

**SUPREME COURT OF NIGERIA**  
FRIDAY 22<sup>ND</sup> FEBRUARY, 2013. SC. 248/2005  
**CORAM:- W. S. N. ONNOGHEN, C. M. CHUKWUMA-  
ENEH, S. GALADIMA, B. RHODES-VIVOUR,  
M. D. MUHAMMAD, JJSC**

GODWIN UGWUANYI ..... APPELLANT  
AND  
NICON INSURANCE PLC ..... RESPONDENT

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MASTER & SERVANT - Conditions of employment - NICON Act s. 26(2) - Since appellant's appointment is predicated on the Handbook - The Act is binding in the circumstance (H1)

MASTER & SERVANT - Actions - Pre action notice - NICON Act s. 26(2) placed duty on appellant to serve the notice - Before commencing any action against respondent (H2)

EVIDENCE - Unchallenged facts - Fate - Averments that are not specifically denied - Are deemed as accepted - And court can act on them (H3)

MASTER & SERVANT - Court - Jurisdiction - Since there was non compliance with NICON Act s. 26(2) - The court has no jurisdiction to entertain the action (H4)

WORDS & PHRASES - Master & servant - "No suit" - Meaning - NICON Act s. 26(2) - The expression is wide enough to cover all manner of action - As same does not admit of any exception (H5)

ACTIONS - Waiver - Plea of - Sustainability - Court must be satisfied that a party has consciously waived his right - Before upholding the plea (H6)

***FACTS***

By a writ of summons filed at the High Court of Enugu State, plaintiff/appellant claimed against defendant/respondent as follows – damages for unlawful termination of appointment, injunction restrain-

ing respondent from ejecting appellant from the accommodation and declaration determining the worth of Nigerian currency due to appellant on the judgment day.

Respondent after entering an unconditional appearance in this matter has challenged the competence of the instant suit by an application seeking to strike it out for want of jurisdiction, on the ground that appellant has failed to serve pre-action notice on respondent before commencing the action as required under section 26(2) of the NICON Act. In its ruling, the court upheld the preliminary objection and struck out action. Appellant filed appeal at the Court of Appeal Enugu Division. The court dismissed the appeal. Hence, appellant filed further appeal at Supreme Court.

### **ISSUES FOR DETERMINATION**

(1) *“Whether it is the Companies and Allied Matters Decree 1990, the Memorandum and Articles of Association of NICON Insurance Plc, the appointment paper and the Handbook on the conditions of service of NICON Insurance plc or the NICON Act 1969 and 1990 that regulates the contract relationship between the appellant and the respondent, now NICON Insurance Plc. Registered under the Companies and Allied Matters Decree 1990.*

(2) *Whether or not pre-action notice is applicable to the specific contract of service between the appellant and the respondent.*

(3) *Whether or not the respondent, after receiving service of the plaintiff/appellant’s Writ of Summons on 30/5/96, after filing an unconditional Memorandum of Appearance dated 5/6/96, after filing first Motion for Preliminary Objection dated 20/6/96, withdrawn same on 3/12/97, after taking three fresh steps before filing the second motion for preliminary objection dated 15/7/99, that was after more than three years of the receipt of the Writ of Summons, had waived its right of Pre-action Notice.”*

**HELD** (Dismissing the appeal per **CHUKWUMA-**

**ENEH JSC, RHODES-VIVOUR JSC** Dissenting)

*MASTER & SERVANT - Conditions of employment*

**1. What has emerged so far from the foregoing resume is that at all material times to this action, the letter of appointment**

**and the Handbook heavily relied upon by the appellant in this matter have been entered into with NICON, which have been predicated upon NICON Act and therefore subject to the provisions of S.26(2) (supra) long before even transforming into NICON Insurance plc. There is therefore, no way one can avoid relying on NICON Act in examining the employment relationship between the instant parties. It is upon that basis that I make the proposition that the appellant having conceded as per his counter affidavit and pleadings as I shall show fully anon that his conditions of employment are predicated on his letter of employment and the Handbook cannot be seen to have opted out of being bound by Section 26(2) (supra). He cannot pick and choose in the circumstances. There is no doubt that his conditions of service are subject to the provision of Section 26(2) (supra) as supported by the empirical facts as accepted in this case. (p. 602 A)**

*Actions - Pre action notice*

**2. Again, I must make the point that in the appellant's appointment letter is contained the crucial provision affecting their contractual relationship to the effect that,**

***"you (the appellant) will be subject in all respects to the conditions of service of the corporation"***

**This clause in my view literally construed has served to incorporate Section 26(2) into the letter of the appellant's instant appointment without more. Just as Section 26(2) is an enforceable term of the conditions of service of the respondent's officers and servants so it is a condition of service in the instant appellant's conditions of service. I am prepared on the other hand on having scrutinized this clause to hold that the clause is unambiguous and given its literal interpretation is wide enough for the said provision of Section 26(2) (supra) to be incorporated into the appellant's conditions of service. Since the appellant's contract of employment contains such an enabling implied term there can be no question about incorporating the instant provisions of Section 26(2) into the appellant's conditions of employment thus imposing a duty on the appellant the breach of which is enforceable at**

**the suit of the respondent here being grounded in their employment relationship. This duty as imposed on the appellant by Section 26(2) simply put is to serve pre-action notice before commencing any actions against the respondent. The word “shall” used in Section 26(2) in articulating this duty shows**  
 B **that it is a compulsory duty and imperative and this has been so expressed, if I may elaborate further, by the use of the words therein as follows: “No suit shall be commenced against the corporation... after written notice of intention to commence**  
 C **the suit shall have been served upon the corporation by the intending plaintiff...”**

**Although a party as a defendant in an action by a plaintiff may all the same voluntarily decide to waive it, thus, it shows that the duty is not mandatory but directory. In other words**  
 D **the parties may even decide to contract out of it. Nonetheless the important consideration here is as to whether its breach can be founded in contract as is postulated by the respondent. It is my opinion that this is so, based on the contemporary judicial opinion to treat and interpret such a breach in**  
 E **this way. (p. 602 E)**

*EVIDENCE - Unchallenged facts - Fate*

**3. The defendant/respondent’s affidavit in support of the motion to strike out the suit at paragraph 6 (six) reads as follows:**  
 F

**“6. That the defendant on record is the same person as the National Insurance Corporation of Nigeria a creature of the statute under Cap. 263 Laws of the Federation of Nigeria**  
 G **and is thus governed by the provisions of that statute.”**

**In reply to the foregoing averment/deposition the plaintiff/appellant at paragraph 2 of his counter affidavit has responded thus:**

**“(2) That I have read the affidavit dated 15th day of July, 1999 in support of motion on Notice of the defendant/applicant in this case struck out and say that the facts deposed to in paragraphs 3, 4, 5 and 6 are not true in their entirety”.**  
 H

**Throughout its counter-affidavit no attempt has been made by the appellant to expatiate on this paragraph and to**

**specifically traverse the said paragraphs 3, 4, 5 and 6 severally. And so, I rely on the cases of Falobi v. Falobi (1976) SC to say that these averments/depositions not having been specifically denied are deemed as accepted and unchallenged facts and the court can act on them and has rightly acted on them.** (p. 604 G) B

*Court - Jurisdiction*

**4. That said; if I may repeat there can be no argument about it that no pre-action notice has been served on the respondent as required by Section 26(2) (supra); the appellant has not controverted that point and the consequences are trite and obvious. See: Madukolu v. Nkemdilim (1961) 2 NSCC 374 - a case that has settled the ingredients of jurisdiction to include inter alia that a case has to be initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction. Any defects in these respects render the entire proceedings incompetent; in this case for failing to serve pre-action notice on the respondent as provided by Section 26(2). The question of non-service of pre-action notice ought to be taken as conceded by the appellant on the peculiar facts of this matter as it is evident that the appellant has never claimed to have done so... And I so hold.** C D E

**It therefore follows that once it is established that the respondent is entitled to be so served with pre-action notice on the circumstances of this case then on the facts of the appellant's action, the instant action in its entirety becomes incompetent (the pre-action notice not having been served on the respondent) and the court is therefore, not clothed with the jurisdiction to entertain the action.** (p. 606 B) F G

*Master & servant - "No suit" - Meaning - NICON Act s. 26(2)*

**5. The overall implication of my reasoning above is that the provisions of Section 26(2) (supra) amply apply to this matter and it provides:** H

**"No suit shall be commenced against the corporation before the expiration of a period of one month after written notice of intention to commence the suit shall have been served**

*upon the corporation by the intending plaintiff or his agent; and the notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the relief which he claims”.*

**The provision of the foregoing Section is clear and unambiguous and has to be given its literal meaning. See Oviawe v. I.R.R. (supra). By the phrase “No Suit” it is beyond argument that all suits, causes and matters whether or not it is founded upon a contract of services or specific contract are within its ambit and so each of such cases requires the service of pre-action notice to constitute a competent action severally against a defendant as the respondent here otherwise it is fatal to the action. It has been the contention of the appellant that the provision does not cover contracts of service or specific contracts and has relied on such cases as N.P.A. v. Construzioni e.t.c. (supra) and the like cases as I have mentioned herein for so contending. I think the appellant has misconceived the meaning of the phrase “No Suit” as used in the context of the Act vis-a-vis the processes initiating any actions by due process of law upon fulfilling the condition precedent. I have no misgivings that the above provision as I have surmised herein is wide enough to cover all manner of actions, causes or matters including the instant one. The phrase does not admit of any exception. (p. 606 G)**

*ACTIONS - Waiver - Plea of - Sustainability*

**6. In this case therefore the two questions to answer are:**

- (1) Is the waiver in this case clear and unambiguous, and**
- (2) Has the appellant clearly failed to take advantage of his right in the circumstances.**

**These two requirements must co-exist to lead to the inevitable conclusion that the respondent has deliberately refused to take advantage of the waiver. It is in my opinion on the backdrops of these factors that one has to approach the instant case. I have put side by side the positions taken on this question by both parties to the appeal and it is my view that the appellant has failed to substantiate both requirements**

**and his case in this regard must fail.**

**From the facts of this case it is clear that the defendant/respondent although he has entered an unconditional appearance has followed it since becoming aware of the irregularity by an application challenging the competency of the action without first having been served with a pre-action notice. In fact what has transpired since the first application to challenge the competency of the action can be characterized as processes challenging the writ. In this regard the respondent has not relented at all. The crucial question here is discovering a clear mindset of the respondent as per his actions in regard to the exercise of his right of making a choice of the two benefits available to him as predicated upon in the circumstances of the peculiar facts of this matter; that is to say, in this case notwithstanding that he has entered an unconditional appearance before protesting the incompetency of the action. In other words, the court has to be satisfied that the party as the respondent here has consciously waived his right so as to uphold the plea of waiver. Put in another way such skirmishes as have occurred in regard to the facts in this matter cannot be taken to constitute a voluntary waiver.**

(p. 610 E)

## NOTABLE POINT OF INTEREST

**RHODES-VIVOUR JSC** - Dissenting

### **1. Suits brought under specific contract does not require pre action notice**

The position of the Law is that where a suit is brought under an express or specific contract it is no longer necessary to serve on the Corporation pre-action notice. Furthermore from decided authorities there would be no need to serve pre-action notice when goods have been sold, and the price is to be paid upon quantum meruit, or for cases of breach of contract, claims for work and labour done.

Clearly the appellant's claim is founded in contract. The appellant's main claim is for the payment of his entitlement due from the respondent as a result of the contract of employment they both entered into. The appellant as the employee, and the respondent the

employer. The sums of money became due when the appellant's employment was terminated by the respondent. Section 26 of the NICON Act is not intended by the legislature to apply to specific contracts consequently the mandatory nature of Section 26 of the NICON Act does not apply to the appellant's suit, it being an action on a specific contract. A contract of employment. (p. 619 E)

### **REPRESENTATION**

A. B. Igwenagu with Jude Ogbuenyi Esq., for the Appellant  
C Sonny O. Wagu with Dandy U. Wagu Esq., for the Respondent

### **CASES REFERRED TO**

NPA Plc v. Lotus Plastic Ltd. (2006) AFWLR (pt. 297) 1023  
Larmie v. Data Processing Maintenance & Service Ltd. (2006) AFWLR  
D (pt. 296) 775  
Olaniyan v. Unilag (2004) 15 WRN 44  
Omega Bank (Nig) Plc v. OBC Ltd. (2005) AFWLR (pt. 249) 1964  
Nigeria Marketing Board v. Adewunmi (1972) 11 SC 111  
Fakorede v. A-G Western State (1972) ANLR 178  
E Katto v. C.B.N. (1999) 6 NWLR (pt. 607) 390  
Total (Nig) Plc v. Akinpelu (2003) AFWLR (pt. 170) 1428  
Udo v. Orthopedic Hospital (1993) 7 SCNJ (pt. 42) 445  
Awuse v. Odili (2004) AFWLR (pt. 212) 1664  
CBN v. Adedeji (2005) AFWLR (pt. 244) 912  
F FGN v. Zebra Energy Ltd. (2002) 3 NWLR (pt. 754) 471  
Oduka v. Kasumu (1968) NMLR 28  
Kate Ent. Ltd. v. Daewoo Nig. Ltd. (1985) 2 NWLR (pt. 5) 116  
Ajomale v. Yaduat No.2 (1991) 5 NWLR (pt. 191) 257

### **STATUTES REFERRED TO**

NICON Act Cap 54 LFN 2004, ss. 4(6), 7, 26(2), 33  
Companies & Allied Matters Act, ss. 33, 35, 39(1), 41(1)  
Interpretation Act, ss. 1(1), 6  
H Ports Act, s. 97(1)(2)

### **LEAD JUDGMENT BY CHUKWUMA-ENEH JSC**

This appeal is against the decision of the Court of Appeal, Enugu Division dismissing the plaintiff/appellant's appeal for failing to com-



ply with a condition precedent of serving the defendant/respondent in this matter with a pre-action notice as provided by Section 26(2) of the National Insurance Corporation of Nigeria Act now Cap. No.54 Laws of the Federation of Nigeria 2004 before instituting the instant action.

In the beginning the plaintiff/appellant by a writ of summons filed in this matter claims against the defendant/respondent as follows:

(a) *“The sum of N3,590,302 being damages, benefits and entitlements for wrongful and unlawful termination of the plaintiff’s appointment without regard to the provisions of the plaintiff’s ap-  
pointment.”*

(b) *An injunction restraining the defendant, its agents, servants, privies or whomsoever acts on the instruction etc from ejecting the plaintiff from the accommodation together with its appurtenances of No.4 NICON Crescent Independence Layout Enugu, until the determination of this suit.*

(c) *A declaration that the rate of depreciation of the Nigerian Currency be taken into account in determining the appropriate worth of the amount due to the plaintiff on the judgment day of the case.”*

The defendant/respondent after entering an unconditional appearance in this matter has challenged the competence of the instant suit by an application seeking to strike it out for want of jurisdiction, the plaintiff/appellant having failed to serve pre-action notice on the defendant/respondent before commencing the instant action. The trial court in a considered Ruling upheld the preliminary objection and struck out the plaintiff/appellant’s action. He has unsuccessfully appealed to the court below hence the instant appeal to this court.

Dissatisfied with the decision, the appellant has filed on 28/9/ 2004 a Notice of Appeal containing 5 (five) grounds. Both parties have in accordance with the Rules of this court filed and exchanged their respective briefs of argument in the appeal. The appellant has in his brief of argument raised 3 (three) issues for determination as follows:

(1) *“Whether it is the Companies and Allied Matters Decree 1990, the Memorandum and Articles of Association of NICON Insurance Plc, the appointment paper and the Handbook on the conditions of service of NICON Insurance plc or the NICON Act 1969 and*

*1990 that regulates the contract relationship between the appellant and the respondent, now NICON Insurance Plc. Registered under the Companies and Allied Matters Decree 1990.*

*(2) Whether or not pre-action notice is applicable to the specific contract of service between the appellant and the respondent.*

B *(3) Whether or not the respondent, after receiving service of the plaintiff/appellant's Writ of Summons on 30/5/96, after filing an unconditional Memorandum of Appearance dated 5/6/96, after filing first Motion for Preliminary Objection dated 20/6/96, withdrawn same on 3/12/97, after taking three fresh steps before filing the second motion for preliminary objection dated 15/7/99, that was after more than three years of the receipt of the Writ of Summons, had waived its right of Pre-action Notice."*

D The respondent has also raised 2 (two) issues for determination as follows:

*(1) "Whether the Court of Appeal is wrong in holding that the NICON Act governed the respondent and that failure by the appellant to give the requisite pre-action notice prevented the trial court from exercising jurisdiction in the instant case.*

E *(2) Whether having regard to facts of this case, the respondent can be said to have waived his right to pre-action notice"*

F A preface of additional facts to the above facts will include the following accepted facts; that upon service of the writ of summons on the defendant (respondent), it has entered an unconditional appearance and has followed it up with an application challenging the competency of the suit for not serving of pre-action notice as prescribed by Section 26(2) of NICON Act as alleged on the defendant/respondent. The application has been withdrawn and consequently has to be struck out. The plaintiff later on has filed the Statement of Claim following it up with an application for judgment in default of the respondent's pleadings. This process has galvanized the respondent into resurrecting overtly its protest against the action. The defendant has in the result filed another application again challenging the competency of the instant suit for failing to comply with Section 26(2) (supra).

H The plaintiff in response to this latest application has filed a counter-affidavit alleging the competency of the said suit and that no provision for service of pre-action notice before filing the instant suit

has been provided in the plaintiff's conditions of service with the respondent excepting as required in regard to actions in libel and slander. I have to fill in these facts in order to assist in understanding the background of this appeal.

The appellant's case (who has been employed in January 1980) is that by the provisions of Sections 33, 35, 39(1) and 41(1) of Companies and Allied Matters Act (CAMA) that the employment relationship between the parties in this matter is governed by the Articles and Memorandum of Association, as the respondent is a Registered Company under Companies and Allied Matters Act (CAMA) a position mutually exclusive to its status under NICON Act. And that Sections 4(6) and 33 of the NICON Act exclude the provisions of CAMA from applying to NICON and that on having been incorporated under CAMA as NICON Insurance Plc the respondent ought to have shed its status under NICON Act, so that its activities more particularly the employment relationships as between it and its staffers are regulated by CAMA that is to say, are governed by the Memorandum and Articles of Association as registered under CAMA. And that the letter of appointment, conditions of service as per the Company's Handbook, all constitute part of their contract of employment.

He therefore submits that once the parties have entered into a contractual relationship as per the above mentioned documentary evidence as regards their employment relationship in this matter that it is not the duty of the court to rewrite the same for them or fill in any lacuna therein in any manner whatever. He relies on the following cases for these submissions: See: *NPA Plc v. Lotus Plastic Ltd.* (2006) AFWLR (Pt.297) 1023 at 1054, *Larmie v. Data Processing Maintenance & Service Ltd.* (2006) AFWLR (Pt.296) 775 at 792, *Olaniyan v. Unilag* (2004) 15 WRN 44 at 157, *Omega Bank (Nig) Plc v. OBC Ltd.* (2005) AFWLR (Pt.249) 1964 at 1988, *Nigeria Marketing Board v. Adewunmi* (1972) 11 SC 111 at 117, *Fakorede v. Attorney General Western State* (1972) ANLR 178, *Katto v. C.B.N.* (1999) 6 NWLR (Pt.607) 390 at 405 and *Total (Nig) Plc v. Akinpelu* (2003) AFWLR (pt.170) 1428 at 1445.

The appellant has particularly referred to and relied on paragraph 5 of the appointment Handbook containing thus,

*"you will be subject in all respects to the condition of service of the corporation";*

To strongly argue that in the context in which the clause is used that the Handbook being the compendium of the binding conditions of services of NICON has prescribed pre-action notice only as pertaining to, “legal proceedings for libel and slander” and no more. And that the mention of specific things as per the said Handbook among other possible alternatives means the exclusion of other things not specifically therein mentioned. See: *Udo v. Orthopaedic Hospital* (1993) 7 SCNJ (P42) 445 and *Awuse v. Odili* (2004) AFWLR (Pt.212) 1664.

It is conceded that the employment relationship of the parties in this matter is not one governed by statutory flavour so that the said appellant’s employment is governed wholly by the Handbook and the letter of appointment and not by any provisions of NICON Act. In other words, that the said provision of Section 26(2) cannot be seen as forming part of his conditions of employment and therefore is not enforceable against him.

On Issue 2 - on whether pre-action notice is applicable to contracts of service or specific contracts as here. The appellant has posited that pre-action notice does not apply to specific contracts and so that the instant action being in relation to his contract of services does not require service of pre-action notice as a condition precedent to instituting the instant action and refers to and relies on *Nigerian Ports Authority v. Construzioni Generali Farsura Cogefar Spa & Anor.* (1974), ECCLR 658; (1974) 12 SC; and more so on the cases of *Salako v. LEDB & Anor.* 20 NLR 169, *CBN v. Adedeji* (2005) AFWLR (Pt.244) 912 at 930, *FGN v. Zebra Energy Ltd.* (2002) 3 NWLR (pt.754) 471 at 409. These cases he submits have similar provisions as in the case of *Nigerian Ports Authority v. Construzioni E.t.c.* (supra) and has further opined that they have held non applicability of pre-action notice to cases of specific contracts as in this case for breach of contract of personal service. The court is urged to uphold the foregoing submissions as the law in this matter and to order the defendant to file its pleadings for the case to proceed to its conclusion.

I think I should bring in the respondent’s response to the above two issues where as here the two issues have been compressed into its issue one as set forth above; its issue 2 deals with question of waiver simpliciter. The respondent has referred to the averments/depositions as to the material facts in this matter to submit that the respon-

dent, NICON Insurance Plc is the same entity as National Insurance Corporation of Nigeria (NICON) and to contend that where these facts have not been specifically denied as deposed to in the respondent's counter-affidavit, they are deemed as binding on the parties as uncontested facts and a court is obliged to act on them; and that evidence tendered in regard to unpleaded facts goes to no issue. See: *Oduka v. Kasumu & Anor.* (1968) NMLR 28 at 31, *Kate Ent. Ltd. v. Daewoo Nig. Ltd.* (1985) 2 NWLR (Pt.5) 116. B

It is submitted on *Ajomale v. Yaduat No.2* (1991) 5 NWLR (pt.191) 257 at 276 - that the same goes for the failure to deny depositions in the affidavits as here which leaves the court no other option than to uphold the facts not controverted as admitted. And so in this case that the respondent's deposition that it is governed by NICON Act which Act is still extant until repealed not having been controverted is admitted - *Kwusu v. Udom* (1990) 1 NWLR (pt.127) 421. Coming to the provision of Section 26(2) of the NICON Act (now Cap 54 Laws of the Federation (2004) it is contended that the instant action has not been exempted from the application of its provision; and so the words, "No suit", as used in the said section relates to any suits including such cases as the instant one. And that this is clearly so as this provision is unambiguous and plain so that given its ordinary meaning it clearly encompasses every suits that it covers any actions causes e.t.c. for that matter. See *Oviawe v. I.R.R.* (1997) 3 NWLR (pt.492) 126 at 139 E - F, and *Amadi v. NNPC* (2000) 10 NWLR (pt.674) 76 at 112 F - G. The respondent has urged the court to resolve these issues in its favour even moreso on the appellant's misconceptions in this matter. C D E F

I have considered the submissions and counter submissions here as proffered by the parties to this appeal and it seems to me that the appellant's case simply put is that the employment relationship between the parties i.e. NICON Insurance Plc and the appellant is regulated in the main by the Memorandum and Articles of Association of the Company in accordance with the Companies and Allied Matters Act (CAMA) and the letter of his appointment, the Company's Handbook on conditions of services of its employees (being collective agreements binding on the parties) and not by any provisions outside these defined precincts; and that the said Handbook has impliedly excluded the application of Section 26(2) of the NICON Act G H

by expressly mentioning the nature of cases requiring pre-action notices as follows:

*“No step shall be taken by a staff without the consent of the corporation to institute legal proceedings for libel and slander in connection with matters arising out of his official duties”.*

B Clearly the instant matter is neither libel nor slander and cannot by any stretch of the foregoing provision come within its contemplation. It is submitted that having specifically so provided that the instant case not having been covered by that provision does not come within the ambit of the cases requiring pre-action notices to be served C on a defendant as the respondent here. Besides, that it is even moreso as contended by appellant where NICON has been transformed into NICON Insurance Plc and now a privatised and commercialised company registered under the Companies and Allied Matters Act and D totally governed by CAMA in every respect. In other words, that it has shed off its status as NICON simpliciter as stipulated in NICON Act to assume the status conferred on it under CAMA. It remains to be seen if these propositions are tenable on the peculiar facts.

E Let me observe pre-emptorily that these arguments appear to me as spurious in that the instant letter of appointment and the Handbook relied on here by the appellant are the conditions of service agreed with NICON and not with NICON Insurance Plc. These are facts the appellant has overtly admitted. The appellant has nowhere F alleged that these documents have lost their respective effectiveness and therefore not binding on the parties on NICON having been transformed into NICON Insurance Plc. That is not the appellant's case here nor has the appellant pleaded any other documentary evidence entered into, in these respects with NICON Insurance Plc covering their employment relationship. Of course he knows that that G will be the end of his case in this matter rather he has propped up his case on them that is the instant documents relating to his employment relationship with NICON. Even then what is more devastating to the appellant's case is the fact that NICON as established by the H National Insurance Corporation Act 1969 - now Cap. No.54 Laws of the Federation 2004 has one significant provision in the Act thus providing that NICON as per Section 7,

*“shall be deemed to be a company registered under the Insurance Act”.*

It is not intended to expatiate on the implication of the foregoing provision being totally irrelevant to the immediate question for resolution in this appeal.

It is my view, however, that so long as the Act has not been repealed that, that status still remains extant. And so it must be observed that the appellant's submission that one of the consequences of NICON having been registered under CAMA that is to say in this case is that NICON has been duly privatised as a commercial venture with private participation in its equity share capital to the tune of 51% and so that it has shed its status under NICON Act. This assertion cannot be taken as having nullified NICON's status as registered under NICON Act as the proposition seems to have ignored the fact, nonetheless unarguably so, that the National Insurance Corporation of Nigeria Act, the enabling Act, has not been repealed to the effect of obliterating NICON Act completely from our compendium of Laws of the Federation. It is still very much extant and by its Section 7 NICON is deemed to be registered under the Insurance Act. See Sections 1(1) and 6 of the Interpretation Act and see also *Kay v. Godwin* (1830) 6 Bing 576 at p.582.

However I cannot find any support for the appellant's view that the two registrations cannot stand side by side. Meaning that short of a statutory provision to that effect there is no basis of implied ouster of its status under the instant registration vis-a-vis the Insurance Act however inconvenient with its status as conceived by the appellant of its registration under CAMA on having been privatised. The sooner this anomaly is regularized by another Act the better. Therefore, it would be wrong to hold without more that NICON Insurance Plc has shed all its contractual status under the NICON Act as it concerns its activities in regard to the employment relationships with its staffers in this matter, particularly so when NICON Act is still extant. I think I should not even then delve too deeply into this question as the transformation into National Insurance Plc has been duly accomplished by mere registration under CAMA and not by any Act of the National Assembly as such. It is also interesting to note that NICON Insurance plc still retains its registered name as "NICON" under the NICON Act. From my reasoning above it is my view that this question therefore does not admit discussing whether or not the NICON Act has been repealed by implication as it cannot be on the

peculiar facts of this matter.

***What has emerged so far from the foregoing resume is that at all material times to this action, the letter of appointment and the Handbook heavily relied upon by the appellant in this matter have been entered into with NICON, which have been predicated upon NICON Act and therefore subject to the provisions of S.26(2) (supra) long before even transforming into NICON Insurance plc. There is therefore, no way one can avoid relying on NICON Act in examining the employment relationship between the instant parties. It is upon that basis that I make the proposition that the appellant having conceded as per his counter affidavit and pleadings as I shall show fully anon that his conditions of employment are predicated on his letter of employment and the Handbook cannot be seen to have opted out of being bound by Section 26(2) (supra). He cannot pick and choose in the circumstances. There is no doubt that his conditions of service are subject to the provision of Section 26(2) (supra) as supported by the empirical facts as accepted in this case.***

***Again, I must make the point that in the appellant's appointment letter is contained the crucial provision affecting their contractual relationship to the effect that,***

***"you (the appellant) will be subject in all respects to the conditions of service of the corporation"***

***This clause in my view literally construed has served to incorporate Section 26(2) into the letter of the appellant's instant appointment without more. Just as Section 26(2) is an enforceable term of the conditions of service of the respondent's officers and servants so it is a condition of service in the instant appellant's conditions of service. I am prepared on the other hand on having scrutinized this clause to hold that the clause is unambiguous and given its literal interpretation is wide enough for the said provision of Section 26(2) (supra) to be incorporated into the appellant's conditions of service. Since the appellant's contract of employment contains such an enabling implied term there can be no question about incorporating the instant provisions of Section 26(2) into the appellant's conditions of employment thus imposing***



***a duty on the appellant the breach of which is enforceable at the suit of the respondent here being grounded in their employment relationship. This duty as imposed on the appellant by Section 26(2) simply put is to serve pre-action notice before commencing any actions against the respondent. The word “shall” used in Section 26(2) in articulating this duty shows that it is a compulsory duty and imperative and this has been so expressed, if I may elaborate further, by the use of the words therein as follows: “No suit shall be commenced against the corporation... after written notice of intention to commence the suit shall have been served upon the corporation by the intending plaintiff...”***

***Although a party as a defendant in an action by a plaintiff may all the same voluntarily decide to waive it, thus, it shows that the duty is not mandatory but directory. In other words the parties may even decide to contract out of it. Nonetheless the important consideration here is as to whether its breach can be founded in contract as is postulated by the respondent. It is my opinion that this is so, based on the contemporary judicial opinion to treat and interpret such a breach in this way.*** The above cited cases bear out this proposition.

Also see Gutsell v. Relve (1936) 1 K.B. 272 distinguishing Aylloh v. Quest Ham Corporation (1927) 1 Ch.30 where a comparable question as in this matter has been decided. It is even moreso as regards other terms of collective agreements on similar pedestal as the instant Handbook or collective bargain(s) that have created legal relations so as to make them binding agreements between the contracting parties (that is between employers and employees) in their employment relationships. See: Hill v. Levy (1858) 157. E.R. 366; affirmed (1858) 3 H & N 702 - showing that the courts have readily implied such terms where the contract contains an implied term thus making such terms legally binding. This is so as the provision of Sections 26(1) and (2) relates to the staffers of the corporation and is a crucial condition of service for all employees of the respondent.

In this regard let me emphasise their employment relationship by referring to Section 18 of the NICON Act as to who are its employees and as regards their functions and duties as they are defined as follows:

*“(1) Subject to Sections 19 and 20 of this Act, there shall be in the employ of the corporation such number of officers and servants as may appear expedient and necessary to the Board, for the proper and efficient conduct of the business and functions of the corporation.*

B *(2) Unless otherwise precluded by this Act, the corporation may exercise any of the powers and perform any of the functions and duties conferred and imposed on the corporation by this Act through or by any of its officers and servants duly authorized by the corporation in that behalf.”*

C It is unarguably based on the above plain provisions of Section 18(1) and (2), that the officers and servants of the corporation as the appellant here are employed and each of them is subject to the provisions of NICON Act thus reinforcing my proposition that the provision of Section 26(2) is enforceable against the staffers severally including the appellant.

I have now come to construe the question that the appellant’s case is within the purview of Section 26(2) (supra) from the perspective of the averments/depositions in the affidavits filed by the parties and the plaintiff’s pleadings as filed in this matter and as having established at all material times that the appellant has conceded in his affidavit and pleadings that NICON is also known as NICON Insurance Plc, and having so pleaded it is trite that he is bound by his averments/depositions. Again, it is in the context of the foregoing that recourse has to be had of the processes filed in this matter by the parties to establish that the parties have not joined issue on the crucial averment/deposition that NICON Insurance Plc is not governed by NICON Act and so, it pre-empts the appellant’s claim of being at all material times an employee of the defendant/respondent that is “a Public Liability Company” as constituted under CAMA.

***The defendant/respondent’s affidavit in support of the motion to strike out the suit at paragraph 6 (six) reads as follows:***

H ***“6. That the defendant on record is the same person as the National Insurance Corporation of Nigeria a creature of the statute under Cap.263 Laws of the Federation of Nigeria and is thus governed by the provisions of that statute.”***

***In reply to the foregoing averment/deposition the plain-***

**tiff/appellant at paragraph 2 of his counter affidavit has responded thus:**

**“(2) That I have read the affidavit dated 15th day of July, 1999 in support of motion on Notice of the defendant/applicant in this case struck out and say that the facts deposed to in paragraphs 3, 4, 5 and 6 are not true in their entirety”.** B

**Throughout its counter-affidavit no attempt has been made by the appellant to expatiate on this paragraph and to specifically traverse the said paragraphs 3, 4, 5 and 6 severally. And so, I rely on the cases of Falobi v. Falobi (1976) SC. 1 and Adjekpemevor v. Onafeko (2000) FWLR (Pt. ) at 1425, Uzo v. Nnalimi (2000) FWLR (pt) at 1258 and Adekanya v. Comptroller of Prison (2000) FWLR (Pt. ) at 1258 to say that these averments/depositions not having been specifically denied are deemed as accepted and unchallenged facts and the court can act on them and has rightly acted on them.** C D

Again, in paragraph 7 of the statement of claim the appellant has described and referred to the respondent as,

**“National Insurance Corporation of Nigeria (now known as NICON Insurance Plc)”** and the implication in the context of this question is irrefutable. E

It is clearly an admission that “National Insurance Plc” and NICON refer to the same legal person. And so the appellant cannot be seen to be speaking from both sides of his mouth (i.e. approbating and reprobating at the same time). From the above surmises, I agree with the respondent that the defendant/respondent on record is the same legal person as the National Insurance Corporation of Nigeria, a creation of Statute under Cap.263 Laws of the Federation and is governed by its provisions. Flowing naturally from that reasoning is the fact that a pre-action notice is required by Section 26(2) of National Insurance Corporation of Nigeria Act to be served on the respondent here and which Section as I have also found above forms part of the appellant’s conditions of appointment and that no pre-action notice has been duly served on the respondent in order to render this suit competently initiated. F G H

Having construed the cases of the parties on the two issues before this court as raised by appellant in this appeal, I have no doubt that the appellant has misconceived the fact that NICON Act governs

the appellant's employment relationship with the respondent not having been repealed neither expressly nor by necessary implication and that the service of the requisite pre-action notice as contemplated and prescribed under Section 26(2) (supra) forms part of the appellant's conditions of service and as the said pre-action notice  
 B required by Section 26(2) (supra) has not been so served on the respondent before instituting the instant action, the trial court is precluded from exercising its jurisdiction over the instant matter.

***That said; if I may repeat there can be no argument about  
 C it that no pre-action notice has been served on the respondent as required by Section 26(2) (supra); the appellant has not controverted that point and the consequences are trite and obvious. See: Madukolu v. Nkemdilim (1961) 2 NSCC 374 - a case that has settled the ingredients of jurisdiction to include  
 D inter alia that a case has to be initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction. Any defects in these respects render the entire proceedings incompetent; in this case for failing to serve pre-action notice on the respondent as provided by  
 E Section 26(2). The question of non-service of pre-action notice ought to be taken as conceded by the appellant on the peculiar facts of this matter as it is evident that the appellant has never claimed to have done so... And I so hold.***

***It therefore follows that once it is established that the  
 F respondent is entitled to be so served with pre-action notice on the circumstances of this case then on the facts of the appellant's action, the instant action in its entirety becomes incompetent (the pre-action notice not having been served on  
 G the respondent) and the court is therefore, not clothed with the jurisdiction to entertain the action. See: Madukolu v. Nkemdilim (supra).***

***The overall implication of my reasoning above is that the provisions of Section 26(2) (supra) amply apply to this  
 H matter and it provides:***

***"No suit shall be commenced against the corporation before the expiration of a period of one month after written notice of intention to commence the suit shall have been served upon the corporation by the intending plaintiff or his agent;***

***and the notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the relief which he claims”.***

***The provision of the foregoing Section is clear and unambiguous and has to be given its literal meaning. See Oviawe v. I.R.R. (supra). By the phrase “No Suit” it is beyond argument that all suits, causes and matters whether or not it is founded upon a contract of services or specific contract are within its ambit and so each of such cases requires the service of pre-action notice to constitute a competent action severally against a defendant as the respondent here otherwise it is fatal to the action. It has been the contention of the appellant that the provision does not cover contracts of service or specific contracts and has relied on such cases as N.P.A. v. Construzioni e.t.c. (supra) and the like cases as I have mentioned herein for so contending. I think the appellant has misconceived the meaning of the phrase “No Suit” as used in the context of the Act vis-a-vis the processes initiating any actions by due process of law upon fulfilling the condition precedent. I have no misgivings that the above provision as I have surmised herein is wide enough to cover all manner of actions, causes or matters including the instant one. The phrase does not admit of any exception. See: Amadi v. NNPC (supra) where Karibi Whyte, JSC interpreting a similar phrase has stated that the expression,***

***“No suit” in Section 11(2) NNPC Act, 1977, has been construed in Section 46(1) as wide and all embracing”.***

Guided by this dictum once it has been established that the provision of Section 26(2) (supra) forms part of the conditions of employment of the appellant as I have found herein there can be no gainsaying that the instant action is within the ambit of the said provision to require serving of pre-action notice on a defendant as the respondent here. So that all the furore that has been raised by the appellant in contending contrariwise pales into insignificance being baseless. In that vein, all the cases cited by appellant in support of his contention as per issues 1 and 2 in this appeal, are inapplicable and at best distinguishable on the particular facts of this matter. And I agree with the respondent that most of cases cited by the appellant

are hinged on the principle of freedom to enter into contracts without any interference by the courts, which have been misconceived by the appellant in making his case for conditions precedent as regards the exercise of the court's jurisdiction. There can be no doubt that while the former operates to govern the rights and obligations of the parties and thus forming the basis upon which to found their action, the later concerns the basis upon which the court is clothed with the power to deal with matters. See: *Katto v. CBN* (supra).

I have no qualms in answering both issues 1 and 2 in the appellant's brief of argument in the affirmative even as I resolve the same against the appellant.

The appellant's grouse under issue 3 is to the effect that the appellant has waived the service of pre-action notice in this matter. In this regard the appellant in canvassing his case on the facts of this matter as I have outlined in the early paragraphs of this judgment has contended that whenever a party to a case has entered an appearance without protest (as in this matter where the defendant has entered an unconditional appearance after having been served the writ) that, that party has waived his right to raise objection on any irregularity apparent on the face of the record thereafter. In other words, that it is profoundly so where the party has taken fresh steps in a matter since becoming aware of his right to object in a cause or matter afflicted by irregularities. In this case the appellant has submitted that the instant preliminary objection has been taken against the trial court's jurisdiction to deal with the action for not serving pre-action notice on the respondent as required under Section 26(2) vis-a-vis whether that right has been waived because the respondent as defendant according to the appellant has taken fresh steps (3 (three) times) since becoming aware of the instant irregularity that is to say by:

- (1) entering an unconditional appearance.
- (2) by filing a motion for preliminary objection; and
- (3) by withdrawing same after a period of one and half year.

The appellant has relied on order 26 Rules 4(1) of the High Court Rules applicable to Enugu State to submit that a party wishing to contest the competence of a proceeding or an irregularity must enter a conditional appearance and must not take fresh step(s) since discovering the irregularity. He submits that a single fresh step suf-

fices. He is peeved by the fact that the court below has not deliberated on the facts that the respondent here has filed a motion which he has withdrawn and the effect of having raised another one being the instant application on the same ground as the withdrawn application nearly 3 years thereafter. He opines that these circumstances pointedly attest to the appellant's abandonment of his right to insist on being served a pre-action notice in this matter. B

Let me interject here to say that the appellant has once again missed the point as this question has raised on a question of fact or at best a question of mixed law and fact whose determination has to depend on the particular facts of the case and that no decided case on facts is a guiding precedent in determining other cases. The appellant has relied on the following cases - *Duke v. Akpabuyo Local Government* (2006) AFWLR (Pt.294) 559 at 569 - 570, *Sande v. Abdullahi* (1989) 411 WLR (Pt.116) 287. On the cases of *Okeola v. Adeleke* (2004) AFWLR (Pt.224) 1980 at 1994 and *NICON v. Power & Ind. Engr. Co. Ltd.* (1986) 1 NWLR (Pt.14) 1; *Oguejiofo v. Oguejiofo* (2006) AFWLR (Pt.301) 1792 at 1807 - 1808, *Amadi v. Orisakwe* (2005) AFWLR (Pt.247) 1529 at 1558. The appellant has stood on them to contend that the decisions of the two lower courts being perverse should be disturbed by this court to avoid a miscarriage of justice. C D E

The respondent on the other hand has argued that the appellant once more has misconceived the concept of waiver as espoused in so many decisions of this court and as per such cases as including *Ariori v. Elemo* (1983) ANLR (Pt.355) 171, *Kano State Development Board v. Fanz Construction Ltd.* (1994) 4 NWLR (Pt.142). It has surmised that the proper question is whether the filing of an unconditional memorandum of appearance by the respondent in this matter on its peculiar facts has amounted to the intentional or voluntary relinquishment of the respondent's right to be served a pre-action notice as provided by Section 26(2) of the NICON Act. And I agree with that proposition as the gist of this matter. F G

From the appellant's case here, there can be no doubt that he has grossly misconceived the concept of waiver vis-a-vis as it relates to a party's right to pre-action notice as expounded in the cases the appellant has relied upon above. I think that ordinarily depending on the facts of each case the implication of entering unconditional H

appearance to a writ of summons served on a defendant without fulfilling a condition precedent of firstly serving him with pre-action notice where it is so required by the law raises an irregularity which can be waived. The concept of waiver has been defined in *Ariori v. Elemo* (supra) it says that

B *“...it presupposes that a person who is to enjoy a benefit or who has the choice of two benefits is fully aware of his right to the benefit, or where he has a choice of two, he decides to take one but not both”. See: Vyuyan v. Vyuyan 30 Beav 65 per Sir John Romilly M.R. at p.74 (See 54 ER 817) as approved and relied by this court,*  
C *per Eso JSC.*

The case of *Fawehinmi Construction Co. Ltd. v. O.A.U.* (supra) has brought out two attributes of waiver thus:

*“The waiver must be clear and unambiguous like allowing all  
D evidence to be taken or even decision given before challenging the hearing. It will then show that the party, deliberately refused to take advantage when it availed him. Such failure to take advantage of a right must be so clear that there will be no other reasonable presumption than that the right is let to go.”*

E ***In this case therefore the two questions to answer are:***  
***(1) Is the waiver in this case clear and unambiguous,***  
***and***

***(2) Has the appellant clearly failed to take advantage of  
F his right in the circumstances.***

***These two requirements must co-exist to lead to the inevitable conclusion that the respondent has deliberately refused to take advantage of the waiver. It is in my opinion on  
G the backdrops of these factors that one has to approach the instant case. I have put side by side the positions taken on this question by both parties to the appeal and it is my view that the appellant has failed to substantiate both requirements and his case in this regard must fail.***

***From the facts of this case it is clear that the defendant/  
H respondent although he has entered an unconditional appearance has followed it since becoming aware of the irregularity by an application challenging the competency of the action without first having been served with a pre-action notice. In fact what has transpired since the first application to chal-***



***lenge the competency of the action can be characterized as processes challenging the writ. In this regard the respondent has not relented at all. The crucial question here is discovering a clear mindset of the respondent as per his actions in regard to the exercise of his right of making a choice of the two benefits available to him as predicated upon in the circumstances of the peculiar facts of this matter; that is to say, in this case notwithstanding that he has entered an unconditional appearance before protesting the incompetency of the action. In other words, the court has to be satisfied that the party as the respondent here has consciously waived his right so as to uphold the plea of waiver. Put in another way such skirmishes as have occurred in regard to the facts in this matter cannot be taken to constitute a voluntary waiver.*** See Kano State Development Board v. Fanz Construction Ltd. (supra).

Furthermore, it is clear on the facts that the appellant has failed to discharge the onus on him to establish that the respondent has clearly and unambiguously showed his intention to abandon his right to be served a pre-action notice. Having failed as to the first requirement it is even then more difficult to show clearly as to the overt acts of the respondent pointing on the balance of probability to its failure to take advantage open to it. This is so as the three grounds relied upon by the appellant for alleging a waiver are unequivocally consistent as challenging the court's jurisdiction in this matter. The appellant has alluded to the motion raising the preliminary objection and the application withdrawing the same as fresh steps taken by the respondent in this matter as amounting to a waiver and I beg to disagree. It is so clear from the processes before the court that apart from entering an unconditional appearance, that the respondent has followed it up with two applications to strike out the matter and to my mind these are sufficient grounds to suggest that he has not waived his right to raise the question of pre-action notice not having been first served on the respondent. Otherwise, how else is the respondent to challenge the action (except by raising these applications). The respondent has not yet filed its defence implying that the parties have not joined issues in the matter. And the characterization of the respondent's conduct in this matter to say the least is not consistent with one who has given up its protests against the action vis-a-vis

want of jurisdiction of the trial court to deal with the matter.

B Besides, I hold this view in accordance with the extant rules in many of our jurisdictions, whereas demurrer has been abolished giving way to the requirement for the defendant being allowed by the Rules of court to plead questions of substantive and procedural law as to be relied upon at the hearing of the matter with an indication to seek leave to raise that question by way of an application to be tried separately before the substantive hearing of the case particularly so where it has the potentiality of finally determining the fate of the action. Surely in that instance it cannot be taken as a waiver. Thus it is my conclusion that the defendant has showed by the steps taken in the matter that it has not intended to waive its right; and I so find.

C In sum, the appellant has cited too many cases in this matter and to my mind as submitted by the respondent most of the time D inapplicable to the facts of this case and without even marking the clear distinctions between irregularities arising from defects in serving of originating processes as in such cases as *Ezomo v. Oyakhire* (1985) 2 SC 260, *Adegoke Motors Ltd. v. Adesanya* (1989) 3 NWLR (Pt.109) 250, *Total Industries Ltd. v. Amogboro* (1994) 4 NWLR (pt.337) E 147, *Mkpot Enin L. G. v. PIKK* (2004) AFWLR (pt.236) 287 and irregularities as here arising from failure to serve pre-action notices.

One clear difference between the two set of circumstances is that in the former case, appearance simpliciter suffices as a waiver of the irregularity in serving of the irregular processes; whereas in the F latter case, as in this case, the law has provided the procedure for issuing pre-action notices and even then since the abolition of demurrer it is permitted to be pleaded as an irregularity. I find no basis agreeing with the appellant that the filing of an unconditional appearance by the respondent per se is without more coterminous on G the facts of this matter with waiving his privilege of raising an objection for non service of pre-action notice in this action.

H The respondent on the facts of this matter cannot evidently be said to have waived his privilege to be served a pre-action notice in this matter. And I so hold. Issue 3 is resolved against the appellant.

In the result, I can see no merit in this appeal. The appellant having not served on the respondent a pre-action notice as provided by Section 26(2) (*supra*) the instant action is a non-starter and incompetent and the court has no jurisdiction to deal with it. I affirm

the concurrent decisions of the two lower courts striking out this matter for incompetency. The appeal is hereby struck out accordingly. In the circumstances of this case I make no order as to costs. Appeal struck out.

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B

**ONNOGHEN JSC**

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

I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed. I have nothing useful to add to the said judgment. C

I therefore dismiss the appeal and abide by the consequential order made in the said lead judgment including the order as to costs. Appeal dismissed. D

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**RHODES-VIVOUR JSC (DISSENTING)**

I am unable to agree with the majority decision. The facts of this case are undisputed, and as relevant to this judgment are briefly as follows: E

The appellant was an employee of the respondent. On the 22nd of August, 1995, the respondent wrote to him in a letter terminating his employment. The appellant as plaintiff thereafter filed a suit against the respondent at an Enugu High Court. His claims were for: F

(a) The sum of N3,590,302 being damages, benefits and entitlements for wrongful and unlawful termination of the plaintiff's appointment without the regard to the provisions of the plaintiff's G appointment.

(b) An injunction restraining the defendant, its agents, servants, privies or whomsoever acts on the instruction e.t.c. from ejecting the plaintiff from the accommodation together with its appurtenances of No.4 NICON crescent Independence Layout, Enugu, until the determination of this suit. H

(c) A declaration that the rate of depreciation of the Nigerian Currency be taken into account in determining the appropriate worth of the amount due to the plaintiff on the judgment day of the case.

On a Motion on Notice filed by the respondent challenging the competence of the suit the learned trial judge ruled on the 2nd day of February, 2000 that failure to serve pre-action notice on the respondent in compliance with Section 26(2) of NICON Act Cap 263 Laws of the Federation of Nigeria, 1990 is fatal to the suit. His lordship then struck out the suit. Dissatisfied with the Ruling the appellant filed an appeal. It came before the Court of Appeal, Enugu Division. That court in its judgment delivered on the 30th day of June, 2004 agreed with the learned trial judge, and dismissed the appeal. Still dissatisfied the appellant has now come before this court. Briefs were duly filed in accordance with well laid down Rules of this court. The appellant's brief was filed on the 18th day of September, 2006, while the respondent's brief was deemed duly filed on the 6th of June, 2012.

Learned counsel for the appellant formulated three issues for determination. They are:

1. Whether it is the Companies and Allied Matters Decree 1990, the Memorandum and Articles of Association of NICON Insurance PLC, the appointment paper and the Handbook on the conditions of service of NICON Insurance PLC or the NICON Act 1969 and 1990 that regulates the contract relationship between the appellant and the respondent now NICON Insurance PLC, registered under the Companies and Allied Matters Decree 1990.

2. Whether or not pre-action Notice is applicable to the specific contract of service between the appellant and the respondent.

3. Whether or not the respondent, after receiving service of the plaintiff/appellant's writ of Summons on 30/5/96, after filing an unconditional memorandum of appearance dated 5/6/96, after filing first Motion for preliminary objection dated 20/6/ 96, withdrawn same on 3/12/97, after taking fresh steps before filing the second Motion for preliminary objection dated 15/7/99, that was, after more than three years of the receipt of the Writ of Summons, had waived its right to pre-action Notice.

On his part, learned counsel for the respondent formulated two issues for determination, which are:

1. Whether the Court of Appeal was wrong in holding that NICON Act governed the respondent and that failure by the appellant to give the requisite pre-action notice prevented the trial court

from exercising jurisdiction in the instant case.

2. Whether having regard to the facts of the case, the respondent can be said to have waived his right to pre-action notice.

The reason why the learned trial judge struck out the suit was simply because the appellant did not serve pre-action notice on the respondent. The Court of Appeal was of the view that the learned trial judge was correct to strike out the suit. The live issue for determination is whether the appellant was required to serve pre-action notice on the respondent before commencing his suit at the Enugu High Court. To my mind the appellant's issue 2 easily addresses the real grievance in this appeal. All the other issues would not be considered, they being peripheral. B  
C

At the hearing of the appeal on the 27th day of November, 2012 both counsel for the parties adopted their briefs of argument and did not advance oral argument. Once again I shall consider only issue 2 formulated by the appellant in view of the fact that the only real issue in contention in this appeal is whether the provisions of Section 26 of the NICON Act is applicable to a plaintiff who sues on a specific contract. It reads:

Whether or not pre-action Notice is applicable to the specific contract of service between the appellant and the respondent. E

Learned counsel for the appellant, Mr. A. D. Igwenagu observed that Section 97(1) of the Ports Act on which *NPA v. Construzioni Generali Fersura Gogefar SPA & Anor* 1974 9 NSCC p.622 was decided is similar to Section 26(2) of the NICON Act contending that the courts below were wrong not to have followed the decision of this court in *NPA v. Construzioni Generali Fersura Gogefar SPA* supra. F

He submitted that pre-action notice is generally not applicable to action based on contract as in the instant case. Reliance was further placed on *Momoh v. Okewale* 1977 6 SC p.81, *Alapiki v. Gov. of River State* 1991 5 NWLR pt.211 p.171, *FGN v. Zebra Energy Ltd* 2002 3 NWLR pt.754 p.471. He urged this court to set aside the judgment of the Court of Appeal and enter judgment in favour of the appellant. G  
H

In reply learned counsel for the respondent, Mr. S. O. Wogu argued in his brief that Section 26(2) of the NICON Act which provides for the appellant to give the respondent pre-action notice did

not exempt any suit whether or not arising from specific contracts of service. Laying emphasis on the words “No suit” in Section 26(2) supra he argued further that if the words in a statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in the natural and ordinary sense. Reliance was placed on *Oviawe v. IRP* 1997 3 NWLR pt.492 p.126, *Amadi v. NNPC* 2000 10 NWLR pt.674 p.76.

He urged this court to dismiss the appeal and uphold the judgment of the Court of Appeal.

Before I go to the real issue I must say a thing or two on waiver. It is the contention of learned counsel for the appellant that the respondent waived his right to rely on Section 26 of the NICON Act because paragraph 3.7 of the Conditions of Service state that:

*“No step shall be taken by a staff without the consent of the Corporation to institute legal proceedings for libel or slander in connection with matters arising out of his official duties.”*

“Notwithstanding” in Section 26(1) of the NICON Act means that no provision of the NICON Act itself, or any statute made under it, or any legislation or guideline, Condition of Service Handbook shall be allowed to prevail over the provision of Section 26(1) supra. The expression notwithstanding is a term of exclusion. The conditions of service Handbook is in the circumstances relevant at trial, but not at this stage of deciding whether pre-action notice should be served on the respondent. The respondent never waived his right to rely on Section 26 supra.

Pre-action Notices are recognized procedural provisions. They give the defendant breathing time so as to enable him to determine whether he should make reparation to the plaintiff. See: *Ngelegia v. Tribal Authority Nongowa Chieftdom* 1953 14 WACA p.325 at p.327. Legislation, for example the NICON Act, which prescribes conditions to be fulfilled before a suit can be instituted against NICON in no way constitutes a denial of the right of access to the court of anyone wishing to sue NICON. Section 26(2) of the NICON Act which states the conditions to be fulfilled before a suit is filed against NICON PLC is not unconstitutional or inconsistent with 6(6)(b) of the Constitution. See: *Gambari v. Gambari* (1990) 5 NWLR (pt. 152) p.572, *Obada v. M. G. of Kwara State* (1994) 4 NWLR (pt. 336) p.26.

Section 26(2) of the NICON Act is a condition precedent for

the institution of a suit against NICON PLC. Judicial powers exercisable by the courts under Section 6(6)(b) of the Constitution are limited to conditions precedent. Once, as in this case, legislation (NICON Act) provides for a condition precedent before a court has jurisdiction, that condition must be fulfilled subject to recognized exceptions. The suit would be incompetent if the court does not ensure that there is compliance with the condition precedent. See: Madukolu v. Nkemdilim 1962 2 SCNLR p.341

There is no dispute, and the Record of Appeal is clear on the point that the appellant did not serve the respondent a pre-action Notice. The issue is whether the appellant ought to have served the appellant a pre-action Notice.

Section 26(1) and (2) of the NICON Act States that:

(1) Notwithstanding anything in any other enactment, no suit against the Corporation, a director or any officer or servant of the corporation for any act done in pursuance or execution or intended execution of any enactment or law, or of any public duties or authority, shall lie or be instituted in any court, unless it is commenced twelve months next after the act, neglect or default complained of or, in the continuance of damage or injury, within twelve months next after the ceasing thereof.

(2) No suit shall be commenced against the Corporation before the expiration of a period of one month after written notice of intention to commence the suit shall have been served upon the Corporation by the intending plaintiff or his agent, and the notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the relief which he claims.

Now, Section 97 of the Ports Act considered in *NPA v. Construzioni Generali FSC & Anor* (supra) reads:

(1) When any suit is commenced against the Authority or any servant of the Authority for any act done in pursuance or execution, or intended execution of any Ordinance or Law, or any public duties or authority, or in respect of any alleged neglect or default in execution of such Ordinance, Law, duty or authority such suit...

(2) No suit shall be commenced against the Authority until one month at least after written notice of intention to commence the same shall have been served upon the Authority by the intending plaintiff

of his agent...

It is clear that Section 26(1) and (2) of the NICON Act and Section 97(1) and (2) of the Ports Act are saying more or less the same thing.

The Court of Appeal considered Section 97 of the Ports Act and decided not to follow NPA v. Construzioni Generali Supra. The reasoning is interesting. The Court of Appeal said:

*“...The issue in that case was a matter of contract which was not explicitly included and necessitating a pre-action notice. This case is however distinguishable from the one under consideration which the provision of Section 26(2) clearly requires that there must be pre-action notice to the Corporation in “any suit” giving no single specification or exception. Thus the remarkable distinguishing factor from the case under reference and cited by the appellant’s learned counsel.”*

The reasoning of the Court of Appeal is wrong. The issue in this case is also a matter of contract, a contract of employment. How may I ask is NPA v. Construzioni Generali supra distinguishable. The Court of Appeal said that any suit in subsection 2 of Section 26 of the NICON Act gives no single specification or exception, but failed to see and also failed to explain subsection 2 of Section 97 of the Ports Act which also has in this case “No suit”. “No suit” and “Any suit” in the context used in the legislation mean the same thing. I fail to see this case can be distinguishable from NPA v. Construzioni Generali Supra.

In the Construzioni case, the appellants, a statutory corporation engaged the 1st respondent, building contractors to construct what used to be known as the second Apapa Wharf Extension. The appellant sued for ₦163, 124 while the respondent counterclaim. It was held inter alia by this court:

*“That Section 97 of the Ports Act and similar enactments are not intended by the legislature to apply to specific contracts. Also when goods have been sold, and the price is to be paid upon a quantum meruit, the Section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provision of the statute.”*

To my mind nothing can be clearer than the above. The Sec-



tion and all other similar Sections do not apply to contracts. In *Salako v. L.E.D.B. and Anor* 20 NLR p.169. Hon. Justice SPJ de commarmond examined the provision of Section 2 of the Public Officers Protection Ordinance which is almost identical with Section 97 of the Ports Act and thereafter stated the Law as follows:

*"I am of opinion that Section 2 of the Public Officers Protection Ordinance does not apply in cases of recovery of land, breaches of contract, claims for work and labour done."* B

I must observe that the view of this court in the *NPA v. Construzioni* case is in consonance with judgments of English courts dealing with similar provisions in English Statutes. See: *Midland Railway Company v. The Local Board for the District of Withington* 1882-3 11 Q.B.D. p.788 where the Court of Appeal in England construed Section 264 of the Public Health Act of 1875 which is similar to Section 97 of the Ports Act the same way as was done by this court. D

Section 264 supra states that:

*"A writ or process shall not be sued out against or served on any local authority or any member thereof, or any officer of a local authority, or persons acting in his aid, for anything done or intended to be done or omitted to be done under the provisions of this Act, until the expiration of one month after notice in writing has been served on such local authority member, officer, or person..."* E

The position of the Law is that where a suit is brought under an express or specific contract it is no longer necessary to serve on the Corporation pre-action notice. Furthermore from decided authorities there would be no need to serve pre-action notice when goods have been sold, and the price is to be paid upon quantum meruit, or for cases of breach of contract, claims for work and labour done. F

Clearly the appellant's claim is founded in contract. The appellant's main claim is for the payment of his entitlement due from the respondent as a result of the contract of employment they both entered into. The appellant as the employee, and the respondent the employer. The sums of money became due when the appellant's employment was terminated by the respondent. Section 26 of the NICON Act is not intended by the legislature to apply to specific contracts consequently the mandatory nature of Section 26 of the NICON Act does not apply to the appellant's suit, it being an action on a G

specific contract. A contract of employment.

There are recognized exceptions to the rule on interpretation of statutes that when words used are unambiguous they should be given their plain and ordinary meaning. Where the words or phrases have been judicially interpreted especially by the Supreme Court and similar courts abroad that interpretation will apply to the same words or phrases and all that the courts need do is follow decided cases, thereby showing consistency in interpreting them.

Section 26 (1) and (2) of NICON Act, Section 97 of the Ports Act, Section 11 of the NNPC Act are all identical or similar provisions which provide for service of a pre-action Notice on the Corporation by anyone with intentions to sue. Section 97 of the Ports Acts was interpreted in the *Construzioni* case. That case has shown the limitations of Section 97 of the Ports Act and all similar provisions. Once a claim is founded on a specific contract Section 26 (1) and (2) of the NICON Act is no longer applicable. The appellant was correct not to serve a pre-action notice on the respondent.

Heavy weather was made of the decision of this court in *Amadi v. NNPC* 2000 10 NWLR pt.674 p.76 Before I consider the case I must observe that a case is only relevant for the question it determined and upon which it based its decision See: *Fawehinmi v. NBA* (No.2) 1989 2 NWLR pt.105 p.558, *Clement v. Iwuanyanwu* 1989 3 NWLR pt.107 p.39.

In the *Amadi* case, the appellant (Mr. Amadi) was employed by the respondent (NNPC). He was suspended then dismissed. He sued his employers. In a preliminary objection the learned trial judge struck out the case for lack of jurisdiction. This was confirmed by the Court of Appeal. The suit was struck out and affirmed by the Court of Appeal because the appellant as plaintiff failed to comply with Section 11(2) of the NNPC Act. It reads:

2. No suit shall be commenced against the Corporation before the expiration of a period of one month after written notice of intention to commence the suit shall have been served upon the Corporation by the intending plaintiff or his agent, and the notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the relief which he claims.

The issue before the court was whether the pre-action notice

served on the respondent contained the information as provided by Section 11(2) of NNPC Act and not whether the NNPC Act extended to suits of breach of contracts of employment. This court set aside the decision of the Court of Appeal and ordered the case heard by another judge of the Lagos High Court, after finding that all the requirements of Section 11(2) of the NNPC Act had been met by the plaintiff. If ever there was a case most irrelevant to the issue under consideration *Amadi v. NNPC* supra is that case. The issue in this case once again is whether a plaintiff who sues on a specific contract (a contract of employment) needs to serve pre-action notice on the defendant, while in *Amadi's* case, a pre-action notice was served but, did the pre-action notice contain the required information as provided by Section 11(2) of the NNPC Act. That was the issue.

I have not seen any authority and none was cited to me or contained in the briefs which say the interpretation in *NPA v. Construzioni* supra is wrong. In the absence of such an authority the decision therein must be followed as it is sound law and reflects how similar provisions are/have been decided in this and other jurisdictions.

Concurrent findings of fact are rarely upset by this court, but this court would be compelled to interfere and upset findings of the courts below if found to be perverse, or cannot be supported by evidence before the court or there was a miscarriage of justice or violation of some principle of law or procedure. See *Ogba v. State* 1992 2 NWLR pt.222 p.164, *Dakolo v. Dakolo* 2011 46 NSCQR p.669. Concurrent findings of the courts below are that where a plaintiff's claim is for a specific contract or whatever claim he must serve on the defendant a pre-action notice as provided by Section 26 of the NICON Act, before the court can have jurisdiction to hear his suit. This finding confirmed by the Court of Appeal is perverse in the light of the reasoning in *NPA v. Construzioni* supra which states clearly that Section 97 of the Ports Act and similar enactments are not intended by the legislature to apply to specific contracts.

The concluding part of the appellant's brief reads:

*"Set aside the judgment of the Court of Appeal and enter judgment in favour of the appellant."*

This cannot be done at this stage since there was never a hearing of the appellant's claim on the merits. The case was struck out

without a hearing on the merits because the trial judge was of the view that he did not have jurisdiction to hear the case.

In *N.P.A. v. Construzioni Generali Supra* this court said:

That Section 97 of the Port Act and similar enactments are not intended by the legislature to apply to specific contracts. Also when goods have been sold and the price is to be paid upon a quantum meruit the section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute.

Again in *NPA PLC v. Lotus Plastics Ltd.* 2005 19 NWLR pt. 959 p.158. This court again said that section 97 of the Ports Act applies to everything done or omitted or neglected to be done under the powers granted by the Act. The section however does not apply to cases of specific contracts. Thus the statutory privilege granted to the Nigerian Ports Authority under section 97(1) of the Ports Act does not apply to cases of contract. This is because it would be unjust to cloth the Nigerian Ports Authority with special protection in all cases of contract as that would negate the general principles upon which the Law of Contract is based.

The NPA Act and the NICON Act both say “NO Suit” in Sections 97(2) and 26(2) respectively. I must restate for emphasis that where, as in this case the appellant’s cause of action is founded in contract, a contract of employment, a specific contract, Section 26 of the NICON Act and similar enactments do not apply. Consequently the appellant was right not to serve pre-action notice on the respondent before filling his action.

The appeal succeeds and it is hereby allowed by me with no order on costs. The case is hereby remitted to the High Court of Enugu State to be heard by another Judge other than E. C. Ahanonu J.