

COURT OF APPEAL, IBADAN DIVISION
19TH APRIL, 2011. CAI/55/2011
CORAM:- S. S. ALAGOA, S. D. BAGE,
J. S. IKYEGH, JJCA

1. ELDER WOLE OYELESE
& 36 ORS APPELLANTS
AND
1. INEC
2. PEOPLES DEMOCRATIC
PARTY RESPONDENTS
3. THE EXECUTIVE GOVERNOR
OF OYO STATE

PRACTICE & PROCEDURE - Interlocutory applications - Objections
- Procedure for raising - Is to file notice of preliminary objection (H1)

DOCUMENTS - Newspapers - Admissibility - Newspapers are not
generally admissible - And when they are uncertified copies - No
reliance should be placed on them (H2)

AFFIDAVITS - Depositions - Denial - There must be specific and out-
right denial - As using the phrase “not in a position to admit or deny”
- Is deemed an admission (H3)

TECHNICALITIES - Appeals - Record of proceedings - Complete-
ness of - Where strict adherence to C.A. Rules will not serve the ends
of justice - Leave is granted to include Exhibits B and C as supple-
mentary record (H4)

FACTS

This matter commenced with Motion on Notice brought by
2nd respondent/applicant before the Court of Appeal, Ibadan Divi-
sion. The motion is brought pursuant to Order 7 Rule 1 of the Court
of Appeal Rules 2007 as well as under the inherent jurisdiction of the
Court. The motion is supported by an affidavit of 26 paragraphs and
6 exhibits i.e. A - F. Applicant is seeking leave for the inclusion of
exhibits B and C to the record of proceedings of Federal High Court,

Ibadan on the 14th February 2011 in Suit No. FHC/IB/2/2011 as additional or supplementary record. He contends that exhibits D, E and F which are Newspaper Reports of the Guardian, Punch and Tribune of the 15th February 2011 captured the proceedings of the Federal High Court Ibadan of the 14th February 2011.

On the counter affidavit of the 6th April 2011 deposed to by Humphrey Wegbuom Orlu, Director (Litigation) of the Federal High Court Ibadan especially paragraphs 2, 3 and 4, 2nd respondent contends that the expression *“That I am not in a position to deny nor agree with the depositions in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25 and 26”* is an admission of those paragraphs. On the contrary, appellants contend that exhibits D, E and F should be discountenanced on the ground that they are mere uncertified photocopies and as such are inadmissible. Appellants also contend that the inclusion of exhibits B and C should be discountenanced because of non-compliance with Order 8 Rules 6 and 7 of the Court of Appeal Rules 2007.

HELD (Unanimously allowing the application per **ALAGOA JCA**)
Interlocutory applications - Objections

1. An appropriate point at which to commence this discourse is to ask whether the 2nd Respondent/Applicant can bring this application. Mr. Akeredolu SAN has raised what is in essence an objection to the present application being brought by the 2nd Respondent. His reasons have been stated and I do not consider it necessary to repeat them. Suffice it to say that the proper procedure for raising an objection to an application being taken is to file a Notice of preliminary objection which has not been done here. Having said this, it is worthy of note and as rightly pointed out by Learned Senior Counsel Prince Fagbemi SAN that the 2nd Respondent being a party to the proceedings at the Federal High Court Ibadan and in this Court is at liberty to bring the application to safeguard his interest in the outcome of the Appeal. (p. 693 A)

Newspapers - Admissibility

2. I shall now proceed to deal with Exhibits D, E1 & F which are purportedly newspaper reports of the Guardian, Punch and Tribune of what transpired in this case at the Federal High Court Ibadan on

the 14th February 2011. The issue is whether they should be discountenanced as Mr. Akeredolu SAN has urged us to do or relied upon as prince Fagbemi has urged us to do.

It is trite that newspaper reports are not generally admissible in proof of facts recorded in them. When such newspaper reports are uncertified photocopies no reliance should be placed on them.

The said Exhibits D, E, F cannot therefore be relied upon as authentic reports of proceedings at the Federal High Court Ibadan on the 14th February 2011 and I so hold. (p. 693 D)

AFFIDAVITS - Depositions - Denial

3. The bone of contention in paragraph 2 is the expression,

“That I am not in a position to neither deny nor agree with the deposition in paragraphs...”

Arguments have already been canvassed on all sides as to whether this expression amounts to an admission of the averments contained in those paragraphs of the supporting affidavit of the 2nd Respondent/Applicant’s motion dated the 28th March 2011 and filed on the 29th March 2011.

Prince Fagbemi while contending that that expression amounts to an admission, the case of *OSENI V. DAWODU* (1994) 4 NWLR PART 339 at page 410 relied upon by him would appear to support the contention of Mr. Akeredolu SAN that it relates to pleadings. There is nothing in that authority that suggests that it does not pertain to affidavits as well. The position is however made clearer in *HON. GOZIE AGBAKOBA V. INEC* (2008) 18 NWLR (PART 1119) page 489 at page 549 where the Supreme Court held that paragraphs of an affidavit not denied are deemed admitted. The purport is clear and it is that except there is a specific and outright denial of facts contained in an affidavit they are deemed to be admitted.

The expression “not in a position to admit or deny” would thus appear to amount to an admission whether it is used in pleadings or in affidavits. (p. 696 D)

TECHNICALITIES - Appeals - Record of proceedings

4. The deposition in paragraph 3 of the Counter affidavit of Wegbuom Orlu of the 6th April 2011 is to the effect that emphasis in his Lordship’s recording of the proceedings of the 14th February 2011 may

have been based on what was considered relevant and not necessarily complete. Mr. Akeredolu SAN has himself alluded to the fact that not everything that transpired in Court on the 14th February 2011 would have been recorded. It is this lacuna - a distinction between what is considered relevant and which can be quite subjective and what is in essence complete that has given rise to Exhibits B and C. The purport of paragraph 3 of the counter affidavit of the 6th April 2011 is, "I recorded what was relevant and not what all that counsel said" while Exhibits B and C are at least an attempt at recording all what transpired in court on the 14th February 2011. The Appellants will be taken as having admitted all that the 2nd Respondent said in their supporting affidavit of the 29th March 2011.

I think this is an application that ought to be granted being meritorious. The Applicants are challenging the completeness of the Record. What they are contending is that certain things which should have been recorded in the Court's Record of the 14th February 2011 were not so recorded and this is one case where a strict adherence to the provisions of order 8 Rules 6 and 7 of the Court of Appeal Rules 2007 would not serve the ends of justice. What is sought to be amended is simply the inclusion of Exhibits B & C to the record of the 14th February 2011 as additional or supplementary record and the application is hereby accordingly granted as prayed. Leave is hereby granted to the 2nd Respondent/Applicant to use the documents marked Exhibits B and C as forming part of the proceedings of the Federal High Court Ibadan on 14th February 2011 in Suit No. FHC/IB/2/2011.

It is further ordered that Exhibits B and C be and are hereby deemed as forming part of the bundle of documents of the Federal High Court Ibadan of the 14th February 2011 in Suit No. FHC/IB/2/2011 to be used as the Record of Appeal. (p. 697 F)

REPRESENTATION

O. O. Akeredolu SAN, with M.F. Lana Esq., S. S. Akinyele Esq., F. Aragbada Esq. and Y. A. Akeredolu (Miss), for the Appellants
 Prince L. O. Fagbemi SAN appears with Bolaji Ayorinde SAN and Dr. Joseph Nwobike SAN, H. O. Afolabi Esq, S. O. Ajayi Esq., W. A. Onajide Esq., L. L. Akanbi Esq, Tosin Ogwezi (Ms), R. Isamotu Esq, Oshunwusi Funmilayo (Miss), O. Ayandipo Esq, A. A. Akinteye (Miss),

Y. Olumide Esq. ,Chief R. Akinjide SAN, Aare Abdulsalam Ladi Abdullahi Esq, Hon. Attorney General and Commissioner for Justice Oyo State, Pastor R. A. Ogunwole SAN, Mrs. Oluwabunmi Oluwaseyi Oyesina, Solicitor-General and Permanent Secretary Oyo State Ministry of Justice, H. F. Sule Director of Public Prosecutors Oyo State, Mr. Opakunle (Legal Officer), O. O. Oni Esq., A. A. Lufadeju (Miss), B. Y. Dada (Mrs), O. O. Adediji (Miss), O. Oni Esq., Miss J. Y. Dada and Miss O. O. Akindiji, for the Respondents

CASES REFERRED TO

ONEH V. OBI (1998) 7 NWLR (PT. 611) 487 C
 OSENI v. DAWODU (1994) 4 NWLR (PT. 339) 410
 OPARAJI V. OHANU (1999) 6 SC 41
 GEORGE V. DOMINION FLOUR MILLS LTD (1963) 1 ANLR 7
 LONG JOHN V. BLANK (1998) 6 NWLR (PT. 555) 524 D
 AGBAI v. INEC (2008) 14 NWLR (PT. 1108) 417
 BABALOLA V. SUNDAY (2009) 3 NWLR (PT. 1128) 414
 OGUNNOLA V. EIYEKOLE (1990) 7 SC (PT. 1) 146
 OMORINBOLA V. MILITARY GOVERNOR OF ONDO STATE (1995) (PT. 418) 201 E
 NGIGE V. OBI (2005) 14 NWLR (PT. 999) 1
 R.N.H.W. V. SAMA (1991) 2 NWLR (PT. 171) 64
 OSITA NWOSU V. IMO STATE ENVIRONMENT SANITATION AUTHORITY (1990) 2 NWLR (PT. 135) 688
 THYME V. THYME (1955) 3 W.L.R. 466 F
 BARCLAYS BANK DCO V. HASSAN (1961) ANLR 836

RULES REFERRED TO

Court of Appeal Rules 2007, O. 7 r. 1, O. 50 r. 2, O. 8 rr. 6 & 7 G

LEAD JUDGMENT BY ALAGOA JCA

This is a motion on Notice dated the 28th March 2011 and filed on the 29th March 2011 by the 2nd Respondent/Applicant.

It is for reliefs set out on the motion paper which are as follows- H

1. AN ORDER amending the record of proceedings already before this Honourable Court by addition of the submissions of various Counsel in the case on the 14th day of February 2011.

2. AN ORDER granting leave to the 2nd Respondent/Appli-

cant to use the document marked Exhibits B and C as forming part of the proceedings of the Federal High Court, Ibadan on the 14th February 2011 in Suit No. FHC/IB/2/2011.

3. AN ORDER deeming Exhibits B and C herein which is the proceedings of the Federal High Court on 14th February 2011 in Suit No. FHC/IB/2/2011 as part of the bundle of documents to be used as the record of appeal.

AND FOR SUCH FURTHER ORDERS as this Honourable Court may deem fit to make in the circumstance.

The grounds of this application as stated on the motion paper are:

- (i) The record of the trial Court on the Honourable Court does not reflect in full what transpired in that Court on that day.
- (ii) Respondent/Applicant has challenged the record of proceedings of the trial Court.
- (iii) There is the need to allow the 2nd Respondent/Applicant bring before the Court facts of what transpired that was not recorded by the trial Judge.

Notice was also given that at the hearing of this application, the 2nd Respondent/Applicant shall rely on the record of the Court and all processes filed so far in this suit. As stated on the motion paper, the motion is brought pursuant to Order 7 Rule 1 of the Court of Appeal Rules 2007 as well as under the inherent jurisdiction of the Court. The motion is supported by an affidavit of 26 paragraphs and 6 Exhibits - A - F. Counsel for the 2nd Respondent/Applicant Prince L. O. Fagbemi SAN relied on all the paragraphs of the affidavit and the Exhibits attached. Learned Senior Counsel referred to and relied on the following processes more emphatically -

(a) Counter Affidavit deposed to by Victor Adewole on the 30th March 2011;

(b) Further counter affidavit of Babatunde Akinola deposed to on the 7th April 2011;

(c) Further Affidavit in Reply to Appellants' Counter affidavit deposed to by Olubunmi Ogunniran on the 1st April 2011;

(d) Further and Better Affidavit to the Appellants' further counter affidavit deposed to by Olubunmi Ogunniran also on the 12th April 2011;

(e) Counter Affidavit to Affidavit of 2nd Respondent challenging Record of proceedings of the Federal High Court Ibadan of 14th

February 2011 deposed to on the 6th April 2011 by Mr. Humphrey Wegbuom Orlu Director (Litigation) of Federal High Court Ibadan;

(f) Affidavit of 2nd Respondent challenging the Record of Proceedings of the Federal High Court Ibadan of 14th February 2011 deposed to by Rashidi Isamotu on the 29th March 2011.

Prince Fagbemi submitted that the 2nd Respondent/Applicant had given an account of what transpired at the Federal High Court Ibadan on the 14th February 2011 by attaching Exhibit B which is the handwritten note and Exhibit C which is the typed version of same by one of his Counsel who was present and took down the notes at the Federal High court Ibadan on the 14th February 2011. Learned senior counsel referred especially to page 175 of the Records, submitting that it consists of the list of Counsel that appeared in this matter at the Federal High court Ibadan on the 14th February 2011 with particular reference to R. Isamotu who appeared with L. O. Fagbemi; V. Adewole who also appeared and was deponent to an application before this Court where he described himself as Victor Adewole; B. Akinola who also appeared in that Court on the 14th February 2011 and deposed to the counter affidavit of the 7th April 2011; O. Ogunniran who was also present in Court on that day and deposed to two processes on the 1st April 2011 and 12th April 2011. Learned Senior Counsel Prince Fagbemi now wondered whether Learned Senior Counsel for the Appellants or any of his junior Counsel did not take down any notes at the said Federal High Court Ibadan on the 14th February 2011 just as Respondents had done. Prince Fagbemi went on to submit that in order to debunk the Respondents' account of what transpired at the Federal High Court Ibadan on the 14th February 2011, the Appellants should have Exhibited something as the 2nd Respondent did with respect to Exhibits B and C and that the Appellants had failed to Exhibit anything to the contrary. On that score alone the 2nd Respondent's application should succeed, there being nothing to pitch against the 2nd Respondent's record.

Learned Senior Counsel drew the attention of this Court to page 176 of the Record and to the name L. O. Fagbemi SAN and stated that whatever L. O. Fagbemi SAN must have stated was not recorded by the learned trial Judge at the Federal High Court Ibadan on the 14th February 2011 and therefore on the part of the learned

trial Judge there was an omission. Prince Fagbemi with reference to paragraphs 7 and 8 of the Counter Affidavit deposed to on the 30th March 2011 by Victor Adewole, submitted that while paragraph 7 of the said counter affidavit accords with what the learned trial Judge of the Federal High Court Ibadan said on the 14th February 2011, paragraph 8 is not so captured in the records of the Court of the 14th February 2011 which goes to show that the Court's record for the 14th February 2011 is not complete. Prince Fagbemi next referred to paragraphs 7, 8 and 9 of the further counter affidavit of Babatunde Akinola of the 7th April 2011 and submitted that while paragraph 7 of the said affidavit is captured at page 176 of the Record not only is paragraph 8 of the said Counter affidavit not captured, it is an admission by Counsel for the Appellants of paragraph 9 of the said counter affidavit which is not captured in the lower Court's Record of the 14th February 2011.

Prince Fagbemi next submitted that Exhibits D, E & F which are Newspaper Reports of the Guardian, Punch and Tribune of the 15th February 2011 captured the proceedings of the Federal High Court Ibadan of the 14th February 2011. Learned Senior Counsel Prince Fagbemi next addressed this Court on the counter affidavit of the 6th April 2011 deposed to by Humphrey Wegbuom Orlu Director (Litigation) of the Federal High Court Ibadan especially paragraphs 2, 3 and 4 of the said counter affidavit. With respect to paragraph 2 Prince Fagbemi submitted that the expression "That I am not in a position to deny nor agree with the depositions in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25 and 26" is an admission of those paragraphs.

Reliance was placed on *OSENI v. DAWODU* (1994) 4 NWLR PART 339 page 410 paras. G-H. Learned Senior Counsel Prince Fagbemi with respect to paragraph 3 of the same counter affidavit stating what the Judge said, submitted that the learned trial Judge's remark does not debunk the assertion of the 2nd Respondent/Applicant that the learned trial Judge did not record everything that transpired in Court on the 14th February 2011. Prince Fagbemi submitted that if the 2nd Respondent/Applicant made the application that the 3rd Respondent be discharged, the learned trial Judge would have recorded it as relevant. Prince Fagbemi therefore urged this Court to allow the Applicant use Exhibits B and C as supplementary

Records and to allow the Applicant to amend the Record with Exhibits B & C as supplementary Records.

Chief Richard Akinjide SAN in his submissions agreed with Prince Fagbemi SAN that the application of the 2nd Respondent be granted. He referred to the further affidavit in reply to Appellants' counter affidavit deposited to on the 1st April 2011 by Olubunmi Ogunniran and urged us to accept same as correct as the deponent was present at the Federal High Court Ibadan on the 14th February 2011 when this matter came up. He also referred to the first of the two paragraphs 11 of the same further affidavit and submitted that fabrication is a criminal offence which must be proved beyond reasonable doubt by the Appellants who had failed to do so. He also referred to the further and better affidavit to the Appellants' further counter affidavit deposited to by Olubunmi Ogunniran on the 12th April 2011 and submitted that the deponent who was at the Federal High, Court Ibadan on the 14th February 2011 was in a position to give the best evidence. With respect to the counter affidavit of Mr. Humphrey Wegbuom Orlu, Director (Litigation) of the Federal High Court Ibadan deposited to on the 6th April 2011, the Learned Senior counsel Chief Richard Akinjide agreed with the position taken by Prince Fagbemi SAN that paragraph 2 of the said counter affidavit amounted to all that was said by the Respondents. Reference was made to OGUNNOLA V. EIYEKOLE (1990) 7 SC (PART 1) page 146 at page 159 paragraphs 19-23.

Learned Senior counsel also urged us to admit the handwritten note and its typed version attached as Exhibits B & C which are notes taken by Prince Fagbemi's junior Counsel Rashidi Isamotu as they are contemporaneous and consistent with other admitted facts and further contended that the Appellant's response should be taken as an afterthought and same should be rejected.

Learned Senior Counsel Chief Richard Akinjide SAN submitted that the standard of proof in that regard is balance of probability which is in the Respondents' favour. It is the submission of Learned Senior Counsel that the Respondents have provided the best evidence possible and the other side has not. Chief Akinjide therefore urged us to accept the Respondents' own side of the story as the proper synopsis of events that happened on the 14th February 2011. Reference was made to OPARAJI V. OHANU (1999) 6 SC 41 at

page 52 pages 16-30. Learned Senior Counsel submitted that the 2nd Respondent has complied with Order 8 Rule 6 of the Court of Appeal Rules 2007 by preparing additional Record of appeal which was annexed to their affidavit in support as Exhibits B and C and which is in compliance with *BABALOLA V. SUNDAY* (2009) 3 NWLR PART 1128 page 414 at page 446 paragraphs C-H and urged us to grant the application.

Responding, O. O. Akeredolu SAN Learned Senior Counsel for the Appellants submitted that in the first place Chief Richard Akinjide SAN has no application before this Court and that the onus in an application of this nature is on the Applicant to show that there is need to have a supplementary record. Learned Senior Counsel Mr. Akeredolu SAN has gone on to state that from records it was Counsel for the 3rd Respondent that was engaged in argument at the Federal High Court Ibadan which 3rd Respondent has been struck out and is not in this appeal. He went on to say that it is true that Prince Lateef Fagbemi SAN was Counsel to the 3rd Respondent and it is the 3rd Respondent who should bring an application to challenge the record and the said 3rd Respondent having not appealed cannot challenge the record. Learned Senior Counsel further stated that if it is assumed that Prince Fagbemi who is now Counsel for the 2nd Respondent can bring this application he would proceed to reply and concede that the processes filed are the real ones and he would rely on all the counter affidavits and further counter affidavits filed in this matter.

Learned Senior Counsel disagreed with Prince Fagbemi's submission that Exhibits B & C are what transpired at the Federal High Court Ibadan on the 14th February 2011. He went on to submit that all that transpired in Court cannot be in the record of the Court. Mr. Akeredolu SAN submitted that Prince Fagbemi read paragraphs 7 and 8 of the counter affidavit deposed to on the 30th March 2011 by Victor Adewole and agreed with them. Paragraph 8 of the counter affidavit he said is not a submission to Court. On paragraphs 7, 8 and 9 of the Further Counter Affidavit deposed to by Babatunde Akinola on the 7th April 2011 Mr. Akeredolu SAN submitted that since the 3rd Respondent was no longer a party, a Notice of discountenance having been filed by the Appellants, Prince Fagbemi for the 3rd Respondent was not to be heard and the Court need not record that since by Order 50 Rule 2, his client had ceased to be a party. Learned

Senior Counsel went on to say that at pages 140-141 of the Record, Prince Fagbemi had a pending application to have the 3rd Respondent discontinued against and he did not argue that application. With respect to Exhibits D, E and F, Mr. Akeredolu SAN urged us to discountenance those Exhibits as they are not admissible. Not only are they mere photocopies, they are neither original nor certified he said and referred to *AGBAI v. INEC* (2008) 14 NWLR (PART 1108) page 417 at page 438. In the unlikely event that they are found admissible by this Court, the records of the Newspapers contradict one another and also contradict Exhibits B & C. With respect to the counter affidavit of Humphrey Wegbuom Orlu deposed to on the 6th April 2011, Mr. Akeredolu SAN submitted that paragraph 2 of the said counter affidavit does not amount to admission and that the cases referred to by Prince Fagbemi SAN and Chief Richard Akinjide SAN are not relevant as they deal with pleadings and not affidavits. Learned Senior Counsel went on to say that neither the Director of Litigation nor the learned trial Judge is a party to the proceedings. Assuming that the Court holds otherwise, the admission is an omnibus one Mr. Akeredolu submitted. Counsel went on to submit that what was important was what the learned trial Judge said in paragraph 3 of the counter affidavit of the 6th April 2011. Appellants' appeal is based on the ruling of the Court at pages 176 and 177 of the Record and the said ruling was not based on any application but on processes filed in discharging his order as can be seen at page 176 of the Record where the learned trial Judge said as follows, "I have read the processes filed." Mr. Akeredolu SAN went on to submit that what was recorded by the recorder in Exhibits B & C which runs thus - "COURT - Order of Court made on 1/2/2011 is vacated and discharged. 3rd defendant's name struck out from the case" does not reflect the totality of what the Court said. He went further to say that the Record of Court forwarded by the lower Court is presumed to be correct until the contrary is proved and that burden is on the Applicant who has not discharged that burden. Mr. Akeredolu SAN further submitted that even if the Court agrees with the Applicant on the need to provide supplementary records there has not been compliance with Order 8 Rules 6 and 7 of the Court of Appeal Rules 2007. Learned Senior Counsel further submitted that for Exhibits B & C to be used as supplementary record, the Judge must affirm that the contents are

true. Prince Fagbemi SAN thereafter replied on points of law.

On the submission by Mr. Akeredolu SAN that it is only the 3rd Respondent whose name was struck out and is not in this appeal that would have been competent to bring this application, Prince Fagbemi submitted that there is no notice of preliminary objection to the application as to who should bring the application. Furthermore there is no inhibition in the way of the 2nd Respondent to bring this application since the Applicant was a party to the proceedings below and is still a party in the present proceeding and may be prejudicially affected if the step he has taken was not taken. Being affected by the subject matter of this appeal he is well grounded and suited to bring this application. Learned senior counsel submitted that it is not the law that once a notice of discontinuance is filed against a party that party is barred from responding. The court he said will still have to make a pronouncement not only on the withdrawal but also on the response of the party against whom the withdrawal is sought. Prince Fagbemi submitted further that pages 176 and 177 of the Records are relevant as the Appellants made an application to court. On Exhibits D, E and F, prince Fagbemi SAN submitted that the question of admissibility does not come in at an interlocutory stage. He relied on *NWOSU V. IMO STATE ENVIRONMENTAL SANITATION AUTHORITY* (1990) 2 NWLR PART 135 page 688 at page 735 paragraphs B & C.

Prince Fagbemi SAN went further to say that should the Court agree with the Appellants and reject the said Exhibits D, E and F, there are other materials to be relied on in granting the application. Exhibits B and C, Learned senior counsel submitted, were served on the learned trial Judge and if he did not respond to the contents he is deemed to have admitted the contents. Reference was made to *OSANI v. DAWODU* (supra). Affidavits, prince Fagbemi submitted, stand in the position of pleadings. Reference was made to *AGBAKOBA v. INEC* (2008) NWLR PART 1119 page 489 at page 549. Learned senior counsel went on to say that Exhibits B and C captured the essence of the Court's ruling delivered on the 14th February 2011. On Order 8 Rules 6 and 7 of the Court of Appeal Rules 2007, Prince Fagbemi SAN submitted that what is being challenged by this application is the completeness of the Record by which is meant that certain things that should have been recorded were not so recorded

and that does not call for compliance hook line and sinker with the provisions of Order 8 Rules 6 & 7 of the Court of Appeal Rules 2007. Learned Senior Counsel urged us to rely on our earlier ruling on this subject matter and to grant the application.

An appropriate point at which to commence this discourse is to ask whether the 2nd Respondent/Applicant can bring this application. Mr. Akeredolu SAN has raised what is in essence an objection to the present application being brought by the 2nd Respondent. His reasons have been stated and I do not consider it necessary to repeat them. Suffice it to say that the proper procedure for raising an objection to an application being taken is to file a Notice of preliminary objection which has not been done here. Having said this, it is worthy of note and as rightly pointed out by Learned Senior Counsel Prince Fagbemi SAN that the 2nd Respondent being a party to the proceedings at the Federal High Court Ibadan and in this Court is at liberty to bring the application to safeguard his interest in the outcome of the Appeal.

I shall now proceed to deal with Exhibits D, E1 & F which are purportedly newspaper reports of the Guardian, Punch and Tribune of what transpired in this case at the Federal High Court Ibadan on the 14th February 2011. The issue is whether they should be discountenanced as Mr. Akeredolu SAN has urged us to do or relied upon as prince Fagbemi has urged us to do. In urging us to rely on their contents Prince Fagbemi SAN has submitted that the question of admissibility does not come in at an interlocutory stage. OSITA NWOSU V. IMO STATE ENVIRONMENTAL SANITATION AUTHORITY (supra) relied upon by senior counsel Prince Fagbemi SAN referred to the decision in ADEJUMO V. GOVERNOR OF LAGOS STATE (1970) 1 All NLR 183 to the effect that documents in an affidavit must not be objected to until the substantive action comes up for hearing. ***That is not the position here. The original newspapers have not been produced and attached. We are here confronted with photocopies of fragments of these documents which by law need to be certified for their contents to be relied upon.***

It is trite that newspaper reports are not generally admissible in proof of facts recorded in them. See ONEH V. OBI

(1998) 7 NWLR (PART 611) 487; NGIGE V. OBI (2005) 14 NWLR (PART 999) 1 at 167-168 paras. D-F; R.N.H.W. V. SAMA (1991) 2 NWLR (PART 171) 64; OMORINBOLA V. MILITARY GOVERNOR OF ONDO STATE (1995) (PART 418) 201 at 222. **When such newspaper reports are uncertified photocopies no reliance should be placed on them. The said Exhibits D, E, F cannot therefore be relied upon as authentic reports of proceedings at the Federal High Court Ibadan on the 14th February 2011 and I so hold.**

I shall now direct my attention to the affidavits, counter affidavits and further affidavits of Counsel. The list of Counsel who deposed to these affidavits, counter affidavits and further affidavits, are listed at page 175 of the Record of the proceedings for the 14th February 2011 and are as follows - V. Adewole and B. Akinola in the legal team of O. O. Akeredolu SAN; R. Isamotu in the legal outfit of L. O. Fagbemi SAN and O. Ogunniran in the legal train of Chief Richard Akinjide SAN. That they were present in the Federal High Court Ibadan on the 14th February 2011 when this matter came up has not been contested by anyone. That they made these depositions has also not been contested by anyone. R. Isamotu who appeared in Court as one of the junior Counsel with Prince L. O. Fagbemi leading the pack deposed to an affidavit wherein he challenged the record of the proceedings of the Federal High Court Ibadan of the 14th February 2011 in Suit No. FHC/IB/2/2011 now forwarded to this Court. Attached to this deposition are Exhibits B & C which are his handwritten and typed versions respectively of his minutes or recording of what happened in Court on the 14th February 2011. The question being asked is whether the Appellants did not take down any notes on that day the effect being to debunk the 2nd Respondent's account as highlighted in Exhibits B and C. The question I think is quite pertinent. If one looks at page 176 of the Records, one sees just below the word "COURT" the name L. O. FAGBEMI SAN. Thereafter there is no recording of what the learned senior Advocate said. That this is a clear omission on the Record is not in doubt. Learned Counsel for the 2nd Respondent/Applicant has referred to the counter affidavit of Victor Adewole deposed to on the 30th March 2011 and while conceding that paragraph 7 of the said counter affidavit accords with what the learned trial Judge said at page 176 of the

Record has nevertheless gone on to submit that paragraph 8 is not captured in the Records for the 14th February 2011. Mr. Akeredolu has submitted that paragraph 8 is not a submission to Court. By that submission I understand Mr. Akeredolu SAN to be saying that paragraph 8 need not have been captured in the records of the trial Court. That paragraph (8) reads as follows:

“That thereafter there was argument between counsel as to what procedure to be adopted in the proceedings since the application for contempt has not been completed.”

That may not be a submission of Counsel as correctly observed by Mr. Akeredolu but could the records not have been made to capture the arguments of the various Counsel in the matter given the fact as borne out by page 157 of the Record that there was a pending motion on Notice for committal for contempt brought by Mr. Akeredolu SAN himself the quick determination of which if successful, would have had the effect of preventing the then 4th Defendant/contemnor from being further heard in the proceedings? I therefore agree with the Learned Senior Counsel Prince Fagbemi SAN that the said paragraph I if correct ought to have been captured in the record for the 14th February 2011 and was not.

I shall now turn my attention to paragraphs 7, 8 and 9 of the further counter affidavit of Babatunde Akinola deposed to on the 7th April 2011. Prince Fagbemi while conceding that paragraph 7 of the further counter affidavit was captured on page 176 of the Record for the 14th February 2011 has submitted that paragraphs 8 and 9 were not so captured by the Records. Mr. Akeredolu SAN’s reaction to this is that since the 3rd Respondent was no longer a party, a Notice of discontinuance having been filed by the Appellants, Prince Fagbemi for the 3rd Respondent was not to be heard and the court need not record that since by order 50 Rule 2 his client had seized to be a party. If indeed paragraph 8 is a true account of what happened, it is to my mind relevant enough to have been recorded in the Court’s proceedings of the 14th February 2011. The same is true with respect to paragraph 9 of the further counter affidavit. I shall now proceed to deal with the counter affidavit of Humphrey Wegbuom Orlu, Director (Litigation) of the Federal High Court, Ibadan deposed to on the 6th April 2011. It is styled “Counter Affidavit to Affidavit of 2nd Respondent challenging Record of proceedings of Federal High

Court Ibadan on 14th February 2011 which has now been forwarded to the honourable Court by the Appellants”.

Paragraphs 2 and 3 in the four paragraph Counter affidavit are germane to this discourse. Paragraph 2 reads as follows,

B *“That I am not in a position to deny nor agree with the depositions in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25 and 26”.*

C It must stated at this juncture that the affidavit in support of the 2nd Respondent’s motion deposed to on the 29th March 2011 does not contain a paragraph 17. In essence with the exception of paragraph 10 of the supporting affidavit to the motion of the 2nd Respondent filed on the 29th March 2011 which paragraph 10 is dealt with in paragraph 3 of the counter affidavit to affidavit of the 2nd Respondent filed on the 6th April 2011. The deponent to that counter affidavit of the 6th April 2006 and Director (Litigation) of the Federal High Court Ibadan Mr. Humphrey Wegbuom Orlu is not in a position to deny nor admit the entirety of the paragraphs of the deposition of the 2nd Respondent/Applicant. ***The bone of contention in paragraph 2 is the expression,***

E *“That I am not in a position to deny nor agree with the deposition in paragraphs...”*

F ***Arguments have already been canvassed on all sides as to whether this expression amounts to an admission of the averments contained in those paragraphs of the supporting affidavit of the 2nd Respondent/Applicant’s motion dated the 28th March 2011 and filed on the 29th March 2011.***

G ***Prince Fagbemi while contending that that expression amounts to an admission, the case of OSENI V. DAWODU (1994) 4 NWLR PART 339 at page 410 relied upon by him would appear to support the contention of Mr. Akeredolu SAN that it relates to pleadings. There is nothing in that authority that suggests that it does not pertain to affidavits as well. The position is however made clearer in HON. GOZIE AGBAKOBA V. INEC (2008) 18 NWLR (PART 1119) page 489 at page 549 where the Supreme Court held that paragraphs of an affidavit not denied are deemed admitted. The purport is clear and it is that except there is a specific and outright denial of facts contained in an affidavit they are deemed to be admitted.***

The expression “not in a position to admit or deny” would thus appear to amount to an admission whether it is used in pleadings or in affidavits. See also OSITA NWOSU V. IMO STATE ENVIRONMENT SANITATION AUTHORITY (1990) 2 NWLR PART 135 page 688 at 735 paras. A-B; LONG JOHN V. BLANK (1998) 6 NWLR (PART 555) page 524 at Page 532; GEORGE V. DOMINION FLOUR MILLS LTD. (1963) 1 ANLR 7; BARCLAYS BANK DCO V. HASSAN (1961) ANLR 836. Paragraph 3 of the counter affidavit of Humphrey Wegbuom Orlu Director (Litigation) Federal High Court Ibadan reads as follows:

“That with regard to paragraph 10 thereof, on the 31st day of March 2011 Honourable Justice J. E. Shakarho before whom this matter is pending in the Federal High Court Ibadan informed me in Chambers and I verily believe him as follows -

That on the 14th day of February 2011 I recorded only what was relevant in the matter and not everything that all Counsel said in court.”

Paragraph 10 of the supporting affidavit of the 2nd Respondent’s application that the learned trial Judge was reacting to through Mr. Wegbuom Orlu is as follows,

“That going through the record of the Court below particularly the record of proceedings of 14th February 2011 recorded by the Presiding Justice, Honourable Justice J. E. Shakarho I realised that it does not reflect what actually transpired at the Federal High Court Ibadan on the 14th February 2011.”

The deposition in paragraph 3 of the Counter affidavit of Wegbuom Orlu of the 6th April 2011 is to the effect that emphasis in his Lordship’s recording of the proceedings of the 14th February 2011 may have been based on what was considered relevant and not necessarily complete. Mr. Akeredolu SAN has himself alluded to the fact that not everything that transpired in Court on the 14th February 2011 would have been recorded. It is this lacuna - a distinction between what is considered relevant and which can be quite subjective and what is in essence complete that has given rise to Exhibits B and C. The purport of paragraph 3 of the counter affidavit of the 6th April 2011 is, “I recorded what was relevant and not what all that counsel said” while Exhibits B and C are at

least an attempt at recording all what transpired in court on the 14th February 2011. The Appellants will be taken as having admitted all that the 2nd Respondent said in their supporting affidavit of the 29th March 2011.

I think this is an application that ought to be granted being meritorious. The Applicants are challenging the completeness of the Record. What they are contending is that certain things which should have been recorded in the Court's Record of the 14th February 2011 were not so recorded and this is one case where a strict adherence to the provisions of order 8 Rules 6 and 7 of the Court of Appeal Rules 2007 would not serve the ends of justice. What is sought to be amended is simply the inclusion of Exhibits B & C to the record of the 14th February 2011 as additional or supplementary record and the application is hereby accordingly granted as prayed. Leave is hereby granted to the 2nd Respondent/Applicant to use the documents marked Exhibits B and C as forming part of the proceedings of the Federal High Court Ibadan on 14th February 2011 in Suit No. FHC/IB/2/2011.

It is further ordered that Exhibits B and C be and are hereby deemed as forming part of the bundle of documents of the Federal High Court Ibadan of the 14th February 2011 in Suit No. FHC/IB/2/2011 to be used as the Record of Appeal.

F _____

BAGE JCA

I had the privilege of reading in draft the lead ruling of my learned brother S. S. ALAGOA J.C.A. I agree entirely with the reasoning contained therein. The amendment sought for inclusion of Exhibits B & C to the record of the 14th February, 2011 as additional or supplementary record is also allowed by me. I also abide by the further consequential order contained in the lead ruling.

H _____

IKYEGH JCA

I am in agreement with the Ruling delivered by my learned brother, S. S. Alagoa J.C.A.

For in Akinyede and Others v. Opere and Others (1967) 1 All NLR

302 at 305, Ademola, C.J.N., delivering the judgment of the Supreme Court held that:

“It is not in doubt that the Court has an inherent power to order the record of appeal of the trial to be amended so as to comply with facts proved and the decision given - see Thyme v. Thyme (1955) 3 W.L.R. 466 referred to at P.1675 of 1966 White Book.” B

In the Akinyede v. Ofere case (supra) the notes made by junior counsel of what transpired in the trial Court were examined by the Supreme Court for the purpose of ascertaining whether the trial Court omitted to record certain important aspects of what transpired before it. C

In the instant case, the yawning lacuna left in page 176 (under the column for “L. O. Fagbemi) of the record transmitted to this Court by the Registrar of the court below in respect of what Prince Lateef Fagbemi learned S.A.N., was said to have submitted before the court D below and captured by Exhibit B, the hand written notes of his learned junior colleague, satisfies me. The application has merit. I hereby grant it and abide by the consequential orders contained in the thorough Ruling of my learned brother, Alagoa, J.C.A. E

F

G

H