

**SUPREME COURT OF NIGERIA**  
FRIDAY 7<sup>TH</sup> DECEMBER, 2012. SC. 66/2001  
**CORAM:- I. T. MUHAMMAD, M. S. MUNTAKA-  
COOMASSIE, J. A. FABIYI, M. D. MUHAMMAD,  
C. B. OGUNBIYI, JJSC**

LAGOS STATE BULK PURCHASE  
CORPORATION ..... APPELLANT  
AND  
PURIFICATION TECHNIQUES  
(NIG.) LTD ..... RESPONDENT

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**ACTIONS** - Cause of action - Meaning - It refers to entire set of facts that give rise to enforceable claim - Comprising every fact which if traversed - Plaintiff must prove to entitle him to judgment (H1)

**PROPERTY LAW** - Transfer - Meaning in relation to the Edict in issue - It is assignment or conveyance of all assets and liabilities - That may vest in transferee as the transferor had therein (H2)

**PROPERTY LAW** - Successor - Meaning - Successor is one who takes the place that another has left - And sustains the like part or character (H3)

**ACTIONS** - Statutes - Amendment vide s. 1 of the Edict made while litigation is on - Would have no legal effect on that matter - As it would be subjudice (H4)

**ACTIONS** - Cause of action - Applicable law is the law in force at the time cause of action arose - And not the law at the time the jurisdiction of court is invoked (H5)

**PARTIES** - Joinder of party - Purpose - Joinder of party in suit is to make that person - Bound by the result of the suit and question to be settled (H6)

**APPEALS** - Fresh issue - Leave - Where new issue is to be introduced and argued afresh - Party introducing it has duty to apply and obtain

leave to do so from court (H7)

### ***FACTS***

By an agreement made in 1980, a company known as Central Merchant Ltd agreed to supply 20,000 tonnes of steel reinforcement bars to the Lagos State Building Material Co. Ltd (LSBMC). By a private arrangement, Central Merchant Ltd appointed respondent (Purification Techniques Nig. Ltd) as its procuring agent for supply of the said steel to LSBMC. By Lagos State Edict No.17 of 1986, LSBMC ceased to exist. In 1986, the State government enacted Edict No.17 which established appellant as a statutory corporation. Section 23 of the Edict transferred the assets and liabilities of LSBMC to appellant with effect from April 1986. However, by another Edict No.3 of 1987, section 23 of the 1986 Edict was deleted.

Consequently, Central Merchant Ltd and respondent (as plaintiffs) sued appellant in suit no. LD/150/87 in the High Court of Lagos State, claiming the sum of N9,519,074.12 and US\$12,017,526.20 being the amount of financial loss suffered in consequence of breach by defendant of the aforementioned agreement. At the end of hearing, judgment was entered in favour of plaintiffs. Nevertheless, respondent commenced fresh action against appellant by way of originating summons in suit no.M/218/91, claiming inter alia, the above stated sums of money with accruing interest. Appellant opposed the claims on the ground that the action in suit no. LD/150/87 was commenced after assets and liabilities of LSBMC was transferred to it and that it ought to have been joined in the suit. After hearing, the court dismissed the originating summons. Aggrieved, respondent appealed to the Court of Appeal. The court allowed the appeal. Dissatisfied appellant filed appeal in Supreme Court.

### ***ISSUES FOR DETERMINATION***

1. *“Whether the respondent (as plaintiff in the High Court) ought to have joined the appellant or substituted it for the Lagos State Building Materials Corporation Ltd. (LSBMC) (the defendant) in suit No. LD/150/87 commenced on the 29<sup>th</sup> of January, 1987 when LSBMC (the defendant) had ceased to exist and/or its assets and liabilities transferred to the appellant with effect from 30<sup>th</sup> of April, 1986 by virtue of Section 23 of Edict No. 17 of 1986.*

2. *Whether the proceedings and judgment obtained in suit*

*No. LD/150/87 against a non-existing body or wrong defendant is a nullity and therefore unenforceable-against the appellant."*

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

*Cause of action - Meaning*

**1. It is the law from time immemorial that a cause of action refers to the entire set of facts that gives rise to an enforceable claim, comprising every fact which if traversed, the plaintiff must prove to entitle him to judgment.**

**It has been held by this court that when these facts have occurred, a cause of action is said to accrue to the plaintiff because he can then prosecute an action effectively. Thus, the accrual of a cause of action is the event whereby a cause of action becomes complete so that the aggrieved party can begin and maintain his cause of action. Both the trial and the lower courts are agreed (pp. 37 and 73 of the record) that a cause of action does not accrue or due to the plaintiff at the date of judgment but by the time the action is filed in court. I entirely agree. (p. 3841 G)**

*PROPERTY LAW - Transfer - Meaning in relation to the Edict*

**2. The word 'transfer' in law, is wide, having a lot of variables: it can represent the way in which the title to property is conveyed from one person to another. It can be the sale and every other method, direct or indirect, of disposing of or parting with property or with an interest therein, or with the possession thereof, or of fixing a lien upon property or upon interest therein, absolutely of, by or without judicial proceedings, as a conveyance, sale, payment, pledge, mortgage lien, encumbrance, gift, security or otherwise. It can even include the act of giving property by will.**

**In relation to the provision of the Edict on hand, 'transfer' can by no means be anything more than the assignment or conveyance of all those assets and liabilities and or other rights, obligations, acts or things associated thereto, that may vest in**

***the transferee as the transferor had therein. Thus, all the assets, liabilities etc aforementioned have by law been absolutely conveyed and vested in the corporation as it becomes the legal successor to the Building Materials Company.***

(p. 3842 H)

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*PROPERTYLAW - Successor - Meaning*

***3. A successor, in law, generally, is one that succeeds or follows. One who takes the place that another has left, and sustains the like part or character, one who takes the place of another by succession. Where the terms relate to a corporation however, as in the case on hand, it means another corporation which through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes the burdens of the first corporation. This presupposes that all the powers, rights, duties, liabilities and privileges which were enjoyed or exercised, or were due to, or from the Building Materials Company, could equally be fully enjoyed, exercised or taken from its successor, the Lagos State Bulk purchase Corporation. This is in accordance with section 23 of Edict No.17 of 1986.*** (p. 3843 D)

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*Statutes - Amendment vide s. 1 of the Edict*

***4. I am in agreement with the stance taken by the court below. The amendment brought about by section 1 of Edict NO.3 of 1987, can have no legal effect whatsoever on a matter where cause of action accrued on the 29 day of January, 1987, whereas the 1987 Edict came into operation on the 11<sup>th</sup> day of June, 1987. Although the Ruling in suit NO. LD/150/87, by Ayorinde, J. was delivered on the 20<sup>th</sup> day of April, 1989, the amendment to the Edict when the cause of action accrued could have no legal consequence on the provision of section 23 of Edict NO.17 of 1986. This is for the simple reason that, the matter, when the amendment was made, was already in litigation [subjudice]; and secondly, as rightly cited by the learned Solicitor-General and the court below that section 6 of the Interpretation Act is a saving grace.*** (p. 3845 A)

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*Cause of action - Applicable law*

**5. The trite position of the law is that in any proceeding the applicable law is the law in force at the time the cause of action arose and not the law at the time the jurisdiction of the court is invoked.**

**It is the law, as well, that the jurisdiction of a court is determined by the existing law at the time the cause of action in dispute arose and not the existing law at the time the jurisdiction of the Court is invoked.** (p. 3845 G) B

*Joinder of party - Purpose* C

**6. But who in law, is a party whose joinder in the suit is necessary? This Court has in a number of decided cases laid down the test as to whether a person is a necessary party to be joined in a suit. For instance, it has been held in the case of PEENOK INVESTMENTS LIMITED VS. HOTEL PRESIDENTIAL LIMITED [1982] NSCC 477,**

***“The test as to whether there should be joinder of a party in a suit is based on the need to have before the court such parties as would enable it to effectually and completely adjudicate upon and settle all the questions in the suit.”*** E

**Again, in a number of decided cases, it has been stated that the main reason/purpose for joinder of a party/parties in a suit is to make that person[s] bound by the result of the suit and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he/they be made a party or parties.** (p. 3846 G) F

*APPEALS - Fresh issue - Leave* G

**7. The trite position in law is that where a new issue is to be introduced and argued afresh, the party introducing it has the duty to apply and obtain for leave to do so from the court. The appellant in this case has not shown that he has asked for and been granted such leave. The issue is therefore a fresh one for which there is no leave to introduce and argue it. It is incompetent and same is hereby discountenanced and struck out.** (p. 3849 G) H

## NOTABLE POINT OF INTEREST

### **MUHAMMAD JSC**

#### ***1. A Judge should not alter decision of another Judge***

Lastly, quite apart from the overriding duty imposed on the trial court by the foregoing Sections of the 1979 Constitution to enforce the judgment of Ayorinde J. given in Suit No. LD/150/98, the court has also run foul against another settled principle of law. It is trite that no judge is entitled to reverse, vary or alter the decision of another judge of coordinate jurisdiction in the absence of statutory authority except where such decision is arrived at without the necessary jurisdiction. (p. 3857 A)

### **REPRESENTATION**

Mr. Lawal Pedro [SAN] [Solicitor-General, Lagos State], with A. O. Adebayo [Mrs.] [CSC] and J. I. Jacobs Esq., for the Appellant Respondent and counsel absent but served

### **CASES REFERRED TO**

- E Sese v. Sentnell Assurance Co. Ltd. (1988) 3 NWLR (Pt.31) 673  
Intercontractors v. N.P.F.M.B. (1988) 2 NWLR (Pt. 76) 280  
N. B. C. I. v. Alfijir (Mining) Nig. Ltd. (1999) 14 NWLR (Pt. 638) 176  
Laibru Ltd v. Building & Civil Eng. Contractors (1962) 2 SCNLR 118  
F Ajao v. Alao (1986) 5 NWLR (Pt.45) 805  
Management Ent. Ltd. v. Otusanya (1987) 4 SC 387  
Lazard Bros. v. Banque Ind. DE Moscou (1933) AC 289  
Sken Consult Nig. Ltd. V. Ukey (1981) 1 SC 6  
U. A. C. v. Macfoy (1962) AC 152  
G Ogba v. Onwuzo (2005) 14 NWLR (Pt.945) 331  
Letang v. Cooper (1965) 1 QB 222  
Egbe v. Adefarasin (1985) 5 SC 50  
Alese v. Aladetuyi (1995) 7 SCNJ 40  
Savage v. Uwaechia (1972) 1 All NLR (Pt.1) 251  
H Adesokan v. Adegorolu (1997) 3 SCNJ 1

### **STATUTES REFERRED TO**

Lagos State Bulk Purchasing Corporation Edict No. 17 of 1986, ss.

11, 23

Interpretation Act, ss. 6(1), 14(c)

Constitution of Federal Republic of Nigeria 1999, 33(1)

***BOOK REFERRED TO***

Blacks Law Dictionary, 6<sup>th</sup> ed p. 1497

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***LEAD JUDGMENT BY MUHAMMAD JSC***

The facts giving rise to this appeal can be summarized as follows:- By agreement made in 1980, a company known as Central Merchant Limited (as plaintiff at the trial court), agreed to supply 20,000 tonnes of steel reinforcement bars to Lagos State Building Material Company Ltd. (LSBMC) which was wholly owned by Lagos State Government. By a private arrangement, the said Central Merchant Company Ltd. appointed Purification Techniques Nigeria Ltd. (the respondent herein) as its procuring Agent for supply of the said steel to LSBMC. C

By Lagos State Edict No. 17 of 1986, LSBMC ceased to exist, in 1986, the Lagos State Government enacted Edict No. 17 which established the appellant as a statutory Corporation. Section 23 of the said Edict ("The Edict") transferred the assets and liabilities of the LSBMC to the appellant with effect from April, 1986. However, by another Edict No. 3 of 1987, section 23 of the 1986 Edict was deleted. E

On the 29<sup>th</sup> of January, 1987, Central Merchant Ltd. and the respondent as plaintiffs, sued the appellant (as defendant) in the High Court of Lagos State (trial court) in suit No. LD/150/87 for the sum of N9,519,074.12k and US\$12,017,526.20 being the amount of financial loss suffered in consequence of breach by the defendant of the agreement aforementioned. Judgment was entered by the trial court on the 20<sup>th</sup> of April, 1989, in favour of the plaintiffs. F

The respondent, being one of the Plaintiffs/Judgment Creditors in suit No. LD/150/87, commenced a fresh action by way of ORIGINATING SUMMONS in suit No. M/218/91 against the appellant as defendant. The following reliefs were set out in the Originating Summons: G

*"1) A declaration that by virtue of the provisions of section 23 of Edict No. 17 of 1986 of Lagos State, the defendant is indebted to*

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*the plaintiff in the sum of N9,519,074.12 and US\$12,017,526.20 and interest at the rate of 6% per annum from 20<sup>th</sup> April, 1989 till determination herein.*

*2) An Order directing the payment by the defendants to the plaintiffs of the aforesaid suits within seven days of such order.*

B *3) An Order granting the plaintiffs leave to enforce the Judgment obtained in suit No. LD/150/87 against the above named defendant.”*

C The appellant contested the claim on the ground, among others, that the action in suit No. LD/1 50/87 was commenced after the assets and liabilities of Lagos State Building Materials Corporation Ltd was transferred to it and the plaintiff/respondent ought to have joined it in that suit before judgment was delivered. The trial court agreed with the appellant and dismissed the Originating Summons of D the plaintiff/respondent.

E Dissatisfied, the respondent appealed to the Lagos Division, of the Court of Appeal (court below). The court below, in a unanimous decision, allowed the appeal and held, inter alia, that the respondent was entitled to the reliefs sought in the Originating Summons, i.e. that the appellant was liable to settle the judgment debt in suit No. LD/150/87.

The appellant felt aggrieved with the decision of the court below and now appealed to this court.

F Briefs were settled by the parties as required by our Court’s Rules: The appeal was heard on the 17<sup>th</sup> of September, 2012. The respondent and his counsel were not in court. The Registry informed the court that Hearing Notice was sent to the respondent on the 27<sup>th</sup> day of July, 2012.

G Mr. Pedro, SAN (Solicitor General, Lagos State), for the appellant adopted and relied on his brief of argument which was filed on the 6<sup>th</sup> of October, 2005 but deemed duly filed on the 20<sup>th</sup> of September, 2006. He urged this court to allow the appeal and affirm the trial court’s decision.

H It is on record that the respondent filed its brief of argument on the 19<sup>th</sup> of February, 2007 but was deemed duly filed by this court on the 26<sup>th</sup> of September, 2007. The respondent was deemed to have argued his appeal under Order 6(6) of the Court’s Rules (as amended in 2002).

Learned counsel for the appellant formulated the following issues for our consideration:

1. *“Whether the respondent (as plaintiff in the High Court) ought to have joined the appellant or substituted it for the Lagos State Building Materials Corporation Ltd. (LSBMC) (the defendant) in suit No. LD/150/87 commenced on the 29<sup>th</sup> of January, 1987 when LSBMC (the defendant) had ceased to exist and/or its assets and liabilities transferred to the appellant with effect from 30<sup>th</sup> of April, 1986 by virtue of Section 23 of Edict No. 17 of 1986.* B

2. *Whether the proceedings and judgment obtained in suit No. LD/150/87 against a non-existing body or wrong defendant is a nullity and therefore unenforceable against the appellant.”* C

Learned counsel for the respondent adopted in his brief the issues formulated by the appellant.

Learned counsel for the appellant in his issue No. 1 admitted D that:

*“It is not in dispute that on the 30th of April, 1986, Lagos State Building Material Corporation Limited ceased to exist and/or had its assets and liabilities transferred to Lagos State Bulk Purchase Corporation (the appellant) by virtue of Section 23 of Lagos State Bulk Purchase Corporation Edict No. 17 of 1986. The two lower courts also made a finding that as at the time of commencement of the action in suit No. LD/150/87 on the 29<sup>th</sup> of January, 1987 the Defendant in that suit (LSMBC) had ceased to exist. (underlining supplied for emphasis).”* E F

Learned counsel went further to argue that when the plaintiff filed the action as above the defendant had ceased to exist and/or lost its capacity to sue or be sued in respect of its assets and liabilities. The appellant who had by statute taken over the assets and liabilities of the defendant was therefore a necessary party for the determination of the claims in suit No. LD/150/87 and ought to have been joined or substituted for the LSBMC as defendant in the suit. The learned counsel cited and relied on the case of *Green v. Green* (1987) 1 NWLR (Pt. 61) 480. Learned counsel argued that as at 1986, before the action was instituted in 1987 and Judgment delivered by the court in 1989 in suit No. LD/150/87, the alleged liability of the LSBMC to the plaintiff had not been established and could not be part of the liability deemed to have been transferred to the appellant in 1986. G H

So, any action, according to the learned counsel for the appellant, filed in court after 30<sup>th</sup> of April, 1986 to establish any alleged liability of the LSBMC could only have been filed against the appellant as a party so that it can be bound by the decision and, more importantly, to allow the appellant fair hearing, in the determination of its obligation under a statute that came into force before the action was commenced. He referred this court to section 36 of the Constitution of Nigeria, 1999. The analogous situation of the liability of an insurer and the insured accepted by the court below, and the case of *Sese v. Sentnell Assurance Co. Ltd.* (1988) 3 NWLR (Pt.31) 673 are irrelevant to this case. He submitted that even in insurance law action cannot be instituted and maintained against a dead insured person in his personal capacity and automatically expect his insurer to be bound by the outcome of the case. In his own analogy, the learned counsel, after having cited the cases of *Intercontractors v. N.P.F.M.B.* (1988) 2 NWLR (Pt.76) 280 at 293; *N. B. C. I. v. Alfijir (Mining) Nig. Ltd.* (1999) 14 NWLR (Pt.638) 176 at 200, equated this case with the liability of a receiver/manager or liquidator and a company under receivership or liquidation. He submitted in that respect that it would be a fundamental procedural irregularity that cannot be waived to sue a company under receivership or liquidation for debt owed without making the receiver/manager or liquidator a party to the proceedings, worst still, a company that has ceased to exist and that the same principle would apply to the respondent who had sued LSBMC for debt owed without making the appellant who had inherited its assets and liabilities, a party to the proceedings.

As for the subsequent suit filed by the respondent in M/218/91, which has resulted in the present appeal, it ought to be regarded as multiplicity of proceedings and an abuse of the process of the court. The case of *Laibru Ltd. V. Building & Civil Eng. Contractors* (1962) 2 SCNLR 118, was cited in support and urged that on same principle, the respondent in this case ought to have made the appellant a party to the proceedings in suit No. LD/150/87 for it to be liable for the judgment debt. Learned counsel submitted that S. 6(1) of the interpretation Act relied upon by the court-below on the transferred liability of LSBMC to the appellant is erroneous. He added that the repeal of any statute or law shall not affect any investigation, legal proceedings or remedy etc and such can only be enforced or

continued where the parties remain alive/in existence. Section 6 cannot be extended against a party that had ceased to exist in law or lost the capacity to sue or be sued in respect of his assets and liabilities as in the present case.

On this issue No. 2, the learned counsel for the appellant made the following submissions, among others: that a judgment delivered without jurisdiction may be set aside null judgment is sought to be relied upon by a party either as defendant or plaintiff to an action. He cited and relied on *Ajao v. Alao* (1986) 5 NWLR (Pt.45) 805. Learned counsel argued further that it is settled law that a writ issued against a defendant that is dead or no longer in existence as well as the proceedings against him is grossly defective and amounts to a nullity as the court lacks the competence to carry on with the case without necessary application to substitute him with an existing person. The cases of *Management Ent. Ltd. V. Otusanya* (1987) 4 D SC 387; *Lazard Bros. v. Banque Ind. DE Moscou* (1933) AC 289, were cited. It was submitted further that as at 1987 when the plaintiff/respondent commenced the action in suit LD/150/87 in respect of the alleged debt owed by LSBMC, its claim should have been against the appellant who had inherited or taken over the liabilities of LSBMC. Having regard to the provisions of Section 23 of Edict 17 of 1986, it is obvious that the respondent sued a wrong defendant or failed to join necessary party for the determination of the claim in suit No. LD/150/87. Learned counsel for the appellant submitted that proceedings and judgment delivered against a dead or wrong defendant are nullity and liable to be set aside. He cited *Ayorinde v. Oni* (supra). Failure of the plaintiff/respondent to join or substitute LSBMC with the appellant as defendant before judgment was delivered in the suit is a fundamental procedural irregularity that touches on the jurisdiction of the court and rendered the proceedings and the judgment a nullity, devoid of any legal consequence. The cases of *Sken Consult Nig. Ltd. V. Ukey* (1981) 1 SC, 6; and *U. A. C. v. Macfoy* (1962) AC 152 were relied upon and cited. The learned Solicitor-General urged us to allow the appeal, set aside the judgment of the court below and substitute it with that of the High Court.

In his submission, the learned counsel for the respondent Mr. Ogundipe argued that the appellant has not sought before the court below or this court the setting aside of specific findings of the

trial court as to the fact that Edict No. 17 of 1986 passed on the liabilities of the LSBMC to the appellant from when it took effect and that the liability was not reversed by Edict No. 3 of 1987. Again, none of the decisions supports appellant's contention that non-joinder of the appellant can defeat the liability imposed upon it by statute. Reference of the appellant to companies under receivership are misconceived as there is no question of receivership in this case. Learned counsel for the respondent argued that there is absolutely no evidence whatsoever that the LSBMC is a non-existing body and no basis for challenging the validity of the judgment in suit No. LD/150/87. Learned counsel submitted that the ground of appeal and issue upon which existence or otherwise of the LSBMC were rested should be struck out as same were not canvassed before the trial court or court below. No leave was had and obtained to raise and argue them as new issues before this court. He referred to the case of *Ogba v. Onwuzo* (2005) 14 NWLR (Pt.945) 331. Learned counsel urged this court to dismiss the appeal.

In the determination of this appeal, it is pertinent, I think, to clarify from the outset that there were two decision in respect of the matter in litigation: (a) the suit initiated originating summons between: [1] Purification Techniques Nigeria Ltd. [2] Central Merchants Ltd as plaintiffs by against Lagos State Bulk Purchasing Corporation as defendant. This suit was numbered LD/150/87 (it is to be referred to herein, as "the 1<sup>st</sup> suit"). (b) suit No. M/218/91 between Purification, Tech. Nig. Ltd as plaintiff against Lagos State Bulk Purchasing Corporation as defendant (This is referred to herein, as "the 2<sup>nd</sup> suit"). It is to be observed that in and entered judgment for the plaintiffs. There was no appeal against that decision.

The present appeal, therefore, stems from the 2<sup>nd</sup> suit in which the plaintiff asked the court for an order to enforce the judgment in the 1<sup>st</sup> suit. Akinboboye, J. dismissed the originating summons of the respondent on the basis of non-joinder.

Secondly, and in the appeal on hand, what appears to be most important I think, is the consideration of whether the non-joinder of the appellant is fatal to the whole case in view of the provisions of section 23 of Edict No. 17 of 1986. My spring board, my Lords, is to try to settle the naughty question: who is first in time: the egg or the hen? In other words and in this appeal, the question that presents

itself is: which event was first in time in this case: the promulgation of the Edict which transferred the assets and liabilities of the LSBMC to the appellant or the filing of the suit No. LD/150/87. It is common that both counsel agreed that Edict No. 17, titled "Lagos State Bulk Purchasing Corporation Edict 1986," came into effect from the 30<sup>th</sup> of April, 1986. The 1<sup>st</sup> suit was commenced on 29<sup>th</sup> of January, 1987<sup>B</sup> and ruling given by Ayorinde, J; on 20/4/1989.

Thus, promulgation of Edict No. 17 of 1986 was first in time.

Now, on the 30<sup>th</sup> of April, 1986, the Lagos State Government through its Edict transferred all the assets and liabilities of the Building Materials Company to the Lagos State Bulk Purchasing Corporation, the appellant. It is on record also that there was an attempt before Ayorinde, J. to remove the 1<sup>st</sup> plaintiff in the 1<sup>st</sup> suit. It was averred by the then defendant in its counter affidavit as follows:

*"5. That the 1<sup>st</sup> plaintiff is not a party to the aforesaid agreement and the defendant says that it is not a term of the aforesaid contract that the 1<sup>st</sup> plaintiff Company or any other company for that matter be procured and or appointed as agent to carry out any of the obligations under the contract.*

*6. That the defendant denies any knowledge of the procurement, appointment or employment of the 1<sup>st</sup> plaintiff as procuring agent under the contract."*

In his ruling, Ayorinde, J made the following findings:

*"In this case, I find that no wrong person is joined as plaintiff. I have no doubt about this... These two letters show that the plaintiffs are proper plaintiffs and the plaintiff cannot be pushed out by the Defendant."*

Thus, the defendant in the 1<sup>st</sup> suit failed woefully to succeed.

The above analysis My Lords, becomes germane in relation to the prevailing law at the time of the contract and the accrual of the cause of action. ***It is the law from time immemorial that a cause of action refers to the entire set of facts that gives rise to an enforceable claim, comprising every fact which if traversed, the plaintiff must prove to entitle him to judgment.*** See Letang v. Cooper (1965) 1 QB 222 at p. 242 per Diplock, L. J. See also: Egbe v. Adefarasin (1985) 5 SC 50 at p.87; Alese v. Aladetuyi (1995) 7 SCNJ 40 at p.50. This consists of two elements - (a) the wrongful act of the defendant which gives the plaintiff his cause of complaint<sup>H</sup>

and (b) the consequential damage. See *Savage v. Uwaechia* (1972) 1 All NLR (Pt.1) 251 at p.257; *Egbu v. Araka* (1988) 2 NWLR (Pt. ???) 598; *Adesokan v. Adegorolu* (1997) 3 SCNJ 1 at p.16.

***It has been held by this court that when these facts have occurred, a cause of action is said to accrue to the plaintiff because he can then prosecute an action effectively. Thus, the accrual of a cause of action is the event whereby a cause of action becomes complete so that the aggrieved party can begin and maintain his cause of action.*** See *Adimora v. Ajufo* (1988) 1 NSCC 1005. ***Both the trial and the lower courts are agreed (pp 37 and 73 of the record) that a cause of action does not accrue or due to the plaintiff at the date of judgment but by the time the action is filed in court. I entirely agree.*** It is the finding of the trial court that:

D “From the writ of summons dated 29<sup>th</sup> January, 1987 it is clear that when the cause of action arose, section 23 of Edict No. 17 has not been repealed. This then have (sic) the effect of having transferred the liabilities of the Defendant in suit No, LD/150/87 to the Lagos State Bulk Purchasing Corporation and it cannot be repealed  
E thereafter in June, 1987 when section 23 was repealed.”

The court below is in tandem with the above finding of the trial court:

F “From the writ of summons dated 29/1/87 it is very clear to me that when the cause of action arose, Section 23 of Edict No. 17 has not been repealed.”

Now, therefore, the existing law as at the time the cause of action accrued which regulated the transaction between the Central Merchant Ltd. and LSBMC was Edict No. 17 of 1986

G When the Edict came into being, that is the 30<sup>th</sup> day of April, 1986, section 23 thereof, made the following provision:

*“All assets and liabilities of the Lagos State Task Force Committee on essential Commodities, and the Building Materials Company are hereby TRANSFERRED and VESTED in the Corporation.”*

H Section 1[1] of the Edict referred to the Lagos State Bulk Purchasing Corporation [LSBMC] as the corporation, in the Edict.

Thus, from the 30<sup>th</sup> day of the April, 1986, all the assets and liabilities of the Building Materials Company were legally and effectually transferred and vested in the corporation, that is LSBMC. ***The***

***word ‘transfer’ in law, is wide, having a lot of variables: it can represent the way in which the title to property is conveyed from one person to another. It can be the sale and every other method, direct or indirect, of disposing of or parting with property or with an interest therein, or with the possession thereof, or of fixing a lien upon property or upon interest therein, absolutely of, by or without judicial proceedings, as a conveyance, sale, payment, pledge, mortgage lien, encumbrance, gift, security or otherwise. It can even include the act of giving property by will. [See Blacks Law Dictionary, sixth edition, page 1497]. In relation to the provision of the Edict on hand, ‘transfer’ can by no means be anything more than the assignment or conveyance of all those assets and liabilities and or other rights, obligations, acts or things associated thereto, that may vest in the transferee as the transferor had therein. Thus, all the assets, liabilities etc aforementioned have by law been absolutely conveyed and vested in the corporation as it becomes the legal successor to the Building Materials Company. A successor, in law, generally, is one that succeeds or follows. One who takes the place that another has left, and sustains the like part or character, one who takes the place of another by succession. Where the terms relate to a corporation however, as in the case on hand, it means another corporation which through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes the burdens of the first corporation. This presupposes that all the powers, rights, duties, liabilities and privileges which were enjoyed or exercised, or were due to, or from the Building Materials Company, could equally be fully enjoyed, exercised or taken from its successor, the Lagos State Bulk purchase Corporation. This is in accordance with section 23 of Edict No.17 of 1986.***

Our attention has been drawn by the learned Solicitor-General of Lagos State that another Edict was promulgated by the Lagos State government. It was titled: “*Lagos State Bulk Purchasing Corporation [Amendment] Edict 1987.*” This was Edict No. 3 and it came into force on the 11<sup>th</sup> day of June, 1987. This Edict sought to amend section 23 of Edict No. 17 of 1986. In the 1987 Edict, section 1 thereof States:

*“Section 23 of the Lagos Bulk purchasing Corporation Edict, 1986 is hereby deleted.”*

The effect of this deletion, as it were, is to counter the transfer and vesting of the assets and liabilities of the Building Materials Company to the corporation. The learned Solicitor-General for the appellant, though obliquely, made a snappy reference to that amendment and he said:

*“It is submitted that the repeal of any statute or law shall not affect any investigation, legal proceedings, or remedy etc and any such investigation, legal proceedings or remedy may be instituted, continued or enforced. But in the case of legal proceedings, it can only continue where the parties remain alive and in existence. Also the provision of section 6 of the interpretation Act can only apply, to legal proceedings ongoing or liability established as at time of repeal. It does not justify the commencement and maintenance of an action against a party that had ceased to exist in law or lost the capacity to sue or be sued in respect to his assets and liability as in this present case.” [Page 10 of appellant’s brief of argument].*

I think it is apposite at this juncture to refer to the circumstances under which the court below made reference to Edict No.3 of 1987 and S.6 of the Interpretation Act. The court below stated on page 73 of the printed Record of Appeal, as follows:

*“From the writ of summons dated 29/1/87 it is very clear to me that when the cause of action arose, S. 23 of Edict NO. 17 has not been repealed. This has the effect of having transferred the assets and liabilities of the defendant in suit NO. LD/150/87 to the Lagos State Bulk Purchasing Corporation and it cannot be rendered ineffective thereafter on 11/6/87 when section [sic] was repealed. In other words the effort made by Edict NO.3 of 1987 to avoid the vesting of such existing liability clearly failed. I say this because s. 6[1] of the Interpretation Act provides thus:*

*“The repeal of any ordinance or law or any part thereof shall not unless the contrary intention appears, affect any investigation, legal proceedings, or remedy in respect of any right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation legal proceedings or remedy may be instituted, continued or enforced and any such forfeiture or punishment may be imposed as if the repealing ordinance or law had not been*

passed...”

**I am in agreement with the stance taken by the court below. The amendment brought about by section 1 of Edict NO.3 of 1987, can have no legal effect whatsoever on a matter where cause of action accrued on the 29 day of January, 1987, whereas the 1987 Edict came into operation on the 11<sup>th</sup> day of June, 1987. Although the Ruling in suit NO. LD/150/87, by Ayorinde, J. was delivered on the 20<sup>th</sup> day of April, 1989, the amendment to the Edict when the cause of action accrued could have no legal consequence on the provision of section 23 of Edict NO.17 of 1986. This is for the simple reason that, the matter, when the amendment was made, was already in litigation [subjudice]; and secondly, as rightly cited by the learned Solicitor -General and the court below that section 6 of the Interpretation Act is a saving grace.** It provides as follows:

*“The repeal of any ordinance or law or any part thereof shall not unless the contrary intention appears, affect any investigation, legal proceedings, or remedy in respect of any right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such forfeiture or punishment may be imposed as if the repealing ordinance or Law had not been passed.”*

Thus, as a legal successor to the Building Materials Company and by virtue of section 23 of Edict NO. 17 of 1986, the Lagos State Bulk purchase Corporation [LSBPC], as found by the trial court in 1989 and the court below, that no wrong person was joined as a plaintiff and that there was no need for the respondent to join the appellant in suit NO. LD/150/87 as the appellant’s liability arose as a result of the provisions of a statute. **The trite position of the law is that in any proceeding the applicable law is the law in force at the time the cause of action arose and not the law at the time the jurisdiction of the court is invoked.** See MUSTAPHA VS. GOVERNOR OF LAGOS STATE [1987]2 NWLR [part 58] 539; ALAO VS. AKANO [1988]1 NWLR [part 71] 431; UWAIFO VS ATTORNEY-GENERAL OF BENDEL STATE [1982]75 SC. 124; ALASE VS. ALADETUYI [1995] 7 SCNJ 40 at page 52. **It is the law, as**

**well, that the jurisdiction of a court is determined by the existing law at the time the cause of action in dispute arose and not the existing law at the time the jurisdiction of the Court is invoked.** See GOVERNOR OF OYO STATE VS. FOLAYENI, KASIKWU FARM LIMITED VS. ATTORNEY-GENERAL OF BENDEL STATE [1986] 1 NWLR [part 19] 695; OWUSADE VS. AKANDE [1987] 2 NWLR [part 55] 158. In the case of GOVERNOR OF OYO STATE VS. FOLAYAN [supra], at page 81, it has been held that the applicable law to a cause of action is the law prevailing at the time the cause of action arose notwithstanding that the law had been revoked at the time the action is being tried. It is my view that the applicable law in this appeal is law when the cause of action accrued and afortiori, binds the parties in litigation.

One vital argument raised by the learned Solicitor-General and which cannot be glossed over is as follows:

*“It is respectfully submitted that in the light of the clear provision of s. 23 of Edict NO. 17 of 1986, the Plaintiff/Respondent ought to have joined the appellant as Defendant in suit No. LD/150/87 before judgment was delivered in 1989 to enable the court adjudicate upon and settle all issues involved in the suit between all necessary parties. It is not in dispute that the respondent had knowledge of the provision of section 23 of Edict NO. 17 of 1986, the existence of the Appellant and the obligation of the Appellant to settle liabilities of LSBMC before commencing the action in suit No. LD/150/87. The Appellant was a necessary party whose presence was essential for effectual and complete determination of the plaintiff’s claim in that suit which is a debt alleged to be owed by LSBMC and inherited by the appellant by virtue of a statute. The respondent had the opportunity and ought to have applied to have the appellant joined in the suit before judgment”*

**But who in law, is a party whose joinder in the suit is necessary? This Court has in a number of decided cases laid down the test as to whether a person is a necessary party to be joined in a suit. For instance, it has been held in the case of PEENOK INVESTMENTS LIMITED VS. HOTEL PRESIDENTIAL LIMITED [1982] NSCC 477,**

***“The test as to whether there should be joinder of a party in a suit is based on the need to have before the court such***

***parties as would enable it to effectually and completely adjudicate upon and settle all the questions in the suit.***”

***Again, in a number of decided cases, it has been stated that the main reason/purpose for joinder of a party/parties in a suit is to make that person[s] bound by the result of the suit and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he/they be made a party or parties.*** See further: AMON VS. RAPHAEL TRUCK & SONS LTD [1956] 1 QB 357 at page 380; ORIARE VS. GOVERNMENT OF WESTERN NIGERIA [1971] 1 All NLR 138; UKU & ORS VS. OKUMAGBA & ORS [1974] 3 SC. 35; OYEDEJI AKANBI [MOGAJI] & ORS VS. FABUNMI & ORS [1986] 2 SC 431; ODUOLA & ORS VS COKER [1981] 5 SC 197. One may therefore, ask: can the non-joinder of the appellant be fatal to the suit filed before AYORINDE, in suit NO. LD/150/87. Learned Solicitor-General for the appellant answered the question in the affirmative. Equally, the Learned Trial Judge, Akinboboye J., in the 2<sup>nd</sup> suit that is M/218/91 gave what appears to me to be a perplexing ruling on the main suit generally and on the issue of nonjoinder of the appellant by the respondent at the first trial court. This is what she said:

*“In the present action when Edict NO.17 was passed in 1986 to commence in April, 1986, section 23 had passed on the liabilities and assets of Lagos State Building Materials Company Limited to the Lagos State Bulk Purchasing Corporation though Edict NO. 3 of 1987 repealed section 23 of Edict NO. 17 which passed this right yet since the right had been given before the repeal that is in March, 1986. This right is unaffected and preserved.*

*However, the plaintiff neglected to make Lagos State Bulk purchasing Corporation a party to the former action until judgment was entered in its favour, then the plaintiff /judgment creditor found that all Assets of the former Defendant have accrued to Lagos State Bulk Purchasing Corporation because of the provision of section... NO.17 which although later revoked in 1987.*

*Failure of the learned counsel to apply to substitute the present Defendant in suit NO. LD/150/87 before judgment was entered is fatal to applicant’s effort to now make the present Defendant liable for the judgment debt incurred in the judgment given in other suit*

*since the Respondent was never a party thereto.*” [Underlining supplied for emphasis].

My humble answer to the question is a Capital No. This is for a number of reasons:

B 1) For a person to be joined as a defendant there are some vital questions which need to be answered:

(a) Is it possible for the trial court to adjudicate upon the cause of action set up by the plaintiff unless the person is added as a defendant?

C (b) Is the person someone who ought to have been joined as a defendant in the first instance? And

(c) As an alternative, is the person someone whose presence before the court as defendant will be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the D questions involved in the cause?

2) The first suit taken before Ayorinde J., and its ruling, were conducted under the 1972 High Court of Lagos State [Civil Procedure] Rules and under Order 12 of the Rules, it is stated as follows:

E *“No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regard the rights and interest of the parties actually before it.”*

F 3) It is the submission of the learned counsel for the respondent that there was absolutely no evidence to support the assertion that the LSBMC had “ceased to exist” I totally agree. There should have been an evidence to convince both trial courts that the LSBMC ceased to exist for any purpose.

G A mere assertion without any evidence to back it up cannot ground a decision in favour of the party that asserts. It offends section 135 of the Evidence Act.

H 4) It has been held in the case of OMOLOYE VS. ATTORNEY-GENERAL OF OYO STATE & ORS. [1987] 4 NWLR [part 64] 267 at page 283 that parties to an action includes their privies. A privy in this respect is the successor in interest to the Building Materials Company whose assets and liabilities were by a statute transferred and vested in the corporation.

It is my belief as found by the court below that the suit before the first trial court could effectually and completely be determined

without making the appellant a co-defendant. I therefore, resolve issue one against the appellant and in favour of the respondent.

On the 2<sup>nd</sup> issue, this court is called upon to set aside the judgment delivered in suit NO. LD/150/87 as it was delivered without jurisdiction and was obtained against a non-existing body or wrong defendant. I already recapitulated the submissions of the learned counsel for the respective parties on this issue earlier. In what appears to be an objection by the learned counsel for the respondent in countenancing appellant's issue No. 2, learned counsel argued that the ground of appeal and the issue upon which existence or otherwise of the LSMBC were rested should be struck out as same were not canvassed before the trial court or court below. He submitted further, that no leave of this court was sought and obtained to raise and argue them as new issues before this court.

I have myself gone through the proceedings of the two trial courts and the court below. The issue of non-existing body was not dealt with by any of the courts, whether as a ground of appeal or an issue for determination. The said finding by the court below on page 7 of the record referred to by learned counsel in his brief of argument [page 11] must have been tied to both issues. It was related to the Edict NO.17 and the time of delivery of judgment in suit NO.LD/150/87. I think it was the choice of words in defining the effect of transfer and vesting of the assets and liabilities of the Building Materials Company to the corporation that confused the learned counsel for the appellant. It is very clear that the Edict did not use the word "cease" or "ceased" anywhere in relation to the Building Materials Company. The best one can take of comment is a surplusage [statement], which amounts to an OBITER, which is not applicable in any case.

***The trite position in law is that where a new issue is to be introduced and argued afresh, the party introducing it has the duty to apply and obtain for leave to do so from the court. The appellant in this case has not shown that he has asked for and been granted such leave. The issue is therefore a fresh one for which there is no leave to introduce and argue it. It is incompetent and same is hereby discountenanced and struck out.***

However, looking at it from the vantage point of its credibility,

even if it was to be considered, the issue cannot still scale through as the appellant failed clearly to show any evidence before the trial court that the Building Materials Company was non-existent. I already commented on this point [supra] which requires no repetition.

In the final result, this appeal fails and it is hereby dismissed.

**B** I affirm the judgment of the court below. I order each party to bear its own costs in this appeal.

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### ***MUNTAKA-COOMASSIE JSC***

**C**

This is an appeal against the judgment of the Court of Appeal Lagos Division delivered on the 5<sup>th</sup> day of July 2000, in which the lower court allowed the appeal by the plaintiff/respondent and specifically held that the respondent was entitled to the reliefs sought in the originating summons i.e. the Defendant now appellant was liable to settle the judgment debt in suit No. LD/150/87. The defendant/appellant was not happy with the decision of the Court of Appeal Lagos Division and has now appealed to this court. The trial court entered judgment in favour of the plaintiffs on the 20/4/1989 in the sum of N9,519,074.12k and US\$12,017,526.20 being the amount claimed in the High Court of Lagos State. This is the amount claimed against the Defendant namely, the financial loss suffered in consequence of breach by the defendant of the agreement.

**F**

The defendant claimed that the action in suit No. LD/150/87 was commenced after the assets and liabilities of Lagos State Building materials corporation Ltd was transferred to the appellant and the plaintiff now respondent ought to have joined the defendant in that suit since all the assets and liabilities of the corporation were transferred to it by an Edict before the High Court delivered its judgment.

**G**

The trial High Court was overwhelmed and was convinced by the argument of the defendant judgment was then entered, as I stated earlier on. The respondent commenced a fresh action by way of originating summons in suit No. M/2/8/91 against the appellant as defendant therein. The trial court in a reserved judgment agreed with the appellant and dismissed the originating summons of the plaintiff.

**H**

The plaintiff was aggrieved by the decision of the said trial High Court successfully appealed to the Court of Appeal Lagos Division. The lower court in a unanimous decision allowed the appeal of

the plaintiff now respondent, namely, that the respondent was entitled to the reliefs sought in the said originating summons. The crux of the issue was that the appellant, Lagos State Bulk Purchase Corporation, was liable to settle the judgment debt in suit No. LD/150/87. The issue of the Edict No. 17 of 1986 and subsequent amendment in Edict No. 3 of 1987 were of no moment. B

The decision of the Court of Appeal was appealed against, by the appellant who was aggrieved by it, to this court. Briefs of argument were filed and exchanged by the parties. Two issues were distilled by the appellant while the respondent adopted the issues for determination as formulated by the appellant and proceeded to respond accordingly. C

I had the privilege of reading in a draft form the illuminating lead judgment of my learned brother Tanko Muhammad JSC just delivered. His lordship in his usual characteristic style, did not leave any stone un-turned. I entirely agree with his Lordship that the appeal is devoid of merit and same shall be dismissed. I too dismiss it. I abide by the consequential order made in the lead judgment. Each party shall bear its own costs. D

E

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### ***FABIYI JSC***

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

I seek leave to chip in a few words of my own in support of my learned brother. In the judgment delivered by Ayorinde, J. of the Lagos High Court on April 20, 1989 in Suit No. LD/150/87, a company wholly owned by the Lagos State Government to wit: the Lagos State Building Materials Company Limited (LSBMC) was found liable to pay the respondent the sums of =N=9,519,074.12 and US\$12,017,526.20 and 6% interest. G

The Lagos State Government passed Edict No. 17 of 1986 H which established the appellant herein. Section 23 of the Edict vested the assets and liabilities of LSBMC in the appellant with effect from April, 1986. By another Edict No. 3 of 1987, section 23 of Edict No. 17 of 1986 was deleted.

The respondent filed an Originating Summons in suit No. M/218/91 against the appellant herein in a bid to recover the outstanding judgment debt in suit No. LD/150/87. In the 2<sup>nd</sup> suit, Akinboboye, J. found that the liability pronounced against the LSBMC by Ayorinde, J. on 20<sup>th</sup> April, 1989 had become vested in the appellant from April, 1986. It was held that the liability was unaffected and preserved notwithstanding the provisions of Edict No. 3 of 1987 based on the applicable provision of section 14 (c) of Interpretation Act, Cap 89 which in my opinion was carefully considered.

The trial court however held that since the appellant was not joined as a party to Suit No. LD/150/87, the appellant could not be made responsible for the liability pronounced by Ayorinde, J. in Suit No. LD/150/87.

The respondent herein appealed to the court below which without any hesitation, allowed the appeal on 5<sup>th</sup> July, 2000. It found that the respondent having assumed liability under a Statute, it is under obligation to discharge it. The Court of Appeal maintained that principles regarding joinder of a party as well as fair hearing enshrined in section 33 (1) of the 1999 Constitution were not applicable to the circumstances of this case.

The appellant has decided to try its chance by appealing to this court. The issue touching on joinder of the appellant is the paramount one herein.

It must be stated by me that one thing that cannot be contested is that a necessary party should be allowed to have his fate in his own hands. A necessary party is someone whose presence is essential for the effectual and complete determination of the issues before the court. It is a party, in the absence of whom the whole claim cannot be effectually and completely determined. See: *NNN Ltd. v. Ademola* (1992) 6 NWLR (Pt. 507) 70 at 83.

In the case of *Chief Abusi David Green v. Dr. E. T. Dublin Green* (1987) 3 NWLR (Pt. 60) 480, this court per Oputa, JSC, maintained that in order to decide the effect of non-joinder or even misjoinder of a party, the court should ask itself the following questions:-

- (a) Is the cause or matter liable to be defeated by nonjoinder?
- (b) Is it possible to adjudicate on the cause or matter unless the 3<sup>rd</sup> party is added as a defendant?

(c) Is the 3<sup>rd</sup> party a person who should have been joined in the first instance?

(d) Is the 3<sup>rd</sup> party a person whose presence before the court as a defendant will be necessary in order to enable the court to effectually and completely adjudicate or settle all the questions involved in the cause or matter. See also the case of *Uku v. Okumagba (1974) 1 All NLR 475*. Issue touching on joinder goes beyond simply demanding same.

The Court of Appeal on the issue at page 75 of the Record found as follows:-

*“Both the Lagos State Building Material Company and the Lagos State Bulk Purchasing Corporation are established and wholly owned by one and the same Lagos State Government. The two establishments are one and the same for purpose of determining liability by virtue of the provisions of the statute. Since the Lagos State Building Materials Company was a party (Defendant) which had fought and lost Suit No. LD/1 50/87, and it was determined in that action that the said defendant was liable. There was no need to join the new corporation in the previous action, since it has been vested with the assets and liabilities of action.*

*The respondent having assumed this liability under a statute, the appellant (at the court below) is entitled to call upon it to discharge its liability and pay the judgment debt. The respondent having assumed liability under a statute it is under obligation to discharge it.”*

The appellant in this appeal having assumed liability under a statute is under obligation to discharge it. It should not shy away from same under any guise. To my mind, the appellant was a privy which did not need to be joined.

The other issue faintly raised in this court is the existence or otherwise of LSBMC which was never an issue at the trial High Court or the Court of Appeal. The appellant failed to seek leave to raise same in this court. The issue is therefore incompetent and it is hereby discountenanced and accordingly struck out. See *Ogba v. Onwuzo (2005) 14 NWLR (Pt. 945) 331* cited by respondent’s counsel.

The court below was on a firm ground in the stance posed by it. To find that the appellant is not liable will be tantamount to standing logic on its head. A body owned by the Lagos State Gov-

ernment must settle the outstanding judgment debt. And that body is the appellant which assumed liability under a statute that remains extant notwithstanding steps taken to get it obliterated to no avail.

For the above reasons which is just like a tip of the iceberg and of course the detailed reasons ably adumbrated in the lead judgment, I too find that the appeal lacks merit and it is dismissed by me. I endorse the consequential orders therein contained, that relating to costs inclusive.

C

### **M. D. MUHAMMAD JSC**

Having had a preview of the lead judgment of my learned brother I. T. Muhammad JSC, I agree with his reasonings and resultant conclusion that this appeal lacks merit and it should be dismissed.

In stating these concurring words, done purely by way of emphasis, I am bound by the summary of the facts that brought about the appeal supplied in the lead judgment.

The appellant's defence at the trial court is that the judgment in favour of the respondent in Suit No. LD/150/87 commenced after the assets and liabilities of the defendant in that suit had been transferred to the appellant herein does not avail the respondent who was the claimant in suit No. M/218/91. It is contended that the appellant not being a party in suit No. LD/150/87, its right to fair hearing will be violated if respondent is allowed to enforce the decision in the earlier suit through the fresh action in suit No. M/218/91.

In the course of determining the action before her, Akinboboye J. found firstly at page 37 line 16-20 of the record as follows:-

*"From all these definitions, it is my firm view that the cause of action does not accrue due to the Plaintiff at judgment but by the time the action is filed in court.*

*In this case from Exhibit LOI, the earlier action LD/150/87 was filed on 29<sup>th</sup> January 1987 by the same Plaintiffs against the Lagos State Building Materials Company Ltd."*

She proceeded thus:-

*"By virtue of Edict No. 17 of 1986 which came into being on 30<sup>th</sup> April 1986, Section 23 thereof transferred and vested in the*

*newly Created Lagos State Bulk Purchasing Corporation all assets and liabilities of the... Building Materials Company Limited.*

*By virtue of Edict No. 3 of 1987 the Lagos State Bulk Purchasing Corporation (Amendment) Edict 1987 which commenced on 11th June 1987, Section 23 of the Lagos State Bulk Purchasing Edict of 1986 was deleted.”* B

The court’s further but crucial finding subsequent to the foregoing facts at line 32 page 37 to page 39 lines 1 to 6 is thus:-

*“From the writ of summons dated 29<sup>th</sup> January 1987 it is clear that when the cause of action arose, Section 23 of Edict No. 17 C has not been repealed. This then have the effect of having transferred the liability of the Defendant in Suit No. LD/150/87 to the Lagos State Bulk Purchasing Corporation and it cannot be repealed thereafter in June 1987 when Section 23 was repealed.*

*This is based upon the provision of our interpretation Act D otherwise known as Law...”*

As if it has not been sufficiently understood, the court became more succinct at page 39 lines 3 - 10 of the record of appeal thus:

*“In the present action when Edict No. 17 was passed in 1986 E to commence in April 1986, Section 23 had passed on the liabilities and assets of Lagos State Building Materials Company Limited to the Lagos State Bulk Purchasing Corporation though Edict No. 3 of 1987 repealed Section 23 of Edict No. 17 which passed this right, yet since F the right had been given unaffected and preserved”*

The foregoing notwithstanding, the court in its judgment rationalized that the respondent:-

*“...Neglected to make the Lagos State Bulk Purchasing Corporation as party to the former action until judgment was entered in G its favour...”*

*Now, they have applied to have Lagos State Bulk Purchasing Corporation substituted as the judgment Debtor even though they were never parties to the action”*

The court concluded by dismissing respondent’s originating H summons because of their failure to join the appellant herein in suit No. LD/150/87.

Dissatisfied, by the decision, the respondent appealed to the Court of Appeal which at pages 75 - 76 of the record of appeal in

allowing the appeal held, and correctly in my view, as follows:-

*“The main purpose of the Appellants’ originating summons was to obtain confirmation from the lower court of the Interpretation given by the Appellant’s counsel of the statutory provisions. The learned trial judge impressively confirmed the interpretation of the provisions of Edict No. 17 and 3 of 1986 and 1987 respectively. In her judgment however, she shied away from taking matters to a logical conclusion, and with due respect, she wrongly held that the principles of law regarding joinder (sic) of a party as enunciated in Green Vs Green (1987) 3 NWLR (part 61) 480 and the principle of fair hearing as enshrined in Section 33 (1) of the 1979 Constitution were applicable to the situation and circumstances of this case. The Principles have no applicability to the circumstances of this case.”*

I hasten to state that the foregoing finding of the lower court is unassailable. The trial court’s perverse decision that has evolved by its application of wrong principles must, and has correctly been interfered with by the Court below.

It must be stressed that the trial court has misconceived the true import of respondent’s originating summons, particularly the reliefs urged the court therein. The respondent’s action Suit No. M/218/9 is not aimed at joining the appellant that was not made a party in suit No. LD/150/87. Without any embellishment, Respondent’s case before Akinboboye J. is to facilitate the enforcement of the judgment of Ayorinde J. that has not been appealed against.

In relation to the issues raised by this appeal, it must be emphasised that decisions of courts not appealed against remain valid, binding, subsisting and presumed acceptable between the parties until their decision is set aside. See Williams Vs Sanusi (1961) 11 ALL NLR 334, SHELL PETROLEUM Dev. Co (Nig) Ltd and Anor Vs X. M. Federal Ltd and Anor (2006) ALL FWLR (part 339) 882 at 833; Nweke Nwokedi & 2 Others Vs Ekwenugu Okugo & 2 others (2002) 16 NWLR (part 794) 441 at 448 to 449; Prince (Dr.) B. A. Onafowokan & 2 others Vs Wema Bank Plc & 2 others NSCQLR Vol 46 (2011) 181, and Wahabi Adejobi & 1 or. Vs The State NSCQLR Vol 46 (2011) 737.

Again, the trial judge seems in this regard to have forgotten the duty imposed on him/her by Sections 274 and; 287 (3) of the 1979 Constitution (as amended) extant at the time the respondent

herein commenced Suit No. M/218/91 seeking the reliefs contained in its originating summons.

Lastly, quite apart from the overriding duty imposed on the trial court by the foregoing Sections of the 1979 Constitution to enforce the judgment of Ayorinde J. given in Suit No. LD/150/98, the court has also run foul against another settled principle of law. It is trite that no judge is entitled to reverse, vary or alter the decision of another judge of coordinate jurisdiction in the absence of statutory authority except where such decision is arrived at without the necessary jurisdiction. See *Shell Vs Edamkue & 2 others* (2009) 14 NWLR (part 1160) 1 at 24 and *Wimpey (Nig) Ltd & Anor Vs Alhaji Bulogun* (1986) 3 NWLR (part 28) 324 at 339. B  
C

In the instant case, the simple case the trial court is asked to determine is whether by virtue of the deletion of Section 23 of the Lagos State Edict No. 17 of 1986 following the amendment of the principal legislation by Section 1 of the Amendment Edict No. 3 of 1987, the judgment of Ayorinde J. in Suit No. LD/150/87 has become unenforceable. It is not the case of any of the parties before the trial court that Ayorinde J. had proceeded to judgment without jurisdiction or that the decision has been set aside following an appellate court's intervention. The trial court lacks the vires to interfere with Ayorinde J's judgment given with jurisdiction even if same has, and it does not, the defect the court wrongly says it has. In the absence of any statutory authority and the trial court itself has correctly found that the Lagos State Edict No. 3 of 1987 is not such an authority, the court remains without the jurisdiction of interfering with that judgment. The Court's duty is to enforce the judgment. This duty the court failed to carry out. Squarely, this remains the case of both sides even before us. D  
E  
F  
G

The arguments of learned senior counsel for appellant ingenious as they seem, are manifestly diversionary. As the two lower courts rightly held, Lagos State Building Materials Company Limited, the defendant in Suit No. LD/150/87, has been properly sued and since it has remained alive as at 20<sup>th</sup> April 1989, when judgment was pronounced, the judgment debt accrued from the date respondent's cause of action arose, the date the respondent filed the writ for the recovery of the sum, 29th January 1987. The effect of Section 23 of the Lagos State Edict No. 17 of 1986 is simply to transfer the liability H

of the defendant in suit No. LD/150/87 as ascertained by Ayorinde J. to the defendant in the instant matter against which the Edict has made the judgment enforceable.

The trial court remains on the right tract in its finding that given the provision of Section 6 (1) of the Lagos State Interpretation Law, the purported repeal of Section 23 of the Lagos State Edict of 1986 by Section 1 of Edict No. 3 of 1987 does not affect the liability of the defendant in suit No. LD/150/87 as ascertained by Ayorinde J. That liability has, by operation of law, Section 23 of Lagos State Edict No. 17 of 1986, been transferred to the appellant and remains unaffected by the amendment purportedly made under Section 1 of Edict No. 3 of 1987. The liability is equally recoverable from the appellant.

In dismissing respondent's suit in the instant matter on the basis of non-joinder of the appellant in Suit No. LD/150/87 by the respondent, the trial court has proceeded on a very wrong premise. It took into cognisance matters not within its competence as only an appellate court, which the trial court is not, can temper with Ayorinde J's Judgment at that level.

It is for the forgoing and the other reasons adumbrated in the lead judgment of my learned brother I. T. Muhammad that I also affirm the lower court's judgment setting aside the perverse decision of the trial court. I also abide by the consequential orders made in the lead judgment.

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### **OGUNBIYI JSC**

By a judgment delivered by the Lagos High Court on April 20<sup>th</sup> 1989, in suit No. LD/150/87, a company wholly owned by the Lagos State Government namely the Lagos State Building Materials Company Ltd (LSBMC) was adjudged liable to pay the Respondent the sums of N9,519,074.12 and US \$12,017,526.20 plus interest.

By Lagos State Edict No. 17 of 1986, the appellant herein was established as a statutory corporation by the same said Lagos State Government. Section 23 of Edict No. 17 also vested the assets and liabilities of LSBMC in the appellant with effect from April 1986. By and large and vide a subsequent Edict No. 3 of 1987, section 23 of Edict No. 17 of 1986 was in the main deleted.

In the action before the High Court of Lagos State from which

this appeal originated, that court on the 20<sup>th</sup> April, 1989 held that the liability pronounced against the LSBMC in suit No. LD/150/87 had become vested in and consequently a liability of the appellant from April, 1986. It is of significance on the onset to restate the further position of the trial court wherein it also held that the liability was “unaffected and preserved” notwithstanding the provisions of Edict No. 3 of 1987 which deleted section 23 of Edict No. 17 of 1986. B

Suffice and intriguing to state also that despite the findings by the High Court, it nevertheless held that in the absence of joining the appellant as a party to suit No. LD/150/87, it could not be made C responsible for the liability pronounced against the LSBMC in that action. An appeal against that findings was lodged to the Court of Appeal and the lone issue raised was:-

*“Whether the failure to join the appellant, justified the decision to dismiss the plaintiffs originating summons in its entirety.”* D

While the Respondent in this court as the appellant at the lower court submitted that their non-joinder in that action did not extinguish the liability pronounced against the Lagos State Building Materials Corporation, the appellant herein submitted differently.

The lower Court in its considered judgment allowed the appeal, set aside the judgment of the trial High Court and held that the appellant therein was entitled to the reliefs sought per the originating summons. As a consequence, the judgment in suit No. LD/150/87 was therefore held enforceable by way of originating summons against the respondent therein. E F

The Lagos State Bulk Purchase Corporation was dissatisfied with the lower court’s decision and hence the filing of the notice of appeal which contains two grounds of appeal. The appellant for its relief sought for an order setting aside the judgment of the court G below and restore that of the trial High Court.

Suffice to say that the two issues formulated for the determination of this appeal are well set out in the lead judgment.

For purpose of emphasis and also highlighting the salient features of the questions raised, I will in respect of the 1<sup>st</sup> issue refer to pages 8 -9 of the record of appeal wherein the earlier action LD/150/87 was filed on the 29<sup>th</sup> January, 1987. This is evidenced vide the statement of claim filed by the Purification Techniques Nigeria Limited (the same plaintiff) in suit No. M/218/91 against the Lagos State H

Building Materials Company Limited.

By virtue of Edict No. 17 of 1986 therefore, section 23 transferred and vested in the newly created Lagos State Bulk Purchase Corporation all assets and liabilities of the Lagos State Task Force Committees on Essential Commodities and the Building Material Company Ltd. When the cause of action arose on the 29<sup>th</sup> January, 1987, section 23 of Edict No. 17 had not been repealed.

By reason of operation of section 6(1) of the Interpretation Act therefore, it had the effect of having transferred the assets and liabilities of the defendant in suit No. LD/150/87 to the Lagos State Bulk Purchase Corporation which effect cannot by any stretch of imagination be rendered ineffective on the 11<sup>th</sup> June 1987 when the section was effectively repealed. Even at the risk of repetition, the reproduction of the provision of section 6(1) of the Interpretation Act herein is sacrosanct as it is sure deductive and all encompassing, in stating thus:-

*“The repeal of any ordinance or law or any part thereof shall not unless the contrary intention appears, affect any investigation, legal proceedings, or remedy in respect of any right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such forfeiture or punishment may be imposed as if repealing ordinance or law had not been passed.”*

For purpose of negating the submission by the learned appellant’s counsel, suffice it to state without mincing words that, from all deductions there is no evidence on the record expressly or otherwise and revealing any such contrary intention as specified in the said section 6(1) of the Act reproduced supra. The effect is to hold that the clear and unambiguous expression is absolute and enforceable.

The deductive summary of the foregoing is to the effect that by virtue of the provisions of Edict No 17 of 1986, the liability of the Lagos State Building materials company which was so clearly pronounced against it in suit No. LD/150/87 became the liability of the Defendant now appellant before us. The absence of non-joinder of the respondent as a party to the said suit notwithstanding did not in any way or by any imagination extinguish the liability which was so pronounced against the said Lagos State Building Materials Com-

pany in the action. The appellant in the result did not need to join the respondent in suit No LD/150/87. As rightly held by the learned justices of the Court of Appeal, the liability of the respondent before them now appellant in this court arose as a result of the provisions of the statute.

The 1<sup>st</sup> issue is in the circumstance resolved against the appellant. On the 2<sup>nd</sup> issue which alleges non-existing body or wrong defendant, I would briefly restate and affirm the submission advanced by the learned respondent's counsel. In other words and as rightly submitted by the counsel, Babajide Ogundipe, Esq., the question of the existence or otherwise of LSBMC was never an issue either before the trial high court or the court below. There is also no evidence that the appellant sought and obtained leave to raise this new issue in this court. The consequential effect is that it ought not be permitted at this stage as it would work injustice against the respondent whose interest will certainly be overreached and therefore prejudiced. The said issue in the circumstance is therefore a non starter. It follows that the incompetent issue as it were as well as the submission advanced thereon are all liable to be struck out. The overriding conclusion is to say that there is no evidence to support the assertion that LSBMC had ceased to exist. As an authority on this proposition the case of Ogba V. Onwuzo (2005) 14 NWLR (Pt. 945) 331 is relevant wherein this court per Akintan JSC had this to say at page 344:-

*"It is settled law that generally, where an issue is not raised in the court below by the parties before it, such an issue should not be raised in the appeal court. But if the issue raised by such point is fundamental in nature, the appeal court will be disposed to give leave for it to be raised and will hear it for that reason. Therefore an issue not canvassed in the court below can only be taken on appeal with leave and in special circumstances."* (Emphasis is mine).

There is no disclosure by the appellant to warrant this court invoke the special circumstance principle alluded to in the foregoing authority. Hence the said new issue is held as incompetent and accordingly struck out.

On the totality of this appeal, I hereby concur with the lead judgment by my learned brother Tanko Muhammad, JSC that it is devoid of any merit. In other words, I hold that the appellant in the circumstance fails in its appeal which is hereby also dismissed by me.

As a consequence, the judgment of the Court of Appeal Lagos Division which set aside that of the trial High Court Lagos is hereby affirmed in the same terms of the lead judgment inclusive of the order made as to costs.

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