

SUPREME COURT OF NIGERIA
FRIDAY 1ST FEBRUARY, 2013. SC. 164/2004
CORAM:- C. M. CHUKWUMA-ENEH, S. GALADIMA,
M. D. MUHAMMAD, C. B. OGUNBIYI,
S. S. ALAGOA, JJSC

AMINU ISHOLA INVESTMENT LTD APPELLANT
AND
AFRIBANK NIGERIA PLC RESPONDENT

TORTS - Detinue - Nature of - *Kosile v. Folarin* - Detinue involves unlawful diversion of plaintiff's chattel - Which he has immediate right to possess - After having demanded for its return (H1)

DAMAGES - Contract - Torts - Since chattel does not include abstract money - The award of N2 million based on detinue is wrong - As measure of damages in tort is not the same as in contract (H2)

APPEALS - Damages - Interference - Since trial court relied on wrong premise of tort of detinue instead of contract - Court of Appeal rightly disturbed the excessive damages awarded (H3)

CONTRACTS - Agreement - Binding nature of - Parties are bound by terms of agreement freely entered into - And court must give effect to such agreement - And is not to make a new one (H4)

FACTS

Plaintiff/appellant - a customer of defendant/respondent lodged a bank draft/cheque in the sum of N467,000.00 to open a fixed deposit account with respondent. By an agreement partly oral and partly written entered into by both parties, respondent at its Ilorin branch opened for appellant a fixed deposit account No. 70-100-029. Pursuant to the agreement, appellant authorized respondent to transfer the sum of N467,000.00 into the deposit account. In reply, respondent confirmed to appellant the opening of the deposit account at an agreed rate of 12.25 % per annum. Thereafter, appellant notified respondent of its intention to withdraw the sum of N467,000.00 from the said account for the purposes of procuring

for sale some second hand Peugeot vehicles.

However, respondent refused to accede to appellant's request on the ground that it had received directive from its head office to stop payment on the account because the CBN Cheque No. 009661 for N471,548.44 with which the proceeds were transferred into the account was in dispute. Appellant contended that the money was paid from his current account with respondent and not with a CBN Cheque. Appellant therefore instituted this action at the High Court of Kwara State Ilorin, contending that respondent is in wrongful detention of its money (N467,000.00) and accruing interests in its deposit account, by reason of which appellant has suffered damages. Appellant thus sought for inter alia, that the refusal to release the money constitutes a breach of contract and appellant's Constitutional right to property. After hearing, the court found in favour of appellant by relying on tort in detainee. Respondent was not satisfied. Hence, it appealed to the Court of Appeal, Ilorin. The court allowed the appeal. Dissatisfied, appellant filed appeal to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court below was right in holding that the relationship between the Appellant and Respondent was based only on contract and in setting aside the award of Two Million Naira (N2 Million) damages in favour of the Appellant by the trial Court.

2. Whether the Appellant was only entitled to interest at the originally agreed rate of 12.25 % per annum on the fixed deposit account".

HELD (Unanimously dismissing the appeal per

ALAGOA JSC)

TORTS - Detinue - Nature of

1. What is the nature of an action in detainee? In *Kosile V. Folarin* (1989) NWLR (PART 107) 1; the Supreme Court per Nnaemeka Agu, JSC held as follows,

"It must be clearly stated that in an action for detainee the gist of the action is the unlawful diversion of the Plaintiff's chattel which he has an immediate right to possess after the Plaintiff has demanded its return." (p. 1038 H)

Contract - Torts

2. Cases referred to earlier in this write-up show that “chat-tel” or “goods” cannot mean money except for example money in form of cash in a bag. The authorities do not show that the term “chattel” or “goods” can by any stretch of the imagination be extended to mean or include money in an abstract form such as a bank draft used in the transaction, the subject matter of this case now on further appeal to us. Paragraph 5 of the Further Amended Statement of Claim refers to “term of the agreement” details of which are no doubt contractual between the parties, imposing obligations on both sides. An award of N2 Million damages based on the tort of detainee cannot therefore be right. In *Armel’s Transport Ltd V. Transco (Nig) Ltd (1974) 11 SC 173*, the Supreme Court held that the measure of damages in an action in tort is not the same as in an action in contract. (p. 1039 C)

Damages - Interference

3. Thus it is clear that the trial court was not only operating under the wrong premise that the relationship between the Appellant and Respondent was one under the tort of detainee instead of contract, the damages were excessive and liable to be disturbed on appeal by the lower court which did so. (p. 1040 B)

CONTRACTS - Agreement - Binding nature of

4. In other words in the absence of any special agreement that the initially agreed interest rate of 12.25% has to be reviewed upwards after a given period, can the Appellant or the trial court foist a new and reviewed interest rate on the parties? Parties are bound by the terms of an agreement freely entered into by them and the duty of a trial court is simply to give effect to that agreement freely entered into by the parties and not to make a new agreement for them. This is an age old legal principle - a notorious one for that matter and there is a plethora of case law on that subject matter.

In what manner if I may ask? Did the agreement stipulate by

what percentage annually the reviewed interest would be? Appellant has also admitted that it did not appeal on the trial court's finding that paragraphs 4, 5, 6, 7, 8, 9, 13, 14, 19, 20, 27 and 37 of the further Amended Statement of Claim remained un-denied by the Respondent in its further Amended Statement of Defence. Of what significance is it then to have been raised in the Appellant's Brief of Argument? This issue must also be and is hereby resolved in favour of the Respondent against the Appellant. (pp. 1043 G/1044 H)

REPRESENTATION

M. I. Hanafi, Esq with D. T. Nwachukwu, S. S. Umoru and S. O. Q. Giwa, for the appellant
Sheni Ibiwoye, Esq with Theophilus Okwute and Jessikan Nanfe (Miss),
D for the respondent

CASES REFERRED TO

Unity Bank Plc v. Bouari (2008) 7 NWLR (pt. 1086) 372
Okoro v. The State (1988) 12 SC 191
E Latunde v. Lajinfin (1989) 5 SC 59
Awojugbagbe Light Ind. Ltd v. Chinukwe (1995) 4 NWLR (pt. 390) 379
Ogunbiyi v. Ishola (1996) 6 NWLR (pt. 452) 12
Balogun v. NBN (1978) 3 SC. 155
F Alien v. London Country & Westminster Bank (1915) TLR 310
Benin Rubber Producers Ltd. v. Ojo (1997) 9 NWLR (pt. 521) 388
Chime v. Chime (1995) 6 NWLR (pt. 404) 734
Atoyebi v. Bello (1997) 11 NWLR (pt. 528) 268
G Ndinwa v. Igbinedion (2001) 5 NWLR (pt. 705) 140
ACME Builders Ltd. v. K.S.W.B. (1999) 2 NWLR (pt. 590) 288
Union Bank Ltd v. Odusote Bookstore Ltd (1995) 9 NWLR (pt. 421) 558
Allied Bank of Nigeria v. Akubueze (1997) 6 NWLR (pt. 509) 374
H Kalu v. Mbuko (1980) 3 NWLR (pt. 80) 86

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, s. 233 (3)
Court of Appeal Rules, O. 3 r. 3(1)

BOOK REFERRED TO

Halsbury's Laws of England 3rd Ed. Vol. 38 p. 775 para. 1285

LEAD JUDGMENT BY ALAGOA JSC

This is an appeal against the judgment of the Court of Appeal B
Ilorin Division in Appeal No. CA/IL/42/2000 delivered on the 10th
December, 2001 which allowed the appeal of the present Respon-
dent against the judgment of the High Court of Kwara State in Suit
No. KWS/ 88/91 delivered on the 21st December, 1999. The facts of C
this case as presented before the High Court are that the present
Appellant who was Plaintiff was a customer of the Respondent and
lodged a bank draft/cheque in the sum of N467.000.00 to open a
fixed deposit account with the Respondent. The terms upon which
the account was opened are best captured by recourse to paragraphs D
4 and 5 of the Further Amended Statement of Claim at page 32 of
the Record of Appeal as follows:--Paragraph 4 - By an agreement
partly oral and partly written entered into by the Plaintiff and the
Defendant in or about August, 1988 the Defendant at its Ilorin branch
opened for the Plaintiff a fixed deposit account No. 70-100-029. E

Paragraph 5 - Among other things it was a term of the agree-
ment.

i. The deposit account shall initially attract an annual interest of
12.25%.

ii. The annual interest shall be payable at the end of every F
month from the date of the deposit into the account and credited
directly 25 to the Plaintiffs Current Account No. 36-180369M with
the Defendant.

iii. The duration of the account was to be 12 months with G
liberty to the plaintiff after giving notice to the Defendant to with-
draw any amount from the deposit in the account for the purposes
of its business during the currency of the agreed period of deposit.

iv. Interest would only be paid on any amount standing to the H
credit of the account at the end of every month.

v. Interest payable on the deposit could be reviewed upwards
from time to time to any rate agreed by the parties after negotiation.

vi. The account could be renewed for another period of time
at the expiry of the first year of deposit.

Other facts germane to this case and as contained in the further amended statement of claim are that pursuant to the agreement, the Plaintiff (now Appellant) by its letter dated the 12th August, 1988 authorized the Defendant (Respondent) to transfer the sum of N467,000.00 into the deposit account. In reply to the Plaintiff's said letter of 12th August, 1988 the Defendant by its letter dated 15th August, 1988 confirmed to the Plaintiff the opening of the deposit account and the agreed rate of 12.25 % per annum.

In its letter dated the 31st October, 1988 the Plaintiff (Appellant) gave notice to the Defendant (Respondent) of its intention to withdraw the sum of N467,000.00 from the deposit account for the purposes of procuring for sale some second hand Peugeot vehicles.

In response to the Plaintiff's said letter, the Defendant's Ilorin branch in its letter dated 31st October, 1988 refused to accede to the Plaintiff's request on the ground that they had received directive from their head office to stop payment on the account because the CBN Cheque No. 009661 for N471,548.44 with which the proceeds were transferred into the account was in dispute. The Plaintiff (Appellant) stated that the sum of N467,000.00 paid into the deposit account was transferred from the Plaintiff's current account with the Defendant at its Ilorin Branch and not by any CBN Cheque. The Plaintiff (Appellant) averred in paragraph 37 of the further Amended Statement of Claim that Defendant (Respondent) has wrongfully detained and still detains the Plaintiff's (Appellant's) money in its deposit account the value of which is N467,000.00 plus interest thereon from August, 1988 till date by reason whereof the Plaintiff has suffered damage and in paragraph 38 of the further amended Statement of Claim the Plaintiff (Appellant) claimed as follows:-

i. DECLARATION that the failure or refusal of the Defendant to allow the Plaintiff to withdraw from its deposit account No. 70-100-029 constitutes a breach of contract and the Plaintiff's constitutional right to its property and is therefore wrongful and illegal.

ii. AN ORDER directing the Defendant to release to the Plaintiff the principal sum of N467,000.00 deposited into the account plus interest at the rate of 12.25% per annum from August, 1988 till November, 1989.

iii. AN ORDER directing the Defendant to pay the Plaintiff by way of special damages additional interest calculated at the rate of

25% or any other rate found due by the court on the principal sum plus accrued interest from December, 1989 till the date of judgment.

iv. Order directing the Defendant to pay 10% interest on whatever sum is adjudged due to the Plaintiff from the date of judgment till liquidation.

v. AN ORDER directing the Defendant to pay to the Plaintiff the sum of N20,000.000.00 representing general damages suffered by the Plaintiff as a result of the failure of the Defendant to allow the Plaintiff to withdraw money from the deposit account and or as damages for breach of contract and or for the wrongful detention of the Plaintiff's money since 1988 to date. The Defendant (Respondent) went on to file a Statement of Defence which was subsequently amended and the matter proceeded to be heard at the end of which judgment was given in favour of the Plaintiff (Appellant), the learned trial Judge holding that the Defendant (Respondent) had wrongfully detained the Plaintiff's (Appellant's) funds and ordered a refund of the deposit made by the Plaintiff (Appellant) with interest at rates which varied, from the 12.25 % per annum agreed by the parties to 25%. The sum of N2,000,000.00 (Two Million Naira) was also awarded as damages in favour of the Plaintiff. The Defendant appealed successfully to the Court of Appeal Ilorin Division. This is a further appeal from that court (hereinafter referred to as the lower court), by the aggrieved Plaintiff (hereinafter referred to as the Appellant) to the Supreme Court.

However in order to properly institute this appeal the Appellant brought an application on Notice at the Court below pursuant to section 233 (3) of the Constitution of the Federal Republic of Nigeria 1999 and Order 3 Rule 3(1) of the Court of Appeal Rules and under the inherent jurisdiction of that Court for leave to appeal to the Supreme Court against the judgment of that court delivered on the 10th December, 2001 on ground other than grounds of law on the grounds that the Ground of Appeal contained grounds of law, fact and mixed law and facts, which application having been granted, the Appellant filed a Notice Of Appeal dated the 17th January, 2002 at pages 289 - 294 of the Record of Appeal consisting of eight grounds of appeal itemized hereunder shorn of particulars:-

GROUND OF APPEAL

1. The learned Justices of the Court of Appeal erred in law

when they held as follows:-

B *“From the totality of the facts of the case it is my view that the relationship that existed between the parties in the instant case on appeal was emphatically that of banker and customer which said relationship is founded on contract and nothing more. It is trite law that where a banker refuses to pay a customer’s cheque when the banker holds in hand an amount equivalent to that endorsed on the cheque belonging to the customer, such an act of refusal to pay amounts to a breach of contract.”*

C The learned justices of the Court of Appeal further erred in law when they held that:

D *“It follows therefore that when the Respondent demanded for the payment of its deposit and the Appellant refusal to comply the Appellant committed a breach of its contract with the Respondent and I also hold. I therefore do not agree that the action of the Appellant in refusing to pay up the deposit as previously agreed between the parties amounts to both a breach of contract and commission of the tort of detinue as canvassed by learned SAN for the Respondent.”*

E The learned Justices of the Court of Appeal misdirected themselves when they held thus:

F *“From the passages quoted supra, it is very clear that the trial court never found that the Respondent had two causes of action - one in contract and another in detinue. Rather the judge was emphatic throughout his judgment including the assessment of damages due to the Respondent, that the action is founded in detinue. This is a clear finding of fact by the lower court which the Respondent has not challenged by way of a cross appeal. Even though it is clear from the pleadings and evidenced of the Respondent and address of Counsel that the Respondent was claiming both in contract and detinue, that is clearly not what the trial court found. It is my considered view that without a cross appeal challenging the copious findings of the trial court on the issue of the action being grounded on detinue alone,*
H *the learned SAN cannot legally be heard submitting in the contrary to this court. In other words in view of the above findings of the learned trial judge the judgment of the court can only stand if the relationship between the parties is founded on detinue as decided therein since the issue of the cause of action being also on contract is*

not properly before this court being the Court of Appeal.”

The learned Justices of the Court of Appeal erred in law in setting aside the general damages of N2 Million awarded in favour of the Appellant when there was no valid legal grounds canvassed by the Respondent to justify the action and this led to a grave miscarriage of justice against the Appellant. The learned Justices of the Court of Appeal erred in law by holding that:-

“The position of the law being what it is, it follows that the award of N2 Million damages in addition to the deposit of N467,000.00 with interest thereon at the rate of 12.25% per annum from 1988 to December, 1989 minus the months of August and September, 1988 already paid in an award in contravention of the principle of law governing award of damages in cases of breach of contract as reproduced supra. That being the case, it is my view and I agree with learned counsel for the appellant that the award of the said N2 Million damages under the circumstances amounts to double compensation which is frowned upon by law. That being the case, it is my view that the said damages of N2 Million be and is hereby set aside and Issue No.2 resolved in favour of the Appellant.”

The Learned Justices of the Court of Appeal totally misdirected themselves when they held thus:

“Paragraph 5 (v) in particular provides that the interest payable on the deposit could be reviewed upwards from time to time to any rate agreed by the parties after negotiation. This provision clearly shows it is not mandatory but permissive. To my mind, it is the same as saying that the interest payable on the deposit may be reviewed upwards etc. from the agreed 12.25% per annum.

That being the case it is my view that until that is done by negotiation the agreed rate of 12.25% per annum will continue to govern the transaction between the parties. There is no provision to the effect that where a party refuses to negotiate the upward review of interest payable the other party can unilaterally impose a rate of interest on the other simply because the contract between the parties did provide for a permissive upward review of the rate of interest as in the present case. The principle of sanctity of contract enjoins us to deal carefully with the agreements as reached by the parties.

In the present case there is no doubt that the Appellant is entitled to interest, the issue is at what agreed rate? From the totality of

the facts before the lower court the only rate of interest agreed by the parties to the transaction is 12.25% per annum and I am of the firm view that any award above that rate is contrary to what was agreed and therefore invalid. I agree with learned counsel for the Appellant that it does not matter whether lending rate rose to 200% in some banks the parties are bound by their agreement in so far no negotiation took place between them to review upwards the agreed rate of interest of 12.25% per annum."

The learned Justices of the Court of Appeal further erred in Law by holding that:

"That apart the Respondent pleaded in Paragraph 27 of the Further Amended Statement of Claim - the second Statement thereof which was not admitted by the Appellant; that it shall lead oral and documentary evidence of the regime of interest on deposit in commercial banks in Nigeria over the period of 1988 to 1994 and de-regulated interest rates on deposits of the period of 1991 to 1993 in particular - emphasis supplied. There is no evidence on record that the interest on deposit as pleaded is the same as lending interest as testified to by DW.1. Obviously they cannot mean the same thing without evidence to that effect. In effect it is my view that Issue No.3 be and is hereby resolved in favour of the Appellant. Consequently any award of interest made by the learned trial judge over and above the agreed rate of 12.25% per annum for the period covered by the rates of interest already set aside."

The judgment is against the weight of evidence. From these grounds of appeal the Appellant in its Brief of Argument dated the 30th November, 2004 and filed on the 2nd December, 2004 formulated the following two issues for determination by the Supreme Court:-

1) Whether the court below was right in holding that the relationship between the Appellant and Respondent was based only on contract and there was no element of detinue involved in the matter and thereby setting aside the award of damages of N2Million awarded in favour of the Appellant by the trial court.

2) Whether the court below was right in setting aside the interest awarded by the trial court and in holding that the Appellant was only entitled to 12.25% interest on the fixed deposit notwithstanding the fact that it was the Respondent that refused for 11 years to negotiate upward review of the interest with the Appellant.

The Respondent for its part distilled in the Respondent's Brief of Argument dated the 24th January, 2005 and filed same day, the following three issues for determination by this Court: -

1. Whether the Court below was right to hold that the Appellant's action is founded in contract and not in the tort of detinue. B

2. Whether the Court of Appeal was right to have set aside the award of N2Million damages made by the trial court.

3. Whether the Appellant was only entitled to interest at the originally agreed rate of 12.25 % per annum on the fixed deposit account. This appeal came up to be heard on the 6th November, 2012. 30 M. I. Hanafi leading D. T. Nwachukwu, S. S. Umoru and S. O. Q. Giwa as Counsel for the Appellants adopted and relied on the Appellant's Brief, of Argument and urged this court to allow the appeal and set aside the judgment of the lower court. C D

Sheni Ibiwoye appearing with Theophilus Okwute and Jessikan Nanfe (Miss) as Counsel for the Respondent also adopted and relied on the Respondent's Brief of Argument and urged us to dismiss the appeal.

What is apparent at a glance is that issues 1 and 2 in the Respondent's Brief of Argument have been encapsulated and conveniently dealt with as Issue 1 in the Appellant's Brief of Argument while issue 2 in the Appellant's Brief of Argument is same as Issue 3 in the Respondent's Brief of Argument which Issue 3 is to my mind to be preferred for its brevity and clarity. What then emerges as the issues for determination by this court are Issue 1 in the Appellant's Brief of Argument and Issue 3 in the Respondent's Brief of Argument. Put more simply and clearly the two issues for the determination of this appeal which indeed are issues formulated by the Appellant and Respondent themselves with slight modifications are as follows:- E F G

"1. Whether the Court below was right in holding that the relationship between the Appellant and Respondent was based only on contract and in setting aside the award of Two Million Naira (N2Million) damages in favour of the Appellant by the trial Court. H

2. Whether the Appellant was only entitled to interest at the originally agreed rate of 12.25 % per annum on the fixed deposit account".

This slight reformulation of issues for determination by an appellate court is permissible in order to give precision and clarity to the issues. See *Unity Bank Plc V. Edward Bouari* (2008) 7 NWLR (PART 1086) 372; (2008) 2 - 3 SC. PART III; *Okoro v. The State* (1988) 12 SC. 191; *Latunde & Anor V. Bello Lajinfin* (1989) 5 SC 59; 25
 B *Awojugbagbe Light Ind. Ltd V. Chinukwe & Anor.* (1995) 4 NWLR (PART 390) 379, *Ogunbiyi V. Ishola* (1996) 6 NWLR (PART 452) 12; (1996) 5 SCNJ 143.

I now propose to consider the issues for determination serially.
 C Issue 1 is whether the Court below was right in holding that the relationship between the Appellant and Respondent was based only on contract and in setting aside the award of N2Million damages in favour of the Appellant by the trial court. Appellant has submitted in its Brief of Argument that a careful reading of the pleadings of the Appellant
 D shows that the Appellant's case is based on two causes of action namely Breach of Contract and the tort of Detinue and this fact is appreciated by the Respondent by a reading of the amended Statement of Defence. References were made to paragraphs 6 - 22, 27 - 33 of the Further amended Statement of Claim at pages 33 - 36 of the Records
 E which are said to bear out clearly the issue of breach of contract while paragraphs 4 - 25 of the Further amended Statement of Defence at pages 45 - 47 also bear out the issue of breach of contract.

On the issue of detinue Appellant contends that paragraphs
 F 22,29,34,37 A and 38(v) of the further amended Statement of claim support that cause of action while paragraphs 2,13 and 40 of the further amended Statement of Defence support the issue on Detinue. Appellant submitted that a Plaintiff could found his claim on more than one cause of action. In other words a Plaintiff could claim
 G in contract and in tort at the same time and where he succeeds he will be entitled to all the reliefs he has established. It is not the law, Appellant maintained that a Plaintiff who claims in contract cannot rely on other causes of action like detinue or conversion.

Reliance was placed on *Balogun V. NBN* (1978) 3 SC. 155 at
 H 173; *Alien V. London Country & Westminster Bank* (1915) TLR 310. Appellant went further to submit that in the present case the Respondent had manifested an intention to permanently deny the Appellant of the money deposited and in so doing, the tortious claim of detinue was clearly made out. Reliance was placed on the following cases -

Benin Rubber Producers Ltd. V. Ojo (1997) 9 NWLR (PART 521) 388 at 410; W. A. Oilfields Services Ltd V. UAC (Nig.) Ltd. (2000) 13 NWLR (PART 638) 68; Ndinwa V. Igbinedion (2001) 5 NWLR (PART 705) 140 at 150; ACME Builders Ltd. V. K.S.W.B. (1999) 2 NWLR (PART 590) 288 at 305. On the award of damages, the Appellant submitted that an appellate court will not interfere with the award of damages made by the trial court where such an award of damages is justifiable. B

Reliance was placed on Union Bank Ltd V. Odusote Bookstore Ltd (1995) 9 NWLR (PART 421) 558 at 585 - 586; Allied Bank Of Nigeria V. Akubueze (1997) 6 NWLR (PART 509) 374; Kalu V. Mbuko (1980) 3 NWLR (PART 80) 86. The lower court Appellant submitted that the lower court was wrong to have interfered with the trial court's findings on damages and further contended that the era of technical justice is over. Reliance was placed on Bello V. A-G. Oyo State (1986) D 5 NWLR (PART 45) 828 at 889 - 890; Chime V. Chime (1995) 6 NWLR (PART 404) 734 at 750; Atoyebi V. Bello (1997) 11 NWLR (PART 528) 268 at 284. C

The Respondent for its part has submitted that the basis of the relationship between the parties is agreement and therefore the relationship is contractual in nature involving obligations on both sides, breach of which is a breach of contract. Reference was made on the terms upon which the account was opened as spelt out in paragraph 5 of the further amended Statement of Claim at page 32 of the Record. This conclusion the Respondent submits is supported by a number of judicial authorities:- F

Union Bank V. Ozigi (1991) 12 NWLR (PART 176) 677 at 694 wherein it was held that "*The law of banking is a specie of the law of contract with the special usage of commercial transactions in money including the use of special documents and collateral such as mortgages and debentures thrown in.*" Other cases referred to are Joachim V. Swiss Bank Corporation (1922) 3 KB 110; Balogun V. National Bank of Nigeria Ltd (1978) 11 NSCC 135. Respondent submitted that it is not in doubt that the relationship between the parties could not have come into being in the absence of an agreement or contract. The subject matter of detinue according to the Respondent is "goods" or "chattel" which cannot be money and in order to succeed in a suit in detinue the Appellant must establish the wrongful deten- G H

tion of his chattel by the Respondent. Reliance was placed on Udechukwu V. Onwuka (1956) FSC 70. Respondent “went on further to submit that detinue does not lie for money unless it is specifically identified, as for example money in a bag and not money in the abstract as in a fixed deposit account which is not chattel for which an action in detinue will lie. Reliance was placed on Julius Berger V. Omogui 25 (2001) 15 NWLR (PART 736) 401 at 415 - 416 and to Halsbury’s Laws of England (Third Edition) Volume 38 page 775 paragraph 1285 where the learned authors said as follows with respect to the subject matter of detinue – *“The subject matter of both trover and detinue must be specific personal property whether goods or chattels. Neither trover nor detinue lies for money unless it is specifically identified...”* In Foster V. Green (1862) as reported in 31 LJ Ex 158 at p. 161 it was held per Pollock C.B. that” an action (in detinue) would not lie for money unless in a bag.”

It was Respondent’s contention that what was taken to the Respondent by the Appellant that led to the present case now on further appeal to this court was not money but a bank draft which is in line with the evidence of PW 2 under cross examination and the evidence of DWI.

On the setting aside of the award of N2 Million general damages by the Court below, Respondent submitted that this was proper, since the trial court had based its award of that sum to the Appellant on the wrong premise that the action was one on the tort of detinue. Respondent further submitted that quite apart from the fact that the award of N2 Million general damages to the Appellant was based on a wrong premise, the court below was also right to have interfered with the award which to be proper must not be manifestly too high or manifestly too low and in the present case it was manifestly too high in view of the fact that interest on the amount fixed had already been granted. Respondent went on to submit that in cases of contract, the principle of award of damages is as laid down in Hadley V. Baxendale (1854) 9 EXCH 341 which was not the principle adopted by the learned trial Judge in the High Court.

What is the nature of an action in detinue? In Kosile V. Folarin (1989) NWLR (PART 107) 1; (1989) 4 SC Pt 150 the Supreme Court per Nnaemeka Agu, JSC held as follows, “It must be clearly stated that in an action for detinue

the gist of the action is the unlawful diversion of the Plaintiff's chattel which he has an immediate right to possess after the Plaintiff has demanded its return."

See also Shonekan V. Smith (1964) 1 All NLR 168 at p. 173; Akpene V. Barclays Bank Nig. Ltd & Anor. (1977) 1 SC 47; Kate Ent. Ltd V. Daewoo Nig. Ltd (1985) 2 NWLR (PART 5) 116; Adegbaieye V. Loyinmi (1986) 5 NWLR (PART 43) 665. In Chigbu V. Tonimas Nig. Ltd (2006) NWLR (PART 984) 189, the word "chattel" is used interchangeably with the word "goods" with respect to the ingredients of the tort of detinue. This definition would appear to be in consonance with that in Halsbury's Laws of England (Third Edition) Vol. 38 page 775 paragraph 1285 as was seen earlier. ***Cases referred to earlier in this write-up show that "chattel" or "goods" cannot mean money except for example money in form of cash in a bag. The authorities do not show that the term "chattel" or "goods" can by any stretch of the imagination be extended to mean or include money in an abstract form such as a bank draft used in the transaction, the subject matter of this case now on further appeal to us. Paragraph 5 of the Further Amended Statement of Claim refers to "term of the agreement" details of which are no doubt contractual between the parties, imposing obligations on both sides. An award of N2 Million damages based on the tort of detinue cannot therefore be right. In Armel's Transport Ltd V. Transco (Nig) Ltd (1974) 11 SC 173, the Supreme Court held that the measure of damages in an action in tort is not the same as in an action in contract.*** In Chief Paul Ordia V. Pied Mont (Nigeria) Ltd (1995) 2 NWLR (PART 379) 16 the Supreme Court held per Iguh, JSC that:-

"In general the damages to which a Plaintiff who has been deprived of his chattel is entitled to prima facie the value of the chattel together with any special loss which is the natural and direct result of the wrongful act."

See Re Simons (1934) 1 CH J. *"A successful Plaintiff in an action on detinue may obtain judgment which entitles him to the return of the chattel or its value and also damages for its detention."* This is to be compared with an award of damages for breach of contract. In Universal Vulcanizing (Nigeria) Ltd V. Ijesha United Trading & Transport & Ors (1992) NWLR (PART 266) 388 this Court held

that:

B *“The object of awarding damages for breach of contract is to put the injured party so far as money can do it in the same position as if the contract had been performed. The injured party can never get more in damages than the loss which he has suffered. In fact the injured party can even get less than the loss he has suffered under the exclusion principle of “remoteness of damages” as laid down in Hadley V. Baxendale (1854) 8 EX 341.”* per Iguh, JSC at pages 38 - 39, paras G - B. **Thus it is clear that the trial court was not only operating under the wrong premise that the relationship between the Appellant and Respondent was one under the tort of detinue instead of contract, the damages were excessive and liable to be disturbed on appeal by the lower court which did so.**

D In Williams V. Daily Times of Nigeria Ltd (1990) 1 NWLR (PART 124) 1 this court per Nnamani, JSC, reiterated this well known principle of law thus,

E *“It is well settled that the award of damages by a trial court can only be upset by an appellate court if that court feels that the trial court acted on wrong principles of law or that the amount awarded by the trial court is extremely high or low.”*

Issue No. 1 ought therefore and is hereby resolved in favour of the Respondent.

F Issue 3 is *“whether the Appellant was only entitled to interest at the originally agreed rate of 12.25% per annum on the fixed deposit account.”*

G At page 163 of the Records the trial court in its judgment had stated as follows, *“For avoidance of doubt, the Plaintiff is hereby awarded interest on its deposit with the Defendant at the rate of 12.25% per annum from October, 1988 to 14th August, 1989; 18.25% interest per annum from 15th August, 1989 to 14th December, 1989 and thereafter interest at the rate of 25 % per annum until the date hereof as enumerated in Exhibit 28.”*

H Several reasons had been given by the learned trial Judge for awarding those interest rates to the Plaintiff (Appellant) but principally because *“the Defendant has wrongfully held on to the Plaintiff’s deposit and would not negotiate a review of the interest rate since the past eleven years.”* See page 162 of the Records. The court be-

low had disagreed with this finding of the trial court and set same aside. Was the court below right to have done so? Appellant has submitted in its Brief of Argument that in paragraphs 5, 27, 33, 34, 35 and 36 of the further Amended Statement of Claim it copiously pleaded its entitlement to interest at rates over and above 12.25% initially agreed by the parties. Specific reference was made to paragraph 5(v) of the Further Amended Statement of Claim at page 32 of the record which stated as follows, *“Among other things it was a term of the agreement that: (v) interest payable on the deposit could be reviewed upward from time to time to any rate agreed to by the parties after negotiation.”*

Appellant also stated that in paragraph 27 of its Further Amended Statement of Claim a request in its letter to the Respondent dated 21st September, 1989 for a 25% interest on the deposit account had been turned down by the Respondent in its letter of the 22nd November, 1989. Respondent according to the Appellant had not denied these facts. Denials of paragraphs 33, 34, 35 and 36 of the further Amended Statement of Claim were only general in nature, as claimed by the Appellant and yet the court below still found it convenient not only to question but to even set aside the interest awarded by the trial court to the Appellant. Appellant went further to submit that the trial court had noted in its judgment that paragraphs 4, 5, 6, 7, 8, 9, 13, 14, 19, 20 and 37 A of the further Amended Statement of Claim were not denied in the Respondent’s Statement of Defence and even though the Appellant did not appeal on this fact, the court below still went ahead to set aside the decision of the trial court on this point. It was the contention of the Appellant that there was never an agreement between both parties that interest rate on the deposit account would be fixed or remain at 12.25 %. On the contrary it was agreed that the interest rate would be renegotiated annually.

Appellant faulted the finding of the court below on evidence adduced by the Appellant showing that higher interest rates could have been payable as perverse. Reliance was placed on *Aina V. UBA Plc* (1997) 4 NWLR (PART 498) 181 at 189; *NEPA V Ososanya* (2004) 5 NWLR (PART 867) 601 at 625. Not only were exhibits 28 and 29 not contradicted, the Respondents failed to challenge the entitlements claimed by the Appellant, so claimed the Appellant. It

was therefore the submission of the Appellant that the Respondent having deliberately stopped an upward review of the interest rate for eleven years, was legally and morally estopped from stopping an award of interest in excess of 12.25 % which inures to the Appellant as of right having been contemplated by the agreement between the parties.

Appellant relied on the following cases to buttress that point: *Owoniboy Technical Service Ltd. v. UBN LTD* (2003) 15 NWLR (PART 844) 545; *Ekwunife V. Wayne West Africa Ltd* (1989) 5 NWLR (PART 122) 422 at 445; *London, Chatham & Dover Railway V. S.E. Railway* (1893) 429 at 434. This right though not claimed on the writ has, according to the Appellant been claimed in the Statement of Claim which supersedes the writ.

Reliance was placed on *Udechukwu V. Onwuka* (1956) 1 F.S.C. 70 at p. 71; (1956) SCNLR 189; *Ekpan & Anor. V. Uyo* (1986) 3 NWLR (PART 26) 63.

On this issue the Respondent has claimed that any claim of interest in the present case has its basis on the agreement entered into by the parties as stipulated in the terms of agreement pleaded in paragraph 5 of the Further Amended Statement of Claim at page 32 of the Record of Appeal. The relevant Terms on the issue of interest according to the Respondent are:-

- (i) The deposit account shall initially attract interest of 12.25%.
- (v) Interest payable on the deposit could be reviewed-upwards from time to time at any rate agreed by the parties after negotiation.

Respondent submitted that the award of interest by the learned trial Judge at rates other than 12.25% was clearly wrong and that the court below was absolutely right to have set aside such an award. It was the contention of the Respondent that contracts are made by parties on terms agreed mutually by them and that in the present case the parties only agreed on 12.25% and not on any other rate of interest. That being the case it was wrong for the trial court to have imposed an award which was in the contemplation of only one of the parties to the detriment of the other party and which was against settled principles of law that a court does not make an agreement for the parties but only enforces the agreement made by them. Reliance was placed for this proposition of the law on *African Reinsurance Corporation V. Fantaye* (1996) 1 NWLR (PART 426) 565 at 605.

Respondent further submitted that its refusal to negotiate a review of interest is no justification for the Appellant to impose different rate of interest. Respondent submitted that it admitted only the first sentence of paragraph 27 of the Amended Statement of Claim in its amended Statement of Defence and not the entirety of the contents of paragraph 27 of the further Amended Statement of Claim. Respondent also submitted that DW1 in evidence emphasized that the rate of interest agreed to by the bank was 12.25% and no more and that Appellant had only tried to mislead the court. The Respondent also submitted that evidence of DW1 was on lending rate of the bank and not deregulated interest on deposit as averred in paragraph 27 of the Further Amended Statement of Claim. B C

In further clarification, Respondent submitted that the lending rate of banks is different from interest rate on fixed deposit and there was no evidence before the trial court that both were the same for the relevant time. D

The terms of the Agreement were pleaded in paragraph 5 of the Further Amended Statement of Claim which terms were earlier in this write-up reproduced and therefore need no further reproduction. The highlights of the agreement on interest rate are undoubtedly that the deposit shall attract initially interest of 12.25% per annum and that the interest payable on the deposit could be reviewed upwards from time to time at any rate agreed by the parties after negotiation. I have carefully read paragraphs 5,27,33,34,35 and 36 of the further Amended Statement of Claim referred to by the Appellant and I am satisfied that Appellant copiously pleaded its entitlement to interest at the rates over and above the 12.25% agreed to by the parties. The question is whether this derogates from the fact that any upward review of the initially agreed 12.25% interest rate has to be agreed upon by the parties. E F G

In other words in the absence of any special agreement that the initially agreed interest rate of 12.25% has to be reviewed upwards after a given period, can the Appellant or the trial court foist a new and reviewed interest rate on the parties? Parties are bound by the terms of an agreement freely entered into by them and the duty of a trial court is simply to give effect to that agreement freely entered into by the parties and not to make a new agreement for them. This is an age old H

legal principle - a notorious one for that matter and there is a plethora of case law on that subject matter. See Afrotec Technical Services (Nig) Ltd V. MIA & Sons Ltd & Anor (2000) 15 NWLR (PART 692) 730; (2000) 12 SC (Pt. 11) 1; (2000) ALL NLR 533; Bookshop House Ltd V. Stanley Consultant Ltd (1986) NWLR (PART 26) 87 at 97. In Nika Fishing Co. Ltd V. Lavina Corporation (2008) 16 NWLR (PART 1114) 509, the Supreme Court per Niki Tobi, (JSC), put the position this way.

"It is the law that parties to an agreement retain the commercial freedom to determine their own terms. No other person, not even the court can determine the terms of contract between parties thereto. The duty of the court is to strictly interpret the terms of the agreement on its clear terms."

Onnoghen, JSC in Augustine Ibama V. Shell Petroleum Development Company Nig. Ltd (2005) 17 NWLR (PART 954) 364 lent his voice when he stated thus,

"It is trite law that the court can only interpret or enforce the agreement entered into by the parties and is incapable of making any contract between them"

Could the learned trial Judge have been right when in his judgment at page 163 of the Records he had said, *"For avoidance of doubt, the Plaintiff is hereby awarded interest on its deposit with the Defendant at the rate of 12.25% per annum from October, 1988 to 14th August, 1989; 18.25% interest per annum from 15th August, 1989 to 14th December, 1989 and thereafter, interest at the rate of 25% per annum until the date hereof as enumerated in Exhibit 28."*

I think not because that would be foisting a new and reviewed interest regime on the parties which was neither contemplated nor embodied in the terms of the agreement entered into between them. Appellant was quick and I must say honest enough to say that its request in the 21st November, 1989 letter asking for 25% interest on the deposit account was rebuffed by the Respondent in its letter of the 22nd November, 1989. Heavy weather appears to have been made by the Appellant where in continuation of his evidence at page 104 of the Records PW2 had said, *"There was no agreement that the Interest rate on the deposit account would be fixed or remain at 12.25%. On the contrary it was agreed that the rate of interest would be re-negotiated annually."* **In what manner if I may ask? Did the**

agreement stipulate by what percentage annually the reviewed interest would be? Appellant has also admitted that it did not appeal on the trial court's finding that paragraphs 4, 5, 6, 7, 8, 9, 13, 14, 19, 20, 27 and 37 of the further Amended Statement of Claim remained un-denied by the Respondent in its further Amended Statement of Defence. Of what significance is it then to have been raised in the Appellant's Brief of Argument? This issue must also be and is hereby resolved in favour of the Respondent against the Appellant. B

The appeal lacks merit and is dismissed and the judgment of the court below delivered on the 10th December, 2001 is hereby affirmed. Parties are however to bear their own costs. C

CHUKWUMA-ENEH JSC

I agree with the judgment prepared by Alagoa, JSC. Appeal is dismissed. Parties to bear their costs. D

GALADIMA JSC

I have had the preview of the judgment of my learned brother, Alagoa, JSC. I agree with the reasoning and conclusion arrived at. I agree with him that the appeal lacks merit and is hereby dismissed, the judgment of the Court of Appeal delivered on 10th December, 2001 is accordingly affirmed. Parties to bear their own costs. E F

MUHAMMAD JSC

I read in draft the lead judgment of my learned brother, Alagoa, JSC with whose reasoning and conclusion that the appeal lacks merit. I entirely agree. G

I rely on the facts that brought about the appeal as fully captured in the lead judgment in emphasizing why the appeal must fail. I agree with my learned brother that the 1st issue formulated by the appellant along with Respondent's 3rd issue should form the basis of our consideration of the merit or otherwise of the appeal. The two have also been reproduced in the lead judgment. H

Arguing the appeal, learned appellant counsel contends that

from his pleadings appellant's case is that not only is the respondent in breach of the contractual agreement between the two, he is also liable in tort for detainee. Learned counsel asserts that parties have joined issues on the two causes of action. The appellant has also led evidence on both causes.

B The Lower court, submits learned counsel, is wrong to have set aside the trial court's unassailable decision in favour of the appellant. The lower court's judgment that from the pleadings and available evidence appellant's action is only grounded in contract is therefore perverse. Learned counsel insists that the appellant is permitted by law to maintain both causes of action in contract and detainee. He supports his contention inter alia with *Balogun Vs NBN* (1978) 3 SC 155 at 173, *Ndinwa Vs Igbiniedion* (2001) 5 NWLR (Pt 705) 140 and 150 and *W.A. Oil fields services Ltd Vs U.A.C. (Nig) Ltd* (2000) D 13 NWLR (Pt 638) 68.

Further arguing the appeal, learned appellant counsel submits that the court below has relied on wrong principles in setting aside the damages awarded the appellant who has established the two causes of action he averred to in his further amended statement of claim. E Learned counsel relied: on *Kalu Vs Mbuko* (1980) 3 NWLR (Pt 80) 86 *Union Bank Ltd Vs Odusote Bookstore Ltd* (1995) 9 NWLR (Pt 421) 558 at -586. Further relying on *Atoyebi Vs Bello* (1997) 11 NWLR (Pt. 528) 268 at 284 and *Bello Vs A-G Oyo State* (1986) 5 NWLR (Pt. 45) 828 at 889-890, in urging that we disallow the enthronement of technical justice by allowing the appeal. F

Responding learned counsel submits that the contractual agreement that the appellant avers to in his further amended statement of claim cannot form the basis of the tort of detainee he asserts to have established at the trial court. Parties having joined issues on the agreement between them, learned respondent counsel contends, will not be allowed to prove a case outside what they pleaded. Counsel refers to the further amended statement of claim, particularly paragraph 5 thereof and submits that the customer/Banker relationship G the appellant pleads has been held in many cases to be contractual. H The trial court, it is argued, is wrong to have held differently. Learned counsel relies on the decisions in *Balogun Vs National Bank of Nigeria* (1978) 11 NSCC 135, *Union Bank Vs Ozigi* (1991) 12 NWLR (Pt 176) 677 at 694 among others. Besides, learned respondent counsel

further submits, a cheque's value in a fixed deposit account, not being goods or chattel, cannot form the basis of the tort of detinue. He supports his contention with *Julius Berger Vs Omogui* (2001) 15 NWLR (Pt. 736) 401 at 415 - 416, and *Udechukwu Vs Onwuka* (1956) FSC 70.

Learned counsel submits that the lower court is right in law to have interfered with the trial court's award of damages because of the appellant's failure to prove his case. In any event, the sum awarded the appellant, learned counsel further contends, is manifestly too high and not legally justifiable. B

Concluding, learned respondent counsel submits that had the appellant proved the breach of the contract between him and the respondent, he would have been entitled only to the 12.25% per annum interest parties agreed to. The trial court's award outside what the parties agreed as interest is also perverse. Counsel relies on the case of *African Insurance Corporation Vs Fantaye* (1996) 1 NWLR (Pt 426) 565 at 601 and urges us to dismiss the unmeritorious appeal. C D

Learned counsel for the respondent is on a firm terrain that given the pleading of parties and the evidence led before the trial court, the lower court's judgment is unassailable. I offer and very briefly too three main reasons. E

Firstly, parties are bound by their pleadings. They cannot, in law, make a case outside their pleadings as evidence in respect of unpleaded facts do remain unavailing. See *Okonkwo Vs CCB* (2003) 8 NWLR (822) 347, *Ndoma-Egba Vs Chukwuogor* (2004) 6 NWLR (Pt 869) 382 and *Jolayemi Vs Alaoye* (2004) 12 NWLR (Pt. 887) 322. In the instant case, the court below is right to insist that the appellant whose entire pleadings rest on the contractual relationship with the respondent cannot lead evidence to prove the tort of detinue. Granted appellant's further amended statement of claim contain averments on the said tort, I further agree with learned respondent's counsel that the respondent cannot be found liable since the money in a deposit account with the respondent, if a cheque/ Bank draft can be so termed, is neither "goods" nor "chattel". In *Barau Vs M.C. Brett & Sons Nig Ltd* (1968) NSCC 133 at 136, this court has held that an action is brought in detinue for the specific recovering of personal chattels or goods wrongly detained from the F G H

person entitled to the possession of them and for damages occasioned by the wrongful detainer. Secondly, the lower court in affirming the trial court's findings that respondent is liable for the tort of detinue, it would make for the parties a case different from the one the parties approached that court to resolve, a feat the law does not allow it to even attempt let alone sustain. The same principle militates against the interest the trial court awarded to the appellant which the court below rightly refused to affirm but set aside. See Commissioner for works, Benue Vs Davcon Ltd (1988) 3 NWLR (Pt 83) 407.

Finally, the issue of damages arises only where the defendant has been found liable in terms of the plaintiff's claim. In the case at hand where the appellant failed to prove that the respondent is in breach of the "agreement" between the two, the award by the trial court having proceeded on wrong premises cannot endure. Being perverse, it has rightly been set aside too. See Swiss-Nigeria Wood Industries Ltd Vs Bogo (1970) NSCC (Vol. 6) 235 and Edigbonya Vs Dumez (Nig) Ltd & Anor (1986) NSCC (Vol. 17) (pt. 11) 827.

It is for these but the further and fuller reasons adumbrated in the lead judgment that I also dismiss the appeal and affirm the decision of the court below. I abide by the consequential orders made in the lead judgment including the order on costs.

OGUNBIYI JSC

I read in draft the lead judgment just delivered my brother, Hon. Justice S. S. Alagoa, JSC. I agree that on the totality this appeal is devoid of any merit and is also dismissed by me.

Just for purpose of recapitulation and to comment on the 1st issue raised, I wish to state that paragraph 5 of the further amended statement of claim contains the terms upon which the Appellant open a fixed deposit account with the Respondent Bank as follows:-

"5. Among other things it was a term of the agreement that:

(i) The deposit account shall initially attract an annual interest of 12.25%.

(ii) The annual interest shall be payable at the end of every month from the date of the deposit into the account and credited directly to the plaintiffs' current account No. 36-189 369 M with the defendant.

(iii) *The duration of the account was to be 12 months with liberty to the plaintiff after giving notice to the defendant to withdraw any amount from the deposit in the account for the purposes of its business during the currency of the agreed period of deposit.*

(iv) *Interest would only be paid on any amount standing to the credit of the account at end of every month.* B

(v) *Interest payable on the deposit could be reviewed upwards from time to time to any rate agreed by the parties after negotiation.*

(vi) *The account could be reviewed for another period of time at the expiry of the first year of deposit.* C

From the foregoing it is apt to say therefore that the basis or substratum of the relationship between the parties in this case was agreement and hence the relationship is sine qua non contractual. The anchoring support is the restatement by this court in *Union Bank V. Ozigi* (1991) 12 NWLR (pt. 176) 677 at 694. The principle of law is also well settled that the refusal by a banker to pay a customer's cheque when the customer has sufficient funds in his account to cover the amount on the cheque amounts to breach of contract. It is not also in dispute that the appellant did demand the payment of his deposit but the respondent refused to comply on the ground that the Central Bank of Nigeria did freeze the appellant's account. I further wish to restate that the terms of contract agreed between both parties are well spelt out on, the record as reproduced supra. E

At page 160 of the record of appeal for instance, the learned trial judge held thus and said:- F

*"...I also hold that the defendant is liable to plaintiff in detinue as pleaded in paragraph 37 A of the Further Amended statement of Claim... In the assessment of damages, it has been held by the Supreme Court in *Elisah Oladeji Kosile VS. Amusa Olaniyi Folann* (1989) 4 SCNJ (pt. 11) 198, 204 that a successful party in an action for detinue is entitled to an order of specific restitution of the Chattel, or, in default its value and also damages for its detention up to the date of judgment."* G

Again at page 161 the learned trial judge continued as follows: H
"The declaration being sought by the plaintiff in paragraph 38(1) and the general damages for breach of contract now becomes inappropriate in view of paragraph 37 A of the Further Amended statement of Claim. The plaintiff's case is no longer in contract but in tort

which entitles it to the award of exemplary damages as adumbrated by the Supreme Court in Allied Bank of Nig. Ltd VS. Jonas Akabueze (1997) 6 NWLR (pt.509) on detinue, the plaintiff is outrightly entitled to a refund of deposit in Sum of N467,000.00. As agreed by the parties, the plaintiff is also entitled to 12.25% interest rate per annum on its deposit from October, 1988 to July 1989 being the initial duration of the deposit.”

As rightly concluded by the lower court, it is very clear from the trial court judge’s findings that he never found that the appellant had any other cause different from action in detinue. At least the reference made to the trial court’s judgment supra very well founded wherein the judge was very emphatic in his judgment that the action is founded in detinue. In the absence of an appeal against the said findings of fact made to the lower court, the appellant cannot now be heard to complain that as action was not based on detinue alone. He is rather deemed to have admitted the findings. At page 269 of the record, this is what the lower court per Onnoghen, JCA (as he then was) in the lead judgment said on the findings by the trial court supra:

“it is my considered view that without a cross appeal challenging the copious findings of the trial court on the issue of the action being grounded on detinue alone, the learned SAN cannot legally be heard submitting in the contrary to this court. In other words in view of the above findings of the learned trial judge the judgment of the court can only stand if the relationship between the parties is founded on detinue as decided therein since the issue of the cause of action being also on contract is not properly before this court - being the Court of Appeal.”

I agree with their lordships of the Court of Appeal. Consequently the measure of damages must therefore be as laid down in accordance to the law of contract and the breach thereof.

On the totality of this appeal I am in complete agreement with the reasoning and conclusion arrived thereat by my learned brother, Shenko Stanley Alagoa, JSC that it is lacking in dire merit and is also dismissed by me in like terms of the lead judgment inclusive of the order made as to costs.