Bank (Nig.) Plc. v. O.B.C. Ltd. (2005) 8 NWLR (Pt.928) Pg.547.) In order to create an enforceable contract between the parties, the respondent made an offer to the appellant in the form of the letter now Exhibit 4, which reads as follows:-

*"3rd December, 1990.*

*Chief A.O. Okoli,*

*Chairman,*

*Bilante International Ltd,*

*86, Awolowo Road,*

*Ikoyi,*

*Lagos.*

*Dear Sir,*

*Application For A Facility of N18,000,000.00*

*We refer to your letter No. B1/EN/OBN/2/Vol.2/34 dated 30th November 1990 in connection with your application for a facility of N18,000,000.00 and the contract which you are handling for Anambra State Government.*

*Management has considered the good relationship which you enjoy with the Bank over the years and as we consider you a very valuable customer of the bank we have agreed:*

*i) To pay you 24% (Twenty-four percent) for the fixed Deposit which will be used as collateral for the facility you are asking for.*

*ii) Management has noted that a total of N13 million will be available for the security to cover our exposure which we understand will fluctuate only up to N10 million by the end of January, 1991. We have also noted that your request could be reviewed as the need arises and that an additional N2.9 million will be paid before the end of January to reinforce whatever facility would be granted.*

*iii) As we consider your contract with Anambra State Government a priority commitment, Management has agreed to provide \$300,000.00 (Three Hundred Thousand US Dollars) by middle of January 1991 to meet your immediate requirement and to enable your contract agreement take off smoothly. It is also our view that after this allocation in January, a breathing space will be allowed to enable us handle subsequent foreign exchange need of your com-*

pany.

*It is our hope that with these concessions, the management's magnanimity and understanding would have been recognized. Kindly confirm the above agreement reached at today's meeting by signing and returning the duplicate copy of this letter.*

B *Yours faithfully*

*Orient Bank of Nigeria Ltd.*

*Sgn.*

*E.C. Ike,*

C *MD/Chief Executive.*

*Sgn.*

*I.C. Igboamalu,*

*A.G.M. Banking Operations".*

The foregoing letter obviously gave the terms proposed by the respondent which if accepted would create an enforceable contract between the parties. The respondent communicated this letter to the appellant so as to give the company an opportunity to accept or reject it.

Usually, when an offer is subject to a condition, the formation of the contract is postponed until the happening of the event on which the offer is conditioned. If the condition of the offer is that unless something is done within a stipulated time the offer is determined, such an offer cannot be accepted after the beginning of the event.

The respondent directed in the last paragraph of the letter that the appellant must confirm the above agreement by signing and returning the duplicate copy of the letter. The respondent expected the appellant to sign the duplicate copy of the letter and return it which in effect will amount to an acceptance of the offer expressed in Exhibit 4. Rather than complying with the term of acceptance stipulated in Exhibit 4, the appellant chose to write the letter Exhibit 5, to the respondent by way of reply - which reads as follows: -

The Managing Director,  
H Orient Bank of Nigeria Limited,  
20, Garden Avenue,  
GRA Enugu,  
Sir,

Re: Application For A Facility of N18,000,000.00

We refer to your letter OBN/AD/1/27 dated 3rd December 1990, in respect of our application for a facility of N18,000,000.00 (Eighteen million Naira) and wish to thank you for your approval for the facility at interest rate of 27 1/2% (Twenty-seven and a half per cent).

We further wish to direct that our total security cover of N13 million (Thirteen Million Naira) with your bank comprising -

(a) Cash on fixed Deposit	N11,000,000.00
(b) Bank Guarantee	N2,000,000.00
	N13,000,000.00

be utilized as follows -

1) That the cash on Fixed Deposit - N11,000,000.00 (Eleven million Naira) which is a merger of the existing fixed Deposit Account of N1m (One million Naira) acting previously as a collateral to Account 2 (Account No. 010200374) plus N10m (Ten million Naira) from call Deposit be fixed for one year with effect from today (4/12/90) at the agreed interest rate of 24% (Twenty-Four percent)

2) That the Bank Guarantee of N2m (Two million Naira) now serves as a direct collateral cover on our Account 4 (Account No. 010200593) where hitherto existing overdraft facility of N1m (One million Naira) on Account 2 (Account No. 010200374) should now be transferred.

We have already written the Commissioner of Finance, Anambra State Government, requesting him to execute in favour of your bank, the relevant forms for domiciliation of the contract payments.

We thank you again for your co-operation.

Yours faithfully

Bilante International Limited,

Sgd.

(Chief A.O. Okoli Chairman)"

By the foregoing letter, the appellant set out new terms for the pending legal relationship between the parties quite different from those in Exhibit 4.

An offer must be unconditionally and unqualifiedly accepted. An offer is impliedly rejected if the offeree instead of accepting the original offer makes a counter offer which varies the terms proposed by the offeror. A counter offer is a statement by the offeree which has

the legal effect of rejecting the offer and of proposing a new offer to the offeror. It puts an end to the previous offer of the initial offeror. The legal effect of a counter-offer is to terminate the original offer so that it cannot subsequently be accepted by the offeree. (Hyde v. Wrench (1840) 3 Beav 334, Okubule v. Oyagbola (1990) 4 NWLR B (Pt.147) Pg.723, Gadzama v. Rims Merchant Bank Ltd. (1997) 4 NWLR (Pt.498) Pg.234, Afrotec Technical Services (Nig.) Ltd. v. MIA & Sons Ltd. (2000) 12 SC (Pt.11) at Pg.1.).

Exhibit 5 amounts to a counter-offer, whereupon the appellant as an offeree expressly rejected the offer made by the respondent in Exhibit 4. The terms expressed in Exhibit 5 may form the basis of a new agreement but they have rejected the proposals in Exhibit 4 and thus put an end to the offer of the respondent. Moreover in the Contract Law, Cap 30, Laws of Anambra State 1986, Section 109(1) D stipulates that-

*“Where an offeror prescribes a method by which acceptance of his offer is to be communicated to him, that method shall be adopted by the offeree and acceptance which fails to comply with such requirement shall be ineffective.”*

E This law is binding on both the appellant and respondent. The appellant failed to comply with the above provision of the contract by rejecting the original offer by a counter-offer. The appellant failed to establish a legally binding obligation between itself and the respondent bank.

F In the cross-appeal, the respondent/cross-appellant cannot predicate a counter claim on a non-existing contract. -

It is trite law that you cannot build something on nothing. (U.A.C. v. Macfoy (1961) WLR 1405.)

G With fuller reasons given by my learned brother in the lead judgment, I also dismiss the appeal and cross-appeal and I make no order as to costs.

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H **RHODES-VIVOUR JSC**

It is the duty of the trial court to determine whether there is a binding contract between the parties, and this is done by considering the evidence led, documentary evidence tendered and accepted by the court and oral testimony in line with pleaded facts. The terms of

a written contract on the other hand are easily ascertained from the written agreement. The traditional view is to look for offer and acceptance and consideration. In the absence of any of them there is no valid contract. That though is not always the case. Valid contracts exist in the absence of offer, acceptance, and consideration e.g. Settlement contracts. The overriding consideration in determining if there is a binding contract between the parties is to see whether there was a meeting of the minds between the parties. i.e. consensus ad idem. In all cases of contracts there must be consensus ad idem. B

A valid contract entails a definite offer and a clear acceptance. Where the terms of a written contract are clear, the court should ensure there is enforcement of the contract and not rewrite the contract for the parties. (See DHL International Ltd v. Chidi (1991) 2 NWLR Pt.329 Pg. 720; Union Bank Nig. Ltd v. Ozigi (1994) 3 NWLR Pt.333 Pg.385; African Re-insurance Corp v. S. Fataye (1986) 1 NWLR Pt.14 Pg. 113.) A diligent scrutiny of Exhibits 4 and 5 reveal a definite offer in Exhibit 4 by the respondent, and the introduction of other terms in Exhibit 5 by the appellant amounting to non acceptance, or a counter-offer. The court can only give effect to the intention of the parties. On the state of the exhibits there was no contract between the parties. C  
D  
E

Damages follow breach of contract and is payable by the party responsible for the breach. In the absence of a valid contract a claim for damages fades away, as there can be no breach of a contract that does not exist, and that is the situation in this case. F

For the above and the much fuller reasoning in the leading judgment which I was privileged to read in draft, I am in complete agreement with Fabiyi, JSC that the appeal should be dismissed. G

H