IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT GWAGWALADA

THIS THURSDAY THE 28TH DAY OF MAY, 2020

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: FCT/HC/2600/2013

BETWEEN:

SULEIMAN IBRAHIM ……PLAINTIFF
Trading under the name and style of FORTRESS ROLE INTERNATIONAL

AND

UNITY BANK PLC ……..DEFENDANT

JUDGMENT

The Plaintiff claims against the Defendant as contained in the Amended Statement dated 17th February, 2014 as follows:

a. **A declaration by this Honourable Court that the excess charges by the Defendant on the plaintiff's account with the defendant are illegal.**

b. **A Declaration by this Honourable Court that the excess charges on the Plaintiff's account by the Defendant, are in contravention of the financial policies and directives as laid down in the subsisting Central Bank of Nigeria Guide to Bank Charges, and Central Bank of Nigeria Monetary, Credit, Foreign Trade and Exchange Policy Circular No. 39 of January, 2012.**

c. **A Declaration by this Honourable Court that the Defendant was/is in breach of its duties to the Plaintiff by its actions in line with the excess illegal charges on the Plaintiff's account.**

d. An Order of this Honourable Court that the Defendant refund to the Plaintiff Four Million, Two Hundred and Seventy Nine Thousand, Six Hundred and Ten Naira, Forty Three Kobo (N4,279,610.43) only, being the sum total of the excess illegal charges by the Defendant on the Plaintiff's account, and also the accruing interest during the pendency of this suit.

e. An Order of this Honourable Court that the Defendant pay to the Plaintiff 100% penalty sum of Two Million, One Hundred and Sixty Nine Thousand, Eight Hundred and Seventy Five Naira, Fifty Kobo (N2, 169, 875.50) only, for failure to refund the excess, illegal bank charges and other infractions sum within the regulatory period of Fourteen (14) days in line with section 3.2.4.g of CBN Monetary, Credit, Foreign Trade and Exchange Policy Circular No. 39 January, 2012.

f. Damages to the tune of Ten Million Naira (N10, 000, 000.00) only for frustration of the Plaintiff's business as a result of the excess illegal charges on its account by the Defendant.

The Defendant in response filed a statement of defence and set up a counter-claim against plaintiff dated 18th July, 2013 as follows:

i. The sum of N8, 277, 328.62k (Eight Million, Two Hundred and Seventy Seven Thousand, Three Hundred and Twenty Eight Naira, Sixty Two kobo) only, being the outstanding balance of the loan facility and interest granted him which he has failed and refused to repay as at 31st May, 2013 and 18th April, 2013 respectively.

ii. 22% agreed interest per annum on the said sum from the date of filing this Counter-claim to the date of Judgment.

iii. 10% post Judgment interest from the date of Judgment to the date of final liquidation of the judgment debt.

iv. Cost of this Counter claim.

The Plaintiff then filed a Reply to the statement of defence and counter-claim dated 5th April, 2017.

Hearing then commenced. In proof of his case, the plaintiff called two witnesses. PW1 is Suleiman Ibrahim, the Managing Director of Fortress Role International. He deposed to a witness statement on oath dated 10th April, 2016 which he adopted at plenary hearing. He tendered in evidence the following documents:

1. The letter of offer of Banking facilities dated 8th July, 2009 was admitted as **Exhibit P1.**

2. Statement of Account of Fortress Role International covering the period 10th April, 2008 to 10th April, 2012 was admitted as **Exhibit P2.**

3. The Report of S.M.D consulting was admitted as **Exhibit P3.**

4. The letters by S.M.D. consulting dated 21st December, 2012 and 28th December, 2012 were admitted in evidence as **Exhibits P4 and P5.**

PW1 was then cross-examined. During cross-examination, the letter by Fortress Role International dated 3rd December, 2012 was admitted as **Exhibit P6.**

PW2 is Elijah Akintoye, a Forensic Chattered Accountant working with S.M.D consulting. He deposed to a witness statement dated 15th April, 2016 which he adopted at the hearing. He tendered in evidence the following documents, to wit:

1. A Report prepared by S.M.D consulting dated 10th June, 2013 was admitted as **Exhibit P7.**

2. Certified True Copy (C.T.C) of Central Bank of Nigeria (C.B.N) Guide to Bank charges dated 1st January, 2004 was admitted as **Exhibit P8.**

3. Central Bank of Nigeria Monetary Credit Foreign Trade and Exchange Policy Circular No. 38 was admitted as **Exhibit P9.**

4. Central Bank of Nigeria Circular dated 16th August, 2001 was admitted as **Exhibit P10.**

PW2 was then cross-examined and with his evidence, the plaintiff closed his case.

The defendant on its part called only one witness, Ejeabocha Nenka Cecelia, a Relationship Officer with the defendant. She deposed to a witness statement of oath which she adopted at the hearing. She tendered the following documents in evidence thus:

1. Letter of Offer of Banking Facility from Defendant/Counter-claimant Bank to Plaintiff dated 10th August, 2011 was admitted as **Exhibit D1.**

2. A letter from Plaintiff to Defendant/Counter-claimant titled "Request for Restructuring of Outstanding Facility" dated 28th June, 2012 was admitted as **Exhibit D2**.

3. Letter from Plaintiff to Defendant/Counter-claimant titled "Request for Appeal/Restructuring of Facility" dated 4th September, 2012 was admitted as **Exhibit D3**.

4. Letter from Plaintiff to Defendant/Counter-claimant titled "Application for two (2) months Moratorium in respect of N9, 800, 000 facility" dated 23rd July, 2009 was admitted as **Exhibit D4.**

5. Defendant/Counter-claimant letter to the plaintiff captioned "Re: Lease Financial Facility of N9, 800, 000 granted to you" dated 4th February, 2010 was admitted as **Exhibit D5**.

6. Letter from Plaintiff to the Defendant/Counter-claimant titled "Appointment of SMD Consulting" dated 3rd December, 2012 was admitted as **Exhibit D6.**

7. Letter from Plaintiff to Defendant/Counter-claimant titled "Application for Overdraft facility of N22, 735, 250.00" dated 12th November, 2012 was admitted as **Exhibit D7.**

8. Letter from Plaintiff to Defendant/Counter-claimant dated 1st August, 2012 titled "Application for Overdraft of N3, 650, 000 for 90 days" dated 1st August, 2012 was admitted as **Exhibit D8.**

9. Letter from Defendant/Counter-claimant to the Plaintiff titled "Re: Lease Finance Facility of N9, 800, 000 granted to you" dated 24th November, 2010 was admitted as **Exhibit D9.**

10. Letter from Plaintiff to the Defendant/Counter-claimant dated 26th July, 2011 was admitted as **Exhibit D10.**

11. Letter from Plaintiff to Defendant/Counter-claimant titled "Application for Overdraft of N3,650,000 for 90 days" dated 9th October, 2012 was admitted as **Exhibit D11.**

12. Statement of Account of Plaintiff - Corporate Account Number 000957371 was admitted as **Exhibit D12.**

DW1 was then duly cross-examined and with her evidence, the defendant closed its case.

Parties then filed and exchanged final written addresses. The defendant/counter-claimants written address is dated 5th April, 2019. In the said address, two (2) issues were raised as arising for determination to wit:

1. **Whether having regards to the claim of the Plaintiff, his pleadings, vis-à-vis his viva voce and documentary evidence put before this Court, the Plaintiff could be said to have discharged the evidential burden on him to be entitled to the declaratory and mandatory orders of this Court as contained in the relief sought.**

2. **Whether having regards to the claim of the Defendant/Counter-claimant, as contained in its pleadings, viva voce and documentary evidence placed before this Court, the Counter-Claimant is entitled to Judgment on its Counter-Claimant.**

The address of plaintiff is dated 1st July, 2019. In the address only one (1) issue was raised as arising for determination as follows:

"Whether from the totality of evidence led in support, plaintiff has on a preponderance of evidence not prove (sic) his case to be entitle (sic) to Reliefs sought from court."

The defendant/counter claimant filed a reply on points of law to the plaintiffs address dated 26th November, 2019. I have set out above the issues as distilled by parties as arising for determination. It is not in dispute that there is a claim and a counter claim. It is trite principle of general application that a counter claim is a separate and distinct course of action and the counter-claimant like the plaintiff, must prove his case before obtaining judgment on the counter-claim. See the cases of **Oyebola V. Esso W.A (1966)1 All NLR 170; Shettimari V. Nwokoye (1991)9 NWLR (pt.216)66 at 71.** In view of this settled principle of law, both the plaintiff and defendant have the burden of proving their claim and counter-claim respectively.

This being so, it would appear that the two issues raised by the defendant/counter claimant conveniently accommodates the single issue raised by the plaintiff and has succinctly and with clarity captured the pith of the grievance subject of the present dispute. It is therefore based on the said two issues that I would now proceed to determine this case. In furtherance of the foregoing, I have carefully read the final written addresses on both sides of the aisle and in the course of this Judgment, I shall be making references, where necessary to the submissions of counsel.

ISSUE 1

Whether having regards to the claim of the Plaintiff, his pleadings, vis-à-vis his viva voce and documentary evidence put before this Court, the Plaintiff could be said to have discharged the evidential burden on him to be entitled to the declaratory and mandatory orders of this Court as contained in the relief sought.

I had at the beginning of this judgment stated both the claim and counter-claim of parties.

On the pleadings and evidence, the case of plaintiff is predicated on a lease facility granted to him by defendant/counter claimant and he contends that they allegedly

charged excess charges on the facility in violation of Central Bank of Nigeria regulations and also that they were in breach of their contractual duties to the plaintiff.

On the other side of the aisle, the defendant absolved itself of any blame worthy conduct in the circumstance of the case and contends that it was the plaintiff who was unable to fulfill his commitments under the loan/lease facility granted him and accordingly predicate there counter-claim on this failure to repay back the facility granted to him.

There is therefore no real difficulty or disagreement on the pleadings and evidence that there exists a banker and customer relationship between parties. It is in the context of this precisely streamlined relationship that the crux of this dispute relating to the basic responsibility for the alleged wrongful charges and withdrawals; breach of contractual obligations shall be determined.

Within this contextual construct, it bears stating that the relationship between a banker and customer where a bank accepts money either in savings, current on deposit account from its customer, is a relationship of debtor and creditor and the relationship is essentially contractual. See **Balogun V. N.BN Ltd (1978)II NSCC 135; 3SC 155; Afri Bnak (Nig) Plc V. A.I. Investment (2002)7 NWLR (pt.765)40.**

Having provided the above broad frame work, it is imperative to also situate the required threshold on burden of proof and also on whom it lies in each particular situation. The principle is now of general application that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. **Section 131(1) Evidence Act.** By the provision of **Section 132 Evidence Act**, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, regard being had to any presumption that may arise on the pleadings.

It is equally important to state that in law, it is one thing to aver a material fact in issue in one's pleadings and quite a different thing to establish such a fact by evidence. Thus where a material fact is pleaded and is either denied or disputed by the other party, the onus of proof clearly rests on he who asserts such a fact to

establish same by evidence. This is because it is now elementary principle of law that averments in pleadings do not constitute evidence and must therefore be proved or established by credible evidence unless the same is expressly admitted. See **Tsokwa Oil Marketing co. ltd. V. Bon Ltd. (2002) 11 NWLR (pt 77) 163 at 198 A; Ajuwon V. Akanni (1993) 9 NWLR (pt 316)182 at 200.**

I must also add here that under our civil jurisprudence, the burden of proof has two connotations, to wit:

1. The burden of proof as a matter of law and pleading; that is the burden of establishing a case by preponderance of evidence or beyond reasonable doubt as the case may be;

2. The burden of proof in the sense of adducing evidence.

The first burden is fixed at the beginning of the trial on the state of the pleadings and remains unchanged and never shifting. Here when all evidence is in and the party who has this burden has not discharged it, the decision goes against him.

The burden of proof in the second sense may shift accordingly as one scale of evidence or the other preponderates. The onus in this sense rests upon the party who would fail if no evidence at all or no more evidence, as the case may be were given on the other side. This is what is called the evidential burden of proof.

Putting it more succinctly, it is only where a party or plaintiff adduces credible evidence in proof of his case which ought reasonably to satisfy a court that the fact sought to be proved is established that the burden now shifts to or lies on the adversary or the other party against whom judgment would be given if no more evidence was adduced. See **Section 133(2) of the Evidence Act.** It is necessary to state these principles to allow for a proper direction and guidance as to the party on whom the burden of proof lies in all situations.

Now in this case, and as stated earlier, from the trajectory of the narrative which is not denied, the plaintiff is a customer of the defendant bank. This relationship was precisely defined on clear terms as streamlined in **Exhibit P1**, the offer of Banking Facility dated 8th July, 2009 to plaintiff. The offer was a lease financial facility in the sum of **N9, 800, 000 (Nine Million Eight Hundred Thousand Naira only)**.

The offer was duly accepted by the claimant on terms as stated in the offer letter and the sums were duly disbursed. Now it is stating the obvious that parties to an agreement such as **Exhibit P1** are bound by the terms of the agreement they entered into freely. See **Artra Industries (Nig.) Ltd V. N.B.C. 1 (1998) 4 NWLR (pt.546) 357 at 376 par E.** Indeed where there is a valid contract, parties must be held bound by the agreement and by all its terms and conditions. There should be no room for departure from what is stated therein. See **Jeric (Nig.) Ltd V Union Bank Nig. Plc (2000) 15 NWLR (pt.691) 447 at 462 – 483 par G-A; 466 par C.**

Where there is any disagreement between parties to a written contract or agreement on any particular point, the authoritative and legal source of information for the purpose of resolving that disagreement or dispute is the written contract executed by the parties. The reason for the stringent position of **Section 132 (1) of the Evidence Act** is to ensure that a party to a contact in writing does not change his position midstream in his underserved advantage and to the detriment of the unsuspecting adverse party. See **Larmie V D.P.M & Services Ltd (2005) 18 NWLR (pt.958) 88 at 496 A-B.**

The point to underscore here is that the offer letter and the subsequent restructuring of the offer which I will refer to later, constitutes or provides the basis for the mutual reciprocity of legal obligations between parties and they are bound by it.

Now some of the key features of **Exhibit P1** are as follows:

"1. Purpose: To enable you part finance the purchase of 2 Nos. of Daf 93 Trucks at a total cost of N14, 000, 000 from Zaf Motors.

2. Tenor: Twenty Four (24) months.

3. Repayment Source: Proceeds from Haulage Business to be domiciled with the Bank.

4. Repayment mode: Twenty four (24) monthly principal repayment of N408, 334.00 each plus interest.

5. **Interest Rate: 22% per annum."**

On the pleadings precisely **paragraph 9**, the plaintiff then claimed that he started repaying the facility and that when he had "fears" that his account was been

overcharged in December, 2009, he instructed the firm of S.M.D. Consulting, a forensic Accounting firm to investigate the Account and reconcile all the charges.

Now even at this early stage, there is no evidence showing clearly and precisely **"the repayment"** of the facility, plaintiff claimed he had started paying. Was it on terms as precisely streamlined on the letter of offer? There is no real clear answer on the evidence but by **Exhibit D4**, dated 23rd July, 2009, the plaintiff requested for a two (2) months moratorium to allow him complete an assignment with Texaco Nig. Plc. The plaintiff specifically stated that payment will commence by October, 2009. The defendant granted the moratorium and by letter dated 4th February, 2010, admitted as **Exhibit D5**, the defendant complained that after the moratorium, the plaintiff had not made any repayments and that he had not been servicing the account.

Again there is no real clarity with respect to the trajectory of what transpired between parties but on the evidence it would appear that the relationship continued and the plaintiff was making some payments but then by **Exhibit D10** dated 26th July, 2011, the plaintiff sought for a restructuring of the existing facility which according to him had a balance of **N5, 830, 089.65.**

The defendant agreed to the restructuring and by letter of offer dated 10th August, 2011 vide **Exhibit D1**, the plaintiff was given an **"offer of banking facility in the following terms**: **"Restructured term loan of N6, 676, 105.94 (Six Million and Seventy Six Thousand, One Hundred and Five Naira, Ninety Four Kobo only)."** The plaintiff again duly accepted the restructured offer which was based on his application. Again parties were clearly bound by the terms of this restructured facility.

Now the key terms of this **restructured facility** include:

1. **Facility type : (Restructuring) term loan facility**
2. **Purpose : For adjustment purposes**
3. **Tenor : 9 months**
4. **Repayment terms: 3 (three) quarterly repayment of principal and interest.**
5. **Interest rate: 8% above the banks prime lending rate presently 10% per annum, thus giving a gross lending rate of 27% per annum. Please note**

that the prime lending rate is subject to changes depending on the prevailing money market.

Now from the above evidence particularly the accepted restructured offer facility, it is clear that as at 10th August, 2011, the total indebtedness of plaintiff which he accepted when he executed the restructured offer facility was the sum of **N6, 676, 105.94.**

There is again no clear evidence that the plaintiff kept to the terms of this restructured facility by making repayments as agreed. What is however obvious from the evidence is that the plaintiff made different and varied requests from the defendant. There were **two applications for overdrafts** dated 1st August, 2012 and 9th October, 2012 both in the sum of N3, 650, 000 for 90 days vide **Exhibits D8** and **D11**. There was then request for **further restructuring of his outstanding facility** vide **Exhibit D2**. Indeed plaintiff agreed that as at **28th June, 2012**, his indebtedness stood at **N6, 660,281.81** after he paid N2, 300, 000 into his account on 25th June, 2012. The plaintiff again by letter dated 4th September, 2012 vide Exhibit D3 sought for another restructuring of the loan facility for another period of 24 months. It may be pertinent to reproduce the contents of the letter as follows:

"Branch Manager
Unity Bank plc
Jabi – Abuja

Dear Sir

REQUEST FOR APPEAL – RESTRUCTURING OF FACILITY

Please note that we applied for a restructuring of our outstanding indebtedness with your bank for a period of 24 months.

However, we received an approval for us to repay the facility in a very short period of (6) six months, we kindly write to appeal for a consideration to enable us repay in 18 months against 24 months earlier requested by us.

This request have become very necessary in view of our cash flow (i.e) our sources of funds which is basically contracting. We want to avoid situation where we cannot honour our obligations as at when due.

We anticipate your favourable consideration to our request.

Thank you

Signed
Suleiman Ibrahim
For: Fortress Role International"

The defendant clearly did not on record positively respond to this request. It is therefore clear that by the time **Exhibit D3** above was written by plaintiff, he was clearly still indebted to the defendant with respect to the lease facility. By **Exhibit D1**, the restructured offer letter and in the absence of any **proved repayments**, the indebtedness of plaintiff as at 10th August, 2011 stood at **N6, 676, 105, 94**. The plaintiff by **Exhibit D2** dated 28th June, 2012 however gave a slightly different amount he owes the bank in the sum of **N6, 660, 286.81** after having made some payment in the sum of N2, 300, 000. The statement of account of defendant Exhibit D12 shows this payment of N2, 300, 000 so the indebtedness of plaintiff as at 28th June, 2012 was the sum of **N6, 660, 386.81**.

It is clear even at this point that the **plaintiff** has not met the time sensitive criteria or tenor for the repayment of the restructured facility vide **Exhibit D1** which provides clearly for **Nine (9) months** window for the facility to be repaid. This amount then at that date was due to the defendant by plaintiff.

It is at this point that the plaintiff informed the defendant of the appointment of **S.M.D. Consulting vide Exhibit P6 and D6** to reconcile his accounts over fears that his account was been over charged. The burden as stated earlier was on him to creditably prove these assertions.

Now in proof of this allege overcharges, the plaintiff himself gave evidence on this issue and called **PW2** who appeared for the firm S.M.D. Consulting, the firm charged with the responsibility by plaintiff to reconcile his accounts. The report prepared by the firm was admitted as **Exhibits P3** and **P7**. Exhibit P7 is an updated version of P3.

Before dealing with the evidence of PW2, let me say that the evidence of plaintiff (PW1) with respect to the complaints of excess charges all had to do with the assignment he gave S.M.D consulting to investigate his accounts with defendant. He was essentially in his deposition repeating the contents of the investigations carried out by S.M.D consulting and the conclusions reached by them. There is not much probative value that accrues to this aspect of his evidence since he is not part of "S.M.D Consulting" neither did he partake in the investigation carried out by them or prepared the report he tendered as Exhibit P3. Indeed he engaged them on the evidence to carry out the assignment. That explains why he called PW2 from S.M.D Consulting to give evidence of the nature of the investigations they conducted and the outcome. I will now evaluate the evidence of PW2.

Let me here address the point raised by counsel to the defendant that no value should be placed on either Exhibits P3 or P7 since PW2 is not the maker and that he is also not an expert even if he described himself as a Forensic Accountant, Chartered Accountant, a Chartered Risk Manager, a Chartered Treasury and Financial Accountant.

Now I am not sure, this is a matter we should dissipate unnecessary energy on. The principle is fairly settled that the mere fact that a document is prepared or tendered by an expert does not mean that the court must accept and act on any or everything that it contains. The court has a duty to consider the weight, if any, to be attached to any documentary evidence, even when tendered by an expert before coming to a conclusion is to whether or not it establishes the fact stated thereon. See **Elukpo & Sons Ltd V F.H.A. (1991) 3 NWLR (pt.179) 322 at 333 par. D.**

Now in this case, PW2 clearly stated that he was one of the professionals/experts who carried out the Forensic Analysis of the statement of account and various account transactions of plaintiff with defendant which culminated in the report prepared by his firm, S.M.D. Consulting. He stated that he has the permission of his employer S.M.D. Consulting to depose to the witness deposition. Now his name may not have appeared on the reports but there is no doubt that the reports were prepared by the S.M.D. Consulting, the firm he works for that prepared the report. Fola Oseni who signed the report as Managing Consultant clearly signed "for" the Firm: "SMD Consulting" and not in his personal capacity. There is no evidence suggesting that PW2 does not work in the said firm and or that he was not

part of those who participated in the preparation of the reports – Exhibits P3 and P7. I incline to the view that he is in a position to give evidence on the documents but the question of weight will be dependent on other variables in addition to the reports in the process of evaluation of the entire evidence.

The point to underscore is that a company being a legal, juristic person can only act through its staff, agent or servant and such can give evidence on transactions entered into by the company. Indeed even if such staff is not the one who actually took part in the transaction on behalf of the company, his evidence would be relevant and admissible. His not participating in the transaction merely affects the weight to be attached. See **First Bank of Nigeria Plc V Tsokwa (2004) 5 NWLR (pt.866) 271 at 312 D-F; Saleh V B.O.N Ltd (2006) 6 NWLR (pt.976) 316 at 326 – 327.**

In this case, PW2 stated that he actively participated in the preparation of the report by their Firm. Such evidence is admissible and not hearsay. See **Saleh V B.O.N (supra)**. As stated earlier, the person who signed, did so for the firm "SMD Consulting" as clearly indicated on the report. It was not a personal report so his presence was not a *sine qua non* and could be dispensed with as done here.

Now to the evidence of PW2. I have carefully considered his entire evidence and the basis of same and the entire report the firm prepared can be situated within the following paragraphs of his deposition thus:

"9.That the Plaintiff forwarded his statement of Account No: 2191112527010002 00 maintained with the Defendant to us and instructed our firm, SMD Consulting to reconcile and investigate the Account with a view to determine the propriety of the management of the account having noticed some irregularities regarding inexplicable charges and entries in the account. We did analyze the Accounts vis-a-vis relevant documents and information required and made available to us by the Plaintiff hence, I am very conversant with the facts of this case.

10. That at the conclusion of the reconciliation and investigation of the account, we initially uncovered excess, illegal Bank charges, spurious entries and violation of contractual agreement in the accounts amounting to N2, 650, 756.44 (Two Million, Six Hundred and Fifty Thousand, Seven

Hundred and Fifty Six Naira, Forty Four Kobo) plus interest refund of N473, 869.02 (Four Hundred and Seventy Three Thousand, Eight Hundred and Sixty Nine Naira, Two Kobo) at the prevailing Central Bank of Nigeria Minimum Rediscount Rate/Monetary Policy Rate in line with Section 3.2.4.g of CBN Monetary, Credit, Foreign Trade and Exchange Policy Circular No. 38 of January 05, 2010 to gross N3, 124, 634.46 (Three Million, One Hundred and Twenty Four Thousand, Six Hundred and Thirty Four Naira, Forty Six Kobo).

11. That on the instruction of the Plaintiff, we prepared a report of my findings and notified the Plaintiff vide a letter dated Friday, December 07, 2012 which was duly acknowledged same date wherein we demanded for the refund of N3, 124,634.46 (Three Million, One Hundred and Twenty Four Thousand, Six Hundred and Thirty Four Naira, Forty Six Kobo) including interest refund of N473, 869.02 (Four Hundred and Seventy Three Thousand, Eight Hundred and Sixty Nine Naira, Two Kobo) in line with Section 3.2.4.4 of CBN Monetary, Credit, Foreign Trade and Exchange Policy Circular No. 38 of January 05, 2010."

Now from the above, the investigations and the outcome was predicated on (1) The statement of account of plaintiff No: 21911252701000200 with defendant and (2) relevant documents and information required and made available to them by the plaintiff.

Now this relevant **statement of account** of plaintiff and the period it covers used for the investigation was not attached either to the deposition or the reports Exhibits P3 and P7. Furthermore the **"relevant documents and information"** made available to them by the plaintiff was not identified, streamlined or even attached to enable the court situate the basis for the findings made with respect to the alleged over-charges. There was therefore absolutely no demonstration of the parameters and basis for the conclusions reached in the deposition and even Exhibits P3 and P7. At the risk of prolixity, the analysis or evaluation or the reconciliation and investigation carried by PW2 and his team as admitted by them were predicated on the **"relevant documents and information made available to them by plaintiff."** The question is where are these materials or what is the nature of the information supplied to them by plaintiff? The court cannot obviously

speculate. If these documents are available, why were they not produced in court. The failure to produce these documents and information allows for the invocation of the principle under **Section 167 (d) of the Evidence Act** that if they were produced, it would have been unfavourable to the case of plaintiff.

PW2 said they uncovered excess, illegal Banking charges, spurious entries and violation of contractual agreement in the "accounts" amounting to various figures as stated above. The question is from which of the "accounts" were all these discovered. The PW2 in paragraph 9 talked of a single account but in paragraph 10, allusion is made to "accounts" suggesting they had access to more than one account of plaintiff for the investigation; why were these accounts then not identified? Now even if indeed these illegal charges exist, these ought to be a proper demonstration in court showing how these excess charges accrued; what the spurious entries are and the terms of the contract allegedly violated. There is no way the court can speculate on these key elements in the absence of clear and credible evidence. For example, if there were excess charges on interest rate, there ought to be some demonstration in court clearly showing that the interest rate agreed in the offer letter was not applied and the period it covers and how much this amounted to. Let me quickly make the point that in banking generally, interest is the money payable by a banker to a customer for money deposited or money payable by a customer to the bank for money received from the bank by way of loan as in this case, overdraft and advance or in any related business. Banks are empowered to charge interests on loans or other advances granted to a customer even where there is no express agreement on the rate of interest to be charged because it is implied that the customer must have consented to an interest to be charged on his account. However the determination of interest is not done arbitrarily by banks. The Central Bank of Nigeria is empowered under **Section 15 of the Banking Act** to regulate from time to time, by way of guidelines, the interest rates to be charged by banks. See U**.B.N Ltd V Salami (1998) 3 N.W.L.R (pt.543) 538; U.B.N Ltd V Ayoola (1998) 11 N.W.L.R (pt.573) 338.**

In this case, parties agreed to a precise interest rate and other rates as contained in the offer letters. The plaintiff as stated earlier fully accepted the terms of these offers. Now the plaintiff tendered in court, **Exhibit P8**, the Central Bank of Nigeria Guide to Bank charges but there ought to be some demonstration in court

as stated earlier showing that what was charged over a particular period violated specific areas of the Guidelines. This was not done.

I perused through **Exhibit P8** and in particular **Section 2 (1-21)** pertaining to interest rates, lending fees and other charges and this shows that most of the rates are negotiable and in a few others, negotiable subject to a certain maximum. Even with respect to **Commission on Turnover (C.O.T)**, the rate was equally negotiable subject to maximum of N5 per mile.

In this case there is no pleading or evidence showing any negotiated terms and how they were breached, if any. Even if there was a negotiation of terms, it manifested in the restructured offer letter duly accepted by plaintiff. Most importantly, there is no clear evidence as demonstrated above showing how these alleged excess charges came about and how extant banking regulations were violated.

The point to perhaps again underscore is that in banking transactions, the question of steady accrual of interest on a particular account is a matter the court is expected to take judicial notice of under **Section 122(2) of the Evidence Act**. However, there must be evidence that the rate of interest is never static. It fluctuates according to the dictates of the Central Bank of Nigeria, as provided for by **Section 15 of the Banking Act, Cap. 28, LFN 1990.** See **ACB Plc V Okorie (2007) All F.W.L.R (pt.350) 1399; CBN V Albert Ozigi (1994) 3 SCNJ 42.**

Indeed even if there was no express agreement between parties with respect to the rate of interest payable on a loan granted to the customer, the bank is even entitled to charge interest on the loan on the basis that there is an established custom to that effect or that the customer has impliedly consented without protest, if he allows his account to be debited with such interest. See **Balogun V E.O.C.B (Nig.) Ltd (2007) 5 N.W.L.R (pt.1028) 584.**

In this case until the letter calling for reconciliation by plaintiff of his account to SMD Consulting vide Exhibit P6 and D6, there is nothing on record to show that the plaintiff at any time disputed the rates charged on his facility. In law, he is deemed to have accepted the rates charged on which his lease facility was calculated since he never disputed same at the time. See **Thor Ltd V FCMB Ltd V. Hassan (1961) 1 All NLR 836.**

Indeed on the evidence, the complaints of plaintiff clearly only came about after there was no positive response from the defendant to his series of applications for overdraft and further restructuring of the loan facility vide Exhibits D2 and D3. In this very fluid and uncertain state of plaintiffs case, PW2 then alluded to the fact that they then wrote defendant complaining about these excess charges and because they did not respond within 14 days they computed a 100% penalty sum to be paid by defendant for failure to refund the excess and illegal bank charges. See **Exhibits P4 and P5**. I cannot really fathom the legal basis for these rather ambitious conclusions and demands made by plaintiff through SMD consulting with respect to payment of penalty charges. **SMD consulting** is only a private firm and is not the Central Bank of Nigeria or any of the Banking Regulatory Agencies. It is also not a Court of law. It is therefore difficult to situate the basis of the powers it sought to exercise in paragraph 12 of the deposition of PW2. The complaint plaintiff made may be in order but to seek to be the complainant and judge over the complaint has no legal or constitutional basis.

I have carefully read as already stated **Exhibit P8** (Guide to Bank charges) and further **Exhibit P9** (CBN Monetary, credit, foreign trade and exchange guidelines for fiscal years 2010/2011) and **Exhibit P10** (The CBN circular directing deposit money banks to expand the existing ATM help Desk to handle all consumer complaints and for discount houses and all other financial institutions to establish a consumer help desk) and it is difficult to situate in any of these documents the basis to support the computations and conclusions arrived at by SMD Consulting. These documents have nothing to do with SMD Consulting but simply provides guidelines to guide the working of the Banks. If there are violations of these guidelines, SMD has no oversight role or duty of any kind.

For example **Exhibit P9** is even only applicable to the fiscal year 2010/2011. The extant case clearly extends beyond the period 2010/2011. There is nothing to indicate that this policy of 2010/2011 was maintained for other subsequent years. Most importantly, paragraph 3.2.4 g of Exhibit P9, the basis of the conclusion in paragraph 10 of the deposition of PW2 provides as follows:

"The Inspectorate Department of each bank shall continue to have the responsibility for cross-checking bank charges and interest rates payable on deposit accounts. Where the Inspectorate Department of a bank discovers

non-payment or under-payment of interest on deposits or other entitlement or excessive interest and bank charges, a return thereon shall be made to the Central Bank. Under-payment and/or excessive interest and other charges shall be refunded with interest at the prevailing CBN monetary policy rate, along with a letter of apology to the customer within two weeks. Any bank which fails to refund excess charges or under-payment of interest on deposits within two weeks of the discovery of such error shall, in addition to the refund to the customer, be liable to a penalty amounting to 100.0 per cent of the amount involved."

Again there is no where situating **SMD Consulting** in this paragraph. It is neither the CBN or the Inspectorate Department so its ascribing on itself some powers of oversight which it does not have is an exercise borne out of misplaced popular enthusiasm lacking any legal basis.

Now with respect to the report itself, **Exhibit P7**, it is difficult to really situate what to make of it. The Exhibit contains first, a letter of eight (8) pages and the rest covering pages 1-22 has rows of columns containing different figures. It is really difficult to link the evidence of PW2 with this document. The demonstration of what it entailed necessarily must be one of evidence demonstrated at trial. This document was simply "dumped" in court as it were, and it is difficult to ascribe any probative value to it in the circumstances.

In law, Documents admitted in evidence, no matter how useful they could be, would not be of much assistance to the court in the absence of admissible oral evidence by persons who can explain their purport. See **Alao V Akano (2005) 11 NWLR (pt.953) 160 S.C.**

One more point on this issue: the plaintiff averred in his Amended Pleading that after the complaint of deduction of excess charges, that the defendant vide letter dated May 2nd 2013 admitted its indebtedness to the plaintiff. This letter was pleaded but it was however not tendered. It is curious that such an important letter crucial to elements of plaintiffs case was not tendered even though it was frontloaded with the deposition of **PW1**. If it was tendered, it would have given clarity and insight to this question of the alleged illegal deductions and excess charges and the response of defendant to the complaints of plaintiff. One is really

at loss as to why it was not tendered. Does the letter contain more than the alleged admissions? The court will not speculate but the failure to tender this letter again allows for the invocation of the principle under **Section 167 (d) of the Evidence Act** that if it was tendered it might not be favourable to the case of plaintiff.

It is true that DW1 for the defendant stated under cross-examination that the defendant made some refunds to the account of plaintiff but that does not prove the fact that there were illegal or excess charges or violations of the offer letter to plaintiff. The point to add here is that the core reliefs on the question of excess charges, contravention of CBN guidelines and breach of defendant's duties are all declaratory reliefs (**See Reliefs 1-3**). On the authorities, Declaratory reliefs are in the nature of special claims or reliefs to which the ordinary rules of pleadings particularly on admissions have no application. Indeed it would be futile when Declaratory reliefs are sought to seek refuge on the proposition that there were admissions by the adversary on the pleadings. The authorities on this principle are legion. I will refer to a few.

In **Vincent Bello V. Magnus Eweka (1981)1 SC 101 at 182,** the Supreme Court stated aptly thus:

"It is true as was contended before us by the appellants counsel that the rules of court and evidence relieve a party of the need to prove what is admitted but where the court is called upon to make a declaration of a right, it is incumbent on the party claiming to be entitled to the declaration to satisfy the court by evidence not by admission in the pleading of the defendant that he is entitled to the declaration."

The law is thus established that to obtain a declaratory relief as to a right, there has to be credible evidence which supports an argument as to the entitlement to such a right. The right will not be conferred simply upon the state of the pleadings or by admissions therein.

In **Helzgar V. Department of Health and Social Welfare (1977)3 AII ER 444 at 451; Megarry V.C** eloquently stated as follows:

"The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what, it has found to be

the law after proper argument, not merely after admissions by the parties. There are no declarations without argument. That is quite plain."

I may also refer to the observations of Nnamani J.S.C of blessed memory in **Sorungbe V. Omotunwase (1988)3 N.S.C.C (vol.10)252 at 262 (1988)5 N.W.L.R (pt.92)90** as follows:

"The court of Appeal relied on the decision of this court in Lewis & Peat (N.R.I.) Ltd V. Akhimien (1976)7 SC 157 to the effect that an averment which is not expressly traversed is deemed to be admitted. Admittedly, one does not need to prove that which is admitted by the other side, but in a case such as one for declaration of title where the onus is clearly on the plaintiff to lead such strong and positive evidence to establish his case for such a declaration, an evasive averment...does not remove the burden on Plaintiff. See also Eke V. Okwaranyia (2001)12 N.W.L.R (pt.726)181; Akaniwo V. Nsirim (2008)9 N.W.L.R (pt.1093)439; Maja V. Samouris (2002)7 N.W.L.R (pt.765)78 at 100-101."

The point from the above authorities is simply that declarations are not made because of the stance or position of parties in their pleadings but on proof by credible and convincing evidence at the hearing.

On the whole, neither the evidence of PW2 and the report prepared creditably established the allegation of excess charges or how the defendant breach its duties to the plaintiff.

The bottom line is that there is no dispute that the plaintiff was granted a **lease facility** what was subsequently **restructured.** He was clearly bound by the terms of these offer letters he signed. On the evidence, he certainly must have been making some payments but there is no evidence proffered showing that he has fully settled his obligations or his indebtedness. The plaintiff tendered **Exhibit P2** his statement of account but nothing much was said creditably showing that he has fully liquidated his entire indebtedness. Indeed by Exhibit D3 he acknowledged that he was still owing the defendant. The complaint of excess charges was no where creditably established as already demonstrated. The court can only grant a

party what it has asked for in clear terms and creditably proved. See **Joe Golday Co. Ltd V Cooperative Development Bank Ltd (2003) 35 SCM 39 at 105.**

On the whole, **Reliefs (a), (b) and (c)** seeking declaratory reliefs predicated on alleged excess charges, violation of Banking regulations and guidelines, breach of duties of defendant all fail. **Reliefs (d), (e) and (f)** seeking orders of refund of excess charges, 100% penalty and damages predicated on success of **Reliefs (a), (b) and (c)** equally must fail. You cannot put something on nothing and expect it to stand is a well known legal truism.

Now with respect to the Counter-claim, the issue that arises for determination is as follows:

Whether having regards to the claim of the Defendant/Counter-claimant, as contained in its pleadings, viva voce and documentary evidence placed before this Court, the Counter-Claimant is entitled to Judgment on its Counter-Claimant.

Now I had in the substantive action stated that the counter-claimant must like the plaintiff in the main action establish his case on the same principles to entitle it to the orders sought. The case of defendant is simple and straight forward and I had alluded to aspects of the case in the substantive action. The case of defendant is that they granted plaintiff on his application a lease facility of **N9, 800, 000** which he accepted on terms as earlier streamlined. The defendant agree that after making some payments, plaintiff asked for 2 months moratorium vide Exhibit D4 dated 23rd July, 2009 which was granted. Further that after the moratorium, rather than continuing servicing the loan, plaintiff asked for a restructuring of the loan which was granted vide Exhibit D1 dated 10th August, 2011. The restructured offer facility was in the sum of **N6, 676,105.94** with a tenor of 9 months. DW1 stated that the plaintiff rather than service his loans sought for overdrafts and restructuring of the loans vide Exhibits D2, D3, D7 and D8. Indeed by plaintiffs letter dated 28th June, 2012 **(Exhibit D2)** seeking for restructuring of his facility, the plaintiff agreed that his **"outstanding facility"** with the bank stood at **N6, 660, 286.81** after he had paid the sum of N2, 300, 000 into his account on 25th June, 2012.

As stated severally in this Judgment, there is nothing precisely streamlined by plaintiff showing that since he applied for the restructuring in June 2012, that he had made any further payments or liquidated his indebtedness which he admitted above in the sum of **N6, 660, 286.81**. It is true as already addressed that he now raised the complaints of excess charges and other complaints but as already determined, these allegations were not creditably established.

The defendant is however claiming **N8, 277, 328.62k** being the outstanding balance of the loan facility and interest which plaintiff has refused to pay as at **31st May, 2013** and **18th April, 2013**. This claim too has to be creditably established with evidence. It is not a matter of guess work or speculations. The defendant may have tendered the statement of account of plaintiff vide **Exhibit D12** and also the statement of account produced by defendant but tendered by PW1 – **Exhibit P2,** but there was absolutely no demonstration by DW1 of the various different and varied entries in it or put another way, the Exhibits were not backed up with necessary evidence on how the debit balance was arrived at. It is trite principle that a bank statement of account is not sufficient explanation of debit and lodgments in a customers account to charge the customer with liability for the overall debit balance shown in the statement of account. Any bank claiming a sum of money on the basis of overall debit balance of a statement of account must adduce both documentary and oral evidence to show how the overall debit balance was arrived at. See **Yusuf V. A.C.B. (1986) 1-2 S.C. 49; Wema Bank Plc V. Alhaji Idowu Fasasi Osilaru (2007) LPELR – 8960**. Investigation is not the function of a court. Therefore, it is not the duty of the court to embark on a voyage of discovery in chambers to determine how the debit balance was arrived at. See **Wema Bank Plc V. Osilaru (supra).** It is therefore apposite to reiterate the fundamental principle that a document cannot serve any useful purpose in the absence of oral evidence explaining the essence thereof.

I have carefully evaluated the pleadings and evidence of defendant and there is no credible evidence showing that the indebtedness of plaintiff as at 31st May, 2013 and 18th April, 2013 stood at the amount claimed. The burden at the risk of prolixity is on defendant to creditably prove the debit balance claimed in the statement of account. Exhibits D12 or P2 both produced by the bank has no clear evidence backing the contents or how the contents were arrived at and as stated earlier, this has to be demonstrated at trial through oral evidence and is not a matter

for the address. See **Bilante Int'l Ltd V N.D.K. (2012) 15 NWLR (pt.1270) 407 at 428 – 429.** In this case DW1 just mentioned the sums claimed but not how the sums was arrived at. This is not good enough.

On the evidence however as stated earlier, the plaintiff himself admitted the sum due from him on the facility as at 28th June, 2012 vide **Exhibit D2** in the sum of **N6, 660, 286.81**. This clearly is an admission against interest. In law, an admission is a statement oral or written as in this case vide **Exhibit D2**, (expressed or implied) which is made by a party or his agent to a civil proceedings and which statement is adverse to his case. It is admissible as evidence against the maker as the truth of the fact asserted in the statement. See **Cappa & D'Alberto Ltd V Akintilo (2003) 9 NWLR (pt.824) 49 at 69 C-F; Agbahamovo V Eduyegbe (1990) 3 NWLR (pt.594) 170 at 183 F-G.**

Exhibit D2 is therefore a clear admission of plaintiffs indebtedness on the facility as at 28th June, 2012. The defendant/counter-claimant may not have creditably proved the sums claimed but they are certainly entitled to the amount plaintiff admitted he is indebted to defendant on the facility. There is nothing on the evidence as indicated earlier to show or prove that the plaintiff has made any further payments since then or settled the amount due. It is settled law that a court has no power to grant to a party relief which he has not sought or which is more than he has claimed. See **Gomwalk V. Okwusa (1999)1 N.W.L.R (pt 586)225; Bello V Aruwa (1999)8 N.W.L.R (pt.615) 454**. However where a party claims a particular amount but was able to prove a lesser amount than he claimed, the court has the power to award the lesser amount proved. The law is that a party is entitled to judgment for any part of his claim he is able to establish to the satisfaction of the court even though the reduced sum was not expressly claimed and consequently not pleaded. See **Simton (Nig) Ltd V Pamil Ind Ltd (2001)8 N.W.L.R (pt 714)49 at 50A-B; Benson Okoebor & Anor V Eyobo Engr. Services (Nig) Ltd & Ors (1991)4 N.W.L.R (pt 187)553.**

Flowing from the above, **Relief (1)** on the counter-claim therefore only succeeds to the extant of the amount admitted by the plaintiff in the sum of **N6, 660, 286.61**.

Relief (2) is for 22% interest per annum on the said sum from the date of filing this counter-claim to the date of Judgment. Now it is true that interest may be claimed

as of right where it is contemplated by the agreement of parties. Where interest is claimed as of right, the proper practice is to claim entitlement to it on the writ/statement of claim and lead facts or evidence which show an entitlement to it. See **Daniel Holding Ltd V UBA Plc (2005) 13 N.W.L.R (pt.943) 533**.

Now in this case, the interest claimed and on which evidence was led was in respect of the **first letter of offer Exhibit P1** which was even tendered by the plaintiff even though it was referred to in the pleadings of defendant and address of their counsel. In that offer letter the agreed rate of interest covering the facility was at **22%** per annum.

Now in the evidence, it is not in dispute that this facility was later restructured and a new offer facility given by defendant to plaintiff **vide Exhibit D1**. This restructured facility clearly now **governed the relationship of parties** and there is nothing in it incorporating the terms of the earlier offer which fixed interest rate at 22%. In **Exhibit D1,** the interest rate agreed to by parties is completely at variance with the interest rate contained in the **first offer letter** and which the defendants are now using as a basis to claim interest on the judgment sum.

The bottom line is that there is here nothing produced by defendant showing parties agreed to a **22%** rate of interest. What was agreed via the restructured facility **Exhibit D1** was neither pleaded or evidence led in proof. In the circumstances **Relief 2** having not been creditably established is not availing.

Relief 3 is for 10% court interest from the date of judgment until final settlement. This relief is at the discretion of the court pursuant to **Order 39 Rules 7 of the Rules of Court.** In the overall interest of justice, I am minded to grant this arm of the claim in favour of the counter claimant.

The final relief on the counter claim is for cost of action. I incline to the view that the defendant having succeeded substantially on their counter claim are entitled to cost.

In the final analysis and for the avoidance of doubt, I accordingly make the following orders:

ON PLAINTIFF CLAIMS

The plaintiff's claims fail in its entirety and is hereby dismissed.

ON DEFENDANT'S COUNTER CLAIM

1. **The plaintiff and defendant to the counter claim is ordered to pay to the counter claimant the sum of N6, 660, 286.61 (Six Million, Six Hundred and Sixty Thousand, Two Hundred and Eighty Six naira, Sixty One kobo) being the sums outstanding on the lease facility admitted by plaintiff and due to the counter-claimant as at 28th June, 2012.**

2. **Relief 2 fails and is dismissed.**

3. **I award or grant 10% interest per annum on the judgment sum from today until full settlement of the judgment sum.**

4. **I assess cost in the sum of N25, 000 payable by plaintiff to the defendant counter claimant.**

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Hon. Justice A.I. Kutigi

Appearances:

1. **J.B Alaci, Esq. with Oyebode E. Wale Esq., for the Plaintiff.**

2. **Paula Eshiemomoh, Esq., for the Defendant/Counter-Claimant.**