

**IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE FEDERAL CAPITAL TERRITORY JUDICIAL DIVISION
HOLDEN AT JABI FCT ABUJA**

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN

SUIT NO: FCT/HC/CV/2375/2019

BETWEEN:

FOISI BROADCASTING NETWORK NIGERIA LTD.....PLAINTIFF

AND

NIGERIAN EXPORT AND IMPORT BANK.....DEFENDANT

JUDGMENT

The claimant in this suit with No. CV/2375/2019, claims:

1. An order of this Honourable Court awarding the sum of One Billion, Two Hundred and Sixty-Nine Million, Six Hundred and Thirty-Five Thousand, Six Hundred and Ninety-Five Naira (₦1,269,635,695.00) against the defendant in favour of the claimant as special damages for the expenses incurred by the claimant in fulfilling the terms imposed by the defendant on the loan agreement signed by both parties, based on the representation of the defendant.

In the alternative to prayer I above, the claimant claims:

2. An order of this Honourable Court awarding the sum of One Billion, Two Hundred and Sixty-Nine Million, Six Hundred and Thirty-Five Thousand, Six Hundred and Ninety-Five Naira (₦1,269,635,695.00) against the defendant in favour of the claimant, as general damages for the expenses incurred by the claimant in fulfilling the terms imposed by the

defendant on the loan agreement signed by both parties, based on the representation of the defendant.

3. An order of this Honourable Court awarding the sum of Five Million (~~₦~~5,000,000.00) against the defendant in favour of the claimant, as cost of this suit.
4. An order of this Honourable Court awarding the ten percent (10%) post judgment sum against the defendant, in favour of the claimant, from the date of judgment till the entire judgment sum is fully liquidated.
5. Any other order or orders which this Honourable Court might deem fit to make in the circumstances of this case.

The writ of summons was accompanied by a statement of claim of the claimant dated the 4th day of July, 2019.

The statement of claim spanned from paragraph 1 to 42 covering pages 1 to 11. As borne out of the statement of claim, the claimant averred that on the 10th February, 2011, it applied for a loan facility of US\$25,000,000.00 from the defendant and the application was seriously reviewed and analyzed by the defendant and in the course of which the loan was stated to be the sum of US\$12,088,617 at a point and during the entire process, the claimant's officers were made to undergo sections on detailed questions and answers.

It is averred that upon being satisfied with the claimant's application and after several reviews of the amount, the defendant finally agreed to give the claimant the sum of US\$9,088,617, and consequently the defendant issue the claimant a Term sheet on the 2nd September, 2013 which was later followed by the issuance of offer letter

dated 6th March, 2015 on that amount of US\$9,088,617 divided into two:

(a) Medium Term Guarantee of US\$4,089,017

(b) Medium Term Loan of US\$4,197,600

The claimant averred that the defendant thus offered the loan sum of US\$9,088,617 to the claimant, duly approved by the defendant's Board of Directors, and a Loan Agreement was signed and executed by the two parties, and the loan offer was revalidated by a letter dated 8th January, 2016.

It is stated that the loan facility was to enable it acquire equipment and access working capital needed to up its business as a broadcasting network, and that the defendant was to issue a Bank Guarantee in the sum of US\$4,891,017 to any financial institution in exchange for cash to fund the claimant's equipment while the sum of US\$4,197,600 was to be released in cash to the claimant by the defendant.

The claimant averred that it turned out that no Nigerian Bank accepted the Bank Guarantee issued by the defendant, but the claimant was able to summon this challenge by approaching the United State of American version of Nexim, the United State of America Export and Import Bank and it was prepared to accept the Bank Guarantee issued by the defendant, and the claimant informed the defendant of this privilege and honour offered by the US Exim and the defendant equally accepted to work with the US Exim, its representative, the American Trade and Finance Company, and this resulted in a signed agreement by the claimant, the defendant and the US Exim dated the 18th June, 2015, and based upon the foregoing developments, the defendant made the claimant to sponsor a trip to the United States of America (USA) for two

defendant's staff whose names are Suleiman G. Abdulkadir and Akinloye Akerele, to attend a meeting with the claimant's technical partners and representative of US Exim which took place in New York, USA from the 17th – 18th March, 2015.

The claimant averred that at the meeting in USA, the US Exim sought to have the 2014 audited financials of the defendant, as well as its 2015 Management Account as they will assist them in reaching a final decision to accept the Bank Guarantee issued by the defendant, and that the two defendant's staff then assured the US Exim and the claimant's technical partners that the defendant would make those two documents available to the US Exim as soon as they returned to Nigeria; and that it was surprised and disappointed to discover that four months after the meeting, the defendant could not make available to US Exim the two documents; and as a result of the consequence of the failure, refusal or neglect by the defendant to make available the two documents to US Exim, the US Exim pulled out of the transaction.

The claimant averred that meetings were later held between the claimant and the defendant on 12th July, 2016 and 9th August, 2016 with a view to finding an alternative to US Exim and the defendant then proposed a switch from the US Exim to African Export-Import Bank and that its loan facility package was forwarded to Afrexim who in turn did her due diligence which included a rigorous review and analysis of the claimant's package and eventually approved same, and Afrexim went on to issue a Term Sheet to the claimant which the claimant accepted.

It is averred that the defendant again failed to fulfill its own part of the bargain with Afrexim by failing to endorse the Term Sheet and that was the situation until the Term

Sheet expired in the defendant's custody, and that the only thing the defendant was required to do with the Afrexim's Term Sheet was only to endorse the document, and the claimant who bears the liability of the proposed loan had already accepted same.

It is stated that the defendant went to reapply to Afrexim to renew the Term Sheet but Afrexim refused to renew same along the defendant's line of credit or the offer on the same conditions as stated in the original offer.

It is also averred that a meeting was held between the claimant and the newly appointed defendant's Executive Director, Business on the 8th June, 2017 and at the meeting, the defendant's Executive Director, Business requested to between 10 days to reach the defendant's counterpart at the Bank of industry to arrange modalities for a joint funding of the claimant's business, and on the 3rd July, 2017, the defendant applied for a loan package for the claimant, and on 1st August, 2017, the defendant wrote to Bank of Industry confirming that it will cover the full exposure of the loan facility, that is US\$9,088,617 on behalf of the claimant with necessary Bank guarantees, and the bank of Industry sent to the defendant a Term Sheet on 7th September, 2017, but the defendant without any just cause, refused to provide bank guarantee she had promised to send, and consequently the Bank of industry could not continue with the transaction.

It is averred that the defendant made the claimant and its promoters to suffer irreparable financial losses, going through the lengthy and rigorous transactional dealings, only for the defendant to unconsciously cancel a loan offer approved by a Board of Directors of the defendant, even when there was no Board of Director, in place to prove such cancellation.

It is averred that a part of the conditions the defendant gave for the loan which the claimant complied with was the submission of 3 choice properties valued at One Billion, Five Hundred Million Naira to defendant as collateral, and the properties are:

- a. Plot No. 52, Park View Estate Extension, Victoria Island (VI), Lagos belonging to Jeremiah Timbut Useni, with Certificate of Occupancy No. 79/79/1999L, also known as No. 7, Sir Tony Eromesele street, Ikoyi Lagos.
- b. Plot 6, Block 49, Lekki Peninsula Residential Scheme 1, Lagos belonging to Alhaji Francis Agboro, registered as No. 77/77/2111.
- c. Plot No. 646, off Norman Williams street, Ikoyi South West Lagos, belonging to Aliu Adedoyin, registered as L04451, also known as No. 42, Norman Street, Ikoyi Lagos.

The property in (a) above was submitted to the defendant in 2013, while the property in (b) and (c) above were submitted to the defendant, in 2015, and the defendant against the wish of the claimant had insisted that the three properties mentioned above must be insured, and the claimant complied and insured the properties with Starco Insurance Plc and paid the sum of Two Million, Five Hundred and Fifty-six Thousand, Eight Hundred and fifteen Naira, sixty three kobo (N2,556,815.63 as annual premiums on the properties for 5 years from 2013 – 2017 making a total of N12,784,80.00 (Twelve Million, Seven Hundred and Eighty, four naira) for five years. The claimant averred that she also expended a lot of money sponsoring the trip to the USA for two staff of the defendant and also expended a lot of money meeting other stringent and money consuming requirements of the defendant, and that the claimant had

to take abridge loan in the sum of One Hundred and fifty Million Naira from Aquila Asset Management Limited to meet Nexim closing cost and related requirements.

The claimant averred that she was very surprised and shocked to receive a letter dated 2nd February, 2018 from the defendant, canceling the loan offer made to the claimant, without regard to what the claimant had put into the transaction process; financially and intellectually and otherwise, including the various processes the claimant had been made to go through since 2011, in fulfilling the hard terms and conditions imposed by the defendant.

The claimant averred that on Monday February, 12, 2018 there was a publication in the Nations Newspapers that the Central Bank of Nigeria had given the defendant the sum of Five Hundred and Fifty Billion Naira (~~₦~~550,000,000,000.00) and yet the defendant refused to fulfill its obligations to the claimant under the loan agreement about the same period.

It is averred that the claimant and the defendant started exchanging correspondence till sometimes in April, 2019 and that her solicitors Messrs, Festus Keyamo wrote to the defendant a letter dated 23rd April, 2019 but received with a stamp showing 18th April, 2019, wherein seven days ultimatum was given to the defendant to respond to the demands of the claimant; and that failure to respond to her solicitor's letter of 23rd April, 2019 but received with a stamp showing 18th April, 2019 necessitated this suit.

The claimant averred that:

- (a) The conduct of the defendant in respect of the circumstances of this suit made the claimant to suffer several financial losses.
- (b) The claimant had four staff whose salaries were unpaid for five years, from September,

2014 to 2019 as a result of the actions of the defendant.

The claimant stated the particulars of the salaries and entitlement of each of the following staff:

- (1) Aaron Nnongwun was entitled to \$19,167 per month, which equivalent to \$230,000.00 per year, and which is equivalent to \$1,150,020.00 for five years;
- (2) Halima Adasi, who was entitled to \$10,417 per month which equivalent to \$125,000.00 per year, and which is equivalent to \$625,020 for five years;
- (3) Leonard Fertig, who was entitled to \$8,333 per month, which is equivalent to \$100,000.00 and which is equivalent to \$499,980 for five years.
- (4) Waribo Nick Adasi Esuya, who was entitled to \$8333 per month which is equivalent to \$100,000.00 which is equivalent to \$499,980.00 for five years. The total sum of unpaid salaries of the above-mentioned staff of the claimant for five years for September, 2014 to 2019 is equivalent to \$2,775,000.00 which when converted to naira at the exchange rate of N360 per \$1 is equivalent to N999,000,000.00.

Claimant gave the particulars of the special damages and the breakdown of the sum of N1,269,635,695.00, and also averred that prior to the year 2011, its Chief Executive Officer (CEO) Dr. Aaron F. Nnongwun and the Executive Vice President, Mrs. Halima Adasi, have spend all their lives in the USA wherein their spouses and immediate families reside, and that the actions of the defendant in making them to spend all their financial resources to meet all the obligations imposed by the defendant, and the eventual

refusal of the defendant to fulfill its part of the loan agreement has completely ruined and crippled the business and finances of the claimant, one of the loans taken by the claimant as pleaded above led for the arrest and detention of the claimant's principal officers by the EFCC and the actions of the defendant in the circumstances of this case have occasioned serious and untold hardship on the claimant's principal officers who are the alter egos of the claimant.

The defendant in its statement of defence dated 21st November, 2019 admitted to paragraph 2 and stated that the defendant is established under the Nigerian Export-Import Bank Act Cap. 106, LFN 2004, and also admitted to paragraphs 3 and 4 of the statement of claimed averred that it was in the course of thorough review of the application of the claimant that the defendant concluded that the claimant could not provide evidence of likely income stream to be able to repay the facility, and the business is dominated by DSTV and the claimant could not provide evidence of its ability to compete as all other competitors were not making any significant intact. That the claimant relies on advert from one company Unilever that investigation revealed that it is not in their tradition to put advert on satellite channels as they have never done so with DSTV or any other competitors, and in presenting this evidence to the defendant, the claimant then changed its plan to holding a channel on DSTV which is the opinion of the bank could not support the income stream to be able to repay the facility. They also admitted to paragraph 5 only to the extent that there was an offer with 120 days validity period for facility which was divided into:

- (i) a medium term loan of USA 4,197,600 and
- (ii) a medium term guarantee of USA 4,891,017.

The defendant denied paragraph 6 of the statement of claim and stated that the revalidation of the loan offer contained in the defendant's revalidation letter dated 8th January, 2016 had lapsed and that the defendant states that the validity of the revalidated offer was for 120 days from the date of acceptance based on paragraph 20 of the revalidation letter of 8th January, 2018, to the extent that paragraph 20 of the said letter provided that the offer will only be open for acceptance within 120 days.

Thus, the statement of defence virtually spanned from paragraphs 1 to 36, 39, 40, 41, 42 and the defendant almost denied paragraphs 6-38(a) (b) (e) (f) (g) (h) (i) (j) (k) and (l) of the statement of claim of the claimant and put the claimant to strictest proof.

The statement of claim was accompanied by witness statement on oath of Dr. Aaron F. Nongwun and is a replica of the statement of claim, and the statement of defence too was accompanied by a witness statement on oath of Sheriff Umara Gubio.

In the course of the trial, the claimant put in one witness and the defendant too put in one witness and at the conclusion of the trial, the counsel to both parties were allowed to proffer a final written address in satisfaction of the requirement under section 294 of the constitution of the Federal Republic of Nigeria, 1999 (as amended) and both addresses were adopted by the two counsel.

Also in the course of the trial, the claimant after adopting his witness statement on oath tendered the following documents:

- (1) Certificate of Incorporation of the claimant, which is a certified true copy, marked as EXH. 'A1'

- (2) Application for a facility of \$25 Million to launch a Pan African Broadcast Network dated the 10th February, 2011 addressed to the Managing Director Nexim Bank marked as EXH. 'A2'.
- (3) Loan Agreement between the two parties dated 10th March, 2015 marked as EXH. 'A3'
- (4) Revalidated offer letter dated 8th January, 2016 issued by the defendant to the claimant marked as EXH. 'A4'.
- (5) A letter from American Trade and Finance Company to the defendant dated 18th June, 2015 marked as EXH. 'A5',
- (6) A letter from the defendant to the claimant dated the 17th September, 2015 marked as EXH. 'A6',
- (7) A letter from the claimant to the defendant, for the attention of Very Rev. I.C. Nwade dated 14th March, 2016 marked as EXH. 'A7'.
- (8) A proposal from African Export-Import Bank dated 13th August, 2016 marked as EXH. 'A8',
- (9) E-mail correspondences with regards to the application for \$9,088,617 Direct Lending Facility in favour of the claimant marked as EXH. 9 together with the attachment:
 - (a) Proposed indicative terms
 - (b) A letter from Bank of Industry dated 6th July, 2017 to the defendant.
- (10) A letter from the defendant to the claimant dated 17th January, 2019 marked as EXH. 'A10',
- (11) A letter from Stac Insurance Plc to Mrs. H.O.Adasi (Executive Vice President for

- Administration of the claimant), marked as EXH. 'A11'
- (12) Offer of Bridge Loan Facility by Aquila Asset Management to the claimant dated 29th February, 2016 marked as EXH. 'A12',
 - (13) The Nation Newspapers of Monday 12th February, 2018 page 23 marked as EXH. 'A13',
 - (14) Notice of Intention to commence Action written by the solicitors to the claimant to the defendant dated the 16th March, 2018 marked as EXH. 'A14',
 - (15) A letter from the defendant to the claimant dated 12th September, 2018 marked as EXH. 'A15',
 - (16) A letter from the solicitors of the claimant to the defendant dated 20th May, 2019 marked as EXH. 'A16',
 - (17) Payslip of the Aaron F. Nnongwun, Halima Adasi, Leonard M. Fertig and Waribo Nick Adasi-Efuya marked as EXH. 'A17',
 - (18) Boarding pass of Nnongwun Aaron of Arik Air from Abuja to Lagos dated 12/11/2018, and that Aero ticket of Halima Adasi and other tickets marked as EXH. 'A18',
 - (19) A letter from the landlord of Asgizi Properties Ltd to the claimant dated the 28th July, 2016 marked as EXH. 'A19' and its attachments.
 - (20) Agreement between the claimant and Mr. Aliu Adedoyin marked as EXH. 'A20',
 - (21) Loan Agreement dated 8th October, 2014 between Bytol Nigeria Ltd and the claimant marked as EXH. 'A21',

- (22) Acknowledged copy of the First City Monument Bank Cheque of the sum of N3,000,000.00 marked as EXH. 'A23'
- (23) Payment statement of FCMB of Ugochukwu Edeze & Co. marked as EXH. 'A24',
- (24) Valuation of Properties Lagos outstanding fees, which is on E-mail correspondence marked as EXH. 'A25' and its attachment.
- (25) Central Bank of Nigeria Form M marked as EXH. 'A26',
- (26) A letter from the claimant to the defendant dated 28th December, 2017 which is a response to the letter dated 19th December, 2017 marked as EXH. 'A27',
- (27) A letter from the claimant to the defendant (Mr. Bashir M. Wali) dated 8th August, 2016 marked as EXH. 'A30',
- (28) Resolution of the Board of Directors of the claimant dated July, 2013 marked as EXH. 'A31'.
- (29) A statement of Personal Net worth for individual guarantors of Mariam Okereke marked as EXH. 'A31'
- (30) A statement of Personal Net worth for Individual Guarantors of Aaron Nnongwun marked as EXH. 'A35'
- (31) A statement of Personal Net worth For Individual Guarantors of Halima Adasi marked as EXH. 'A36',
- (32) The original copy of the Certificate of Incorporation of the claimant with No. 656007 marked as EXH. 'A37'

The defendant after adopting his witness statement on oath tendered the following documents:

1. A letter from the defendant to the claimant dated 6th March, 2015 marked as EXH. 'D1',
2. A Certified True Copy of the letter of Acceptance of the claimant dated 25th January, 2016 marked as EXH. 'D2'
3. A letter from the defendant to the claimant dated 18th July, 2018 marked as EXH. 'D3'
4. A letter from the defendant to the claimant dated 22nd November, 2016 marked as EXH. 'D4'
5. A website message from the defendant to the claimant marked as EXH. 'D5'
6. An email message from the defendant to the claimant dated 5th February, 2018 marked as EXH. 'D6'
7. An e-mail message from the defendant to the claimant marked as EXH. 'D7',
8. A letter from the claimant to the defendant dated 18th January, 2019 for the allocation of project finance marked as EXH. 'D8',
9. A letter from the defendant to the claimant dated 8th January, 2016 marked as EXH. 'D9',
10. A letter from the defendant to the solicitors of the claimant Festus Keyamo dated 4th February, 2019 marked as EXH. 'D10',

The claimant also filed claimant's reply to statement of defence spanning from paragraphs 1 to 19, and the claimant denied paragraphs 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19 (a) (b) (c) (d) (e) (g) (h) (i) and (j), 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 of the statement of defendant, while as to some paragraphs the claimant put the defendant to strictest proof.

The counsel to the defendant, in his final written address, formulated two issues for determinations, thus:

- (i) **Whether the claimant has proved its case to be entitled to the reliefs?**
- (ii) **Whether the claimant is entitled to damages sought in this action?**

The counsel submitted that civil cases are decided on preponderance of evidence, and he cited the case of **Goodnews V. Ogbah (2006) II NWLR (pt 990) 65 at 123**, and submitted further that the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence. If no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings, and cited section 133(I) of the Evidence Act 2011, and section 132 of the same Act, and the case of **MTN Nigeria Communications Ltd V. Ocajire A. Esuola (2018) LPELR – 43952 (CA)**.

The counsel submitted that the contention in this case is the loan Agreement entered into by the two parties and what transpired along the line leading to the cancellation of the agreement by the defendant owing to portfolio constraints. The counsel submitted that the parties are ad idem on this, and further submitted that there is no doubt about various negotiations and engagements between the parties, and the law is that a document must be read as a whole, and when interpreting a document, such document needs to be read as a whole in the context, and he cited the cases of **Senator Dahiru Bako Gassol V. Alhaji Abubakar & 2 ors (2013) NSCQR Vol. 53.3 p.196; Nigerian Army V. Brig. Gen. Maude Aminu (2010) NSCQR Vol. 41 pg. 76; per Banjoko JCA in THP Ltd & Ors V. GTB Plc & Anor. 39, paras. B.**

To the counsel, the Loan Agreement allows the defendant to cancel the loan offer, and this provision is contained in Article IV clause 10.0 (iii) where the clause reads:

“In addition to the aforementioned rights, Nexim reserves the exclusive right to:

- i.**
- ii.**
- iii. Cancel the loan offer due to portfolio constraints or if in Nexim’s opinion facts have emerged that the disbursement of the loan to the borrower would not be in the interest of Nexim.”**

The counsel submitted that in the notice sent to the claimant, it was clearly stated that the cancellation was due to Portfolio constraints, and this was reiterated in the communication with the claimant’s solicitors EXH. ‘D10’.

The counsel argued that the law is settled that parties are bound by their agreement; and he cited the case of **Babatunde & Anor. V. Bank of the North Ltd & Ors (2011) LPELR – 8249 (SC) 21, para.** He also buttress this argument with the following cases of **Okonkwo V. CCB Nig. Plc (1997) 6 NWLR (pt 507) 7 NWLR (pt 1033) 402; U.B.N. Ltd V. Ozigi (1994) 3 NWLR (pt 333) p. 385 at p. 404; Nneji V. Zachem Con. (Nig.) Ltd (2006) 12 NWLR (pt 994) 297; and U.B.N Ltd V. SAX (1994) 8** and submitted the parties are bound by their agreement including the right of the defendant to cancel the agreement due to portfolio constraints. The counsel submitted that upon communicating the cancellation of the agreement to the claimant, the defendant offered to pay and indeed paid to the claimant fees paid by it including those that were specified as non-refundable; and to the counsel, this was not contradicted by the claimant,

and that this is clear evidence that the claimant has admitted the decision of the defendant to cancel the Loan agreement and cannot now turn around to claim bogus sums from the defendant in form of damages.

The counsel submitted that the claimant was well aware of the provisions of Article IV clause 10.0 (iii) of the Loan Agreement which the defendant relied upon to cancel the loan agreement. It is submitted that the claimant has asserted that the defendant received the sum of N550,000,000,000.00 (Five Hundred and Fifty Billion Naira) from the CBN and yet failed to fulfill its obligations, and according to the claimant's pleadings, the loan was canceled on 2nd February, 2018 and this was after the cancellation of the loan agreement, and it is therefore preposterous to suggest that the defendant could have fulfilled an agreement under a cancelled loan agreement.

On the issue No. 2, the counsel submitted that general damages are not awarded as a matter of course but on sound and solid legal principles and not on speculations or sentiments or out of sympathy, but rather on legal evidence of probative value adduced for the establishment of an actionable wrong or injury, and he cited the case of **Adekunle V. Rockview Hotels Ltd (2014) 1 NWLR (pt 853) 161 at 166.**

The counsel submitted that the claimant listed the following reliefs:

- (1) Unpaid salaries of its staff: N999,000,000.00
- (2) Loan secured for Nexim transaction related expenses; N150,000,000.00
- (3) Rent in Abuja: N30,000,000.00
- (4) Loan for Bytol Nig. Ltd for Nexim related expenses for 2 years: N10,000,000.00

- (5) Marine Insurance at the instance of Nexim: N5,743,277.00
- (6) Living expenses (including local transportation with food and other utilities: N27,000,000.00
- (7) Third party property fees i.e. properties used as proposed collaterals and consultancy fees: N25,000,000.00
- (8) Insurance on 3 properties lodged at Nexim as collaterals: N12,784,080.00

The counsel submitted that non of the reliefs is said to be directly related to the defendant, and therefore the damages are too remote to be related to the defendant, and he relied on the case of **Chitex Industries Ltd V. Oceanic Bank International (Nig.) Ltd (2005) LPELR 1293 (SC)** and further submitted that the above reliefs cannot stand as they are too remote and the claimant took step in proving that the expenses were made on the processes of the transactions, and in addition, the claimant did not connect the defendant with most of the expenses. To the counsel, the loan was to acquire broadcasting equipment and for working capital and this does not translate into expenses for workers or life style of directors of the claimant.

On the claim of cost of litigation, the counsel referred to the case of **Naude & Ors. V. Simon (2013) LPELR – 20491 (CA)**; and **Ajibola V. Anisere & Anor (2019) LPELR – 48204 CA** and argued that the cost of litigation was not pleaded by the claimant in his pleadings and therefore is not entitled to it.

In his final written address, the counsel to the claimant formulated issue for determination, to wit:

- 1. Whether the defendant is liable in damages to the claimant under the principle of estoppel by**

conduct, having regards to the peculiar facts and circumstances of this case?

2. Whether the claimant has proved the case on the balance of probability and preponderance of evidence as to be entitled to the reliefs sought in this suit?

3. Whether the position of the defendant in this suit is sustainable, having regards to the cause of action of the claimant?

On issue No. I, the counsel to the claimant answered the issue in the affirmative, and submitted that the defendant is liable to the claimant in damages under the doctrine of estoppel by conduct, having regards to the peculiar facts and circumstances of this case; and further submitted that it is settled law that what determines the jurisdiction of the court is the case as presented by the claimant and not what the defendant interprets or understands it to be, especially in the absence of a counter claim. The counsel submitted that in the instant case, it is to be noted that the claimant is only seeking damages against the defendant and not specific performance, and the case of the claimant is hinged on the doctrine of estoppel by conduct as pleaded in paragraph 41 of the statement of claim, and he cited the case of **A.G. Rivers State V. A.G. Akwa Ibom State (2011) 8 NWLR (pt 124) 31 at pp. 82-83, paras. F-C** to the effect that where one party has by his words or conduct, made the offer a promise or assurance which was intended to affect the legal relations between them and to be acted upon accordingly, then once the other party had taken him at his word and acted on it, then the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made

by him. The counsel submitted that applying the above principle, the defendant represented to the claimant that if (the defendant) would give the claimant a loan sum of USD \$9,088,617.00 by issuing medium term guarantee of USD \$4,891,017.00 and medium cash loan of USD \$4,197,600.00, and to establish that, EXH. 'D1', 'A3' and 'A4' were made and signed by both parties, and acting on the representation, the claimant altered her position by taking steps to meet her own part of the obligation, and this led her to incur various costs and expenses, which has now amounted to a total loss, because of the failure of the defendant to simply fulfill her own part of obligations for reasons are not justifiable.

The particulars of the liabilities the defendant's representation led the claimant to incur were properly captured in the particulars of damages pleaded in paragraphs 38 and 39 of the statement of claim, which amounted to N1,269,935,695.00.

The counsel submitted that the claimant altered her position base upon the representation, and this in a manner that affects the legal relations between the parties, and the defendant cannot in this circumstances be allowed to revert to the previous legal relations as if no such representation had been made by it, and the defendant must accept the legal implication of it making the claimant to incur financial losses and damages which arose due to the defendant failure to satisfy its own part of the obligations.

The counsel submitted that it would be inequitable to permit the defendant to walk out of the loan agreement it had with the claimant, without paying damages for the losses and costs the claimant incurred, based on the agreement and what it represents, and urged the court to

so hold. The counsel referred the court to the case of **Rector, Kwara Poly V. Adefila (2007) 15 NWLR (pt 7056) 42 at 116, paras. D-E** to the effect to successfully invoked the doctrine of estoppel is that the party seeking to invoke it must show that by relying on the representation of the other party, he had changed his position to his detriment. In the instant case, the counsel submitted that, the claimant would have altered her position and incurred an expenses had the defendant not represented to the claimant that it would fulfill its obligations under the loan agreement on EXH. 'A3'. The counsel noted that by EXH. 'A2' the claimant made application for loan which the defendant received and started negotiations with the claimant under the representation that it would accede to the request, which indeed led to the formal documentations of the loan offer and loan agreement in 2015 vide EXH. 'D1' and 'A3'.

The counsel submitted that the liability of the defendant in the peculiar circumstances of this case is revealed, buttressed and amplified by the manner in which the defendant failed to perform its own obligations, as follows:

- (1) The US Exim through ATRAFN required the defendant to submit its 2014 audited financials and its 2015 Management Account as they will assist US Exim in reaching a final decision to accept the Bank Guarantee issued by the defendant. Surprisingly, and in total disappointment, the defendant failed, refused and neglected to make the documents available to the US Exim, who consequently pulled out of the transaction. This is more shocking because by EXH. A28 dated 13th**

May, 2016, the defendant had acknowledged and admitted her delay in sending the said documents to US Exim but promised to do the needful, yet it failed to comply.

- (2) Afrexim went on to issue a Term Sheet to the claimant which the claimant accepted, and forwarded to the defendant who was requested to only endorse (sign) same, and the Term Sheet is EXH. A8, and in total disappointment, the defendant failed to fulfill its own part by simply endorsing the Afrexim Term Sheet, and that was the situation until the Term Sheet (EXH. A8) expired in the defendant's custody. This was so shocking despite the assurances given by the defendant in EXH. 'A29', and it was confirmed during cross-examination by the DW1 that the defendant did not sign the said EXH. A8'.
- (3) The defendant further assured the claimant of their readiness to disburse to the claimant the entire loan offer without further delay, as well as engage the Bank of Industry (BOI) to arrange modalities for a joint funding of the claimant's business/project. Consequently, in July, 2017, the defendant applied for a loan package for the claimant from the Bank of Industry (BOI), and on 1st August, 2017, the defendant wrote to BOI confirming that it will cover full exposure of the loan facility, that is, USD 9,088,617 on behalf of the claimant with necessary Bank

Guarantees to be provided by the defendant, and the evidence of their development is EXH. A9', very surprisingly, the defendant without any just cause, refused to provide the Bank Guarantee she had promised to send to the Bank of Industry, consequently the Bank of Industry could not continue with the transaction.

- (4) Shortly thereafter, the defendant proceeded to cancel the entire loan agreement with the claimant in 2nd February, 2018 at a time when there was no Board of Directors of the defendant to approve such cancellation, and this is evidenced by EXH. 'D3' and 'D10'. That during cross examination of the PW1 on the 13th October, 2021, it was emphasized by the PW1 that the cancellation was based on the excuse that the defendant had no money to give to the claimant, whereas about the same time, the CBN had just given the defendant about N550, Billion as evidenced in EXH. 'A13' from where the defendant could have raised the money and given to the claimant, had the defendant been sincere.**

It was submitted by the counsel that under cross examination, the DW1 confirmed that the technical hitches, policy and portfolio constraints (lack of money) the defendant referred to at paragraphs 9 and 10 of the defendant's witness statement on oath was that of the defendant. This implies that the claimant should not have allowed to suffer for the lapses of the defendant. The

counsel further referred to the case of **BF1 Group Corp. V. B.P.E. (2012) 18 NWLR (pt 1337) 209 at 240, paras. C-E** to the effect that where the words or conduct, a party to a transaction freely makes the other any unambiguous promise or assurance which is intended to affect the legal relations between them and the former acts upon it by altering his position to his detriment, the making the promise or assurance without be permitted to act inconsistently with it. He also cited the case of **D.M.V. (Nig.) Ltd V. N.P.A (2019) 1 NWLR (pt 1652) 163** on the same principle, and submitted that the above instances of the defendant's failure to comply with its own obligations to ensure that the claimant obtain the loan, are frivolous and unjustifiable excuses of the defendant who could, in equity, not be allowed to walk away from being liable in damages to the claimant who acted upon the defendant's representations, and urged the court to so hold in favour of the claimant.

On the issue No. 2, the counsel answered in the affirmative and submitted that the claimant has proved her case on the balance of probability and preponderance of evidence to be entitled to the reliefs, particularly having regard to the totality of documentary evidence before this court; and that the claimant need not to prove beyond reasonable doubt her entitlement to the special and general damages sought in this suit against the defendant arising from the principle of estoppel by conduct, and he referred to the case of **Arowolo V. Olowokere (2011) 18 NWLR (pt 1278) 280 at 306, para. B**. He also cited the case of **Dankolo V. Rewane Dankolo (2011) 16 NWLR (pt 1272) 22 at 55, paras. A-C** on the duty of the court to evaluate the evidence before it. He also cited the case of **Ayuya V. Yorin (2011) 10 NWLR (pt 1254) 135 at 162, paras. A-B** on the same principle.

The counsel referred to relief No. I on the statement of claim and submitted that the claimant pleaded the particulars of special damages at paragraph 38 of the statement of claim and also put them in evidence on oath at paragraph 40 of the claimant witness statement on oath, and the said statement was not controverted or challenged during cross examination, and is deemed admitted and should be acted upon by the court, and he referred to the case of **Pascutto V. Adecentro (Nig.) Ltd (1997) 11 NWLR (pt 529) 467**. It is submitted by the counsel to the claimant that the claimant tendered various exhibits to show her expenses incurred as a result of the representation the defendant made that it would give the claimant the loan they agreed upon, and the exhibits are EXH. 'A6', 'A7', 'A10', 'A11', 'A12', 'A17', 'A18', 'A19', 'A20', 'A21', 'A22', 'A24', 'A25' and 'A26'.

The counsel submitted that relief 2 is for general damages sought as an alternative relief claim to relief No. I, and he referred the court to the case of **Federal College of Education, Technical Potiskun V. Joseph (2020) 9 NWLR (pt 1729) 381 at 407, paras. H.** to the effect that the purport of an alternative claim is that one remedy is available in place of the other. He also cited the cases of **Ezekwere V. Golden Guinea Brewery Ltd (2000) 1 NWLR (pt 670) 648**; **U.B.A. Plc V. Mustapha (2004) 1 NWLR (pt 853) 443 at 485 para. G.**; **Mustapha V. Abubakar (2011) 3 NWLR (pt 1233) 123**; and **N.A.O.C. (Nig.) Ltd V. Ebila (2016) 3 NWLR (pt 1498) 120 at 127 – 128, paras. G-A**, all to the effect that a plaintiff can plead the reliefs he seeks separately or in alternative. A plaintiff who pleads his reliefs in alternative is in effect asking the court to grant or award any of the reliefs.

The counsel submitted that the particulars of special damages pleaded and the various exhibits tendered will

enable this court to assess the quantity of general damages to be awarded in favour of the claimant. In the circumstances of this case, and he urged the court to so hold. He argued that relief No. 3 is for the cost of action, ably supported by EXH. A23 and A24 being evidence of part of the legal fees the claimant paid to her solicitors, while relief 4 is for judgment interest.

On the issue No. 3, the counsel answered in the negative and submitted that the position and argument of the defendant in the circumstances of this suit not sustainable having regards to the cause of action of the claimant. He further submitted that the claimant's grouse arose from the failure of the defendant to meet up with her own obligations at various times to actualise the payment of the loan sum to the claimant bringing the claimant to a total and complete loss of her expenses incurred based on the representation of the defendant.

The counsel submitted that the very first position of the defendant is contained at paragraph 2 of the statement of defence to the effect that the defendant concluded that the claimant could not provide evidence of likely income stream to be able to repay the facility. The business is dominated by DSTV and the claimant could not provide evidence of its ability to compete as all other competitors were not making significant impact. The claimant relies on advert from one company Unilever that Investigation revealed that it is not in their tradition to put advert on satellite channels as they have never done so with DSTV or any other competitors.

The counsel submitted that the above position is completely baseless in the face of the documentary evidence before the court, as well as in the entire circumstances of this case.

Firstly, according to the counsel the defendant did not tender document among its EXH. 'D1' to 'D10' to support the above position.

Secondly, EXH. 'A27' contains the export marketing plan of the claimant forwarded to the defendant, showing detailed market analysis.

Thirdly, the act or conduct of the defendant in accepting the claimant's application in EXH. 'A2', followed by the offer letter issued by the defendant as EXH. 'D1', as well as the succeeding loan agreement and revalidation in EXH. 'A3' and 'A4', coupled with the defendant's assurances in EXH. 'A28' and 'A29' completely makes the above position and allegations of the defendant not sustainable in the circumstances of this case, and he cited the cases of **S.S. GMBH V. T.D. Ind. Ltd (2010) 11 NWLR (pt 1206) 589 at 627, para. C; A.G. Bendel State V. U.B.A Ltd (1986) 4 NWLR (pt 37) 547; and Bakari V. Ogundipe (2021) 5 NWLR (pt 1768) 1 at 61-62, paras. G-B** to the effect that documentary evidence is the best evidence. He submitted that from the foregoing, the documentary evidence before the court completely outweigh and render unsustainable the oral testimony put in evidence via paragraph 2 of the statement of defence, as well as its corresponding paragraph in the defendant's witness statement on oath, and he urged the court to so hold.

The counsel submitted that the second position of the defendant is contained at paragraph 6 of the statement of defence that the validity of the revalidated offer was for 120 days from the date of acceptance based on paragraph 20 of EXH. 'A4'.

The counsel submitted that within the said 120 days, it was the defendant that failed refused and neglected to fulfill its part of the obligations in ensuring that the claimant

receives the cash loan and bank guarantee as agreed by both parties in EXH. 'A3' despite the defendant's issuance of EXH. 'A28' and 'A29'.

The third position of the defendant is contained at paragraph 16 of the statement of defence wherein the defendant attempted to deny the implication of the Bank of Industry in the circumstances of this case.

On this, the counsel refer the court to the totality of EXH. 'A9', which documentary evidence speaks for itself in respect of the role of Bank of Industry was to play, but frustrated due to the failure of the defendant to carry on its obligation in the circumstances.

The fourth position of the defendant is contained at paragraph 11, 12 and 13 of the statement of defence, wherein the defendant attempted to deny liability with respect to involvement of the USA Export and Import Bank, US Exim, and on this he referred to the combined effect of EXH. 'A28' which re-enforced the implication and effect of EXH. 'A5'.

The counsel submitted that the fifth position of the defendant is contained at paragraph 19 a-j of the statement of defence wherein the defendant, particularly at paragraphs (c) (i) – (iv) and g (i) – (iii) listed certain documents the claimant was required to submit for the disbursement of the loan. It is the position of the defendant that the claimant failed to provide the said documents, and he submitted that this position of the claimant is completely false as the said documents required by the defendant were indeed made available by the claimant, and as well presented before the court as follows:

- i. EXH. "A31" before the court is the Certified True Copy of the claimant's Resolution,

- authorising the borrowing and pledging its assets as security for the loan.
- ii. EXH. 'A3' before the court is the Loan Agreement with the defendant.
 - iii. EXH. 'A32, 'A33', 'A34', 'A35' and 'A36', before the court are the claimant's Director's personal Guarantees along with the statement of Net worth of the directors.
 - iv. EXH. 'A37' is claimant's evidence of increase in share capital. He contended that the contents of paragraph 19 of the statement of defence is not sustainable in the circumstances of this case.

The counsel further submitted that the sixth position of the defendant is contained at paragraph 20 of the statement of defence wherein the defendant confirmed that it revoked and cancelled the loan offer by a letter dated 22nd January, 2018. To him, even though the said letter was not tendered in evidence by the defendant, the claimant confirmed that the revocation indeed occurred in January, 2018 after the claimant had incurred expenses from 2015 (EXH. 'D1'), through 2016 and 2017, and this forms part of the cause of action in this suit. The said letter of revocation is dated 22nd February, 2018 is further supported by EXH. 'D3' and 'D10'.

The counsel contended that the seventh position of the defendant is contained at paragraph 21 (a) – (a) of the statement of defence, wherein the defendant pleaded a discharge by “accord and satisfaction”

And at paragraph 21 (d) and (e), the defendant pleaded a refund of N44,341,302.00 to the claimant in this suit. It was rather a refund of some upfront fees as evidenced by EXH. D4. It is not part of the claims of the

claimant in this suit under the principle of estoppel by conduct.

Also at paragraph 21 (f) (g) (h), the defendant pleaded a return of the title documents of the properties the claimant had used as collateral. This is already evidenced by EXH. 'A10', and submitted that this form part of the cause of action of the claimant, as the claimant had incurred huge costs in obtaining the said properties as evidenced by EXH. 'A11', 'A20', 'A22' and 'A25'.

The counsel submitted that the averment in paragraph 21 of the statement of defence does not inure in favour of the defendant.

The counsel also submitted that the Eighth position of the defendant is contained at paragraphs 23 and 24 of the statement of defence wherein the defendant posited that the claimant had agreed to bear all the expenses incurred on the course of perfecting the transaction; and submitted that the claims of the claimant in this suit became necessary by operation of law under the principle of estoppel by conduct because in fact, the defendant unjustifiably failed to perfect the transaction.

The counsel posited that the ninth position of the defendant is contained in paragraph 25 of the statement of defence wherein the defendant posited that it had rights to cancel the loan agreement, and submitted further that the cancellation came in January, 2018 after the defendant had given assurances to the claimant, who acted upon the assurances and representation to alter her position and incurred costs.

He also submitted that the tenth position of the defendant is contained in paragraph 27 of the statement of defence wherein the defendant posited that it did everything possible within its powers to perfect the loan

transaction and guarantee agreements, and submitted that the above position is an admission by the defendant that it actually did not perfect the loan transaction with the claimant. He submitted that, however, the defendant has not satisfactorily shown that efforts it made to perfect the loan transaction, particularly with respect to the opportunities presented by the US Exim, Afrexim and BOI discussed above, which the defendant unjustifiably wasted.

The counsel contended that the eleventh position of the defendant is contained at paragraphs 30, 31, 32, 33, 34, and 35 of the statement of defence wherein the defendant denied liability to the claims of the claimant and submitted that in the peculiar facts and circumstances of this case, the defendant is liable in damages to the claimant under the principle of estoppel by conduct, because the claimant acted on the representation of the defendant to incur the expenses she incurred in this suit. The counsel submitted that from the foregoing argument, the various position of the defendant are not sustainable and urged the court to so hold and resolve the issue in favour of the claimant.

In response to the argument of the defendant in his final written address, the counsel submitted that at paragraphs 5.8, 5.11 and 5.14 of the final written address, the defendant argued that the defendant had the right to cancel the loan agreement due to portfolio constraints. In response, the counsel submitted that the cancellation was by 22nd January, 2018 as pleaded by the defendant in paragraph 20 of the statement of defence, and this was after the claimant had incurred huge cost in 2015, 2016 and 2017, in fulfilling various obligations imposed by the defendant on the representation that the loan would be given. Furthermore, as argued by the counsel to the claimant, during cross examination the claimant's PW1

testified that the portfolio constraints, reason which the defendant gave in cancelling the loan was that “there was no money, whereas EXH. ‘A13’ confirms that the defendant had been funded.

The counsel drew the attention of the court to note that the claimant is not seeking specific performance in this suit, and thus, the clauses in the loan agreement, including the clauses which empowered the defendant to cancel the loan offer are not what the claimant seeks to enforce. While not enforcing the loan offer, the claimant is entitled to damages for the representation of the defendant that made him incur cost and expenses.

The counsel submitted that at paragraphs 5.17 to 5.24 of its final written address, the defendant argued that the damages sought by the claimant are too remote and that the claimant is not entitled to same, and submitted further the claimant’s claims are properly covered by the principle of estoppel by conduct, as the expenses incurred flows from the representation of the defendant that it would give the loan and bank guarantee to the claimant, thereby leading the claimant to incur the costs. He urged the court to uphold the case of the claimant and resolve the entire suit in favour of the claimant as sought in the reliefs.

Thus, having reviewed the statement of claim, the statement of defence and the reply to the statement of defence, the final addresses of both counsel, it is incumbent upon this court to formulate the issue for determination, and I adopt the issue No. I of the issues already formulated by the counsel to the defendant, thus:

Whether the claimant has proved its case to be entitled to the reliefs?

Before resolving the above issue, it is also incumbent upon this court to evaluate the evidence of both parties

with a view to ascribe a probative value to the one that is credible. See the case of **B.S.C.C.D.A. V. Ecobank Plc (2023) 99 FWLR (pt 1220) 40 at 85-86, paras. D-A.**

The claimant who through the PW1 told the court during cross examination that financial status of the claimant was superior, and the major partners are based in the United States of America, and that they came here to Nigeria based upon the clarion call by the Nigerian Government for Nigerians in Diaspora to come and invest, and so they raised about N8.M to come and invest and also discovered so many things have to be done to set up a company in Nigeria, and those things are tasking and demanding for securing a broadcast license and permit, and they were in short of funds and they were looking for a way to obtain loans, and they approached the defendant, and the defendant decided to cancel the loan, based on the reason that there was no money, and ten days thereafter the cancellation, the defendant was given N550 Billion by the Central Bank, and the right thing for the defendant to have done was to remove the sum of N1.2 Billion from the N550 Billion they received from C.B.N, and the suggestion that they do not have money is a mere fallacy and untrue.

The PW1 was asked to look at EXH. 'A3' at page 6 under paragraph 10.0, additional solitary rights of the defendant, and to read roman figure (iii), and the PW1 read it, and was asked whether the defendant has cited financial constraints as the reason for cancellation, and the PW1 answered that it is not correct.

I looked at EXH. 'A3' in paragraph 10.0 under "additional solitary Rights of Nexim" and in roman figure (ii) reads:

“In addition to the aforementioned rights, Nexim shall reserve the exclusive right to:

(iii) cancel the loan offer due to portfolio constraints or if in Nexim’s opinion facts have emerged that the disbursement of the loan to the Borrower would not be in the interest of Nexim”

Now the question is whether the PW1 was by that question and answer, has been challenged during cross examination? The answer is in the affirmative because the PW1 disputed that it was not cited, and looking at the paragraph 10.0 of EXH. ‘A3’ it is there written. The evidence of the PW1 in that is not worthy of acceptance, and it is hereby rejected. See the case of **B.S.C.C.D.A. V. Ecobank Plc (supra) of page 42 particularly page 89, para. G** where the Court of Appeal, Lagos Division held that documentary evidence are permanent and impervious to conception in contradistinction to Pam evidence which oozes out from the vocal cord of man and susceptible to distortion by its author. In the instant case, the EXH. ‘A3’ paragraph 10.0 roman no. (iii) is clear and explicit in that the answer given by the PW1 would not be accepted.

The PW1 was asked whether after the cancellation, the defendant made any concession to the claimant, and the PW1 answered in the negative.

Looking at EXH. ‘D4’ tendered by the defendant it reads:

November, 22, 2016

The Managing Director,
Fois Broadcasting Network Nigeria Limited
4th Floor, Adamawa Plaza,
First Avenue,
Central Business District,
Abuja.

Dear sir,
**RE-\$9,088,617.00 MEDIUM TERM DIRECT
LENDING FACILITY AND MEDIUM TERM
GUARANTEE FACILITY BY FOISI BROADCASTING
NETWORK LIMITED ("FBN" OR "THE COMPANY").
REFUND OF UPFRONT FEES.**

We write to notify you that we have transferred the sum of ₦44,341,302.00 to your account domiciled with FCMB on 21st November, 2016 being refund of upfront fees. The refund was at the instance of your company.

Best regards

Yours faithfully

For: NIGERIAN EXPORT-IMPORT BANK

Signed

S.G. Abdulkadir

Deputy Manager

Project Finance Department

Signed

Very Rev. I.C. Nwade

Deputy General Manager,

Head,

Project Finance

Department"

In the final written address of the claimant dated the 22nd day of November, 2024 at paragraph 4.40 under issue 3, the seventh position of the defendant, the counsel to the claimant submitted that this money ₦44,341,302.00, a refund

to the claimant is not part of the claims of the claimant in this suit and it was rather a refund of some upfront fees as evidenced by EXH. 'D4' and it is not part of the claims of the claimant in this suit under the principle of estoppel by conduct.

Thus, by the combining effect of EXH. 'D4' above quoted and the submission of the counsel, it can be inferred that the money ₦44,341,302.00 was paid to the defendant as upfront fees. Now, the question is:

Whether the PW1 was being challenged during cross examination?

Obviously, he was challenged and he answered in the negative that after the cancellation of the loan whether Nexim did any concession to the claimant, and therefore evidence is not worthy of acceptance.

The court is not unmindful of the position of law that address of counsel will never be in place of evidence, however, it is also the position of law that the duty of all the times of every counsel appearing in court, as a minister in the temple of justice, is to honestly disclose all facts, favourable and unfavourable, as doing so immensely assists and/or guides the court in the judicious discharge of its judicious functions. As much as the judex cannot speculate, so also must he Bar not put the bench in a state of factual uncertainties of material facts. See the case of **Umar V. FRN (2021) All FWLR (pt 1085) 711 at 718, paras. A-C.**

The PW1 was also asked as to what did the claimant do with the sum of N8.M, and the PW1 told the court that the sum of N8.M was used in payment of salaries and licenses and other expenses to meet up for the loan. The PW1 was also asked these staff of the defendant, as to whose expense did they travel to United States of America, and the PW1 told the court that it was to meet up with the

conditions for the two staff to meet with the technical partners in USA, and therefore was asked whether it was contained anywhere in the agreement, and the PW1 answered that he is sure, it is contained somewhere in the agreement.

The court painstakingly checked at EXH. 'A4', EXH. 'D1' and 'D9', which is the approval for the loan, discovered in the **"TERMS" AND CONDITIONS** under paragraph I of the conditions, sub-paragraph (i) which provides for satisfactory due diligence visit on the Equipment suppliers (Technical partners).

The PW1 also told the court the claimant is a going concern.

The DW1 told the court that he would not recall that the defendant submitted its 2014 audited financial statement as well as management account; and the defendant did not provide the bank Guarantee to the bank of Industry. The DW1 also told the court that it appears so that the defendant did not sign EXH. 'A8', and that it was not brought to his knowledge that two staff of the defendant were made to travel to USA in respect of this case.

The DW1 told the court that those policy and portfolio constraints were that of the defendant, and the technical hitches were encountered by the defendant, the answer referred to in paragraph 9 is the same with that of paragraph 10 of the witness statement on oath.

From the cross examination, the DW1 was not challenged, neither was he contradicted, and therefore his pieces of evidence are worthy of acceptance, and they are hereby accepted. In the circumstances of this case, I put the evidence adduced by either parties on the scale and I saw the evidence of defendant preponderates than that of

the claimant, and I therefore accept the evidence of the defendant than that of the claimant, and I so hold. See the case of **Usuro V. Usuro (2024) All FWLR (pt 1231) p. 525 at 545, paras. C-F.**

The particulars of special damages as contained in the statement of claim of the claimant are as follows:

- (a) Unpaid salaries - N999,000,000.00**
- (b) Loan secured from Aquila to meet Nexim related expenses – N150,000,000.00**
- (c) Abuja Rent 2013 – 2019 – N30,000,000.00**
- (d) Living expenses (including local transportation especially to Nexim, certifies, food etc – N27,000,000.00**
- (e) 3rd party Property fees (2 properties) plus consultants – partial – N25,000,000.00**
- (f) Insurance on three properties lodged at Nexim as collateral – N12,784,080.00**
- (g) Loan from Bytol Nigeria Ltd for Nexim – Related Expenses at N5.M/2 years – N10,000,000.00**
- (h) Marine Insurance at the Instance of Nexim on N5,743,277.00**
- (i) Legal fees Festus Keyamo chambers – and their legal cost to be expended – N5,000,000.00**
- (j) Valuation from Knight Frank & others as three properties at the instance of Nexim – N4,543,838.00**
- (k) Form M at the instance of Nexim – N514,500.00**
- (l) Legal fees (Ugochukwu Edeze & Co.) – N50,000.00**
- Total - N1,269,635,695.00**

It is the law that special damages must be strictly proved by the person who claims to be entitled to them. The nature of the proof required depends on the facts and circumstances of the case. The evidence must be credible. See the cases of **Registered, Trustees A.C.C. V. Registered Trustees, at 717 to 718, paras. H-B; Nwangwu V. F.B.N Plc (2022) All FWLR (pt 1137) p. 732 at 749, paras. B-D; B.E.T. Ltd V. OAN Overseas Agency (Nig.) Ltd (2022) All FWLR (pt 1158) p. 1012 at 1035, paras. B-C; and UBN Plc. V. Nwankwo (2019) All FWLR (pt 1022) p. 408 at 424, paras. C-E.**

In a bid to discharge the responsibility of proving the claim of special damages as particularised above, the claimant tendered various documents from EXH. A1 to EXH. 37.

What is germen in this suit is the inability of the defendant to honour the loan agreement entered between it and the claimant in EXH. 'A3', and it is therefore established that by EXH. 'D3' and 'D10', the defendant has discontinued with the transaction with the claimant in EXH. 'A3', in favour of the claimant due to policy and portfolio constraint and also because the offer to the claimant had lapsed. EXH. 'D3' reads:

"July 18, 2018

The Managing Director,

Foisi Broadcasting Network Nigeria Limited,

4th floor, Adamawa Plaza,

First Avenue, Central Business District, Abuja.

Dear sir,

**RE-NEXIM OFFER OF US\$9,088,617.00 MEDIUM
TERM DIRECT LENDING FACILITY AND MEDIUM
TERM GUARANTEE FACILITY TO FOISI
BROADCASTING NETWORK LIMITED (FBN
AFRICA)**

We write within reference to your letter dated July 9, 2018 on the above subject and regret to inform you that the Bank is unable to accede to your fresh request due to portfolio constraints.

We thank you for your interest in our products and services and look forward to a mutually beneficial transactional relationship in the future.

Yours faithfully,

For: **Nigerian Export-Import Bank**

Signed

S.G. Abdulkadir

Project Finance Department.

Signed

A.D. Modibbo

Board Secretary/

Legal Adviser.

Equally paragraphs 3, 4, 5 and 6 of EXH. 'D10', they read:

“The facility was declined in line with Article IV, clause 10.0 (iii) of the executed Loan Agreement (copy attached) which provides thus “In addition to the aforementioned rights, Nexim shall reserve the exclusive right to: cancel Loan offer due to portfolio constraints or if Nexim’s opinion facts have emerged that the disbursement of the loan to the borrower would not be in the interest of Nexim”

It will interest you to know that the Bank had explored several possible finding options in order to consummate the transaction without success.

In consideration, it is instructive to note that the Bank took an exceptional steps of refunding most of the fees paid by the customer including those payment specified to be non-refundable under the contract.

Notwithstanding the withdrawal of the offer, we are happy to explore a mutually beneficial relationship with the company when the need arises.

Thank you and best regards

Yours faithfully

For: Nigerian Export-Import Bank

Signed

A. Modibbo

Board Secretary/Legal Adviser”

So, by the combined effect of EXH. ‘D3’ and ‘D10’ above quoted, the defendant had withdrew from the loan agreement entered between it and the claimant, and I therefore so hold; and it is consequent upon the withdrawal by the defendant, the claimant now put these claims. It is to be noted that a claim for special damages is never granted as a matter of course or automatically upon proof of a breach; it must be specifically pleaded, itemised with its particulars and strictly proved by credible and cogent evidence at the trial in that it denotes pecuniary losses that have crystallized in terms of cash and value at the time of the commencement of the action. See the case of **Air France V. Owualah (2020) All FWLR (pt 1065) p. 110 at 167, paras. B-C.**

On the claim of N999,000,000.00 unpaid salaries of the four persons such as:

(1) Aaron Nmongwun (2) Halima Adasi (3) Leonard Fertig and (4) Waribo Nick Adasi Efuya, the tendered statement of personal Net worth for Individual of these four persons, and in paragraph 38 (b) that the statement of claim, the claimant averred that it had four (4) staff whose salaries were unpaid for five years from September, 2014 to 2019, as a result of the actions of the defendant, however in his witness statement on oath, the claimant did not state as to how they were employed either through whatever means they were engaged thereby spelling or specifying the salaries and income of these four persons and their entitlements. The claimant failed to provide the source of engaging these persons, while it is the duty of the claimant to strictly prove. The EXH. 'A32', 'A33', 'A34', 'A35' and 'A36' are not employment or engagement letters as they are statements of personal net worth of five persons including the four persons listed above.

To my mind, claimant could not prove the claim of unpaid arrears of salaries to these workers; and I so hold. This claim is refused accordingly. See the case of **Taylor V. Ogheneovo (2012) All FWLR (pt 610) p. 1363 at pp. 1371-1372, paras. A** to the effect that special damages are such kind of damages, which the law will not presume to flow or to be inferred from the nature of the act or breach complained of by the plaintiff as a matter of course;

On the claim of loan secured from Aquila to meet Nexim related expenses in the sum of N150,000,000.00, the claimant in trying to prove that it secured a loan from Aquila Asset Management, tendered EXH. A12 which is the offer of the Bridge loan Facility. EXH. A12 is dated the 29th February, 2016, and at the last paragraph of the offer it reads:

“We are pleased to have been able to arrange this facility for your company and hold same available for your acceptance till (within 10 days of this offer letter dated) after which it expires at the option of the firm. Kindly indicate your acceptance of the offer by appending your signature(s) and affixing your company seal on this letter.

Yours faithfully,

For: Aquila Asset Management Limited

Signed

Victor Ireobhade

Advisory

Signed

Lami Adekola

Deputy Managing Director

Accepted for and on behalf of Foisi Broadcasting Network Limited

Signed

Aaron Nmungwum

Onum Otitu

Director

Signed

Date – 1st March, 2016

Date 1/03/2016”

From the above quoted portion of EXH. ‘A12’, it can be seen that there was an offer for bridge loan facility made by Aquila Asset Management to the claimant. The law is that it must be strictly proved, and the claimant did not provide any evidence showing that the loan sum has been transferred into the account of the claimant or has been received by the claimant. The importance of receipt in proving the claim of special damages cannot be overemphasized. See the case of **Taylor V. Ogheneovo (supra) page 1361 at p. 1373, paras. C-E** to the effect that production of receipt in a claim for special damages is very

vital, as it would serve as strict proof of payment even without calling the recipient of such payment to testify in court. In the instant case, no evidence exists from the claimant to show that it was in receipt of the loan of the sum of N150,000,000.00 from Aquila Asset Management, and to this, I so hold.

On the claim of Abuja rent 2013 to 2019 in the sum of N30,000,000.00, the claimant could not produce the receipt or any document showing that it has paid that sum to the landlord, and to my mind, the claim must also fail, and I so hold. See the case of **Taylor V. Ogheneovo (supra)**.

On the claim of living expenses (including local transportation especially to Nexim, utilities and food etc), the claimant also failed to produce any receipt to back of the claim, and therefore it must fail, and I so hold. See the same case of **Taylor V. Ogheneovo (supra)**.

On the claim of 3rd party property fees (or properties) plus consultants – partial in the sum of N25,000,000.00, and the claimant tendered EXH. 'A22' to prove that claim nothing to show that the sum of N25,000,000.00 was paid by the claimant for that purpose, and, no receipt in particular was issued to the claimant showing that the sum of N25,000,000.00 was paid, and therefore the claim of the claimant fails.

On the claim of insurance on three properties the sum of N12,784,080.00, and the claimant relied on EXH. 'A11' to support his claim. Looking at EXH. 'A11', it can be inferred that is a confirmation showing that Stac Insurance Plc has assented to the request of the claimant and in it, it is indicated "Premium payable N2,919,444.78. This does not evidence that the sum of N2,919,444.78 has been paid by the claimant to the Insurance Company, and therefore, the receipt showing that that sum has been paid by the

claimant is very material, and therefore the claim fails, and I so hold.

On the claim of loan from Bytol Nigeria Ltd for Nexim Related Expenses at N5,000,000.00 (2 years), the claimant relied on EXH. 'A21'. The said exhibit is a loan agreement between Bytol Nigeria Ltd and the claimant wherein the sum of N5,000,000.00 was agreed to be borrowed by the claimant.

However, no evidence exists that the sum of N5,000,000.00 was given to the claimant as there is no acknowledgement of receipt of that sum, and no evidence that the money was transferred to the account of the claimant, and therefore to my mind, the claim fails.

On the claim of Marine Insurance at the instance of the defendant, the claimant tendered EXH. 'A22' to support the claim. Looking at EXH. 'A22', it can be seen that the gross premium to be paid by the claimant was the sum of N5,743,276,71k, however, no evidence exists that the sum of N5,743,276.71k was paid to the Insurance Company by the claimant, and therefore the evidence of the policy is not enough, and the evidence that the Premium has been paid is what is to be considered as strictly proved that the claimant incurred the expenses. This claim of the claimant also fails.

On the claim of legal fees (Festus Keyamo chambers and other legal cost) to be expended at the rate of ~~N~~5,000,000.00, the claimant relied on EXH. 'A23', which is the photocopied of manager's cheque in the sum of N3,000,000.00 as against the sum of N5,000,000.00 claimed by the claimant. See the case of **Mobil Oil Nig. Plc V. Barbados Cors. Ltd (2019) All FWLR (pt. 988) p. 964 at 1003, paras. B-E** to the effect that where the claimant specifically alleges that he suffered special damages. He must per

force prove it. The method of such proof as to lay before the court concrete evidence demonstrating in no uncertain terms easily cognisable the loss or damages he has suffered so that the opposing party and the court as umpire would readily see and appreciate the nature of the special damages suffered and being claimed. It said not give rise to speculation, approximation or estimate or such fractions. In addition to the above, the solicitor's fee is not legally recoverable under special damages. See the case of **Air France V. Owualah (2020) All FWLR (pt 1065) pp. 172-173, paras. D-A per Geogewill JCA:**

“On the claim by the respondent for the payment of her solicitor’s fees under special damages against the appellants, in law this hear of claim for damages by way of solicitor’s fees and the subsequent award of same by the court below is alien to now civil jurisprudence as such claim is not legally recoverable.

See the cases of **Nwanji V. Coastal Services (Nig.) Ltd (2004) All FWLR (pt 219) 1150** and **Guinness Nig. Plc V. Nwoke (2000) 15 NWLR (pt 689) 135**. In the instant case, the claim of solicitor’s fee fails; and I so hold.

On the claim of valuation from Knight Frank and others on 3 properties at the instance of the defendant at the rate of ₦4543,838.00, the claimant relied on EXH. ‘A25’, and what is in the exhibit is the charges which Knight Frank forwarded to the claimant via G-Mail and was printed for the two properties in the sum of ₦397,971.71 and ₦3,527,934.50 respectively, however no evidence exists that such sum has been paid by the claimant to enable the claimant to claim, and the claim fails.

On the claim of ₦514,500.00 for Form M of the Central Bank, the claimant relied on EXH. ‘A26’. Looking at EXH.

'A26' (Form M), it can be seen that it is not indicative of how much the claimant paid to obtain the form, and also no evidence exists as to the fact that the claimant had strictly paid the sum of ₦514,500.00 for the Form thereby evidencing any receipt of whatever form from the Central Bank of Nigeria, and therefore, the claim fails, and I so hold.

In the circumstances of this case, I come to the conclusion that the weight of evidence tilts in favour of the defendant, this is because anyone asking for special damages is required to prove strictly that he did suffer such special damages as would suggest that indeed, he is entitled to the award under the head. See the case of **Odimade V. Ogunnanle (2011) All FWLR (pt 566) p. 536 at 550, para. A.** In the instant case, the claimant failed to prove strictly that it is entitled to the reliefs, and the claims of the claimant are dismissed.

In the alternative, the sum of ₦10,000,000.00 (Ten Million Naira) is hereby awarded to the claimant payable by the defendant as general damages as a result of the cancellation of the loan agreement by the defendant.

Hon. Judge
Signed
24/02/2025

Appearances:

John Ainetor Esq appeared with Sunday Ikwatwo Esq for the claimant.

Mohammed Dikko Esq appeared for the defendant.