

**SUPREME COURT OF NIGERIA**  
6TH JULY, 2012. SC. 12/2008  
**CORAM:- F. F. TABAI, I. T. MUHAMMAD, J. A. FABIYI,**  
**O. O. ADEKEYE, O. ARIWOOLA, JJSC**

BFI GROUP CORPORATION ..... APPELLANT  
AND  
BUREAU OF PUBLIC ENTERPRISES ..... RESPONDENT

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EVIDENCE - Evaluation - Appeals - Trial court ascribes probative value to evidence - Appellate court does not lightly interfere - Save where inter alia evidence has nothing to do with demeanour of witnesses (H1)

EVIDENCE - Conflicts - Resolution - Where there is conflict in evidence of witnesses - Documentary evidence will serve as a hanger - On which truth shall be resolved (H2)

DOCUMENTS - Bond - Definition - Bond is evidence of debt -On which issuing company promises to pay the bond holder - Specified amount of interest for specified length of time - And to repay the loan on expiration date (H3)

CONTRACTS - Terms - Binding nature - Court must treat as sacrosanct - Terms of agreement freely entered into by parties (H4)

CONTRACTS - Consideration - Definition - Consideration is impelling influence - Which induces a contracting party - To enter into contract (H5)

ESTOPPEL - Estoppel by conduct - Contract - Party who by conduct induces another to enter into legal relationship with him - Will not be permitted to act inconsistently with same (H6)

***FACTS***

Defendant/respondent advertised for expression of interest by interested bidders for the privatization of the Aluminum Smelter Company of Nigeria (ALSCON). Plaintiff/appellant completed the Request

for Proposals (RFP) i.e. Exhibit D1 issued by the National Council on Privatization (NCP). Therein, it is confirmed that a bidder will be selected on the basis of evaluation and selection procedure approved by the NCP and contained in the RFP. By the last provision of Exhibit D1, appellant was made to subscribe to a memorandum of Acceptance. Thereafter, a pre-bid conference was organized wherein a number of agreements were duly reached by both parties. Appellant's bid of US \$410 million was declared as the preferred bidder.

However, respondent wrote Exhibit 6 demanding that appellant must pay 10% of the bid price within 15 days of receipt of Exhibit 6. Appellant did not comply with the latest demand of respondent. Hence, respondent terminated the contract. Consequently, appellant filed this action at the Federal High Court, Abuja claiming inter alia, that the acceptance of its bid by respondent constituted a binding contract. At the end of the hearing, the court held that there was no binding contract between the parties and thus dismissed the claims of appellant. Appellant appealed to the Court of Appeal, Abuja. The court also confirmed the judgment of trial court and held that what the parties did was at best an invitation to treat. Being dissatisfied, appellant filed appeal at Supreme Court.

### **ISSUES FOR DETERMINATION**

1. Having regard to the clear unequivocal and manifest intentions and agreements of the parties as embodied in Exhibit D1 and confirmed by Exhibits 3 and 5 read together with Exhibit 4, whether or not there is a binding contract between the parties capable of being enforced by an order of specific performance.

2. Whether the lower court properly considered and evaluated the evidence before it in reaching its conclusion.

**HELD** (Unanimously allowing the appeal per **FABIYI JSC**)

*EVIDENCE - Evaluation*

**1. An appellate court should not ordinarily substitute its own views of fact for those of the trial court. Ascription of probative value to the evidence of witnesses is pre-eminently the business of the trial court which saw and heard the witnesses.**

**An appeal court will not lightly interfere with same unless for compelling reasons. But where evidence has nothing to do with the demeanour of witnesses or relates to interpretation to be placed on documents tendered before the court, an appellate court will be in a good position to act accordingly. An appellate court will not interfere with findings of fact except where wrongly applied to the circumstance of the case or vital documents tendered were jettisoned or conclusion arrived at was patently perverse or wrong. (p. 2565 H)**

*EVIDENCE - Conflicts - Resolution*

**2. And where there is conflict in the evidence of witnesses, documentary evidence will serve as a hanger on which the truth shall be resolved. Documents tendered as exhibits are very vital as they do not embark on falsehood like some mortal beings. (p. 2566 D)**

*DOCUMENTS - Bond - Definition*

**3. There is no doubt about it that Exhibit 4 qualifies as a demand bond. A bond has been defined as a certificate or evidence of debt on which the issuing company promises to pay the bond holders a specified amount of interest for a specified length of time and to repay the loan on the expiration date. (p. 2568 B)**

*CONTRACTS - Terms - Binding nature*

**4. It must be reiterated here that the court must treat as sacrosanct the terms of an agreement freely entered into by the parties. This is because parties to a contract enjoy their freedom to contract on their own terms so long as same is lawful. The terms of a contract between parties are clothed with some degree of sanctity and if any question should arise with regard to the contract, the terms in any document which constitute the contract are invariably the guide to its interpretation when parties enter into a contract, they are bound by the terms of the contract as set out by them. It is not the business of the court to rewrite a contract for the parties. In this matter, the parties expressly agreed that the bid bond is US \$1 Million. It**

***was not within the province of the court below to query same as such would amount to dictating the terms of the contract to the parties.*** (pp. 2568 F/2569 C)

*CONTRACTS - Consideration - Definition*

- 5. Consideration has been defined as the inducement to contract; the cause, motive, price or impelling influence which induces a contracting party to enter into a contract; the reason or material cause for a contract. Some right, interest or profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.*** (p. 2569 A)

*Estoppel by conduct - Contract*

- 6. In view of the circumstances of this case, what transpired between the parties equates with a contract. The appellant's bid at the auction sale was the preferred bid. It was accepted by the respondent which had been furnished with a bid bond of \$1 Million as agreed. There was a validity period of 180 days placed on the bid bond - Exhibit 4. The respondent must be made to keep to its words and honour. The position of the law still remains the same. It is that where by words or conduct, a party to a transaction freely makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them and the former acts upon it by altering his position to his detriment, the party making the promise of assurance will not be permitted to act inconsistently with it.*** (p. 2569 H)

**NOTABLE POINTS OF INTEREST**

**FABIYI JSC**

***1. Specific performance – Meaning***

- H*** What then is specific performance? It is the rendering as nearly as practicable of a promised performance through a judgment or decrees; a court ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate as when the sale of real estate or a rare article is

involved. In essence the remedy of specific performance enforces the execution of a contract according to its terms. (p. 2574 C)

### **ADEKEYE JSC**

#### ***2. Offer & Invitation to treat – Distinction***

An offer must also be distinguished from an invitation to treat. Invitation to treat is the first step in negotiations between the parties to a contract. It may or may not lead to a definite offer being made by one of the parties to the negotiation. An invitation to treat is not an offer that can be accepted to lead to an agreement or contract. (p. 2575 G)

### **REPRESENTATION**

Chief Wole Olanipekun, SAN; P. I. N. Ikwueto, SAN with V. O. M. Alonge (Mrs.); O. Adeyemi; O. Olanipekun; U. Kelechi; N.O. Lasaki; C.I. Mbeari; G.O. Oguugua), for the Appellants  
J.N. Egwuonwu, with D.H. Bwala and U.M. Jawur, for the Respondents

### **CASES REFERRED TO**

Ebba v. Ogoto (1974) 1 SCNLR 372  
Balogun v. Agboola (1974) 1 All NLR (pt. 2) 66  
Ogbechie v. Onochie (1998) 1 NWLR (pt. 470) 370  
Nwosu v. Board of Customs & Excise (1988) 5 NWLR (pt. 93) 225  
Nneji v. Chukwu (1996) 10 NWLR (pt. 378) 265  
Olujinle v. Adeagbo (1988) 2 NWLR (pt. 75) 238  
Alakija v. Abdulai (1998) 6 NWLR (pt. 552) 1  
Ogbu v. Wokoma (2005) 14 NWLR (pt. 944) 118  
Anatogu v. Iweke II (1995) 8 NWLR (pt. 415) 547  
A.I.D.C. v. Nigeria L.M.G. Ltd (2004) 4 NWLR (pt. 653) 494  
F.G.N v. Zebra Energy Ltd. (2002) 18 NWLR (pt. 789) 162  
Bello v. Attorney-General Oyo State (1986) 5 NWLR (pt. 45) 828  
Niger construction Ltd. v. Okugbeni (1987) 4 NWLR (pt. 67) 738

### **BOOKS REFERRED TO**

Black's Law Dictionary 6<sup>th</sup> Ed p. 179  
Halsbury's Law of England vol. 12 4<sup>th</sup> Ed pp. 556-557

**LEAD JUDGMENT BY FABIYI JSC**

This is an appeal against the judgment of the Court of Appeal, Abuja Division ("the court below" for short) delivered on 5th April, 2007 wherein it dismissed the appeal of appellant herein and affirmed the decision of the trial Federal High Court ("the trial court" for short) which found that there was no valid or enforceable contract between the parties herein capable of being enforced by the court.

At the trial court, the appellant, as plaintiff thereat, claimed against the defendant, the respondent herein, the following declaratory reliefs: -

(a) *An order of declaration that the acceptance of the plaintiffs bid price of the sum of US \$410 million for the acquisition of 77.5% shares as core investor in ALSCON by the defendant at the bid/auction sale of ALSCON sale held on 14/6/2004 constituted a binding contract between the parties.*

(b) *A declaration that the bid by the plaintiff for the purchase of ALSCON 77.5% share holding of the Federal Government of Nigeria under the supervision and control of the defendant by which the plaintiff emerged winner on the 14th June, 2004 is valid, extant and irrevocable.*

(c) *An order of declaration that the understandings and Agreements reached at the Technical Bids Conference held on 20/5/2004 constituted the terms and conditions for the bid and the payment for the acquisition of 77.5% shares on ALSCON by a strategic core Investor under the Federal Government of Nigeria Privatization programme.*

(d) *A declaration that the terms of payment for the 10% initial bid price is as stated in paragraph F of the confirmation of understandings and Agreements made by the defendant and the plaintiff on 20th May, 2004 which state inter alia that the bid price is to be paid within 15 working days of signing the share purchase Agreement (SPA) while the outstanding 90% Bid price is to be paid within 90 calendar days.*

(e) *A declaration that the purported letter of the defendant dated 9th July, 2004 titled "Application for Extension of time" and alleging default of paying the 10% of the Bid price was a ruse meant to cover the defendant's illegality as no application for extension of*

time was made on 8th July, 2004 when the plaintiff was ready and willing to sign the SPA in the defendant's office and no default was made by the plaintiff in the payment of the said 10% of the bid price.

(f) A declaration that the postponement of the signing ceremony of the Share Purchase Agreement (SPA) from 8th July, 2004 to 9th July, 2004 by the defendant was a stratagem designed by the defendant to prevent the plaintiff from taking benefits of the contract willingly entered into by both parties and for which the plaintiff had altered its position to its detriments at the instance of the defendant.

(g) A declaration that the letter written by the defendant to the plaintiff unilaterally terminating the said contract is illegal, void and unconstitutional to say the least.

(h) A declaration that the defendant had deliberately made the plaintiff alter its position to the latter's disadvantage by making the plaintiff commit huge financial resources which include among others the sum of US \$ 3million and another US \$ 1 million bond made in favour of the defendant as well as, loss of goodwill, attraction of Business Partners, affiliate, investors, submission of expression of interest statement, legal evaluation of information memorandum, bidding documents, pre-due diligence technical conference, 3 weeks on sight data room due diligence review at Ikot Abasi, Joint Technical Question and Answer Conference, submission and evaluation of financial bid and international and local media coverage of the final opening bid to mention just a few financial and material resources injected into the bidding exercise at the instance of the defendant.

(i) An order of this Honourable court granting a decree of specific performance mandating the defendant to provide the share purchase agreement for execution by the parties to enable the plaintiff pay the agreed 10% of the accepted bid price of US \$ 410 million (i.e. the sum of US \$ 41 million) within 15 working days from the date of the execution of the share Purchase Agreement accordance with the agreement dated 20/5/2004.

(j) A declaration that the defendant is bound to accept payment of 10% of the Bid Price from the plaintiff within 15 days from the date of signing the share purchase (SPA) by the parties."

The plaintiff at the trial court also sought for an order of perpetual injunction as follows:-

"(k) An order of perpetual injunction restraining the defen-

*dant, its servants, agents, privies, management or howsoever called from inviting any further bidding for the sale and acquisition of ALSCON in violation of the contract between the plaintiff and defendant and or from negotiating to sale, (sic) selling, transferring or otherwise handing over the Aluminum Smelter Company of Nigeria Limited*  
B *(ALSCON) to any person or persons in violation of the contract between the plaintiff and the defendant”*

It is of moment to state it here that upon the exchange of pleadings at the trial court, parties adduced evidence and learned  
C counsel to the parties thereafter addressed the court. In his judgment, the learned trial judge dismissed the plaintiffs claim.

The plaintiff felt aggrieved and appealed to the court below which heard the appeal and dismissed it on 5th April, 2007. The court below in dismissing the appeal reasoned as follows:-

“... have no hesitation saying that the position pushed up by the appellant does not fit into the various processes, negotiations and even in the normal course of agreements, contracts or in short normal business practice. One cannot explain how a contract document  
E signifying the conclusion of the entire transaction with the rights and obligations well embedded can be signed and the purchaser have the luxury of 15 days within which to pay 10 per cent of the contract price with the balance three months or 90 calendar days later. There-  
F fore the further posturing by the appellant that the bid bond of one million US Dollar (\$1 million) sufficed to place the respondent on the spot and have them cornered into full obligation of handing over the property in issue cannot be justified ever from the evidence of the appellant at the court below.

Clearly the appellant and the respondent had not gone too far  
G from an invitation to treat which is stated to be a mere declaration of willingness to enter into negotiations where the wording of a statement is not conclusive, it may be an invitation to treat although it contains the word ‘offer’. Similarly, a statement maybe all offer al-  
H though it is expressed as an acceptance, see *Orient Bank (Nig.) Plc v. Bilante International Ltd. (1997) 8 NWLR (Pt.515) 37.*”

This is a further and final appeal to this court. At this point, it is apt to state the facts which are relevant in the determination of the appeal. The respondent advertised for expression of interest by in-



interested bidders for the privatization of the Aluminum Smelter Company of Nigeria (ALSCON). The appellant completed the request for proposals (RFP) issued by the National Council on Privatization (NCP). The said RFP completed by the appellant was tendered in evidence at the trial court as Exhibit D1. Therein, it is confirmed that a bidder will be selected on the basis of evaluation and selection procedure approval by the NCP and contained in the RFP. It should be noted that clause 4, 8 of RFP which relates to validity of offer is of moment. It provides that:-

*“Bid proposals must remain valid 60 days after the submission date. All proposals submitted by the bidders are required to be binding offers, acceptable by BPE to form binding contract between the parties during the validity period.”*

Clause 4.9 (iv) of RFP which relates to rights of NCP inter alia, is also very crucial. It provides as follows:-

*“The National council on privatization (NCP), at its sole and absolute discretion reserves the right with respect to all submission by Bidders on the acquisition of the company including bid not limited to the following:-*

*(iv) Entering into contract in accordance with the final draft Agreement whose terms and conditions are mutually agreeable to NCP and the Bidders.”*

By the last provision of Exhibit D1, the appellant was made to subscribe to a memorandum of Acceptance by which it attested to and sealed the terms of the contract by its seal duly signed by one of its directors and secretary. In tune with Exhibit D1, a pre-bid conference was held on 20th May, 2004. At the conference, a number of undertakings and agreements were reached in furtherance of the sale of ALSCON. At the end of the pre-bid conference, the undertaking and agreements were set down by the respondent and addressed to the appellant. Same is Exhibit 3. The appellant affirmed and returned a duplicate copy of the undertakings and agreements to the respondent in Exhibit 5. Paragraphs (e), (f) and (k) of Exhibit 5 are very relevant as they contain crucial and fundamental terms. They read as follows:-

*“(e) The Bid Bond;*

*Whereas the Bureau shall make available to the bidders a standard text for the bid bond, the bidders shall ensure that the bid bond*

*is issued by an international bank with a correspondent bank in Nigeria. Furthermore, the bid bond shall be notarized, and must be unconditional. The validity period shall be 180 day as earlier stated in the Request for proposal (RFP)."*

*"(f) Bid Price Payment Schedule;*

- B *The Standard rule of bid price payment shall prevail. That is, 10% of the bid price to be paid within 15 working days of signing the share purchase agreement. The outstanding 90% bid price to be paid within 90 calendar the share Purchase days."*

*"(k) Affirmation;*

- C *While the Bureau appreciates your commitment and understanding in the privatization of ALSCON, we hereby request each bidder for affirm, on the duplicate copy of this letter, that the above reflect the understanding and agreement that were reached at the*  
D *technical bid conference of May, 2004."*

In compliance with the dictate of Exhibit 5, the appellant caused a bid bond in the form prescribed by the respondent to be issued to secure the offer accepted by the respondent when the appellant was declared the preferred bidder on 14th June, 2004. The said bid bond  
E provided by Assurance Bank Nigeria Limited was admitted as Exhibit 4 at the trial court. It provides, inter alia, as follows:-

*"WE ASSURANCE BANK NIGERIA LIMITED, having our registered office at plot 664 Adeyemo Akakija Street, Victoria Island, Lagos (hereinafter called "The Bank") is bound unto the BUREAU OF PUBLIC ENTERPRISES (hereinafter referred to as 'BPE') on behalf of the Bidder, a maximum sum of US \$1,000,000:00 (One Million US Dollars only) which payment well and truly shall be made to the said BPE on the following conditions:-*  
F

- G *1. If the Bidder withdraws its bid during the period of bid validity specified by the bid form, or*

*2. If the Bidder, having been notified of the acceptance of its bid by BPE during the period of the bid validity:-*

- (a) Fails or refuses to execute the shares sales/Purchase Agree-*  
H *ment, as and when required, or*

*(b) Fails or refuses to pay the negotiated bid price in accordance with the terms of sale, we the bank undertakes to pay BPE the full amount of the Bid security Bond upon receipt of the written demand, without BPE having to substantiate its demand, provided that*

*in its demand BPE having to substantiate its demand, provided that its demand BPE will note that the amount claimed by it is due to it owing to the occurrence of one or both of two conditions specifying the occurred condition or conditions and in respect of which we bind ourselves, successors and assigns by these presents.”*

At the financial bid opening held on 14th June, 2004, the appellant's bid of US \$410 Million was declared the preferred bid. The second bidder, Rusal submitted a conditional bid in the sum of us \$205 Million. Its bid was disqualified. Further to the acceptance of appellant's bid by the respondent, the respondent, by its letter dated 17th June, 2006 - Exhibit 6 confirmed same. In this letter, the appellant maintained that a unilateral condition was inserted as follows:-

*“While we wish to congratulate you on this achievement, we wish to remind you that your consortium must pay 10% of the bid price within 15 working days of receipt of this letter.”*

The appellant felt that same was contrary to the provision of clause (f) of Exhibit 5 which states that by the standard rule of bid price payment, 10% of bid price shall be paid within 15 working days of signing the share purchase agreement. Both DW1 and DW2, under cross examination in respect of the mode of payment stated thus:-

*“The meeting of 20th May was to guide the transaction as a whole”* (DW1).

*“Yes, it is true that the understanding that 10% of the bid price be paid within 15 working days of the signing of the share purchase agreement. No SPA was signed as at the time we said plaintiff defaulted.”* (DW2).

The appellant made efforts to fully consummate the sale by having the share purchase Agreement signed with the visit of its officials to the office of the respondent on 8th July, 2008 to no avail. Acceptance of appellant's bid was done on 14 June, 2004. The validity period of appellant's bid is 60 days as per clause 4.8 of Exhibit D. This is in addition to the fact that bid bond was given to last for a period of six months (180 days). As at 8th July, 2004 when contract was unilaterally extinguished by the respondent, the share Purchase Agreement had not been signed by the parties for the purpose of computing time for the payment of the 10% initial bid price. The appellant's transaction with the respondent was still in place and subsisting until 14th August, 2004. The respondent felt that the inability

of the appellant to pay 10% initial bid price within 15 days of the receipt of their letter - Exhibit 6 made it to terminate the contract. Both the trial court and the lower court concluded that there was no binding contract between the parties capable of legal enforcement. The trial court, as confirmed by the court below, declared that the parties had not gone too far from an invitation to treat or a mere declaration to enter into negotiations. The appellant has, with full force, appealed to this court. On 23rd April, 2012, this appeal was heard. Learned senior counsel/counsel adopted and relied on comprehensive briefs of argument filed on behalf of their clients. Thereafter, oral submissions were canvassed by both sides of the divide.

On behalf of the appellant, two issues were formulated for determination of the appeal. They read as follows:-

*(i) Having regard to the clear unequivocal and manifest intentions and agreements of the parties as embodied in Exhibit D1 and confirmed by Exhibits 3 and 5 read together with Exhibit 4, whether or not there is a binding contract between the parties capable of being enforced by an order of specific performance.*

*(ii) Whether the lower court properly considered and evaluated the evidence before it in reaching its conclusion."*

On behalf of the respondent, a lone issue was couched for the determination of the appeal. The issue reads as follows:-

*"Whether on a proper evaluation of both oral and documentary evidence adduced before the trial court, the lower court was right in affirming the finding of fact by trial court that there was no contract between the parties that is capable of being enforced by an order of specific performance."*

The two issues formulated on behalf of the appellant should be considered together. They are subsumed in the issue distilled for determination by the respondent. Senior counsel for the appellant submitted that the decision of a court in a contractual dispute must be based on the documents forming such contract. It is to be noted right away that it is the duty of a court to take into cognizance the comprehensive and unequivocal wordings of the series of agreements between the parties. This point is rooted on the principle that where there is a dispute between parties to a written agreement as in this case the only authoritative and legal source of the information for the purpose of resolving same is the written document executed by the

parties. See *Larmie v. D.P.M.S. Ltd.* (2005) 18 NWLR (pt. 958) 438 at 459. Senior counsel for the appellant further opined that in this case, a determination as to whether or not there was a binding contract capable of being enforced by an order of specific performance cannot be effectively determined by the court without recourse to Exhibits D1, 3, 4, and 5 which create rights and obligations on the parties and thereby become binding on them without more. He emphasized that clause 4.8 of Exhibit D1 expressly states that acceptance of appellant's bid by the respondent creates a binding/enforceable contract while Exhibits 3 and 5 which were made after the technical bid conference lifted the entire transaction above an ordinary contract with the insertion of the affirmation clause which carries with it the character of an oath. B C

After reading though the judgments of the two courts below, I could not see where the vital Exhibits to wit: Exhibits D1, 3, 4 and 5 were carefully scrutinized to see whether in fact a binding contract exists between the parties. Outside oral evidence, the lower court had an abiding duty to scrutinize all the series of documents and bonds to determination whether there exists a contract between the parties. See: *Shell BP Petroleum Co. Ltd. v. Jammal Engineering* (1974) 4 SC 33 at 72 cited by senior counsel to the appellant wherein this court per Coker, JSC pronounced as follows:- E

*"The final exercise of judgment of necessity involves a consideration of all the correspondence that is properly put in evidence by both sides - all the correspondence tendered in order to establish the case and all that produced in order to disprove the existence of a contract. It is only after such detailed consideration that a Tribunal can fairly come to a conclusion as to whether or not the parties actually arrived at an agreement. See: Thomas Hussey v. Hornen Rayne (1879) 4 app. Case 311."* F G

*The task of analyzing the several letters and attempts to reconcile the one with the other is un-doubtfully a very difficult one calling for the most serious examination of each and every one of several documents until the Tribunal is able to say whether a contract is indeed established..."* H

At this point, I need to touch briefly on appraisal of evidence by lower courts. **An appellate court should not ordinarily substitute its own views of fact for those of the trial court. See**

***Ebba v. Ogodo (1974) 1 SCNLR 372; Balogun v. Agboola (1974) 1 All NLR (pt. 2) 66. Ascription of probative value to the evidence of witnesses is pre-eminently the business of the trial court which saw and heard the witnesses. An appeal court will not lightly interfere with same unless for compelling reasons. But where evidence has nothing to do with the demeanour of witnesses or relates to interpretation to be placed on documents tendered before the court, an appellate court will be in a good position to act accordingly.*** See: *Ebba v. Ogodo* (supra); *Ogbechie Onochie* (1998) 1 NWLR (Pt.470) 370.

***An appellate court will not interfere with findings of fact except where wrongly applied to the circumstance of the case or vital documents tendered were jettisoned or conclusion arrived at was patently perverse or wrong.*** See: *Nwosu v. Board of Customs & Excise* (1988) 5 NWLR (Pt. 93) 225; *Nneji v. Chukwu* (1996) 10 NWLR (pt. 378) 265.

***And where there is conflict in the evidence of witnesses, documentary evidence will serve as a hanger on which the truth shall be resolved. Documents tendered as exhibits are very vital as they do not embark on falsehood like some mortal beings.*** See: *Olujinle v. Adeagbo* (1988) 2 NWLR (Pt.75) 238.

Senior counsel for the appellant observed that the lower court merely treated the entire obligations which parties reduced into writing as amounting to nothing but an invitation to treat devoid of any legal efficacy. He submitted that where as in this case, there is a confirmation of the finding of the trial court by the court below, an invitation to this court to upset such can only be justified when such findings are perverse or do not relate to any evidence on record or substantial error is manifest in the proceedings/decision or the findings cannot be supported having regard to the evidence before the court. He cited the cases of *Alakija v. Abdulai* (1998) 6 NWLR (Pt.552) 1; *Ogbu v. Wokoma* (2005) 14 NWLR (Pt.944) 118 at 140. Senior counsel submitted that the concurrent findings of the two lower courts appear caught up by the elements listed above and such would warrant an intervention by this court by virtue of section 22 of the Supreme Court Act. On the salient points advanced on behalf of the appellant there was no serious answer given on behalf of the respondent which seemed to bank on the non-signing of the prospective agreement in

Exhibit 2.

I now have to consider the purport and intendment of the vital exhibits which were tendered at the trial court. The vital exhibits which were jettisoned are Exhibits D1, 3, 4 and 5. Exhibit D1 initiated the transaction between the parties. Clause 4.8 of same provides as follows:-

*“Bid proposals must remain valid 60 days after the submission date. All proposals submitted by the Bidders are required to be binding offers acceptable by BPE to form a binding contract between the parties during the validity period.”*

This exhibit D1 was the form issued by the respondent to every bidder. Upon return of same by the appellant, it became an offer which the respondent accepted on 14th June, 2004. Same creates a contract between the parties during the validity period. The respondent, after the pre-bid conference held between the parties on 20th May, 2004 issued Exhibits 3 and 5 which contain understandings and agreements reached by the parties to the appellant. The respondent directed the appellant to affirm terms contained in the stated exhibits. The appellant obeyed by endorsing an affirmation clause which reads as follows:

*“We hereby affirm that this reflects the agreements and understanding reached at the technical bid conference of May, 2004.”*

It needs no gainsaying that after the affirmation as mandated by the respondent, the contents of Exhibit 3 and 5 become binding on the issuing party - the respondent and the appellant which subscribed to the affirmation which may subject the appellant who made it to penalties of perjury should there be a default on its part. The affirmation made, lifted the status of the transaction over and above a mere contractual agreement; it appears to me. Same involves duty, obligations and responsibility. There is also the possible liability aspect of it of a criminal offence of perjury if it turns out that falsehood occurs in judicial parlance. See: *Anatogu v. Iweke II* (1995) 8 NWLR (Pt 415) 547. Exhibit 4 is also very crucial in the consideration of the whole transaction between the parties. Earlier in this judgment, I set out the contents of Exhibit 4 which is a performance bond or ‘a bid bond’. This court spelt out the effect of same in *A.I.D.C. v. Nigeria L.M.G. Ltd.* (2004) 4 NWLR (pt. 653) 494 at 503 as follows per Ayoola, JSC:-

B *“Performance bonds are bonds made to secure the performance of a principal contract. Such bonds may be classified according to the obligation undertaken by the obligee. In some case, it is, in reality, a conditional guarantee, while in others, it may be what is described as an ‘on demand bond’ or, as it is sometimes called a first downward bond. If the performance bond is an ‘on demand bond’ as argued by the plaintiff, the defendant’s liability would follow merely on a demand for payment made in good faith without a need to prove the validity of the claim.”*

C **There is no doubt about it that Exhibit 4 qualifies as a demand bond. A bond has been defined as a certificate or evidence of debt on which the issuing company promises to pay the bond holders a specified amount of interest for a specified length of time and to repay the loan on the expiration date.**  
D (Black’s Law Dictionary, Sixth Edition page 179). Bond is better defined in volume 12 of the Halsbury’s Law of England, 4th Edition pages 556-557, paragraph 1385 as follows:-

E *“A bond is an instrument under seal, usually a deed poll, whereby one person binds himself to another for the payment of a specified sum of money either immediately or at a fixed future date. The person who so binds himself is called the obligor and the person to whom he is bound is the obligee, and the instrument itself is sometimes called an obligation.”*

F In effect, Exhibit 4, the bid bond, creates an obligation by the appellant in favour of the respondent at its instance. There must, perforce, be a correlating duty to be performed by the appellant in the scenario created by it. **It must be reiterated here that the court must treat as sacrosanct the terms of an agreement freely entered into by the parties. This is because parties to a contract enjoy their freedom to contract on their own terms so long as same is lawful. The terms of a contract between parties are clothed with some degree of sanctity and if any question should arise with regard to the contract, the terms in any**  
H **document which constitute the contract are invariably the guide to its interpretation when parties enter into a contract, they are bound by the terms of the contract as set out by them. It is not the business of the court to rewrite a contract for the parties.** See *Afrotech Services Nig Ltd v. M. A & Sons Ltd* (2002) 15



NWLR (pt. 692) 730 at 788. The court below reasoned that the sum of US \$1 Million bid bond was not sufficient to secure the performance of the obligation on the part of the respondent to perfect the transfer of ALSCON to the appellant.

***Consideration has been defined as the inducement to contract; the cause, motive, price or impelling influence which induces a contracting party to enter into a contract; the reason or material cause for a contract. Some right, interest or profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.*** See: Richman v. Brookhaven servicing Law Dictionary C  
5th Edition page 277).

***In this matter, the parties expressly agreed that the bid bond is US \$1 Million. It was not within the province of the court below to query same as such would amount to dictating the terms of the contract to the parties.*** See: Spasco Vehicle & Hire Co. v. Alraine Nig Ltd. (1995) 8 NWLR (Pt. 416) 665 at 672. Apart from the above, the cold evidence of DW1 at page 349 of the record shows that the bid bond sum was a consensus reached by the parties at the technical bid conference of 20th May, 2004. DW1 testified as follows:- E

*“After the 20/5/04 meeting we reached some agreements which were reduced into writing and signed by the parties... Yes, it was following that agreement that the plaintiff gave us a Bid Bond of \$1 Million. Before the 20/5/04 the Bid Bond was \$5 million. It was at the 20th May meeting that the parties agreed to vary it to \$1 Million.”* F

Senior counsel for the appellant submitted that the lower court was in error in treating the entire transaction as a mere declaration of willingness to enter into negotiations when consideration has passed G and the agreement of the parties have been put down with a validity period of sixty (60) days also provided for the sealing of the transaction. The argument of the senior counsel for the appellant in this respect remained un-counteracted. The argument can well be put on its mettle. ***In view of the circumstances of this case, what transpired between the parties equates with a contract. The appellant’s bid at the auction sale was the preferred bid. It was accepted by the respondent which had been furnished with a bid bond of \$1 Million as agreed. There was a validity period*** H

- of 180 days placed on the bid bond - Exhibit 4. The respondent must be made to keep to its words and honour. The position of the law still remains the same. It is that where by words or conduct, a party to a transaction freely makes to the other an unambiguous promise or assurance which is intended to**
- B **affect the legal relations between them and the former acts upon it by altering his position to his detriment, the party making the promise of assurance will not be permitted to act inconsistently with it.** This is as pronounced in Central London Property Trust Ltd. v. High Trees House Ltd. (1947) K.B. 130. It has remained good law for a long time now. I approve same without any reservation. The respondent in the transaction caused the appellant to alter its position from the beginning of the transaction up to 14th June, 2004 when the appellant was declared the buyer of ALSCON.
- C
- D This is confirmed in the extant evidence of DW1 that the event of 14th June, 2004 the financial bid opening, completed the sale of ALSCON to the appellant. He testified that the respondent confirmed that the appellant had assembled, for the purpose of the purchase of ALSCON, an executive staff in its preparation to take over ALSCON.
- E He also testified that the appellant engaged a technical partner in Daewoo for the purpose of taking over ALSCON. The requirement of a technical partner part of the technical bid conference of 20th May, 2004.

- F It occurs to me that to have treated the entire transaction as a mere declaration of interest that only amounts to an invitation to treat points to the fact that the court below did not take into account the peculiar, complex and segmented nature of the transaction. DW2 maintained that the sale of ALSCON was a very complex transaction.
- G The Trial court found that it was a special process that 'is segmented'. The two lower courts should have treated the contract in its most peculiar form as it is. They should not have put an undue premium and focus on Exhibit 2, the prospective Share Agreement which was subject to signature by terms agreed by the parties at the end. The
- H lower courts, with due diffidence, took a very simplistic view of the whole transaction from the angle of a simple contract without bearing in mind that the sale of ALSCON to the appellant was by way of an auction sale in which each bid is regarded as an offer which if accepted by the auctioneer by the fall of the hammer, creates a bind-

ing and enforceable contract. See: Halsbury's Laws of England, 4th Edition at page 102 paragraph 231. It is clear to me that this is a complex mercantile transaction which is clearly segmented under clause 3.6 of Exhibit D1. Under clause 4.8 of same, parties clearly intended and agreed that acceptance of appellant's bid of US \$410 Million by the respondent created a binding contract between the parties and parties agreed under clause 4.9 that the final and ultimate share purchase agreement in Exhibit 2 would be made out in terms and conditions mutually agreeable to both parties. The intention of the parties must be given legal effect. From the web of commercial transaction in this matter, a pragmatic approach and due appraisal of all documents should take place. In *Omega Bank Nig Plc v. O.B.C. Ltd.* (2005) 8 NWLR (Pt. 928) 547 at 576, this court per Musdapher, JSC (as he then was) pronounced as follows:

*"... I think I need to emphasize and reiterate that although courts may not make contract for the parties where none exists, the courts will seek to uphold bargains made commercially, where possible, recognizing that they often record the most important agreements in crude and summary fashion and will seek to construe any documents fairly and broadly without being too a statue or subtle in finding defects. See: Brown v. Gould (1972) 1 chapter 53; Fillas & Co. Ltd. v. Arcos Ltd. (1932) 147 Lt. 503; (1932) AER 497. After due consideration of all the circumstances and, if satisfied that there was an ascertainable and determinate intention to contract, the courts will strive to give effect to that intention looking at the intent and not mere form."*

Senior counsel for the appellant also pointed it out that where a court is faced with a complex web of commercial transaction as herein, the court is bound to apply the objective theory of contract as espoused by Nnaemeka-Agu, JSC in *Ekwunife v. Wayne (W/A) Ltd.* (1989) 5 NWLR (pt.122) 422 at 442. In pursuing what is described as objective theory of the contract, His Lordship posed the following questions-

- (i) What documents are relevant and admissible for the ascertainment of terms of contract?
- (ii) Can I look beyond these documents to ascertain the nature of the terms?
- (iii) on the true construction of the agreement, was the con-

tract divisible or indivisible?

(iv) on what basis, if at all, is the appellant entitled to payment?

Viewed properly, the contract between the parties herein is clearly divisible. It seems as if the conclusion of the court below was made without due regard to Exhibits D 1, 3, 4 and 5 which clearly establish a contract between the parties. DW1 said Exhibit D1 conferred some rights on the parties for which the appellant was entitled to consent to the final agreement as in Exhibit 2 before it is finally executed by the parties. A divisible contract is separable into parts, so that separate parts of the agreed consideration may be assigned to severable parts of the performance. Such divisible agreements admit of pro rata payments for each portion that was performed, and is independent of performance of other parts of the contract. It is of moment to say it that the reason given for abrogating the contract does not accord with the stipulations in Exhibit 5 the pre-bid conference resolutions which expressly provides that payment of the initial 10% of the purchase price shall be made within 15 working days after the signing of the SPA (Exhibit 2). The respondent had no vires to unilaterally change the mode of payment of 10% of the bid price as unlawfully stated in Exhibit 6. There is nothing unusual in a complex contract for an offer to contain the terms of a prospective contract, See: *F.G.N v. Zebra Energy Ltd.* (2002) 18 NWLR (Pr. 789) 162. The reason given by the respondent for abrogating the contract was most unjustified. The reason is contrary to the agreement of parties contained in Exhibit 5. The insertion of the offensive clause that 10% bid price be paid within 15 days of the receipt of Exhibit 6 came after the financial bid opening held on 14th June, 2004. The unilateral alteration runs against sub paragraph (f) of Exhibit 5 - the sealed and agreed terms of the contract. The unilateral insertion of the offensive clause without mutual agreement of the appellant amounted to a breach of the contract between the parties.

It must be reiterated that an enforceable contract was struck by the parties by acceptance of the appellant's bid on 14th June, 2004. The consideration for same was the bid bond of \$1 Million in favour of the respondent. The appellant was the winner at the bid by the fall of the hammer at the auction sale of 14th June, 2004 and its offer was approved NCP. The only aspect remaining is the putting of hands and seals on mutually agreed version of Exhibit 2 and due

payment of the 10% bid price within 15 days of signing the agreed contract and the balance of bid price within 90 days.

On behalf of the appellant, senior counsel felt that with the facts and circumstances of this matter, the appellant is entitled to the invocation of the maxim *ubi jus ibi remedium*. He opined that this is a principle of justice which is universally admitted. He cited the case of *Bello v. Attorney-General Oyo State* (1986) 5 NWLR (pt.45) 828. Literally *ubi jus ibi remedium* means where there is a right, there is a remedy. It is said that the rule of primitive law was the reverse. Where there is a remedy there is a right. The court is enjoined to provide a remedy where a legal right is established. The court should look into the substance of the action rather than the form. As has been held by this court in *Bello v. Attorney-General Oyo state* (supra), the respondent had a duty to the appellant which was breached by unwarranted abrogation of their contract. The injury suffered by the appellant was not too remote. Same stares both parties in the face and must be redressed by the court. The appellant should not be made to go away empty handed without any remedy.

I now move to the order of specific performance sought by the appellants. In paragraph 5.4 of the respondent's brief at page 40, senior counsel submitted as follows:-

*"Assuming but not conceding that the appeal could succeed, it is our humble but firm submission that the proper order cannot be that of specific performance as ALSCON had already been concession to another company, Rusal of Russia which had long taken possession of ALSCON and now fully operates the said company.*

*That being the case, the appellant could only in the event of success in this appeal, be entitled to damages..."*

It is not clear to me why the above submission of senior counsel to the respondent has come up. There is no evidence on record that Russal of Russia has taken possession of ALSCON and now fully operates it. Such forms part of address which is ordinarily designed to assist the court. It is not evidence and no fine speech in an address can make up for lack of evidence to prove or establish a fact or else disprove and demolish a point in issue. See: *Niger construction Ltd. v. Okugbeni* (1987) 4 NWLR (pt. 67) 738 at page 792. At the onset, I noted it in this judgment that Rusal was the 2nd bidder whose bid in the sum of US\$205 Million with conditionalities was rejected by the

respondent. The appellant's bid in the sum of US\$410 Million was preferred by the respondent. The appellant was declared winner at the auction sale conducted on 14th June, 2004. Indeed, if any one asks me how the name of Rusal has now surfaced on this score, like Sir Thomas Moore, I will say 'it is not for me to attempt to fathom the inscrutable workings of Providence.' The respondent should provide the needed answer. It is being touted that the respondent has taken steps to foist a fait accompli on the court. The respondent must be made to appreciate the purport of the doctrine of *lis pendens* which is aimed at preserving the subject matter of litigation. Any extraneous body including Rusal which buys the subject of litigation does so at its own risks. See: *Vaswani Trading Co. v. Savalakh & Co. (1972) NSCC 692*; *Ogundiani v. Araba (1978) 6-7 SC 55 at 74*.

What then is specific performance? It is the rendering as nearly as practicable of a promised performance through a judgment or decrees; a court ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate as when the sale of real estate or a rare article is involved. In essence the remedy of specific performance enforces the execution of a contract according to its terms. (Black's Law Dictionary, Ninth Edition page 1528).

From the facts and circumstances of this matter, I wish to reiterate the fact that state officials should learn to operate within the rule of law. The world has become a global village and all forms of negative tendencies must be avoided. Senior officials should operate with firmness of purpose. This must be so if we desire to be taken seriously in international trade relations. There is no doubt in my mind that an order of specific performance of the contract between the parties is clearly warranted and same is hereby ordered as prayed. The appeal is meritorious in the extreme. It is hereby allowed. The decisions of the two courts below are hereby set aside. The claims of the appellant at the trial court are hereby granted. The following orders are accordingly decreed.

1. An order of specific performance is hereby decreed mandating the respondent to provide the mutually agreed share purchase agreement for execution by the parties to enable the plaintiff pay the agreed 10% of the accepted bid price of US \$410 Million (i.e. the sum of US \$41 Million) within 15 working days from the

date of the execution of the share purchase Agreement in accordance with the agreement dated 20/5/2004 and 90% balance of bid price shall be paid within 90 calendar days.

2. It is declared that the defendant is bound to accept payment of 10% of the bid price from the appellant within 15 days from the date of signing the share Purchase Agreement (SPA) by the parties. B

3. An order of perpetual injunction is made restraining the defendant, its servants, agent privies, management or howsoever called from inviting any further bidding for the sale and acquisition of ALSCON in violation of the contract between the plaintiff and defendant and or from negotiating to sell, selling, transferring or otherwise handing over the Aluminum smelter company of Nigeria ALSCON to any person or persons in violation of the contract between the plaintiff and the defendant. C

The respondent shall pay N50, 000 costs to the appellant. D

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### **ADEKEYE JSC**

I have read in draft the judgment just delivered by my learned brother, J.A. Fabiyi JSC. My Lord had painstakingly and exhaustively considered the intricate legal issues raised in this appeal. This court cannot close its eagle eyes to the conduct of the parties in the transaction between them. Of vital importance however is that a court of law must always respect the sanctity of the agreement reached by the parties. It must not make a contract for them or re-write the one they have already made. The court however has a duty to construe the surrounding circumstances including written or oral statements so as to discover the intention of the parties. *Owoniboy Technical Services Ltd. v. U.B.N. Ltd.* (2003) 15 NWLR (pt.844) pg.545, *S.E. Co. Ltd. v. N.B.C.I* (2006) 7 NWLR (pt.978) pg.201, *Omega Bank Nig. PLC v. O.B.C. Ltd.* (2005) 8 NWLR (pt.928) pg.547. An offer must also be distinguished from an invitation to treat. Invitation to treat is the first step in negotiations between the parties to a contract. It may or may not lead to a definite offer being made by one of the parties to the negotiation. An invitation to treat is not an offer that can be accepted to lead to an agreement or contract. *Meka B. A. B Manufacturing Co. Ltd. v. A.C.B. Ltd.* (2004) 2 NWLR (pt. 858) pg. 521. E  
F  
G  
H

In the transaction between the parties, consideration must pass from the appellant to the respondent personally provided by the appellant. Consideration under the law of contract is defined as some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. In law, parties to a contract are free to conclude their bargain on whatever terms are deemed to be appropriate. Once the consideration is of some value in the eyes of the law, the courts have jurisdiction to determine whether it is adequate or inadequate. In principle therefore, no consideration is too small or too much or unfair in the absence of fraud, duress or misrepresentation. *African Petroleum Ltd. v. Owodunni* (1991) 1 NWLR (pt.210) pg.391 *Gaji v. Paye* (2003) 8 NWLR (pt.823) pg.583.

It is apparent that Exhibit D1 was agreed as a binding contract between the parties, the breach of which entitles any of the parties to some rights clearly defined in Exhibit D1. Exhibit 6 in the circumstance becomes a universal alteration of the terms of Exhibit D1 - an existing binding contract between them. Both lower courts agreed that the factual situation in the transaction between the parties reveals a right vested in the appellant. The law is that the court must provide a remedy where the plaintiff has established a right. The court is also to look into the substance of an action and not the form. The appellant is entitled to a remedy and justice.

It is trite that a person seeking to enforce his right under a contractual agreement must show that he has fulfilled all the conditions precedent and that he has performed all those terms which ought to have been performed by him. The peculiar circumstance of this case demands that an order of specific performance be granted in favour of the appellant's right constraining the respondent to carry out the agreement which it had entered to with the appellant. Particularly when it was the respondent that took steps to verify the contract. This court must exercise its discretion to grant specific performance as it is the only equitable remedy which can adequately compensate the appellant for the conduct of the respondent. The appellant promptly performed its side of the contract. The appellant has not taken any steps to be adjudged as evidence of abandonment of the contract between the parties.

With fuller reasons given by my learned brother J.A. Fabiyi



JSC in the lead judgment, I agree that the appellant is entitled to the equitable remedy of specific performance in the circumstance of this case and I so order. The appeal is allowed. I abide the consequential orders made including the order on costs.

B

### ARIWOOLA JSC

This appeal is against the judgment of the Abuja Division of the court of Appeal delivered on 5/4/2007. The Appellant was the Plaintiff at the trial court while the Respondent was the defendant. The court below had dismissed the appellant's appeal to it from the trial High court, which had found that there was no valid or enforceable contract between the parties herein, capable of being enforced by the court. Before the trial High court, the plaintiff had claimed as follows:

D

*“(a) An order of declaration that the acceptance of the plaintiff's bid price of the sum of US \$410 million for the acquisition of 77.5% shares as core investor in ALSCON by the defendant at the bid/auction sale of ALSCON sale held on 14/6/2004 constituted a binding contract between the parties.*

E

*(b) A declaration that the bid by the plaintiff for the purchase of ALSCON 77.5% SHARE HOLDING OF THE Federal Government of Nigeria under the supervision and control of the defendant by which the plaintiff emerged winner on the 14th June, 2004 is valid, extant and irrevocable.*

F

*(c) An order of declaration that the understandings and agreements reached at the Technical Bids conference held on 20/5/2004 constituted the terms and conditions for the bid and the payment for the acquisition of 77.5% shares on ALSCON BY A strategic Core Investor under the Federal Government of Nigeria Privatization program me.*

G

*(d) A declaration that the terms of payment for the 10% initial bid price is as stated in paragraph F of the confirmation of understandings and Agreements made by the defendant and the plaintiff on 20th May, 2004 which state inter alia that the bid price is to be paid within 15 working days of signing the share Purchase Agreement (PPA) while the outstanding 90% Bid price is to be paid within 90 calendar days.*

H

(e) A declaration that the purported letter of the defendant dated 9th July, 2004 titled “Application for Extension of time” and alleging default of paying the 10% of the Bid price was a ruse meant to cover the defendant’s illegality as no application for extension of time was made on 8th July, 2004 when the plaintiff was ready and willing to sign the SPA in the defendant’s office and no default was made by the plaintiff in the payment of the said 10% of the bid price.

(f) A declaration that the postponement of the signing ceremony of the Share Purchase Agreement (SPA) from 8th July, 2004 to 9th July, 2004 by the defendant was a stratagem designed by the defendant to prevent the plaintiff from taking benefits of the contract willingly entered into by both parties and for which the plaintiff had altered its position to its detriments at the instance of the defendant.

(g) A declaration that the letter written by the defendant to the plaintiff unilaterally terminating the said contract is illegal, void and unconstitutional to say the least.

(h) A declaration that the defendant had deliberately made the plaintiff alter its position to the latter’s disadvantage by making the plaintiff commit huge financial resources which include among others the sum of US 3million and another US \$1 million bond made in favour of the defendant as well as loss of goodwill, attraction of Business Partners, affiliate, investors, submission of expression of interest statement, legal evaluation of information memorandum, bidding documents, pre-due diligence technical conference, 3 weeks on sight data room due diligence review at Ikot Abasi, Joint Technical question and Answer conference, submission and evaluation of financial and material resources injected into the bidding exercise at the instance of the defendant.

(i) An order of this Honourable Court granting a decree of specific performance mandating the defendant to provide the share purchase agreement for execution by the parties to enable the plaintiff pay the agreed 10% of the accepted bid price of US \$410 million (i.e. the sum of US \$41 million) within 15 working days from the date of the execution of the Share Purchase Agreement in accordance with the agreement dated 20/5/2004.

(j) A declaration that the defendant is bound to accept payment of 10% of the Bid Price from the plaintiff within 15 days from the date of signing the share purchase (SPA) by the parties”

*(k) An order of perpetual injunction restraining the defendant, its servants, agents, privies, management or howsoever called from inviting any further bidding for the sale and acquisition of ALSCON in violation of the contract between the plaintiff and defendant and or from negotiating to sale, (sic) selling, transferring or otherwise handing over the Aluminum smelter company of Nigeria Limited (ALSCON) to any person or persons in violation of the contract between the plaintiff and the defendant”* <sup>B</sup>

The case proceeded to hearing after which the trial court dismissed the plaintiff’s claims. Upon appeal to the court below, the trial court’s decision was affirmed which led to the instant appeal to this court. As can be gathered from the Appellant’s claim stated above, the subject matter of the case was the sale of the Aluminum Smelter Company of Nigeria Limited (ALSCON). In this court, the appellant distilled the following issues for determination of its appeal from its Notice of Appeal dated and filed on 30th May, 2007 containing six (6) Grounds of Appeal. <sup>C</sup>

*“(a) Having regard to the clear unequivocal and manifest intentions and agreements of the parties as embodied in Exhibit D1 and confirmed by Exhibits 3 and 5 read together with Exhibit 4, whether or not there is a binding contract between the parties capable of being enforced by an order of specific performance. (Grounds 1, 2, 3 and 4)* <sup>E</sup>

*(b) Whether the lower court properly considered and evaluated the evidence before it in reaching its conclusion.” (Grounds 5 and 6)* <sup>F</sup>

There is no doubt that the agreement between the parties was predicated on the following Exhibits - D1, 3, 4, 5 and 6.

- Exhibit D1 the request for proposal (RFP) issued by the National Council on Privatization (NCP). <sup>G</sup>

- Exhibit 3 - Contains the understanding and agreements set out by the Respondent addressed to the Appellant.

- Exhibit 4 the bid bond provided by Assurance Bank Nigeria Limited. <sup>H</sup>

- Exhibit 5 The Appellant affirmed and returned a duplicate copy of the understanding and agreements to the Respondent.

- Exhibit 6 is the Respondent’s confirmation letter of Appellant’s offer of US \$410 million bid price.

The bid bond provided in Exhibit 4, inter alia, states as follows:

B *“We Assurance Bank Nigeria Limited, having our registered office at plot 664 Adeyemo Alakija Street, Victoria Island, Lagos (hereinafter called “The bank”) is bound unto the Bureau of Public Enterprises (hereinafter referred to as “BPE”) on behalf of the Bidder, a maximum sum of US \$1,000,000 (one million US Dollars only) which payment will and truly shall be made to the said BPE on the following conditions.:*

C *1. If the Bidder withdraws its bid during the period of bid validity specified by the bid form; or*

*2. If the Bidder, having been notified of the acceptance of its Bid by BPE during the period of the Bid validity:*

D *(a ) Fails or refuses to execute the share sales/Purchase Agreement, as and when required or*

*(b) Fails or refuses to pay the negotiated Bid price in accordance with the terms of sale.*

E *We the Bank undertake to pay BPE the full amount of the Bid Security Bond upon receipt of the written demand, without BPE having to substantiate its demand, provided that in its demand BPE will note that the amount claimed by it is due to it owing to the occurrence of one or both of two conditions, specifying the occurred condition or conditions and in respect of which we bind ourselves, successors and assigns by these presents.”*

F It is note-worthy that from the clear wordings of Exhibit 4 as reproduced above, an enforceable bond was created favour of the Respondent should the final acceptance of Appellants’ bid not carried through by the Appellant. There is no doubt therefore, that the right to indemnity vested in the Respondent cannot exist with out a  
G corresponding obligation. It is equally worthy of note that the Appellant successfully scaled through all the preliminary stages ranging from the negotiation stage to the technical bid phase which Appellant’s technical bid was wholly accepted by the Respondent. At the financial bid opening held on 14th June, 2006, Appellant’s financial bid  
H of US \$410 million was declared the winner/preferred bid. (See pages 291-297 and 330 of the record). It is however interesting to note that the second bidder, RUSAL, submitted only a conditional bid in the sum of US \$205 million with some other conditionalities attached and accordance with Exhibit D1, Rusal’s bid was disqualified. (See

pages 297 and 328 of the record). Further to the acceptance of Appellant's bid by the Respondent, there was a confirmation by the respondent of Appellant's offer of US \$410 million bid price and this was done by the letter dated 17th June, 2006 - Exhibit 6.

It is interesting to note that by the clear provisions of Exhibit D1 at clause 4.8 thereof, the validity period of Appellant's bid duly accepted by Exhibit 6 as a binding contract is 60 days. This is in addition to the fact that the bid bond was given to last a period of six months (180 days). By this, coupled with the fact that the acceptance of Appellant's bid was done on 14th June, 2004, Appellant's bid remained valid and subsisting till the 14th August, 2004. In essence, two factors remained in favour of the Appellant as at the time the Respondent claimed to have revoked the transaction. They are:

- (i) The Share Purchase Agreement had then not been signed by the parties for the purpose of computing time for the payment of the 10% initial bid price;
- (ii) Appellant's transaction with the Respondent was still valid and subsisting until 14th August 2004.

However, against the above facts, the two courts below came to the conclusion that there was no binding and enforceable contract between the parties. As I stated earlier, the agreement between the parties - that is, the Appellant and respondent - was based on certain documents which the court had duly admitted as Exhibits. There therefore no gainsaying that the trial court and even the court below were duty bound to critically scrutinize and examine closely those contractual documents. On this compelling duty of the courts to consider the said documents, this court had opined as follows:-

*"The final exercise of judgment must of necessity involve a consideration of all the correspondence that is properly put in evidence by both sides all correspondence tendered in order to establish the case and all that produced in order to disprove the existence of a contract. It is only after such detailed consideration that a Tribunal can fairly come to a conclusion as to whether or not the parties actually arrived at an agreement. See Thomas Harssey v. Hornen Payne (1829) 4 App. case 311. The task of analyzing the several letters and attempts to reconcile the one with the other is undoubtedly a very difficult one calling for the most serious examination of each and every one of several documents until the Tribunal is able to*

*say whether a contract is indeed established ...*”See; Shell BP Petroleum Co. Ltd. v. Jammal Engineering (1974) 4 SC 33 at 72, (1974) 4 SC (Reprint Edition) 24 at 55 Per Coker, JSC.

B There is no doubt and it is clear from the record, that the important documents upon which the parties in this case based their agreement were not given the required consideration. In particular, Exhibits D1, 3, 4 and 5. For instance, Exhibit 4 is a bid bond duly executed and admitted by the court. This is a type of performance bond and it is “*a bond filed in public construction projects to ensure*”  
C *that the bidding contractor will enter into the contract.*”See Black’s Law Dictionary, Ninth Edition, page 200. In African Insurance Development Corporation v. Nigeria L.G.N. Ltd (2000) 4 NWLR (pt.653) 494 at 503; (2000) 1 NSCQR 258, Per Ayoola, JSC, this court on performance bonds had this to say:

D “*Performance bonds are bonds made to secure the performance of a principal contract. Such bonds may be classified according to the obligation undertaken by the obligee. In some cases it is, in reality, a conditional guarantee, while in others, it may be what is described as an ‘on demand bond’ or, as it is sometimes called a first*  
E *downward bond. If the performance bond is an ‘on demand bond’, as argued by the plaintiff, the defendant’s liability would follow merely on a demand for payment made in good faith without a need to prove the validity of the claim*”

F It is noteworthy that this court has several cases stated that the court is to determine and decide disputes brought before it in accordance with the evidence, both oral and documentary only, in particular, as agreed by the parties. The court is not to draft or make out a different agreement for parties. It will amount to injustice, or mis-  
G carriage of justice, to say the least. In Baker marine (Nig) Ltd v. Chevron (Nig.) Ltd. (2006) 8-9 SCM 103 at...; (2006) 13 NWLR (pt.997) 276 at 287-288, this court, per Ogbuagu, JSC opined thus:

H “*It has been stated and restated in a number of decided authorities that in the interpretation of contracts or documents, the basic principle of law, is that, it is not the duty of any court or Tribunal to make contract for parties. See Fakorede & Ors. v. Attorney General of Western State (1972) 1 All NLR 178 at 189. Contract as a rule are made by the parties thereto who are bound by the terms thereof and the courts are always reluctant to read meaning into a contract terms*

*on which there is no agreement. See; Alhaji Baba v. Nigeria Civil Aviation Training Centre & Anor (1995) 5 NWLR (Pt.192) 388 at 413; (1991) 7 SCNJ 1. In other words, a court or Tribunal cannot write a new contract for the parties.”*

There is, therefore, no doubt and I so hold that the lower court was wrong when it reasoned and concluded that the US \$1 million bid bond was not sufficient to secure the performance of the obligation on the part of the Respondent to perfect the transfer of ALSCON to the Appellant. Since parties expressly agreed that the bid or performance bond in this case shall be US\$1million and the Appellant made it available as evidenced on record, the court was not competent, and nobody was, to question the adequacy of such consideration.

With all other grounds and issues beautifully considered the lead judgment, I am of the firm view that with the acceptance of Appellant's bid and the sufficient consideration provided by the Appellant in Exhibit 4 Bond, a clear enforceable contract was established on 14th June, 2004. In other words, having regard to the terms of the agreement of parties as embodied in Exhibit D1 and confirmed by Exhibits 3 & 5 read together with Exhibit 4, I hold that there is a binding contract between the parties, capable of being enforced by an order of specific performance.

For the above short reason and the detail and fuller reasons beautifully enunciated in the lead judgment of my learned brother, Fabiyi, JSC, I also hold this appeal as meritorious. It deserves to succeed. The industry and diligence applied by the Appellant's senior counsel from whom nothing less was expected are commendable. Accordingly, the appeal is allowed by me. I abide by the consequential order including the order on costs in the leading judgment.