

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA- ABUJA

THIS 8TH DAY OF NOVEMBER, 2023

BEFORE HIS LORDSHIP: HON. JUSTICE ALIYU YUNUSA SHAFI

SUIT NO: FCT/HC/CV/2684/2023

BETWEEN:

ORANTO PETROLEUM LIMITED.....CLAIMANT/APPLICANT

AND

- | | | |
|---|---|-------------------|
| 1. UNIVERSAL ELYSIUM LTD | } | DEFENDANTS |
| 2. UNIVERSAL ELYSIUM
CONSORTIUM LIMITED | | |
| 3. NATIONAL INLAND WATERS
AUTHORITY (NIWA) | | |
| 4. ONITSHA RIVER PORT LIMITED | | |

JUDGMENT

The claimant by an originating summons seeks the determination of the questions contained in paragraph A and the reliefs set out in paragraph B hereunder.

QUESTION FOR DETERMINATION 1-8:

- 1. Whether having regards to the combined reading of the Memorandum of Understanding dated 26th February, 2021 between the Claimant and the 1st Respondent; the 2nd Respondent's letters dated 1/8/22, 12/8/22; 12/8/22,8/12/22 and 5/1/23; and the Claimant's letters dated 9/8/22, 17/8/22, 24/8/22, 6/9/22, 23/11/22 and 16/12/22; there is a binding and enforceable agreement between the claimant and the 1st and 2nd Defendants?**
- 2. Whether having regards to the combined effect of Article 3,4 and 5 of the Memorandum of Understanding dated 26th February, 2021**

between the Claimant and the 1st Respondent, the obligations created by the parties in the Memorandum of Understanding is binding and enforceable on the Claimant and the 1st and 2nd Defendants?

- 3. Whether having regards to the combined reading of the Memorandum of Understanding dated 26th February, 2021 between the Claimant and the 1st Defendant; the 2nd Defendant's letters dated 1/8/22, 12/8/22; 12/8/22,8/12/22 and 5/1/23; and the Claimant's letters dated 9/8/22, 17/8/22, 24/8/22, 6/9/22, 23/11/22 and 16/12/22; and the 3rd Respondent's letter dated 9/11/22 and 9/12/22, the 3rd Defendant is not obligated to give full support to the spirit and letters of the Memorandum of Understanding, including maintaining status quo ante bellum pending the determination of the dispute between the Claimant and the 1st and 2nd Defendant?**
- 4. Whether by the combined reading of Article 4, 5, and 6 and Article 2(a) and (b) of the Memorandum of Understanding dated 26th February, 2021, between the Claimant and the 1st Defendant, the Claimant is not entitled to the 40% shares and 40% board positions in the 4th Respondent for a reasonable amount and to the exclusion of all others until the mutual termination of the binding and enforceable Memorandum of Understanding between the parties?**
- 5. Whether by the combined reading of Article 4, 5, and 6 and Article 2(a) and (b) of the Memorandum of Understanding dated 26th February, 2021, between the Claimant and the 1st Defendant, the letter of the 2nd Defendant dated 5th January, 2023, the 1st and 2nd Defendants Memorandum of Understanding or entertain any offer from third parties for purpose of the transfer of the 40% shares in the 4th Defendant together with the agreement pertaining to the board positions agreed upon as the entitlements of the Claimant in the 4th Defendant during the subsistence of the binding and enforceable Memorandum of Understanding?**
- 6. Whether by the combined reading of Article 4, 5, and 6 and Article 2(a) and (b) of the Memorandum of Understanding dated 26th February, 2021, between the Claimant and the 1st Defendant, and the 2nd Defendant's letters dated 1/8/22, 12/8/22; 12/8/22,8/12/22 and 5/1/23; and the Claimant's letters dated 9/8/22, 17/8/22, 24/8/22, 6/9/22, 23/11/22 and 16/12/22; and the 3rd Respondent's letter dated 9/11/22 and 9/12/22, a dispute has arisen as to what amounts to be**

sold by the 2nd Respondent and acquired by the Claimant in the 4th Defendant?

- 7. Whether by community reading of the Memorandum of Understanding dated 26th February, 2021, between the Claimant and the 1st Defendant, and the 2nd Defendant's letters dated 1/8/22, 12/8/22; 12/8/22,8/12/22 and 5/1/23; and the Claimant's letters dated 9/8/22, 17/8/22, 24/8/22, 6/9/22, 23/11/22 and 16/12/22; and the 3rd Respondent's letter dated 9/11/22 and 9/12/22; and the 3rd Respondent's letter dated 9/12/22; the High Court of the Federal Capital Territory has Jurisdiction to appoint an assessor to determine the reasonable amount reflective of the value of 40% shares in the 4th Defendant?**
- 8. Whether by the value determined by the assessor appointed by the High Court of the Federal Capital Territory to Determine the reasonable amount reflective of the value of the 40% shares of the 4th Defendant shall be binding on all parties as a full and final resolution of all issues submitted to the court for determination?**

RELIEFS SOUGHT 1-12:

- 1. A DECLARATION that having regard to the combined reading of the Memorandum of Understanding dated 26th February, 2021 between the Claimant and the 1st Respondent; the 2nd Respondent's letters dated 1/8/22, 12/8/22; 12/8/22,8/12/22 and 5/1/23; and the Claimant's letters dated 9/8/22, 17/8/22, 24/8/22, 6/9/22, 23/11/22 and 16/12/22; that there is a binding and enforceable agreement between the Claimant and the 1st and 2nd Defendants.**
- 2. A DECLARATION that by the combined reading of Article 4, 5, and 6 and Article 2(a) and (b) of the Memorandum of Understanding dated 26th February, 2021, between the Claimant and the 1st Defendant, the obligations created by the parties in the Memorandum of Understanding is binding and enforceable on the Claimant and the 1st and 2nd Defendants.**
- 3. A DECLARATION that by the combined reading of the Memorandum of Understanding dated 26th February, 2021 between the Claimant and the 1st Respondent; the 2nd Respondent's letters dated 1/8/22, 12/8/22; 12/8/22,8/12/22 and 5/1/23; and the Claimant's letters dated 9/8/22, 17/8/22, 24/8/22, 6/9/22, 23/11/22 and 16/12/22; and the 3rd Defendant's letter dated 9/12/22, the 3rd Defendant is**

obligated to give full support to the spirit and letters of the Memorandum of Understanding, including maintaining status quo ante bellum pending the determination of the dispute between the Claimant and the 1st and 2nd Defendants.

- 4. A DECLARATION that by the combined reading of Article 4, 5, and 6 and Article 2(a) and (b) of the Memorandum of Understanding dated 26th February, 2021, between the Claimant and the 1st Defendant, the Claimant is not entitled to the 40% shares and 40% board positions in the 4th Respondent for a reasonable amount and to the exclusion of all others until the mutual termination of the binding and enforceable Memorandum of Understanding between the parties?**
- 5. A DECLARATION that be the combined reading of Article 4, 5 and 6 and Article 2(a) and (b) of the Memorandum of Understanding dated 26th February, 2021, between the Claimant and the 1st Defendant, the 1st and 2nd Defendants cannot entertain any offer from the third parties for the 40% shares and board positions in the 4th Defendant during the subsistence of the binding and enforceable Memorandum of Understanding.**
- 6. A DECLARATION that by a combined reading of Paragraphs 5 and Article 1, 2(a) and (b), 4 and 5 of the Memorandum of Understanding dated 26th February, 2021, between the Claimant and the 1st Respondent, and the 2nd Respondent's letters dated 1/8/22, 12/8/22; 12/8/22, 8/12/22 and 5/1/23; and the Claimant's letters dated 9/8/22, 17/8/22, 24/8/22, 6/9/22, 23/11/22 and 16/12/22; a dispute has arisen as to what amounts to a reasonable amount reflective of the value of 40% shares to be sold by the 2nd Defendant and acquired by the Claimant in the 4th Defendant?**
- 7. A DECLARATION that by a community reading of the Memorandum of Understanding dated 26th February, 2021, between the Claimant and the 1st Defendant, and the 2nd Defendant's letters dated 1/8/22, 12/8/22; 12/8/22, 8/12/22 and 5/1/23; and the Claimant's letters dated 9/8/22, 17/8/22, 24/8/22, 6/9/22, 23/11/22 and 16/12/22; and the 3rd Respondent's letter dated 9/11/22 and 9/12/22; and the 3rd Respondent's letter dated 9/12/22; the High Court of the Federal Capital Territory has Jurisdiction to appoint an assessor to determine the reasonable amount reflective of the value of 40% shares in the 4th Defendant?**

- 8. A DECLARATION that the value determined by the assessor appointed by the High Court of the Federal Capital Territory to determine the reasonable amount reflective of the value of 40% shares in the 4th Defendant shall be binding on all the parties as a full and final resolution of all the issues submitted to the court for determination.**
- 9. AN ORDER OF PERPETUAL INJUNCTION restraining the 1st and 2nd Defendants from entertaining any offer from third parties and nullifying any offer from third parties for the 40% of shares and board positions in the 4th Defendant during the subsistence of the binding and enforceable Memorandum of Understanding.**
- 10. AN ORDER OF COURT appointing an assessor to determine the reasonable amount reflective of the value of 40% shares in the 4th Defendant.**
- 11. A MANDATORY ORDER OF COURT that the value determined by the assessor appointed by the High Court of Federal Capital Territory to determine the reasonable amount reflective of the value of the 40% shares of the 4th Defendant shall be binding on all the parties as full and final resolution of all issues submitted to the court for determination.**
- 12. AND FOR SUCH OTHER ORDER(S) as the Honourable Court may deem fit to make in the circumstances of this suit.**

Attached to the originating summons is an affidavit in support of originating summons of 35 paragraphs deposited to by one Prince Dr. Okeyeze of No: 12 Chari Close, Maitama Abuja, accompanied are exhibits marked Oranto 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 respectively and a written address in support of the originating summons of 20 pages dated 15th day of March, 2023.

Alongside the originating summons the claimant filed a motion on notice with a motion number M/6191/23 seeking for an order for interlocutory injunction. The ex parte application was moved by the learned senior counsel Abdul Mohammed (SAN) dated the 22-03-2023 on the 3-4-2023. The learned senior counsel Abdul Mohammed and 2 other counsels were in court for the claimant, while one Victor C. Chemezie and Christ Okoye appeared for the 1st, 2nd & 4th defendants respectively.

The learned Senior Counsel to the claimant informed this court that this case was fixed for motion on notice and yet they have not received any response

from the respondents. That the respondents have been served on the 23-3-2023, and the law gives the respondent 7 days to respond and the 7 days have elapsed and they have not responded. He then prayed the court to allow him move his motion.

In response, the 1st Defendant counsel informed the court that they are not ready for the hearing of the motion on notice reasons being that they have not been served with the processes in this suit particularly the motion on notice sought to be heard and only got an idea about the existence of this suit from the 1st Defendant and therefore are willing to accept service in the court.

The counsel to the 2nd & 4th Defendants on his side stated that they were served on the 24-3-2023 and not 23-3-2023 as the learned silk mentioned. That he was briefed of this case by the 2nd & 4th Defendant on Friday of last week and prayed the court to grant them a date to respond to the application.

The learned senior counsel, who by the reasons of non service of the processes on the respondent prayed the court to extend the order of the motion ex parte pending the hearing of the motion on notice. The oral application made for extension of the order granted on the 22-3-2023 was granted and the matter adjourned to 10-5-2023 for hearing of the motion on notice.

On the 10-5-2023, one O.F. Amedo and 2 others Counsels were in court representing the claimant, while Victor C. Chimezie and Chris Okoye represented the 1st & 2nd & 4th Defendants respectively.

Counsel to the claimant informed the court that he was aware of a motion for preliminary objections filed by the 2nd & 4th Defendants counsel, and on their part have also filed a counter affidavit in response to the 2nd & 4th Defendants notice of preliminary objection dated 2-5-2023 and further affidavit to 1st Defendant filed the same date.

The defendant counsel on their part informed the court they were served this morning and some were served yesterday, on the further affidavit fresh issues were raised which they will need time to respond. But they have a motion for regularization of their processes and would like to take the motion for regularization. This the claimant counsel did not object. The defendant counsel then moved the said motion that was filed dated the 02-5-2023. The motion was moved interms and the order sought therein was granted.

The learned counsel to the claimant then asked the court to give them a date to reply if need be and asked the court to extend time for the order of ex parte made by this court. The court granted the oral application for the extension of time on the 22-3-2023 and the matter was adjourned to 21-06-2023 for hearing.

The 2nd & 4th Defendants filed their counter affidavit in opposition to originating summons dated the 27-4-2023 of 40 paragraphs deposed to by one Mrs Taiyobong Osuji of 5 Kokoma Close, Wuse 2 Abuja, attached to the counter are exhibits marked exhibit D1, D2, D3, D4, D5, D6, D7, D8, D9, D10, D11, D12 and in compliance with the rules of this court filed the 2nd & 4th Defendants written address in opposition to originating Summons of 16 pages where in the written address he distilled three(3) issues for determination to wit:

- 1. Whether there is valid contract between the claimant and the 2nd Defendant.**
- 2. Whether the 2nd & 4th Defendant can be bound by the (MOU) memorandum of understanding between the claimant and the 1ST Defendant and whether the 1st Defendant can validly contract to sell the shares of the 4th Defendant without the approval of the 4th Defendant.**
- 3. Whether the relief for specific performance sought by the claimant is such that could be granted by the Honourable Court in the circumstance of this suit.**

The 1st defendant filed the 1st Defendant's counter affidavit in opposition to the originating summons dated the 28th day of April, 2023 of 26 paragraphs deposed to by one Gift Nzei of 5 Kokoma Close Wuse 2, Abuja, attached to the counter affidavit are exhibit marked exhibits A (MOU) dated the 26-2-2021 between Universal Elysium Ltd and Oranto Petroleum Ltd. In compliance with the rules of this court filed alongside the 1st Defendant's written address in opposition to originating summons of 15 pages where in the written address, he distilled a sole issue for determination to wit.

“whether the memorandum of understanding executed by the claimant and the 1st Defendant is a valid and subsisting contract?”

In response to the counter affidavit filed by the 1st & 2nd & 4th Defendant counsel, the claimant counsel filed the claimant further affidavit filed on 2nd May, 2023 of 9 paragraph deposed to by Prince Dr OkeyEze of No: 12 Chari close Madame, Abuja and some documents attached thereto and a written address on points of law, where he distilled two issues for determination to wit;

- 1. Whether the claimant is at fault and should bear any liability over the 1st Defendant's act of surreptitiously incorporating the 2nd defendant as the special purpose vehicle (SPV) for the concession agreement of the Onitsha Port as against the agreed 4th Defendant contrary to the letter and intents of the Memorandum of understanding dated the 26th February, 2021?**

2. Whether there is no sufficient evidence on record to establish the fact that the 1st 2nd & 4th Defendants are sister companies for the purpose of been liable to the claimant's claim in this suit.

Also in response to the 2nd & 4th Defendant's counter affidavit's filed the claimant's further affidavit to 2nd and 4th defendant's counter affidavit filed on 2-May, 2023 dated 9th day of May, 2023 and filed on the same date. attached to the further affidavit are annexure marked A, B and C and the claimants reply on points of law to the 2nd & 4th Defendant's written address filed on 2nd May, 2023 wherein in the said reply on points of law he distilled 3 (three issues for determination to wit:

- 1. Whether the claimant is at fault and should bear any liability over the 1st Defendant's act of surreptitiously incorporating the 2nd defendant as the special purpose vehicle (SPV) for the concession agreement of the Onitsha Port as against the agreed 4th Defendant contrary to the letter and intents of the Memorandum of understanding dated the 26th February, 2021?**
- 2. Whether there is no sufficient evidence on record to establish the fact that the 1st 2nd & 4th Defendants are sister companies for the purpose of been liable to the claimant claim in this suit.**
- 3. Whether the relief for specific performance sought by the claimant's is such that could be granted by the Honourable Court in the circumstance if this suit.**

On the part of the claimant, the learned senior counsel in it's written address distilled the following issues to wit:

“Because the originating summons is a procedure aimed at interpreting the imports of document, the claimant hereby adopts the questions set out on the face of the originating summons as it's issues for determination in this matter and the issues shall be argued together.

Now to the issue for determination and the question set out on the face of the originating summons are what this court will flash it's light on to determine the issues in this case,

The claimant's line first of argument will be taken along with the 1st Defendant's issues for determination together with the 2nd & 4th Defendants issues 1 and 2 together.

Firstly, the learned senior counsel; to the claimant argued that by posing this question:

“Whether the parties intend that the agreement entered into by them is intended to be binding?”

On this it is the learned counsel argument that where parties entered into an agreement, they become bound by the agreement so long as an intention can be discerned from their conduct and the agreement that the parties intend to be bound. That by the agreement of the parties, in the memorandum of understanding (MOU) and their correspondence, there is a clear intention to be bound by the MOU. This he referred to the case of Tower Securities & Merchant Bank Ltd (2020) LPELR-51415(CA), the court of Appeal Per Aliyu JCA at p. 34-36 paragraph A stated the position of the law regarding the enforceability or otherwise of the MOU thus:

“the appellant learned counsel has strongly posited relying on the definition of a MOU to insist that the MOU executed by the parties in this case was not a contract and therefore not enforceable. There is not doubt that an MOU’S status is less than a complete contract. But in the peculiar facts and circumstances of this case under which the MOU was executed, I am confident to hold that the parties intended to be bound by the terms thereof. My reasons Is the language used in the document showing the intent of the parties in signing the MOU especially under the heading” final agreement” that I reproduced supra. The parties must be taken to mean what they stated in fulfilling the agreement. It is to be remembered that the background reason for the execution of the MOU, in this case was the repayment of the appellant’s indebtedness which up to that point was agreed upon vide exhibit E IL2. This is apparent in the MOU under the heading Repayment plan wherein the appellant and the respondent agrees that the appellant under took to repay the respondent the sum of N132, 947,243, 46 and the terms of the repayment were stated therein:

The appellant also forwarded deeds of assignment of it’s properties infavour of the respondent as agreed in the MOU as part of the repayment plan. In the case of B. P. S. Construction Company & Engineering Ltd V FCDA (2017) LPELR-42516 (SC) THE Supreme court held that the MOU extended by the parties was not enforceable mainly because the parties understanding therein was that it was made subject to the signing of a formal contract. But this court held in that case, that the parties did not intend to be bound by the MOU, since it only represented a preliminary understanding of the parties

plan to enter into a contract in the future. But in this case, leading to this appeal, the parties did not make the MOU subject to the execution of any further agreement. They intended that it should be binding on them and indeed commenced the execution of the terms therein as noted supra. In this circumstances the appellant cannot be allowed to renege from it. See IfeanyiChukwu T. I. W. Ltd & Anor V O.C. B. Ltd (supra) which has similar facts to this case (relied upon by the respondent where the supreme court Per Ariwoola JSC held:

“Indeed there was a clear admission directly, on one hand by the appellant of the indebtedness and on the other hand, an admission of the sum claimed through the appellant counsel. the correspondence between counsel was not denied by the appellant. This therefore is not a case that the defendant should be allowed longer time to continue to delay the settlement of their indebtedness. It would be an unwarranted indulgence by the court and this may result into injustice to the respondent whose money the appellant had benefited from and refused to pay back.

On this, the learned senior claimant counsel also referred this court to the case of Eagle Sight Ltd V Rolbams (Nig) Ltd (2022) LPELR-59321(CA) where in this case the court of Appeal Per Atten JCA at P. 25-27 paragraph B. B. restated his position of the law thus:

“the black’s law Dictionary 8th Ed defines Memorandum of understanding “by reference to “letter of intent”--- (at p. 924 as “(a) written statement detailing the preliminary understanding of parties who plans to enter into a contract or some other agreement. A letter of intent is not meant to be binding and does not hinder the parties from Business people typically mean not to be bound by a letter of intent and courts ordinarily do not enforce one, but courts occasionally find that a commitment has been made” the above definition was given Judicial imprimatur in BPS Const&Engr LTD V FCDA (2017) 10 NWLR (PRT. 1572) 11 at 28-29. It seems to be one that even though a letter of intent on MOU generally speaks to the future happening of a more formal relationship between the parties and the steps each party needs to take to bring that intention to reality, the word “but courts occasionally find that a commitment has been made” in the above definition suggest

that the intentions of the parties is to be gathered from the actual content thereof. Thus a contractual document may be labelled as a letter of intent or MOU when it is in fact a complete agreement between the parties setting out their respective rights and obligation with nothing left to be done at a later date. That is the scenario in exhibit A1 which does not point to any future steps to be taken by the parties thereto. On the contrary, clause 1 states that:

“the driver/operator will make a monthly return of the sum of N200,000 to Eagle Sigt Ltd” whilst clauses 8 is to the effect that “All repairs must be done by the Driver/operator and there will be no liability whatsoever on the owner in respect of LASTMA, MOT and police as the owner must ensure that all papers are complete before the option of the contract. Driver should report to the owner immediately any paper expires. The MOU is binding as between the Appellant and the Driver/operator of the trailer and the lower court got it amiss in holding that it” cannot by any stretch of the imagination be considered to be a binding contract on parties” but whether that bindingness extends to a third party (such as the respondent) or the MOU can be given effect in the manner the appellant sought to do before the lower court is a different matter entirely”

The learned senior counsel went further to state that the reasons why a MOU has been taken to be binding has it's roots in the principle of promissouyestoppel and referred to the case of Central London Pty. Trust Ltd V High Tress Homes Ltd (1947) ILB 130 and the decision in sixth interim report of the law revision committee encapsulated in section 169 of the EA provides:

“when one person has either by virtue of an existing court Judgment, deed or agreement, why his declaration/act or omission, intentionally counsed or permitted another person to believe a thing to be true and to act upon such beliefs neither he nor his representatives in interest shall be allowed in any proceedings between himself and representative in interest, to deny the truth of that thing.

Also in the case of Oraka V Oraka& Anor (2019) LPELR-47673 (CA) the court of appeal did a detailed analysis of the position of an MOU and held that it can be enforceable based on the principle of estoppel Tobu JCA at pg. 41-48 paragraph e

“based on the evidence of the DW4, the lower court was emphatic in holding that MOU, which is exhibit a5 and d12 is enforceable and binding on the parties who executed same which are the Appellant and the 1st Respondent. The Appellant who willingly executed MOU2 cannot deny the binding force of MOU2 on him. It is not binding as a contract but on the principle of estopped since he has made a promise of intention to enter into a contract.

See A. G. Bendel State Vs A. G. Fed (1981)10SC1, Lawal V UBA Plc & Com & ors (1995) 2 NWLR (PT. 378) 407, The MOU is not a contract or an agreement in the sense of the word but rather an intention to enter into a contract later. At this state, I will briefly look at the argument presented before this court in both briefs as to the binding force of the MOU it is argued by the Appellant that the MOU 2 was entered into to enable the 1st Respondent withdraw her case against him and therefore the contract is not valid because the consideration is illegal. In this respect, the Appellant says a contract which has an illegal consideration is not enforceable. I agree with the appellant that a contract is only valid when all the ingredients that make up a valid contract are present. One of such ingredients is consideration which the law says must not necessarily be sufficient. See Chabasaya Vs Anwasi (2010) 10 NWLR (pt. 1201) 163, BFI Group Cor. V B.P.E. (2012) 7 SC (pt. III)1. The above principle applies to contract. The point must be made that 1015 not all agreements do not require consideration as they are not contracts. A MOU falls into such categories as it is an understanding between parties on the understanding of been bound by the terms therein. From all intent and purposes, a MOU does not have the binding force of contract as it is not contractual but rather an intention to enter into a contract”

In safetrust saving and Loan Ltd V GovEkiti State and ors (2014) LPELR-22778 (CA) Galinge JCA as he then was at pages 13-14 this court held:

“the applicant has admitted entering into an agreement with the 2nd Respondent, an agreement which he said is a MOU. As far as I am concerned, MOUA not an agreement yet. Blacks law Dictionary 6th Edition Defines Memorandum as an informed record, not or instrument embodying something that the parties desire, to fix in memory by the aid of written evidence, or that is to serve as the basis of a future formal

contract or deed. In Kerme V Hughes tool Co 128 CAL RPTR 839 AT 945, it was stated that memorandum implies something less than a complete contract and that the memorandum functions only as evidence of the contract and need not contain every term, so that a letter may be a sufficient memorandum to take a case out of frauds. MOU 1 & 2 has no contractual binding force on the parties or indeed the courts power to enforce those documents in a binding contract is limited. The binding effects of an MOU is to the extent of the intention to enter into an agreement but not binding as an agreement or contract. In the circumstances it is therefore immaterial that the consideration supplied for the MOU 2 is illegal. The argument by the appellant in this regard is of no moment and cannot hold water as there is wide difference between a contract and memorandum of understanding both in legal and grammatical terms, more so, in their legal understanding and consequence.

In response, the 1st Defendant filed a counter affidavit in opposition to originating summons of 26 paragraph where he formulated a sole issue to wit:

“whether the memorandum of understanding executed by the claimant and the 1st Defendant is a valid and subsisting contract?”

On this he argued that a memorandum of understanding is a less formal agreement between parties in a transaction that shows an intention to enter into a legally binding agreement. That it is used in cases where parties do not imply contractual or enforceable agreement between them. See *Aburima & Anor Vs Osunbor* (2022) LPELR- 57590 (CA) where the court of Appeal explains the position of the law as regard MOU, thus:

“it is trite that a MOU is not an agreement yet, MOU implies something less than a complete contract and it functions only as evidence of the contract and need not contain every term.

---Having discourse that a MOU is not a complete contract or an agreement it presupposes that it cannot be placed on the same pedestal with an agreement or a contract.

The implication is that its content cannot be enforced. Be that as it may, it remains a document which the parties can refer to for the purpose of reminding them of the content therein”

Reference also to the case of *Bilanter International Ltd V Nigeria Deposit Insurance Cor.* (2011) L.E.P.L. R- (SC/177/1996. The Supreme court held that:

“it is trite before any contract or argument can be said to have come into existence in law, there must be an unmistakable and precise offer and unconditional acceptance of the terms mutually agreed upon by the parties thereto. In other words, the parties to the agreement must be in consensus ad idem as regards the terms and conditions freely and voluntarily agreed upon by them”

That in the instant case the MOU provided that the consideration will be “a reasonable amount to be agreed as reflective of the value of the 40% shares to be sold and acquired in Onitsha River Port Ltd” This provision does not in any way sound like a definite offer capable of acceptance. It is at best a guide to the future intentions of the parties that the provisions. Clearly provides the basis of any future formal contract to be entered into by the party, until the parties agree on this amount reflective of the value, formal contract cannot be made by the parties.

Furthermore, that the claimants case would have been a different ball game if the parties have agreed on the amount reflective of the value of the purposed 40% shares and yet the 1st Defendant fails to enter into contract. That in this case, the parties’ failure to agree on an appropriate consideration and the failure to agree on the very terms to the contract dealt an irreplaceable blow on the transaction.

Hold therefore that an MOU can only be binding where all the conditions of a valid contract are definite and existent and offer, acceptance consideration, intention to be bound by the terms of the contract. That in the instant case, the consideration was yet to be agreed and was indeed left for a future agreement (to be agreed), that it is apparent that the parties intend to contract if and when the consideration is agreed. And that the facts that this very crucial element of a valid contract was left for a future agreement shows that the parties are still negotiating and not yet ad idem and so could not have created a valid contract as per the MOU signed between the claimant and the 1st Defendant.

The learned counsel to the 1st Defendant went further to state that where an MOU is subject to the fulfilment of certain terms and conditions, such MOU is inchoate and not binding until fulfilled and it would be incorrect to say that the terms are to be construed in a mandatory sense. Further that the agreed terms of the parties, it is likely to be ambiguous and the vaguer such an MOU is then less likely that it is binding, But in the instant case according to the terms in the MOU article

1. States thus:

“in consideration of Universal Elysium selling 40% shares in Onitsha River Port Ltd to Oranto Petroleum Oranto Petroleum

shall pay to Universal Elysium a reasonable amount as reflective of the value of the 40% shares to be sold and acquired in Onitsha River Port Ltd.

The above position is indicative of further negotiation by the parties. Because an amount has not been agreed upon for the sale of the 40% shares, the MOU is inchoate and not binding. That it is glaring from the MOU that, the claimant and the 1st Defendant only intended the MOU as an intention towards the performance of a future agreement and not a final agreement as the price of the shares was yet to be agreed upon and that the MOU does not contain the elements of a valid contract, as there was a consideration as an element of a valid contract. This he referred to the case of *Altotrin Ltd V A. U. Fed & Anor* (1996) 9 NWLR (pt. 475) 634, the Supreme Court Per Iguh JSC stated that for a contract to be a concluded bargain which has settled all essential conditions that are necessary to be settled and leaves no vital terms or conditions unsettled”

Furtherance to the above, it is the argument of the learned defence counsel to the 1st Defendant that the argument canvassed by the learned claimant where he argued that the MOU between the claimant and the 1st Defendant constituted a binding agreement between the parties. On this the 1st Defendant counsel submitted that most of the cases cited by the claimant are against the case of the claimant while a few others are either not applicable to or distinguishable from the facts of the instant case, he then referred to the case of *Eagle Sight Ltd V Rolbams (Nig) Ltd* (2022 LPELR-59321 (CA) and the case of *Oraka V Oraka & Anor* (2019) LPELR 47675 (CA), where the final decision in this case is against the case of the claimant as the court of Appeal Per Tobi JCA in conclusion held that:

“from all intent and purposes a MOU does not have the binding force of a contract as it is not contracted but rather an intention to entertain a contract.

That in paragraph 3.7 of the written address in support of the claimants originating summons, the claimant referred to the case of *Safe Trust Savings and loan ltd. V. Gov. Ekiti state and Ors* (2014) LPELR-22778 (CA), on this he stated that the decision in that case is against the claimant’s case. In that case, the Court of Appeal rejected all persuasion to the contrary as Per Galinje JCA at P.13-14 held as follows:

“As far as I am concerned, MOU is not an agreement yet in MOU 1 & 2 have no contractual binding force on the parties or indeed the courts power to enforce those documents as a binding contract is limited”

Also the case of BPS Construction & Engineering LTD V FCDA (2017) LPELR-42516 (CA) cited at para 3.8 of the claimants written address in support of originating summons is also against the case of the claimants.

Moving forward, he argued that the fact that the claimant and the 1st Defendant signed a MOU for the sale of 40% shares of the 4th Defendant subject to parties agreeing a reasonable amount reflective of the value of the shares does not and cannot by any stretch of imagination become a definite agreement of the sale of the said shares. That it also cannot preclude the 1st defendant from negotiating with third parties for the sale of the same shares. That the sale of shares is a business decision and until both parties agree on a mutually acceptable price a contract cannot be formed. Reference was also made to paragraph 3.9 of the claimants written address in support of originating summons whereof the claimants counsel referred to the case of Star France & Properties LTD & Anor V. NDIC (2012) 10 NWLR (Pt. 1309) 522.

Furthermore, that the claimant having realized that the MOU may after all not be a binding agreement, argued that the MOU could be made to bind on the 1st Defendant by Virtue of the principle of promissory estoppel. This he stated that promissory estoppel does not arise in the instant case because there was no pre-existing agreement nor a promise to vary such pre-existing agreement.

From the above, he stated that, the cases relied upon by the claimant and the 1st Defendant is only a preliminary understanding between parties to enter into a formal contract in the future and when they agree to an amount reflective of the value of the proposed shares for sale.

The 2nd & 4th Defendant counsel's counter affidavit in opposition to the originating summons, filed dated 2nd May, 2023 of 15 paragraph herein is reproduced below:

PARAGRAPH 3-14

3: I have the consent of the through the Originating Summons and the accompanying Processes filed by the Claimant in this suit.

4: the facts on which the suit is predicated and contained in the Affidavit in support of the Originating Summons are not only falsely presented but are very contentious.

5: The Issues and the facts raised in the Originating Summons are contentious and cannot appropriately be determined on Originating summons, the 2nd and 4th Defendants intend to call witnesses to clarify the contentious facts.

6: The depositions in paragraphs 6 to 34 of the Affidavit in support of the Originating Summons are false, or craftily fabricated to deceive the Honourable Court.

7: Contrary to paragraph 6, 11, and 12 of the Affidavit in support of the Originating Summons, the 1st 2nd and 4th Defendants are not sister companies but companies with distinct legal personalities.

8: contrary to paragraph 7 of the Affidavit in support of the originating Summons, the 2nd and 4th Defendants to acquire forty percent (40%) shares or any shares at all in the special Purpose Vehicle set up with regard to the performance of the obligation in the Concession Agreement of Onitsha River Port.

9: the 2nd and 4th Defendants are not privy to the said Memorandum of Understanding or any agreement whatsoever involving the Claimant and the 1st Defendant.

10: Paragraph 8 of the Affidavit in support of the Originating Summons is false and hereby denied. The reason(s) for entering into the Memorandum of Understanding between the Claimant and the 1st Defendant are expressly contained in the Recital Clause of the Memorandum of Understanding.

11: contrary to paragraph 9 of the Affidavit in support of the Originating Summons, the 2nd and 4th Defendants did not have agreement whatsoever with the claimant for the Claimant to acquire 40% or any number of shares at all in any of the 1st, 2nd, and/or 4th Defendant's SPV for the purpose of executing the obligations under the Concession Agreement entered in respect of Onitsha Ports or for any reason whatsoever.

12: Contrary to paragraph 10 of the Affidavit in support of the Originating Summons, the Memorandum of Understanding between the Claimant and the 1st Defendant was entered was entered into in paragraph 5 of the Recital clause of the Memorandum of Understanding.

13: contrary to paragraph 11 of the Affidavit in support of the Originating Summons, there was no agreement whatsoever for the Claimant to acquire 40% shares in Universal Elysium for the any amount whatsoever or howsoever expressed.

14: in further response to paragraph 11 of the Affidavit in support of the Originating Summons, the correspondence the claimant and the 1st Defendant was independent of any memorandum of Understanding or any prior agreement between the parties. There was no correspondent at all between the Claimant and the 4th Defendant.

In arguing on point of law no 1 & 2 combined he denied that the 1st, 2nd and 4th Defendants are not sister companies and not been sisters companies formed the basis of the 2nd & 4th defendant denials of not being privy and liable to any agreement in the MOU between the claimant and the 1st Defendant.

But however, paragraph 6 & 7 of the further affidavit, where the claimant made detailed and specific averment to justify the facts that the 1st, 2nd and 4th Defendants are sister companies liable to the claimant's claim in this suit. That the claimant referred to the status report of the CAC of the 1st, 2nd and 4th Defendants marked as exhibit Oranto A, B, & C in establishing the facts that the 1st, 2nd and 4th Defendant are sister companies because;

- A. They are interchangeably shareholders in each other's shareholding arrangement thus;**
 - i. The 1st Defendant directly holds 34% of the shares in the 2nd Defendant amounting to 3,400.000 shares.**
 - ii. The 4th Defendant also holds 33% of shares in the 2nd Defendants amounting to 3,300.00 shares**
 - iii. The 1st Defendant is a shareholder in the 4th Defendant.**
- B. The 1st, 2nd and 4th defendants all have No:1 Rima street Maitama Abuja as their respective common registered office address in Nigeria.**
- C. The 1st, 2nd and 4th Defendant have a common managing Director in person of Nwangwu George who is also on the Board of Directors of the 1st, 2nd and 4th defendants.**
- D. Mr Nwangwu George is a common signatory in the shares subscription signature column of the 1st, 2nd and 4th Defendants indicating that the 1st, 2nd and 4th Defendant share common ownership.**

The learned Claimant's counsel posits that upon the invocation of the doctrine of lifting the corporate veil on the 1st, 2nd and 4th Defendants to establish fraud, it will certainly be revealed that they are sister companies controlled by same persons or similar board of directors. Further that in paragraph 8 (d) of the further affidavit, that the 1st defendant abandoned the 4th Defendant as the agreed special purpose vehicle (SPV) to excuse the concession agreement and surreptitiously incorporated the 2nd Defendants as the new SPV in a bid to sabotage the interest of the claimant under the MOU. Also in paragraph 8 (a-c) the claimant refuted this denial of the 2nd and 4th Defendants to the effect that aside the letters and intents of the MOU, there is no other document between the parties that was executed in respect of the sale of 40% shares to the claimant. That sadly, the 2nd and 4th defendants are denying the fact that the 2nd Defendant's offer on the sale of 40% of its shares to the claimant is independent and has no connection whatsoever with the MOU between the claimant and the 1st Defendant. On this he stated that, it can never be the claimant's fault that the 1st Defendant as the SPV to execute the concession agreement, as against the 2nd Defendant that was later incorporated for the same purpose.

This he cited the following cases to back up his argument.

- 1. Ibama v Shell Pet Dev. Co. (NIG.) LTD (1998)3 NWLR (Pt. 543) 493 PP. 499-500 paras H-A.**
- 2. UBN PLC v. Awmar Properties LTD (2018) 10 NWLR (Pt. 1626) 64 (a) page 51 paragraph A, the Apex court held thus**

“In implying terms into a contract, the exercise involved is that of ascertaining the presumed intention of the parties collected from the agreement and the surrounding circumstances”

To pull the bull by the horns, the learned counsel submits that, the 1st Defendant is lamenting banking on its deliberate abandonment of adopting and engaging the 4th Defendant as the SPV in executing the concession agreement as a basis for denying the binding contractual intent and purpose of the MOU, which is now been implemented through the 2nd Defendant as the adopted SPV. That the 2nd and 4th Defendants could not hide the shining light of exhibit Oranto 9, which is a letter dated 9th December, 2022 from the MD/CEO of the 3rd Defendant to MR George Nwangwu who is the common MD of the 1st, 2nd and 4th Defendants. That exhibit Oranto 9, corner-spring and living witness from a natural 3rd party firmly establishing that the entire offer and correspondence on the sale of 40% shares was predicated on the MOU which the 2nd and 4th Defendants are not denying.

On the above he submitted that, exhibit Oranto 9, was a candid business idea to the common MD of the 1st, 2nd and 4th defendants to open up further

discussions with the claimant based on the MOU between the parties for mutual benefit, but the 1st, 2nd and 3rd defendants refused to heed. Therefore, the false denial that there was no agreement between the parties is a deliberate mischief and is grossly ill-conceived.

See MTN (Nig.) Comm. LTD V Corporate Comm. Inv. Ltd (2019) 9 NWLR (Pt. 1678) 427 @ 458 and the case of Kano Tex Plc V GH(Nig.) LTD (2002) 2 NWLR (Pt. 751) 420 @ 450 para B-D where it was held thus:

“A party should not be allowed to benefit from his own wrong. This is encapsulated in the latin maxim *Nullus Commodum Capere Potest de injuria sue propria*...”

Further that the 1st, 2nd and 4th Defendants chose to render the MOU ineffective and null simply on the fact that the 2nd and 4th Defendants are not named on the face of the said MOU, that the 2nd and 4th Defendants chose to tag the MOU as an illegal agreement, whereas, they are the beneficiaries of whatever omission and/or commission on the MOU. That the law does not allow them to tag the MOU as illegal, having benefitted from it one way or the other.

That a careful perusal of paragraph 7 in page 4 under the heading “Warranties and representations” of the MOU, it was rightly agreed that parties to the MOU have requisite consent, approval and authorities of the parties to execute the agreement on respect of its validity, paragraph 7 in page 4 states thus:

The parties warrant and agreement that the parties who enter into this agreement and on behalf of the both parties have the requisite consent and authorities of the respective parties to do so and that all requisite consent, and approval required for the validity of this agreement has been received.”

Finally submits that it should therefore not be an issue whether the 2nd and 4th Defendants are parties to the MOU when the 1st Defendant and its representative clearly covenanted in the MOU that they have all the requisite consent and approval required for the validity of the agreement.

The claimant counsel filed a further affidavit to the 1st Defendant’s counter affidavit filed on the 2nd May, 2023 in opposition to originating summons of 9 paragraphs deposed to by Prince Dr OkeyEze, attached to the further affidavit are exhibit marked Okonkwo1 being the status report of Onitsha River port Ltd which contains the search result of the status of the company Onitsha Rivers Port LTD and a written address of 9 pages, wherein the written address raised the following issues for determination to wit.

- 1. Whether the claimant is at fault and should bear any liability over the 1st defendant's act of surreptitiously incorporating the 2nd defendant as the Special purpose vehicle (SPV) for the concession agreement of the Onitsha port as against the agreed 4th Defendant contrary to the letters and intents of the MOU dated the 4thg February, 2021?**
- 2. Whether there is no sufficient evidence on record to establish the fact that the 1st, 2nd and 4th defendants are sister companies for the purpose of being liable to the claimant.**

The claimant's counsel who argued the issues combined on points of law. This which he referred the court to paragraph 6 of the 1st defendant's counter affidavit where it was denied that the 1st, 2nd and 4th Defendants are not sister companies for the purpose of bearing the claimants liability. However, in paragraph 5 of the further affidavit, the claimant made detailed and specific averments to justify the fact that the 1st, 2nd and 4th Defendants are sister companies liable to the claimants claim. This he referred to the status report of the CAC of the 1st, 2nd & 4th Defendants marked as Exhibit Oranto A, B & C to establish the fact that the 1st, 2nd and 4th Defendants ate sister companies reason as stated below:

- i. The 1st Defendant directly holds 34% of shares in the 3,400.00 shares.**
- ii. The 4th defendant also holds 33% in the 2nd Defendant amounting to 3,300.00 shares.**
- iii. The 1st defendant is a shareholder in the 4th Defendant and that the 1st, 2nd and 4th Defendants all have No.1 Rimi Street Maitama Abujaas their office address in Nigeria, and have a common managing director in the person of Nwangwu George who is also the Board of directrors of the 1st, 2nd and 4th defendants. The said Mr. Nwangwu George is a common signatory in the share subscription signature columns of the 1st, 2nd and 4th Defendants.**

The learned counsel to the claimant further stated that in paragraph 6(d) of the further affidavit, it was deposed that the 1st defendant abandoned the 4th Defendant as the agreed special purpose vehicle (SPV) to execute the concession agreement and surreptitiously incorporated the 2nd Defendant as the new SPV in a bid to sabotage the interest of the claimant under the MOU. The learned counsel in its further affidavit paragraph 7(a-c) refuted this denial of the 2nd and 4th defendant to the effect that aside the letters and intents of the MOU there is no other document between the parties that was executed in respect of the sale of 40% shares to the claimant. On this he stated that the 1st Defendant

sadly is denying the fact that the 2nd defendant's offer on the sale of 40% of its shares to the claimant is independent and has no connection whatsoever with the MOU executed between the claimant and the 1st Defendant.

This he contended that it can never be the claimant's fault that the 1st defendant abandoned using the 4th defendant as the SPV to execute the concession agreement, as against the 2nd defendant that was later incorporated for that same purpose. On this he referred to the case of *IbamaV Shell Pet Dev. Co. (Nig.) Ltd* (1998)3 NWLR (Pt. 542) 493 pp 499-500 paras H-A and *UBA Plc V Awmar Properties LTD* (2018) 10 NWLR (Pt. 1626) 64 @ page 51.

Furthermore, that, the 1st Defendant is banking on its deliberate abandonment of adopting and engaging the 4th defendant as the SPV in executing the concession agreement as a basis for denying the binding contractual intent and purpose of the MOU which is now been implemented through the 2nd defendant as adopted SPV. That unfortunately the 1st defendant could not hide the radiance of exhibit Oranto 9, which is a letter dated the 9th December, 2022 from the MD/CEO of the 3rd Defendant to Mr. George Nwangwu, who is the common MD of the 1st, 2nd and 4th Defendants as exhibit Oranto 9 was a candid business advice to the common MD of the 1st, 2nd and 4th defendants to open up further discussion with the claimant based on the MOU between the parties for mutual benefit, which the 1st, 2nd and 4th Defendant refuse to heed.

That on paragraph 7 in page 4 under the heading of Warranties and Representations of the MOU, it was rightly agreed that the parties to the MOU have the requisite consent, approval and authorities of the parties to execute the agreement in respect of it's validity, it reads:

“The parties warrant and represent that the parties who entered into this agreement and on behalf of the both parties have the requisite consent and authorities of the respective parties to do so and that all requisite consent and approval required for the validity of this agreement has been received.”

On this he therefore submits that the 1st Defendants arguments in paragraph 2.1.19-2;1;21 on the doctrine of promissory estoppel does not arise in this case. This is because the claimant was willing to purchase the 40% shares based on reasonable amount to be agreed as reflective of the value which parties could not agree on what is “reasonable and reflective” hence the claimant's relief seeking the court's intervention in appointing an assessor that will value the 2nd Defendant's share and give a verdict on what amounts to “reasonable and reflective” of the 40% shares which the claimant is entitled to.

The learned senior counsel went further to refer to paragraphs 2:1:26- 2:1:29 of the written address, where the 1st defendant made a stormy weather on the erroneous point that the MOU between the parties got frustrated, hence is no longer subsisting because the expected award for the concession agreement of Onitsha River Port was not awarded to the 4th Defendant but rather the 2nd Defendant. This he referred to paragraph 7(d) of the claimant's further affidavit, where he deposed to the effect that it was the 1st Defendant that abandoned the 4th Defendant as the agreed special purpose vehicle (SPV) and frustrated the direct adherence and implementation of the letters and intents of the MOU by incorporating the 2nd defendant as the SPV to execute the concession agreement in a bid to sabotage the interest of the claimant in the MOU.

Furthermore, the learned senior counsel submitted that, the basis for the 1st Defendant's defence that the MOU between the parties has been frustrated is predicated on the false position that it was Federal Government that awarded the concession agreement of the Onitsha River Ports project to the 2nd Defendant instead of the 4th Defendant, thus the claimant rebutted this falsehood in paragraph 7 (a-d) of the further affidavit that the Federal Government has absolutely nothing to do with the award of the concession agreement, rather same is the exclusive preserve of the 1st Defendant.

Further to that he submitted that, the 1st, 2nd and 4th Defendants did not place anything on record to show by way of documentary evidence that it was the execution of the concession agreement to the 2nd Defendant as against the 4th defendant. This he referred the court to the case of C.C.B vs Onyekwelu (1999) 10 NWLR (Pt. 623) 452 @ 461 paras F-G it was held thus:

“It is not enough for a party to depose in his pleadings that a contract was frustrated. He must lead evidence as to the frustrating events”

Similarly, the court further held in the same case thus at page 461 paragraph E-F thus:

“Frustration of contract occurs whenever the law recognizes that without default of either party, contractual obligations has become incapable of being performed because the in which performance is called for would make it a thing radically different from what was undertaken by the parties in the contract”

In view of the forgoing, he urge this court to discountenance the arguments of the 1st Defendant against the claimant's suit and grant the reliefs as prayed in the interest of fairness and Justice.

Now to the resolution of the reliefs claimed by the claimants, on this, reliefs 1 & 2 is to the effect of whether there is a binding agreement that is enforceable between the claimant and the 1st & 2nd Defendant. In view of the fact of the Memorandum of Understanding dated 26th February, 2021 between the claimant and the 1st & 2nd Defendant letters dated, 1/8/22, 12/8/22, 8/12/22 and 5/1/2023 and the claimants letter dated 9/8/22, 17/8/22, 24/8/22, 6/9/22, 23/11/22 and 16/12/22.

This letters which are reproduced below for ease of reference.

On the memorandum of understanding between Universal Elysum LTD and Oranto Petroleum LTD dated 26th day of February, 2021 Oranto and exhibit marked Oranto 1, being the MOU between the 1st Defendant and the claimant, Oranto 2 being a letter from the 2nd defendant inviting the plaintiff to acquire four million shares representing 40% equity stakes in Universal Elysum Consortium LTD in furtherance of the MOU Oranto 1 where in the claimant company considers extremely high and wrote exhibit Oranto 3 insisting that the unit of currency of the transaction should be delineated in Nigerian Naira in accordance with the CBN Act and policy. The claimant wrote another letter marked Oranto 3 dated the 1th/8/2022 requesting for further particulars with respect to vital issues and made a counter offer of #508,918,800.00 valuing the shares at #127,23 per share for the 4,000,000.00 shares. And exhibit Oranto 5, a letter dated the 25th August, 2022 in furtherance of the letter dated 17/8/2022 requesting for further particulars on issue that will enable the claimant take an informed decision regarding the transaction. Also exhibit Oranto 6 requesting for a meeting with the representatives of the 2nd Defendant and the claimant in order to discuss in details the terms and condition of the offer with a view to arriving at an agreement. The said letter dated the 06/09/2022.

On this, I wish to state that, in the construction of terms of contract the meaning to be placed on it is that, which is plain, clear and obvious as a result of the terms used. A contract or a document is to be construed in it's ordinary meaning as a question of facts. Thus where the words of a contract agreement or document are clear, the operative word in it should be given their simple and ordinary grammatical meaning. When a contract is reduced to the form of a document into which has been incorporated it ceases to be extrinsic to the main document, but are to be construed as part of it and therefore becomes admissible. It is possible for a contract to emerge from a series of correspondence between two persons when the correspondence exchanged are read together that parties have come to an agreement. See Dalek Nig. LTD V Ompadec (2007) 7 NWLR (Pt. 1033) 402 and U.B.N LTD V Sax (Nig.) LTD (1994) 8 NWLR (Pt.361)402.

It is also trite that where parties to an agreement subsequently decide to introduce new terms they can only do so by specific references to the earlier agreement to the effect that the later agreement has introduced new terms into the contract. Although that could be inferred by the conduct of the parties in certain circumstances. See *Yaro vs. Arewa Construction LTD & Ors* (2007) LPELR-3516SC.

In the instant suit, the terms of the contract are embodied in exhibit marked Oranto 1 been the MOU between the claimant and the 1st Defendant which is the bidder for the Onitsha River Port and its facilities at Onitsha Anambra state (the Onitsha river port) is in the final stage of executing a concession agreement in order to take over, invest in rehabilitation works and improvement and management of the Onitsha River Port in accordance with the concession agreement.

The 1st defendant incorporated a special purpose vehicle with the name “Onitsha River Port LTD” with which it intends to carry out the terms of the concession agreement covering the Onitsha river port and the claimant collaborating with the 1st Defendant through the acquisition of 40% shares in Onitsha river port Ltd. And universal Elysium agreed to the aforesaid acquisition of shares in consideration of Universal Elysium selling 40% shares in Onitsha River port LTD, to Oranto Petroleum, Oranto petroleum shall pay to the Universal Elysium a reasonable amount to be agreed as reflective of the value of the 40% shares to be sold and acquired in Onitsha River port LTD.

The question then is, ‘is there contract between the claimant and the 1st defendant that are binding and enforceable’? this brings us to the issue of the elements of contract as can be deduced from the MOU Oranto 1.

It is trite law, that a valid or binding contract means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. It is elementary to state that there are three basic essentials to the creation of a contract; these are:

- a. Agreement**
- b. Contractual intention and**
- c. Consideration**

It suffices that, therefore that the normal test for determining whether the parties have reached agreement is to ask whether an offer has been made by one party and accepted by the other. See *Akinyemi v. OdulaInv co Ltd.* (2012)17 NWLR P.209 SC. To constitute a binding contract there must be an unmistakable and precise offer and unconditional acceptance of the terms mutually agreed upon by the parties thereto.

In other words, the parties to the agreement must be in consensus ad idem as regard the terms and conditions freely and voluntarily agreed upon by the parties thereto. Furthermore, the promise of each party must be supported by consideration. See *Alfotrin LTD v. A.G Federation* (1996) 9 NWLR (Pt.475) 634. The law is quite settled that parties are bound by the contract they voluntarily entered into and cannot act outside the terms and conditions contained in the said contract. When parties enter into a contract, they should be careful about the terms they incorporate into the contract because the law will hold them bound by those terms. At the same time no party will be allowed to read into the contract, terms on which there has been no agreement. Any of the parties who does so violates the terms of that contract. See *Alhaji Abdullahi Baba v. Nigerian civil Aviation Training Centre, Zaria & Another* (1991) LPELR-692 SC.

On this it is the argument of the learned claimant counsel, where he submitted that it is the content of the MOU that determines whether it is binding or not. That in this instant suit, there was no dispute that the contract of the parties as contained in the MOU is for the claimant to acquire 40% stake and power to appoint Board members in the SPV set up to operate the concession agreement. Furthermore, that, the agreement is so clear that parties that should they be unable to agree to a price, an assessor be appointed for the purpose of achieving the value to be apportioned as financial consideration for the 40% stake. Therefore, submitted that, there is an agreement by the parties on the stake, what remains is the value to be fixed for the 40% stake.

On this it is the submission of the learned counsel to the 1st Defendant, there was no agreement between the claimant and the 1st, 2nd and 4th Defendants for the claimant to acquire 40% shares or any shares at all in the special purpose vehicle setup with regard to the performance of the obligation in the concession agreement of Onitsha River Port. Furthermore, submitted that, the claimant entered into MOU with only the 1st Defendant for the acquisition of 40% shares in the 4th Defendants if the parties subsequently agreed on a reasonable amount to be paid as consideration, Oranto 1 and exhibit "A" being the memorandum of understanding.

The learned senior counsel submitted that, the 1st, 2nd and 4th Defendants are sister companies, and that the 1st Defendant directly holds 34% of shares in the 2nd Defendant who equally holds 33% of shares in the 2nd Defendant amounting to 3,400.000shares and 3,300.000 shares respectively.

Further that the 1st, 2nd and 4th Defendants all have No.1 Rima Street Maitama-Abuja as their registered address at the Corporate Affairs Commission, a common managing Director in the person of Nwangwu George who is on the

Boards of Directors of the 1st, 2nd and 4th defendants, the same Mr Nwangwu George is a common signatory in the shares subscription signature column of the 1st, 2nd and 4th Defendants indicating that the 1st, 2nd and 4th defendant share a common ownership and are sister companies, all these are reflected in exhibit Oranto A, B and C respectively.

On the part of the 2nd and 4th Defendants, the learned Defence counsel denied the assertion that they were not sister companies but companies with distinct legal personalities and that the claimant did not at any time have an agreement with the 2nd & 4th Defendant to acquire 40% shares or any shares at all in the special purpose vehicle set up with regards to the performance of the obligation in the concession agreement of Onitsha River Port, nor are they privy to the said MOU or any agreement whatsoever involving the claimant and the 1st Defendant.

Now, looking at exhibit D being a letter addressed to the MD Oranto Petroleum by Dr. George Nwangwu Director to Universal Elysium consortium Ltd on acquisition of shares in Universal Elysium consortium dated the 1st August, 2022, exhibit D2 a letter dated 12th August, 2022 by the same George Nwangwu addressed to prince Arhiur 1 Eze OFR chairman Oranto Petroleum LTD reference; Response to offer and request for information in the acquisition of shares in Universal Elysum Consortium LTD, attached thereto the business plan of Universal Elysum Consortium LTD (Onitsha River Port) exhibit D3, being a letter dated 18th August, 2022 addressed to prince Arthur 1 Eze OFR, ChiarmanOranto petroleum LTD by George Nwangwu the MD Universal Elysum Consortium LTD and exhibit D5, D6, D7, D8, D9, D10, D11, D12 are all correspondence between the claimant and the 2nd & 4th Defendants. Query who is Dr. George Nwangwu and what is the relationship between Dr. George Nwangwu and the claimant in this case. I say this because the 2nd & 4th Defendant assert that these have no privity of contract with claimant, if there is no privity of contract between them what happened to the communication between them.

It is trite law, that unclear communication during contract processing can have serious consequences, one of the most significant risks is that, the parties involved may not fully understand their obligation and responsibilities under the agreement, which would lead to dispute and legal action just as in this instant case.

Furthermore, unclear language or terminology can leave room for interpretation and different interpretation between parties might interpret a provision differently which might create inconsistencies in expectation. Establishing a clear line of communication between the parties is to ensure that everyone understands their roles and responsibilities in relation to the contract.

In summary, clear communication is vital in contract processing. It ensures that parties involved understand their roles and responsibilities, the terms of the agreement and how they will be held accountable for any breaches.

A cursory perusal of all the exhibits in the instant case, it was a communication between the claimant and the 1st, 2nd and 3rd and 4th Defendants which are most essential and an integral part of a valid contract. Communication in the instant suit is through writing and many of the times, an implied contract becomes a source of a valid contract and becomes a sources of a valid contract and becomes easily enforceable in a court of law.

It is to be noted that communication of the offer is complete where it comes to the knowledge of the person to whom it has been made. So when the offeree becomes aware of the offer by the offeror, the communication of the offer is said to be complete.

Furthermore, when the person to whom the proposal is made signifies his assent thereto, the offer is said to be accepted. Thus, the proposal when accepted becomes a promise. Reference to Oranto 1, Oranto 3, Oranto 6, Oranto 8, Oranto 9, Oranto 10 and Oranto 11. The universal accepted and acknowledged sources of contract formations is undoubtedly through a proposal by the 'promisor' and acceptance of the said proposal by the 'promisee'. Where any one person like the claimant and the Defendants signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

From the foregoing analysis above, can it be said that the 2nd & 4th Defendants are not part of the Memorandum of Understanding when it is clear through their various letters of communication stated above. Through exhibit Oranto 1, the Memorandum of Understanding is between the claimant and the 1st Defendant, though it is as in Oranto 1, but both the 1st, 2nd and 4th Defendants have a common director in person of Dr. George Nwangwu and sister companies, all have No 1 Rima street Maitama Abuja as their address at the Corporate affairs commission. The said Dr. George Nwangwu is on the Board of Directors of the 1st, 2nd and 4th Defendants and a common shares subscription signature column of the 1st, 2nd and 4th Defendants, share a common ownership and sister companies Oranto A. B & C respectively.

In summation, it is my view that the 2nd and 4th Defendants cannot deny not to be part of the communication of the contract that took place between the claimant and the 1st, 2nd and 4th defendants having determined that, hold that the 2nd and 4th Defendant cannot cry foul of not being part of the communication or negotiation between them and the claimant in this instant case. I so hold.

Now to the reliefs sought therein between the claimants, having determined that the 2nd and 4th Defendants are part of the communication and all the proposals involved in this contract. In view of the following, I hold and declare that;

- 1. Having regards to the combined reading of the MOU dated the 26th February,2021 between the claimant and the 1st and 2nd defendants letter dated 1/08/2022, 12/08/2022, 8/12/2022 and 6/1/2023 and the claimant's letters dated 9/08/2022, 17/ 08/2022, 24/08/2022, 6/09/2022, 23/11/2022 and 16/12/2022 there is a binding and enforceable agreement between the claimant and the 1st and 2nd defendants.**

- 2. By a combined reading of paragraphs 5 and article 1, 2 (a)& (b), 4 and 8 of the Memorandum of Understanding dated 26th February, 2021 between the claimant and the 1st Defendant/Respondent, and the 2nd Respondent letters dated 1/8/22, 6/9/2022, 23/11/22 and 16/12/22, a dispute has arisen as to what amounts to a reasonable amount reflective of the value of 40% shares to be sold by the 2nd Defendant and acquired by the 2nd Defendant and acquired by the claimant in the 4th Defendant.**

- 3. That by the community reading of the Memorandum of Understanding dated 26th February,2021, between the claimant and the 1st Defendant and the 2nd Defendant letter dated the 1/8/2022, 12/8/22, 8/12/2022 and 5/1/23 and the claimants letters dated 9/8/2022, 17/ 08/2022, 24/08/2022, 6/09/2022, 23/11/2022 and 16/12/2022 , and the 3rd Defendants letter dated 9/12/22, the High Court of the Federal Capital Territory has Jurisdiction to appoint an assessor to determine the reasonable amount reflective of the value of 40% shares in the 4th Defendant:- Accordingly I appoint Mohammed Musa Sakaba FICI Arb, FC Arb, Musaba Chambers suit 28/33 Efab Plaza, Ahmadu Bello way Abuja to determine the reasonable amount reflective of the value of 40% shares on the 4th Defendants within 21days in accordance with order 29 rule 2 of the High Court of the Federal Capital Territory Abuja Civil Procedure Rules 2018 in reference to exhibit Oranto 1 clause 5, dealing with Applicable laws and dispute Resolution.**

This is my Judgment.

.....

Hon. Justice A. Y. Shafa

Appearance:

1. Abdul Mohammed (SAN) with A. I. Malik and D. O. Nwokike for the Applicant.
2. Victor C. Chimezie for the 1st Defendant and hold the brief of the 2nd & 4th Defendant.