

**SUPREME COURT OF NIGERIA**

11TH MAY, 2012. SC. 67/2004

**CORAM:- A. M. MUKHTAR, F. F. TABAI, S. GALADIMA,  
N. S. NGWUTA, O. O. ARIWOOLA, JJSC**

INTERCONTINENTAL BANK PLC ..... APPELLANT  
AND  
BRIFINA LIMITED ..... RESPONDENT

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PRACTICE & PROCEDURE - Undefended list - Determination - Court must consider notice of intention to defend - And examine if plaintiff has established prima facie claim - In the affidavit (H1)

DAMAGES - Special damages - Proof - Appellant has the burden - To strictly plead the professional fees - As stated in paragraph 20 of supporting affidavit (H2)

COURTS - Jurisdiction - Undefended list - Transfer to general list - Anambra State High Court Rules O. 24 r. 9(5) - At any stage of the proceedings - Court can order the suit to be so transferred (H3)

COURTS - Actions - Undefended list - Transfer to general list - Basis - Where a judge is satisfied that there is triable issue - The suit must be transferred to general list (H4)

APPEALS - Issues - Formulation by court - Correctness of - Appellate court can raise an issue - In order to state the correct position of the law (H5)

***FACTS***

Plaintiff/appellant filed this suit under the undefended list at the High Court of Anambra State, Onitsha claiming: the sum of N168,077,485.40 as debt owed by defendant/respondent, interest on the said amount and N3,500,000.00 being cost of professional fees for hiring a solicitor. Appellant did not strictly prove the cost of professional fees. Respondent on the other hand, filed a Memorandum of Conditional Appearance instead of a Notice of Intention to defend. The court considered the defence stated in the said Memo-

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random of Conditional Appearance to the effect that respondent was under Receivership.

However, no document was attached to the Memorandum in support of being under receivership. Consequently, the court held that there is no issue to be tried in the matter. Judgment was therefore entered in favour of appellant. Dissatisfied, respondent filed appeal at the Court of Appeal, Enugu Division. After a thorough consideration of appellant's claim and the Memorandum of Conditional Appearance, the court held that same raised contentious issue. Thus, the court ordered that the suit be transferred to general cause list to be heard by another judge of the trial High Court. Appellant was aggrieved by this. Hence, appellant appealed to Supreme Court.

### **ISSUE FOR DETERMINATION**

*"1. Was the court below right when it held that the plaintiffs/Respondents/Appellants action was unsuitable to be placed under the undefended list and which unsuitability.*

*a. Rendered the said action incompetent.*

*b. Denied the Defendant/Appellant/Respondent fair hearing.*

**HELD** (Unanimously dismissing the appeal per **GALADIMA JSC**)

*PRACTICE & PROCEDURE - Undefended list - Determination*

**1. This is just not the main hand-hold of the Respondent's case, as it will be shown, anon. The principles applicable in an undefended list proceedings is that the court has a duty to consider the Notice of Intention to defend as well as the affidavit filed in support of the Writ of Summons. Even where there is no Notice of intention to Defend, the court still has to inquire or examine whether the plaintiff has made out his claim in the affidavit accompanying the writ. (p. 1934 E)**

*Special damages - Proof*

**2. I agree with the Learned Counsel for the Respondent that the amount for professional fees stated in paragraph 20 above is speculative and indeterminate. The legal fees sought to be recovered falls within the category of special damages which**

**must always be strictly pleaded and proved. These inconsistencies and inaccurate descriptions characterizing the Appellant's claims have not been explained by the Appellant. The burden to do this lies squarely on the appellant and it has not been satisfactorily discharged.** (p. 1936 A)

*Jurisdiction - Undefended list - Transfer to general list*

**3. I had on the onset expressed the view that the second issue, on the question of memorandum of conditional Appearance, did not really matter in determination of this appeal. However, because the Appellant felt the entire judgment was based on this issue not raised by the parties there is need to state clearly the position of the law regarding the discretionary powers of the trial court in undefended list proceedings. The Court has an important part to play and its jurisdiction in this respect is derived from Order 24 Rule 9(5) of the Anambra State High Court Rules, 1988. It provides as follows:**

***"Nothing herein shall preclude the court from making an order should it so think fit, at any stage of the proceedings for the suit to be transferred to the general list on the ground that the suit is not suitable for placement in the undefended list".*** (p. 1936 C)

*Actions - Undefended list - Transfer to general list - Basis*

**4. In consideration of an action brought under undefended list by the plaintiff, the trial judge is faced with a decision whether to hear the case or transfer it to the General Cause List. He must have to begin with the careful scrutiny of the plaintiff's claim and be satisfied that the action is not contentious and one that should be placed on the undefended list. The defendant is not invited to defend an action before the Court is satisfied that there is a prima facie case calling for a defence. That will tantamount to casting the onus of proof on the defendant. This offends against the fundamental principle of our law that requires the plaintiff to first establish a prima facie case before the defendant can be called upon to defend the case. This is the duty the learned trial judge has failed to perform. The court below did just that, when it held that the Memorandum**

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**of Conditional Appearance raised a triable issue.**  
(p. 1936 F)

*APPEALS - Issues - Formulation by court - Correctness of*  
B **5. The court below did not solely formulate any issue suo motu to the prejudice of the Appellant that led to a miscarriage of justice. When a party in appeal puts up an argument in an issue that requires the re-instatement of the correct position of the law, the appellate court is duty bound to carefully consider the said issue and come up with the correct position of the law.**  
C (p. 1937 B)

### **REPRESENTATION**

Emeka Okoye Esq., for the Appellant  
D Cameroun Eze Esq., for the Respondent

### **CASES REFERRED TO**

Obi v. Commercial Bank Ltd (2001) 2 NWLR (pt. 696) 113  
Olumola v. Islamic Trust of Nig. (1996) 2 NWLR (Pt.430) 253  
E Nwokoro v. Onuma (1990) 3 NWLR (pt.136) 22  
Ugo v. Obiekwe (1989) 1 NWLR (pt. 99) 566  
Alade v. Aborishade (1960) 5 FSC 165  
Owoade v. Omitola (1988) 19 NSCC (pt. 1) 802  
F Nkwo Market v. Obi (2010) 9 SCM 58  
Suberu v. State (2010) 5 SCM 215  
Yesufu v. Adama (2010) 3 SCM 224  
Kayode Vent. Ltd v. Ministry of FCT (2010) 7 SCM 120

### **STATUTES & RULES REFERRED TO**

Evidence Act, s. 138  
Anambra State High Court (Civil Procedure) Rules 1988, O. 5 r. 14,  
O. 24 r. 9(5)

### **LEAD JUDGEMENT BY GALADIMA JSC**

The Appellant as plaintiff filed a suit under the undefended list at the High Court of Justice Onitsha, Anambra State of Nigeria claiming the following reliefs:

*“a. The sum of N168, 077, 485. 40 (One Hundred and Sixty*

*Eight Million Seventy Seven Thousand, Four Hundred and Eighty-Five Naira, Forty Kobo) being outstanding sum/balance owed the Plaintiff by the Defendant as at 25th April, 2000.*

*b. 28% interest on the sum of N168, 077, 485. 40 (One Hundred and Sixty Eight Million Seventy Seven Thousand Four Hundred and Eighty-Five Naira, Forty kobo) from 6th May, 2000 till judgment is delivered in this Suit and thereafter sum is liquidated.* <sup>B</sup>

*c. The sum of N3, 500, 000. 00 (Three Million Five Hundred Thousand Naira) comprising professional fees for hiring a Solicitor and also legal expenses for prosecuting this matter”.* <sup>C</sup>

The Respondent, herein, as the Defendant at the trial Court filed a Memorandum of Conditional Appearance instead of the Notice of Intention to defend. The trial High Court considered the defence stated in the said Memorandum of Conditional Appearance to the effect that the Respondent was under Receivership and that a document attesting to the fact was attached to the Memorandum of Conditional Appearance. In actual fact, no such document was attached and for that reason the court found that no triable issue was raised in the defence and entered judgment for the Appellant. Being dissatisfied with the judgment, the Respondent appealed to the Court of Appeal Enugu Division, which allowed the Appeal in favour of the Respondent herein. Dissatisfied with the judgment of the Court of Appeal the Appellant has now appealed to this Court. <sup>E</sup>

On 9/11/2005, the Appellant brought an application for enlargement of time to file its Brief of Argument and to deem same as validly filed and served on the Respondent. The application was granted. On 28/11/2007 similar application was made by the Respondent for extension of time to file its brief and to deem same as properly filed and served on the Appellant. It was granted and the Respondents' brief of argument was deemed as properly filed and served on the Appellant. <sup>F</sup>

The Briefs of argument of the respective parties having been filed and exchanged, the appeal was heard on 2/2/20/2. On that day Emeka Okoye Esq, the learned counsel for the Appellant having duly identified his brief urged this court to allow the appeal. The learned Counsel for the Respondent, Cameroun Eze Esq, identified his brief and urged the court to dismiss the appeal and to affirm the decision of the court below. <sup>H</sup>

The two issues raised for determination of this appeal by the Appellant are as follows:-

"1. *Was the court below right when it held that the plaintiffs/ Respondents/Appellants action was unsuitable to be placed under the undefended list and which unsuitability.*

- B       a. *Rendered the said action incompetent.*  
          b. *Denied the Defendant/Appellant/Respondent fair hearing.*  
          2. *Does an allegation in the memorandum of conditional Ap-  
pearance that a company is under Receivership without more raise a  
C       triable issue as to warrant a matter brought under undefended list to  
be transferred to the General cause list."*

The two issues identified by the Respondent for determination of the appeal are as follows:

- D       "1. *Was the Court of Appeal right in ordering the action to be  
transferred to the General Cause List for determination before an-  
other judge in the same judicial Division?*  
          2. *Whether the Court of Appeal was right that the plaintiff did  
not discharge the burden of proof of the Trial Court".*

E       Arguing the first issue, the Learned Counsel for the Appellant,  
noted that from the sole issue that arose for determination at the  
court below was the propriety of the trial judge entering judgment in  
the undefended list without placing the matter in the General Cause  
List in view of the fact that, though it was a memorandum of Appear-  
F       ance that was filed but it proffered a defence that the Defendant was  
under a Receivership. It is contended that the major plank upon  
which the court below premised the reversal of the judgment of trial  
court was that the Appellant's claim was not suitable to be placed  
under the undefended list. It is submitted that the court below misdi-  
G       rected itself and went into the scrutiny of the Appellant's claim and  
came up with the conclusion that owing to the inconsistency in the  
claim of the Appellant the judgment ought not to have been en-  
tered. That the court below was of the view that the Appellants' claim  
was not a liquidated money demand but one that requires further  
H       explanation or proof. It is contended that the court below had im-  
ported into the Respondent's case an issue which it did not raise.  
Learned Counsel has argued that the only contention that was be-  
fore the court below was whether the trial court was right to have  
refused to transfer the matter to the General cause list in the face of

the defence allegedly proffered in the memorandum of conditional Appearance that the Appellant was under receivership. That the argument of the Respondent that even though the memorandum of conditional appearance was an appropriate step, to be taken in the proceedings, yet the trial court ought to have given it consideration, cannot hold. It is submitted that the court below, veered away from the sole issue and rested its decision on an issue that was not raised on the ground of appeal, and was not argued in the brief and by so doing, it had formulated suo motu or raised single-handedly for the parties and decided on those issues without hearing the parties, on such issues so formulated; and this it cannot do on the authorities of OLUMOLA v. ISLAMIC TRUST OF NIGERIA (1996) 2 NWLR (Pt.430) 253 at 266; NWOKORO v. ONUMA (1990) 3 NWLR (pt.136) 22 and UGO v. OBIKWE (1989) 1 NWLR (pt.99) 566. B C

It is further submitted that the allusion by the court below to the fact that the judgment entered by the Court was of a mind-boggling sum of N171,577,485.40 on the undefended list, has deeply influenced the court below to undertake the scrutiny of the Appellants' claim at the trial court. In other words, if the Appellant's claim was for a meagre sum, the court below may not have bothered to undertake the task of scrutinizing the Appellant's claim. It is submitted that the court below had expressed unnecessary sentiments on this point; I must say that for the Learned Counsel to attack the revered jurists as having sentimentalized on this issue is to show lack of respect and decorum in advocacy. They may have expressed an opinion based on the fact presented before them. Expression of unwarranted sentiments belongs to the realm of weak and bias minds and these vices do not attenuate the attributes of my learned respected brothers (two of whom are now late, and of blessed memory). D E F G

Be that as it may, the learned counsel for the Respondent has viewed this issue from a different viewpoint. He has submitted that the nature of the claim before the trial court cannot be said to be liquidated sum of money and one suitable to be placed under undefended list. It is submitted that the Appellant's case is inherently contradictory resulting in its not discharging the burden of proof requiring him to show that the Respondent has no defence. The instances of these contradictions were cited in paragraphs 13, 14, 17, 19 and 20 of the Affidavit evidence of the Appellant. H

It is submitted that the issue formulated by the Appellant centred only on the role of the Respondent and that the court below rightly held that based on the role of the said Respondent as shown in its averments and in the documents filed, it raised a triable issue, which is enough to transfer the case to the General Cause List. It is  
 B contended that in considering the issue formulated by the Appellant, the court below has a duty to relate those issues to the relevant laws and rules and it cannot be said to have raised issue suo motu. It is submitted that where a party raises an issue for consideration which  
 C amounts to a misconception this will not amount to raising new issues, if the appellate court reinstates the correct position of the law.

The Appellant's first issue for determination is similar to the Respondent's first issue stated above. However, my observation is that the second issue formulated by the Appellant is not quite helpful  
 D in the determination of the appeal, in the circumstances of this matter. Assuming that the issue of Receivership stated in paragraph 1 of the Memorandum of Conditional Appearance does not disclose a defence, this does not automatically qualify the suit to be so transferred to the undefended list without more.

***This is just not the main hand-hold of the Respondent's case, as it will be shown, anon. The principles applicable in an undefended list proceedings is that the court has a duty to consider the Notice of Intention to defend as well as the affidavit filed in support of the Writ of Summons. Even where there  
 F is no Notice of intention to Defend, the court still has to inquire or examine whether the plaintiff has made out his claim in the affidavit accompanying the writ}*** - OBI v. COMMERCIAL BANK LTD. (2001) 2 NWLR (pt.696) 113.

Several factors have clearly disqualified the Appellant's claims as uncontested and thereby making them not satisfying the requirements of type of action that should come under undefended list. I agree with the court below that the Appellant's case is inherently contradictory, as it has not been able to discharge the burden of  
 H proof that the Respondent has no defence. Instances abound. Firstly, in the facts contained in paragraphs 13 and 14 of the Appellant's affidavit. Where it was averred as follows:

*"13. The next letter the plaintiff wrote to the defendant on the subject matter of this suit is dated 16th December, 1998 and is hereby*



*annexed and marked Exhibit "E".*

*14. That as contained in Exhibit "E" the indebtedness of the Defendant to the plaintiff as of that date was N105,789,739.60 (one hundred and five million, seven hundred and thirty-eight thousand (sic), seven hundred and thirty-nine naira)."*

It is observed that the balance of N105,783,731.00 as at 16/12/1998 is not contained in the statement of Account Exhibit "G" at pp.25 and 25 of the Record.

Secondly, paragraph 17 of the Appellant's Affidavit averred as follows:

*"17. That as at the 25th April, 2000 the total outstanding balance owed the plaintiff by the defendant is N168,077,485.40 (One hundred and sixty eight million, seventy seven thousand, four hundred and eight five naira, forty kobo)."*

The above figure is in contrast with the statement of account at pp. 25 and 26 (Exhibit "G"). At page 26 the balance of account shown therein as at 25/4/2000 is N167,233,412.97 (One hundred and sixty-seven million, two hundred and thirty-three thousand, four hundred and twelve naira, ninety seven kobo).

Thirdly, the actual balance of the Respondent's account on 25th April, 2000 (Exhibit "G") also contradicts paragraph 18 of the Appellant's claims, which is stated as follows:

*"18. As at the 25th day of April, 2000 the total outstanding balance owed the plaintiff by the defendant regarding the said loan and interest due thereon stands at N168,077,485.40 (One hundred and sixty-eight million, seventy-seven thousand, four hundred and eighty five naira, forty kobo). The actual balance shown in Exhibit "G" as overdrawn balance is N176,624,503.76 DR"* (one hundred and seventy-six million, six hundred and twenty four thousand five hundred and three naira, seventy-six kobo).

Fourthly, in paragraphs 19 and 20 of the Appellant's Affidavit's it is averred as follows:-

*"19. That it was the agreement of both parties that the defendant shall bear any legal expenses incurred by the plaintiff in the course of recovery of the loan and interest accruing thereto, should the defendant fail to pay the said loan at when due.*

*20. That it will cost the plaintiff the sum of N3.5 million to prosecute this matter, comprising professional fees to the plaintiff's*

*solicitor and other legal expenses”.*

**I agree with the Learned Counsel for the Respondent that the amount for professional fees stated in paragraph 20 above is speculative and indeterminate. The legal fees sought to be recovered falls within the category of special damages which must always be strictly pleaded and proved. These inconsistencies and inaccurate descriptions characterizing the Appellant’s claims have not been explained by the Appellant. The burden to do this lies squarely on the appellant and it has not been satisfactorily discharged.**

**I had on the onset expressed the view that the second issue, on the question of memorandum of conditional Appearance, did not really matter in determination of this appeal. However, because the Appellant felt the entire judgment was based on this issue not raised by the parties there is need to state clearly the position of the law regarding the discretionary powers of the trial court in undefended list proceedings. The Court has an important part to play and its jurisdiction in this respect is derived from Order 24 Rule 9(5) of the Anambra State High Court Rules, 1988. It provides as follows:**

***“Nothing herein shall preclude the court from making an order should it so think fit, at any stage of the proceedings for the suit to be transferred to the general list on the ground that the suit is not suitable for placement in the undefended list”.***

**In consideration of an action brought under undefended list by the plaintiff, the trial judge is faced with a decision whether to hear the case or transfer it to the General Cause List. He must have to begin with the careful scrutiny of the plaintiff’s claim and be satisfied that the action is not contentious and one that should be placed on the undefended list. The defendant is not invited to defend an action before the Court is satisfied that there is a prima facie case calling for a defence. That will tantamount to casting the onus of proof on the defendant. This offends against the fundamental principle of our law that requires the plaintiff to first establish a prima facie case before the defendant can be called upon to defend the case. See S.138 of the Evidence Act, and ALADE v.**

ABORISHADE (1960) 5 FSC 165 OWOADE v. OMITOLA (1988) 19 NSCC (pt.1) 802 at 808. **This is the duty the learned trial judge has failed to perform. The court below did just that, when it held that the Memorandum of Conditional Appearance raised a triable issue.**

***The court below did not solely formulate any issue suo motu to the prejudice of the Appellant that led to a miscarriage of justice. When a party in appeal puts up an argument in an issue that requires the re-instatement of the correct position of the law, the appellate court is duty bound to carefully consider the said issue and come up with the correct position of the law.***

The Appellant in paragraph 0.3 line 8 of his brief of argument stated that

*“The court below veered away from this sole issue and rested its decision on an issue that was not raised in the ground of appeal and was not also argued on the brief”.*

The above assertion of the Appellant cannot be correct and it is a misconception of the extract in the judgment of the court below at page 75-76 which is as follows:-

*“Fused together the issues formulated by both parties the summary of the amalgam is whether it was proper for the learned trial judge to have entered judgment for the Respondent on the undefended list where the defendant filed no notice of intention to defend the action but filed instead a Memorandum of conditional Appearance. In other words the focus was noncompliance with sub-rule 9(2) of order 24 in total disregard of rule 14 of order 5 which is the genesis of the problems endemic to actions on all the judicial units where the model of that rule operates”.*

The Appellant herein raises an issue for consideration which is clearly a misconception of the law. It will therefore not amount to raising new issues when the court below reinstated the correct position of law. Accordingly the court stated, inter alia:

*“In such a situation it is a scintillating fallacy to confine the duty of the Judge to simple inquiry about whether the defendant has a defence to the plaintiff’s action which does not arise until after the scrutiny of the plaintiff’s case with a view to determining whether, in law, it is an action that ought, in the first place, to be placed in the*

*undefended list. Thus unlike under other rules of court where the decision to place a matter on the undefended list is primary and clearly separated from the inquiry into whether the defendant has a defence to the action that is determined at the hearing, under the Anambra State High court Rules, 1988 the decision on both question is fused”.*

B It has been shown that there were substantial contradictions in the case of the Appellant. The nature of its claim involving compound interest, claim for legal fees and evidence of recovering of facility. This is not the kind of claim in an action that can be brought by the Appellant on the undefended list proceeding. These lapses are obvious facts the learned trial Judge failed to consider and the court below has rightly held so. In sum, there is totally no merit in the appeal. It is dismissed. The decision of the court below, which has painstakingly analysed the facts and the law in this matter very satisfactorily, is hereby affirmed. I award costs in the sum of N50,000.00 in favour of the Respondent.

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### **MUKHTAR JSC**

E By way of a claim under the undefended list, the appellant claimed against the respondent as follows:-

“(a) *The sum of N168,077,485.40 (One hundred and sixty eight million, seventy seven thousand four hundred and eighty five naira forty kobo) being outstanding sum/balance owed the plaintiff by the defendant, as at 25th April 2000.*

F (b) *28% interest on the sum of N168,077,485.40 (One hundred and sixty eight million, seventy seven thousand four hundred and eighty five naira forty kobo) from 6th of May 2000 till judgment is delivered in this suit, and thereafter 5% judgment interest until the total sum is liquidated.*

G (c) *The sum of N3,500,000.00 (three million five hundred thousand naira) comprising professional fees for hiring a solicitor and also for legal expenses for prosecuting this matter.”*

H An affidavit in support was sworn to by one Ibe Elekwa, and certain documents were annexed to the affidavit. A further affidavit was also filed. Rather than file a notice of intention to defend, the defendant filed a memorandum of conditional appearance. The conditions upon which the defendant filed the memorandum are:-

*"1. That Brifina Ltd is now under Receivership. A copy of the deed is annexed as Exh. A.*

*2. That the Managing Director of Brifina Ltd. who has custody of all documents relevant to this matter has travelled out of (sic) country for medical treatment.*

*3. That until the defendant can lay hands on these documents its defence to the action is handicapped."*

The learned trial judge saw no defence in the above and entered judgment for the plaintiff as sought. The defendant was not happy with the judgment, and appealed to the Court of Appeal. The Court of Appeal after considering the submissions of the learned counsel for the parties allowed the appeal thus:- *"Therefore, the appeal is bound to succeed and I allow it. I set aside the judgment of Obidigwe, J, delivered at the Onitsha Judicial Division of the Anambra State High Court on 22/11/2000. In its place it is ordered that the action be and is hereby transferred to the General Cause List to be heard by another Judge of that Judicial Division."*

The plaintiff has now appealed to this court on four grounds of appeal. Briefs of argument were exchanged by the parties, and they were adopted at the hearing of the appeal. Two issues for determination have been raised in each of the parties brief of argument. The appellant's issues are:-

1. Was the court below right when it held that the Plaintiff/ Respondents/Appellant's action was unsuitable to be placed under the undefended list and which unsuitability?

a. Rendered the said action incompetent.

b. Denied the Defendant/Appellant/Respondent fair hearing.

2. Does an allegation in the memorandum of conditional Appearance that a company is under Receivership without more raise a triable issue as to warrant a matter brought under the undefended list to be transferred to the General cause list?

It is instructive to note that when a party files a suit under the undefended list and supports it with supporting affidavits disclosing the facts of its case, the defendant is required by law to file a notice of intention to defend, together with a supporting affidavit to also disclose his defence. In the case at hand the defendant who is the appellant in this court instead of filing the said notice of intention to make his defence known, filed a different document which albeit, did not

categorically state his intended defence. These facts, which have already been reproduced above are more excuses than defence, and the learned trial judge was right when he posited thus in his judgment:-

B *“It is my view that none of the above is a defence to the plaintiff’s action. If the Managing Director is away, where is the receiver. The company is not dead. It is very much alive.”*

C But then that did not mean that judgment should be entered automatically in favour of the plaintiff as per the claim. It is incumbent on the learned judge to carefully peruse the claim and all other documents before him, for where there is inconsistency or discrepancy in the documents then the claim becomes uncertain and the learned trial judge will consider transferring the suit to the general cause list. It is on record that the plaintiff claimed N168,077,485.40 D as balance owed the plaintiff as at 25th April 2000, which was supported by paragraph 17 of the supporting affidavit, but then in the plaintiff’s further affidavit the figure claimed changed as deposed in paragraph 7 as follows:-

E *“7. That as at the said 25th June 2000 the overdrawn balance of the said defendant’s account is N176,624,503.76 (one hundred and seventy six million six hundred and twenty four thousand five hundred and three naira seventy six kobo).”*

F This discrepancy may seem immaterial since at the end of the day the learned trial judge entered judgment in the sum in the claim. Then the documents exhibited do not help matters in respect of the figures in the claim as there are some inconsistencies, even if minor. In this wise, I endorse the judgment of the lower court which reads as follows:-

G *“What must be emphasized from the experience of the case on appeal is that action for recovery of debt involving accounts is tricky for which I consider some guidelines to be instructive. A discrepancy between the amount claimed and the figure that can be ascertained from the supporting evidence, i.e. the verifying affidavit,*  
H *raises a contentious issue that can be resolved only by being tried. Thus where the actual indebtedness of the defendant cannot be ascertained from the evidence available without a resort to other extrinsic accounting source that would operate as a defence which is good enough to justify the transfer of the action to the general cause*

*list to enable it to be tried on the merit regardless of the fact that the defendant did not give Notice of Intention to defend.”*

Indeed, when one considers the issue of receivership raised in the conditional memorandum of appearance, one will really see that a triable issue is manifested therein, and in the circumstances the suit should have been transferred to the general cause list by virtue of Order 24 Rule 9 (5) of the High Court of Anambra State (Civil Procedure Rules, 1988) which states the following:-

*“(5) Nothing herein shall preclude the court from making an order, should it so think fit, at any stage of the proceedings for the suit to be transferred to the general list on the ground that the suit is not suitable for placement in the undefended list.”*

Having failed to adhere to the above rule the Court of Appeal was not in error when it made the following order:- *“In its place it is ordered that the action be and is hereby transferred to the General Cause List to be heard by another Judge of that Judicial Division.”*

In my view, for the above reasoning and the detailed reasoning in the lead judgment, the appeal lacks merit and substance and should be dismissed. I have had the opportunity of reading the lead judgment delivered by my learned brother Galadima JSC, and I am in complete agreement with him that the appeal deserves to be dismissed. I also dismiss it and affirm the judgment and order of the court below. I abide by the order on costs.

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### **ARIWOOLA JSC**

This appeal is against the decision of the Court of Appeal, Enugu Division delivered on the 20th February, 2002. The Court below had allowed the appeal of the Defendant/Appellant/Respondent and in the process set aside the judgment of the trial court by Obidigwe, J of the Onitsha Judicial Division of Anambra State High Court. The court below also ordered that the action be transferred to the General Cause List to be heard by another Judge of the Onitsha Division.

The Appellant herein as Plaintiff had commenced an action at the trial court against the Respondent as Defendant under the Undefended List Procedure. The transactions between the parties began with a banking facility for Eighty Million (N80 million) Naira granted to the Respondent by the appellant for over a period of 90 days with

interest payable on the facility. The Respondent defaulted and the debt was restructured.

The Appellant, as prescribed by Order 5 Rule 14 of the Anambra State High Court Rules, 1988, filed an application to cause a Writ of Summons to be issued under the Undefended List Procedure, against the Respondent. It had claimed in paragraph 21 as follows:

“(a) *The sum of N168,077,485 (one hundred and sixty eight million seventy seven thousand four hundred and eighty five Naira, forty kobo) being outstanding sum/balance owed the plaintiff by the defendant as at 25th April, 2000.*

“(b) *28% on the sum of N168,077,485.40 (one hundred and sixty eight million, seventy seven thousand four hundred and eighty five Naira forty kobo) from 5th of May 2000 till Judgment is delivered in this suit and thereafter 5% judgment interest until the total sum is liquidated.*

“(c) *The sum of N3, 500, 000. 00 (three million five hundred thousand Naira) comprising professional fees for hiring a solicitor and also for legal expenses for prosecuting this matter.”*

In support of the claim was an affidavit of 23 paragraphs to which various documents were attached and marked as Exhibits including the “*Writ of Summons for suits in Undefended List*”. Also attached in support was a further affidavit of 11 paragraphs to which another document was annexed as Exhibit G. Upon being served with the Writ of Summons and the Appellant’s verifying affidavit and attached documents, the Respondent, on 31/5/2000 filed a Memorandum of conditional Appearance.

Order 5 Rule 14 (supra) pursuant to which the Appellant as plaintiff caused the writ of summons to issue provides as follows: Order 5 rule 14:

“*Whenever application is made for the issue of a writ of summons in respect of a claim to recover a debt or liquidated money demand and such application is supported by an affidavit setting forth the grounds upon which the claim is based and stating that in the deponent’s belief there is no defence thereto, the Registrar shall enter the suit in what shall be called the undefended List.*”

However, the rule of the High court (supra) requires that if the party served with the writ of summons and affidavit delivers to the



Registrar, not less than five days before the date fixed for hearing a notice in writing that he intends to defend the suit, together with an affidavit setting out the grounds of his defence, and the court is satisfied that there is a triable issue, then and in such case the suit shall be entered in the general list and pleadings shall be filed. (See Order 24 Rule 9(2) of the Anambra State High Court Rules, 1988. In the instant case, instead of filing a Notice of Intention to defend with an affidavit disclosing defence, if any, what the Respondent filed was a Memorandum of Conditional Appearance, on the following grounds:

(a) That Brifina Limited is now under Receivership. A copy of the Deed is annexed, as Exhibit A.

(b) That the Managing Director of Brifina Limited who has custody of all the documents relevant to this matter has travelled out of the country for medical treatment.

(c) That until the Defendant can lay hands on these documents its defence to the action is handicapped.

There is no doubt, the above grounds cannot satisfy the requirement of Order 24 Rule 9(2) (supra) as Notice of Intention to defend and showing by affidavit evidence the defence proposed. The trial court was therefore right to opine as follows:

*"It is my view that none of the above is a defence to the Plaintiff's action. If the Managing Director is away, where is the Receiver. The company is not dead. It is very much alive. I agree with the Plaintiff's counsel that the defendant has no defence to this suit."*

Accordingly, the trial court entered judgment in favour of the plaintiff against the defendant as claimed together with 28% interest per annum on the same amount. Dissatisfied with trial court's decision above, led to the appeal to the court below on two Grounds contained in the Notice of Appeal filed on 24/01/2001. Briefs of argument were filed and exchanged. Issues formulated were argued by both parties and judgment of the court below was reserved. In its judgment, the court below found the appeal meritorious and allowed same, setting aside the judgment of the trial court, per Obidigwe, J. The success recorded at the court below by the Respondent fed to this appeal by the Appellant filed on 3/5/2012 with four grounds of appeal. Briefs of argument were filed and exchanged by parties. The Appellant distilled the following issues for determination:

1. Was the court below right when it held that the Plaintiff/

Respondent/Appellant's action was unsuitable to be placed under the undefended list and which unsuitability:

- (a) Rendered the said action incompetent.
- (b) Denied the Defendant/Appellant/Respondent fair hearing.

B 2. Does an allegation in the Memorandum of conditional Appearance that a company is under Receivership without more raise a triable issue as to warrant a matter brought under the undefended list to be transferred to the General cause List.

C From the grounds of appeal filed by the appellant, the Respondent distilled the following issues for determination:

- (a) Was the Court of Appeal right in ordering the action to be transferred to the General Cause List for determination before another Judge in the same Judicial Division.
- (b) Whether the Court of Appeal was right that the plaintiff did not discharge the burden of proof at the Trial court.

It is note-worthy that in proffering argument for the issues formulated for determination, the Appellant contended that the major plank upon which the court below premised the reversal of the Judgment of the court of first instance was that, the Plaintiff/Respondent/Appellant's claim was not suitable to be placed under the Undefended List. And that the court below came up with the conclusion that owing to the inconsistency in the claim presented by the Plaintiff/Appellant to the Court of first instance, that judgment ought not to have been entered. In other words, that the court below was of the view that the plaintiff's claim at the trial court was not a liquidated money demand but one that requires further explanation or proof. It should be noted that even though it is the plaintiff or a creditor seeking recovering of some money owed, that decides that a defendant or debtor has no defence to his claim, hence praying for judgment as he claims, the court owes it a duty to scrutinize the claims and the verifying affidavit with the attached documents, if any, to ensure that claim is indeed suitable to be heard under Undefended List procedure. Other, it should be transferred to the general cause list.

H In the instant case, even though the Respondent did not file a Notice of Intention to defend the action with an affidavit disclosing defence, a good look at the facts in support of the Appellant's claim was enough for the trial court to have ordered differently. In other words, if the trial Judge has carefully examined the plaintiffs claim

and documents, the case would not have been taken as an undefended suit, but transferred to the General cause List and ordered pleadings. In paragraph 17 of the affidavit in support of the Appellant's writ of summons the Plaintiff/Appellant's claim as earlier stated was for N168,077,485.40 as at the 25th April, 2000 and that was said to be the total outstanding balance owed the plaintiff by the defendant. But in paragraph 7 of the further affidavit of the Plaintiff/Appellant in support of the same application under the Undeferred List, the plaintiff stated thus:

*"7. That as the said (sic) 25th June, 2000 the overdrawn balance of the said defendant's account is N176,624,503.16 (one hundred and seventy six million, six hundred and twenty four thousand five hundred and three Naira seventy six kobo)"*

The indication by the Respondent in its Memorandum of Conditional Appearance that the debtor company was already in Receivership and the discrepancy in the amount outstanding balance in the Respondent's account as indebtedness are enough pointers for the trial court to have noted that there would be need to call evidence in order to get to the justice of the case. In other words, the Plaintiff would need to file and exchange pleadings to support its claim. In short, I am of the view that the court below was right to have held that the trial court was wrong to have heard the matter under Undeferred List Procedure instead of transferring it to the general cause list. In the circumstance, for the above reason and the fuller reasons in the lead judgment of my learned brother, Galadima, JSC which I had the opportunity to read in draft and agree entirely with the reasoning and conclusion, I too hold that the appeal lacks merit and substance. Accordingly, it is hereby dismissed. I abide by the consequential orders in the lead judgment including order on costs.

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### **NGWUTA JSC**

I read in draft the lead judgment delivered by Mr. Lord, Galadima, JSC and I entirely agree with the reasoning and conclusion therein contained. In matters sought to be pleaded in the undefended list the Court considers only the affidavit evidence and where there is a conflict between the claim and affidavit in the application to place it in the undefended list, that conflict is enough to deny the

application to place it on the undefended list. See *Nkwo Market v. Obi* (2010) 9 SCM 58. As amply demonstrated in the lead judgment, conflicts abound between the claim and the affidavit evidence on one hand. There is also internal conflict in the affidavit evidence relating to the sum claimed and sought to be placed in the undefended list. A party must be consistent in his claim and will not be allowed to approbate and reprobate over the issue. See *Suberu v. State* (2010) 5 SCM 215. In civil cases, the burden of proof rests on the party who asserts. The burden will shift to the defendant once the plaintiff discharges his burden. See *Yesufu v. Adama* (2010) 3 SCM 224. The appellants failed to show that his case is suitable for determination in the undefended list procedure and ipso facto no burden shifted on the respondent.

Paragraph 19 and 20 of the Appellant's affidavit in the trial Court constitute a sad commentary on the appellant's case. They are hereunder reproduced:

*"19. That it was the agreement of both parties that the defendant shall bear any legal expenses incurred by the plaintiff in the course of recovery of the 10 million and interest accruing thereto, should the defendant fail to pay the said 10 million at when due.*

*20. That it will cost the plaintiff the sum of N3.5 million to present this matter, comprising professional fees to the plaintiff's solicitor and other legal expenses."*

The role of the Court is to interpret and enforce the terms of contract between parties. See *Kayode Vent. Ltd. v. Ministry of FCT & Ors* (2010) 7 SCM 120. The Court cannot enforce or interpret terms that are speculative and not certain. The claim for N3.5 million for *"Professional fees... and other legal expenses"* casts the appellant in the role of a gold digger rather than a claim in the undefended list. Furthermore, the interest claimed must be proved before it can be granted. See *Nkwo Market v. Obi* (supra).

For the above and the more comprehensive reasoning in the lead judgment, I have no difficulty in dismissing the appeal as devoid of merit. I abide by the consequential orders including order for costs.