

the 1st and 2nd Defendants had issued unto the Claimant its approval to formally launch the Hawk Eye System by its Letter of Approval dated 15th May, 2019; was NOT wrongful, amounting to a breach of the contract, the 1st and 2nd Defendants entered into with the Claimant.

- 3. Whether the 1st and 2nd Defendants are NOT stopped in law from denying the Claimant's Hawk Eye Crime Reporting, Monitoring, and Response System project and breaching the terms, conditions, and obligations contained in the Memorandum of Understanding dated 19th January, 2017 ("the MOU") duly executed between the parties; the 1st and 2nd Defendants having approved the formal launch of the Claimant's Hawk Eye System vide its Approval Letter dated 15th May, 2019 which approval was granted upon the Claimant's successful completion of the Pilot System Test Period in March, 2019 without any default and to the satisfaction of the 1st and 2nd Defendants.**
- 4. Whether having failed to perform their obligations and/or defaulted in complying with clauses 4 (4.4, 4.8, and 4.9) and 7 (7.1 and 7.2) and all other obligations under the Memorandum of Understanding dated 19th January, 2017 ("the MOU") and duly executed between the parties, the 1st and 2nd Defendants can be permitted in law and/or equity to benefit from their own wrong by resiling from the contract and purporting to terminate the MOU, after the Claimant had duly executed her obligation under the MOU?**
- 5. Whether it is lawful for the 1st and 2nd Defendants to have solicited for financial gratification from the Claimant as a pre-condition for the launch and full operation of the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System project (which condition is not contained in the MOU) after the Claimant had duly executed her obligations under the MOU and had invested and expended Billions of Naira on the said project; and despite the fact that the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System was working effectively and fully operational; and the 1st and 2nd Defendants had granted approval for the formal launch of the project?**
- 6. Whether the 1st and 2nd Defendants can validly terminate the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System project,**

rescind their obligations owed to the Claimant and purport to terminate the Memorandum of Understanding dated 19th January, 2017 duly executed by parties on grounds of the refusal of the Claimant's Directors to yield to the solicitation for financial gratification and corruption by the hierarchy of the 1st and 2nd Defendants except as provided for in the MOU?

- 7. Whether the 1st and 2nd Defendants can validly sabotage and/or circumvent the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System project; impeach and breach the Claimant's property right by purporting to terminate the project and proceed to replicate the Claimant's project (Claimant's Mobil Application) and launch the same under the name "NPF Rescue ME! App. "or indeed, under any other name or guise in violation of the spirit and letters of the Memorandum of Understanding dated 19th January, 2017 ("the MOU") duly executed between the parties?**
- 8. Whether the 1st and 2nd Defendants can lawfully dismantle the Command and Control Centre for the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System project duly constructed and installed by the Claimant in the 1st and 2nd Defendants Premises in Lagos State and Abuja at Claimant's costs pursuant to the Memorandum of Understanding dated 19th January, 2017 (the MOU and duly executed between the parties?**
- 9. Whether the 1st and 2nd Defendants can, having illegally dismantled the Command and Control Centre for the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System project duly constructed and installed by the Claimant in the 1st and 2nd Defendants premises in Lagos State and Abuja at the Claimant's cost, turn around to appropriate and use the resources of the same Command and Control Centre of the Claimant to run their clone Crime Reporting and Response System which is an illegal replica copy of the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System project in contravention of the MOU and the Claimant's property rights.**
- 10. Whether the 1st and 2nd Defendants having willfully and unlawfully terminated, sabotaged and/or circumvented and breached the terms, conditions, and their obligations contained in the Memorandum of Understanding dated 19th January, 2017 ("the MOU") duly executed**

between the parties for the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System project, thus depriving the Claimant of the opportunity to recoup her investments in the project, the Claimant is not entitled to recover specific damages for cost of her investments in the project, damages for loss of projected earnings, general damages for breach of contract, and aggravated and exemplary damages for the bad faith and malicious conduct of the 1st and 2nd Defendants.

And upon resolution of the above questions, the Claimants seeks the following Reliefs:

- 1. A DECLARATION OF THE HONOURABLE COURT that the Memorandum of Understanding dated 19th January, 2017 ("the MOU") and duly executed between the Claimant and the 1st and 2nd Defendants is a contract valid in law, still subsisting, binding and enforceable between the parties thereto, the MOU having provided in clause 3 thereof that on the effective date it shall become effective and binding on parties and shall continue in force; the Claimant having duly discharged her obligations under the MOU; and 1st and 2nd Defendants having failed to terminate the MOU in accordance with the relevant terms or provisions relating to termination of the MOU.**
- 2. A DECLARATION OF THE HONOURABLE COURT that the manner and timing of the termination of the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System project owned and operated by the Claimant in conjunction with the 1st and 2nd Defendants in contravention of the MOU's provisions; and after the 1st and 2nd Defendants had issued unto the Claimant its approval to formally launch the Hawk Eye System by its Letter of Approval dated 15th May, 2019 was wrongful amounting to a breach of the contract of the parties.**
- 3. A DECLARATION OF THE HONOURABLE COURT that the 1st and 2nd Defendants are stopped in law from denying the claimant's Hawk Eye Crime Reporting, Monitoring and Response System project and breaching the terms, conditions and obligations contained in the Memorandum of Understanding dated 19th January, 2017 ("MOU") duly executed between the parties; the 1st and 2nd Defendants having approved the formal launch of the Claimant's Hawk Eye System vide the Approval Letter dated 15th May, 2019 which approval was granted upon the Claimant's successful**

completion of the Pilot System Test Period in March, 2019 without any default and to the satisfaction of the 1st and 2nd Defendants.

4. **A DECLARATION OF THE HONOURABLE COURT** that having failed to perform their obligations and/or defaulted in complying with clauses 4 (4.4, 4.8, and 4.9) and 7 (7.1 and 7.2) and all other obligations under the Memorandum of Understanding dated 19th January, 2017 (“the MOU”) and duly executed between the parties, the 1st and 2nd Defendants cannot be permitted in law and/or equity to benefit from their own wrong by resiling from the contract and purporting to terminate the MOU, after the Claimant had duly executed her obligation under the MOU.

5. **A DECLARATION OF THE HONOURABLE COURT** that it is NOT lawful for the 1st and 2nd Defendants to solicit for financial gratification from the Claimant as a pre-condition for the launch and full operation of the Claimant’s Hawk Eye Crime Reporting, Monitoring and Response System project (which condition is not contained in the MOU) after the Claimant had duly executed her obligations under the MOU and had invested and expended Billions of Naira on the said project; and despite the fact that the Claimant’s Hawk Eye Crime Reporting, Monitoring and Response System was working effectively and fully operational; and the 1st and 2nd Defendants had granted approval for the formal launch of the project.

6. **A DECLARATION OF THE HONOUABLE COURT** that the 1st and 2nd Defendants cannot validly terminate the Claimant’s Hawk Eye Crime Reporting Monitoring and Response System project; rescind its obligations owed to the Claimant; purport to terminate the Memorandum of Understanding dated 19th January 2017 duly executed by parties under the laws of the Federation of Nigeria on grounds of the refusal of the Claimant’s Directors to yield to the solicitation for financial gratification by the hierarchy of the 1st and 2nd Defendants except as provided for in the MOU.

7. **A DECLARATION OF THE HONOURABLE COURT** that the 1st and 2nd Defendants cannot validly sabotage and/or circumvent the Claimant’s Hawk Eye Crime Reporting, Monitoring and Response System project; impeach and breach the Claimant’s property right by purporting to

terminate the project and proceed to replicate the Claimant's project (Claimant's Mobile Application) and launch the same under the name "NPF Rescue ME! App," or indeed, under any other name or guise in violation of the spirit and letters of the Memorandum of Understanding dated 19th January, 2017 ("the MOU") duly executed between the parties.

8. **THE DECLARATION OF THE HONOURABLE COURT** that it is unlawful for the 1st and 2nd Defendants to dismantle the Command the Control Centre for the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System project duly constructed and installed by the Claimant in the 1st and 2nd Defendants Premises in Lagos State and Abuja at Claimant's costs pursuant to the Memorandum of Understanding dated 19th January, 2017 (the MOU) and duly executed between the parties.
9. **A DECLARATION OF THE HONOURABLE COURT** that the 1st and 2nd Defendants having illegally dismantled the Command and Control Centre for the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System project duly constructed and installed by the Claimant in the 1st and 2nd Defendants Premises in Lagos State and Abuja at the Claimant's costs, CANNOT turn around to appropriate and use the resources of the same Command and Control Centre of the Claimant to run their clone Crime Reporting and Response System (NPF Rescue ME! App) which is an illegal replica copy of the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System project in contravention of the MOU and the Claimant's property rights.
10. **A DECLARATION OF THE HONOURABLE COURT** that the 1st and 2nd Defendants having willfully and illegally terminated, sabotaged and/or circumvented and breached the terms, conditions, and obligations contained in the Memorandum of Understanding dated 19th January, 2017 ("the MOU") duly executed between the parties for the Claimant's Hawk Eye Crime Reporting, Monitoring and Response System project, and thereby deprived the Claimant of the opportunity of recovering her investments in the project and earning returns, therefore, the Claimant is entitled to recover specific damages for the cost of her investments in the project, damages for loss of projected earnings, general damages for

breach of contract, and aggravated and exemplary damages for the bad faith and malicious conduct of the 1st and 2nd Defendants.

11. AN ORDER OF PERPETUAL INJUNCTION restraining the Defendants, whether acting jointly and/or severally, from acts and/or further acts of breaching, frustrating, sabotaging, circumventing, and/or in any other manner preventing or inhibiting the Claimant from implementing her **Hawk-Hawk Eye Crime Reporting, Monitoring and Response System project in conjunction with any other Security Agency or with any other person whatsoever.**

The application is supported by a 70 paragraphs affidavit with (41) forty-one annexures marked as **Exhibits A-S**. The application is supported by a written address in which two (2) issues were raised as arising for determination to wit:

- 1. Whether the Memorandum of Understanding (MOU) executed by and between the Claimant and the 1st Defendant on 19th January, 2017 is a valid, binding and subsisting contract?**
- 2. If issue 1 above is answered in the affirmative, whether the Claimant is entitled to all the reliefs sought?**

Submissions were made on the above issues which forms part of the Record of Court. The thrust of the submissions is that the MOU executed by parts in this case is valid, binding and subsisting and that having kept to its side of the MOU, that it is entitled to all the reliefs claimed.

The Defendants in response filed a 14 paragraphs counter-affidavit and filed a written address in support in which one issue was raised as arising for determination to wit:

“Whether the Claimant have placed anything enough for the court to grant this case.”

Submissions were made on the above issue which forms part of the Record of Court. The case made out is simply that the Defendants have no contractual relationship with Claimant and further that it has not placed clear and cogent materials putting the court in any position to grant any of the Reliefs claimed.

The Claimant on been served the Counter-affidavit filed a further and better affidavit of 19 paragraphs with 9 annexures attached and marked as **Exhibits**

web1-web9. A reply on points of law was filed which I will also carefully consider.

At the hearing, counsel on either side of the aisle relied on the processes filed. The Claimants counsel urged the court to resolve the questions in the affirmative and enter judgment for Claimant, while the defence counsel contends otherwise and prayed that the claims be dismissed.

I had earlier stated the issues formulated by the parties which even if framed differently but in substance they project the same question and that is whether the Claimant has proved that it is entitled to all the Reliefs claimed.

In the court's considered opinion, and in the light of the facts streamlined on the processes filed and the issues raised the case will be determined on the basis of the question **whether the Claimant has established the existence of a binding contract breached by the Defendants and accordingly entitled to the Reliefs claimed.**

I had equally because of the contested facts/issues streamlined in the voluminous processes filed raised the questions whether this is a matter that can fairly be resolved under the present legal conduit of originating summons utilised by the Claimant.

Counsel for the Claimant contended that the issue had earlier been raised and resolved but nonetheless submitted that the modality used to commence this action was in order. The Defendant argued to the contrary.

Now let me make some clarifications. It is true that when the Claimant initially commenced this action, it joined the Hon. Attorney General of the Federation as 3rd Defendant. The A.G's office filed a preliminary objection dated 6th May, 2022 contending amongst others, that he is not a necessary party with no link or nexus to the agreement parties may have entered into. In the course of the address on the issue, the learned A.G. made submissions on the fact that the case is hostile and one that cannot be determined by way of originating summons and they urged the court to order for pleadings. The Claimant in its response may have extensively addressed the court on the issue but it also contended that the point raised with respect to the mode of commencing the action is incompetent having not been raised as a specific grounds of the Complaint in the objection or the facts raised only in the affidavit in support of the objection. That since the issue was raised in the address, it is incompetent.

In my Ruling delivered on 22nd March, 2023, I held thus:

“...This then leads to the last issue of whether the case can be determined vide the originating summons. The 3rd Applicant contends that the cause of action involves disputed facts that can only be established by oral evidence while the claimant contends otherwise.

Before dealing with the substance of the issue, let me address the point made by claimant, that the issue is incompetent because it was not raised as a ground of complaint and facts were not disclosed in the affidavit to support the complaint. That the issue was only raised in the written address.

Now it is trite principle that where there is a point of law which if decided one way or the other will be decisive of the entire litigation, advantage ought to be taken of the facilities afforded by the Rules of Court or other statutory provisions to have it disposed of without delay. Preliminary objections are therefore raised where a defendant feels that on the face of the process filed, a suit is patently unsustainable in the sense that it does not meet some requirements of court or relevant statutes or that it is lacking in materials to sustain it and therefore incompetent.

The objection however has to be properly formulated situating the grounds and relevant provisions of the Rules or statute in question putting the adversary on notice of the nature of the objection. It is not a matter of hide and seek.

In this case, I have carefully gone through the grounds of the objection and the affidavit in support and nowhere was the issue that the case was wrongly commenced by originating summons raised as a defined ground of objection.

A preliminary objection just like a motion must contain clear defined reliefs sought. The objective of any motion or objection is targeted ultimately at the realization of these defined Reliefs. A court of law qua justice cannot determine a motion outside the context of the issues raised by the application and the Reliefs sought.

The issue of the wrong conduit for the presentation of this dispute was only raised in the address of Applicant but the address on the issue is completely disconnected from the issue raised in the motion and it is the issues raised in the objection that defines the issues in dispute, not the address.

The bottom line here is there is absolutely no Relief relating to alleged wrong use of the originating summons in this case in the preliminary objection. It is not a matter of form. It is much more fundamental as a court can only grant

a Relief properly claimed by the party seeking the Relief and then creditably established.

The flawed approach here is akin or analogous at trial to raising an issue outside the confines of the pleadings which has defined or streamlined the issues in dispute. A party is bound by his pleadings and cannot go outside it to lead evidence or rely on facts which are extraneous to those pleaded. See Kyari V Alkali (2001) 11 NWLR (pt.724) 412 at 433-434. The court is similarly bound by the pleadings and any matter not pleaded will have no bearing on the decision. See Balogun V Adejobi (1995) 2 NWLR (pt.376) 131 at 158 F.

As a logical corollary and by the same token, an issue or question not raised or defined in the motion or objection cannot have any bearing on the decision subject of that particular application, notwithstanding that parties addressed the issue. The address on this issue in this case has no foundation, which ought to be the point of law raised in the objection and must therefore collapse. You can't put something on nothing and expect it to stand is a well known legal truism. The address here again in the absence of any issue or ground to sustain it in the motion or preliminary objection is akin to leading evidence to support facts not pleaded. In such situation, the evidence led goes to no issue and will be abandoned.

In the absence of any issue or ground on the application situating a challenge or complaint against the mode of commencement of the present action, I hold that the address on it is incompetent and same is accordingly struck out.

On the whole, the preliminary objection only partially succeeds. Having found that the 3rd defendant has no business being a party to the instant case, its name is accordingly hereby struck out.”

The above is clear and therefore the question whether the cause of action and grievance encapsulated in the extant originating summons is one that is not hostile and thus cannot be determined *via* this conduit remains for me a life issue.

Now it is settled principle of general application that the originating summons is one of the modes by which a civil action may be commenced in the High Court. It is a merely a method of procedure and not one that is meant to enlarge the jurisdiction of the Court. See *Re King Mellor V. South Australian Land Mortgage & Agency Co.* (1907)1 Ch. 72 at 75- per Neville, J cited with approval in *National Bank of Nigeria V. Alakija & Anor* (1978) 9-10 SC 59 at 73- per

Eso, JSC. The Rules of this Court provide in **Order 2 Rule 3(2)** provides for the circumstances in which proceedings may be initiated by originating summons.

On the fundamental question of the propriety of initiating this action by originating summons, it is accepted that originating summons is strictly or specially situated for cases on determination of short questions of construction but not matters of such controversy that the justice of the case would demand the settling of pleadings, and should only be applicable in such circumstances as where there is no substantial dispute on questions of fact or the likelihood of such dispute. See **National Bank of Nigeria V. Alakija & Anor supra and Anatagu V. Anatagu (1997)9 NWLR (pt.519)49.**

It would seem that the emphasis is not on the existence of dispute per se since every case necessarily involves one dispute or the other, but whether there is a substantial dispute of fact relevant to the determination of the issue in controversy. See **Habib Nigeria Bank Limited V. Ochete (2001)FWLR (pt.54)384 at 406-407, Inakoju V. Adeleke (2007)AII FWLR (pt.353)3 at 202.** In **Ezeigwe V. Nwawulu (2010)AII FWLR (pt.518)794 at 838-839,** the Supreme Court (per Adekeye, JSC) stated the law succinctly as follows:

...The main advantage in simplicity resulting from the elimination of pleadings. The procedure of originating summons in meant to be invoked in a friendly action between parties who are substantially *ad idem* on the facts and who, without the need for pleadings, merely want, for example, a directive of the court on the point of law involved. The procedure is not meant to be invoked in a hostile action between parties and in which the parties concerned need know beforehand the issues which they are called upon to contend with from the pleadings. There can be disputed facts which originating summons procedure could resolve, but where the disputed facts are substantial, the proper mode of commencing such an action is by writ of summons so that pleadings can be filed. In order words, originating summons procedure is appropriate (only) where there is no substantial dispute of facts between the parties or likelihood of such dispute.

Against the backdrop of the foregoing, I have carefully gone through the depositions made on both sides together with the annexures and the relevant inquiry here is whether or not there is any substantial dispute on the facts making the proceeding potentially hostile that would necessitate exchange of pleadings.

Now in so far as can be evinced from the volume of facts situated in the affidavit in support and the further affidavit of Claimant together with the annexures, the fact

or combination of facts on which the Claimant has premised its right to sue is predicated on an agreement or MOU it said it had with Defendants vide **Exhibit H** to develop a localized and customized national crime reporting system.

The case of Claimant is that it carried out its commitments under the agreement and developed the system which it deployed across the 36 states of the Federation but that just at the programme was about to be launched, that it was suspended by the Defendants Force P.R.O, Mr. Frank Mba under the pretext that the “**system was a fraud, inoperable and non functional**” which was contrary to the feedbacks obtained at the live demonstration. The Claimant in the affidavits stated that efforts to meet with the 2nd Defendant failed as certain officials of the Nigeria Police essentially sabotaged the programme. Firstly, that all attempts to see the 2nd Defendant failed as certain officials demanded for financial and other gratifications before any meeting will be arranged. The Claimant also essentially projected that corrupt demands were made and because its corporate culture does not allow for corrupt practices, the programme was frustrated. The Claimant deposed that it expended huge material and financial resources in executing the terms of the MOU and accordingly claims reliefs earlier streamlined including:

1. Specific/special damages the sum of \$4,428.606.
2. Damages for loss of projected earnings. Total projected revenues for the first five(5) years-\$148,734,844.72.
3. ₦100,000,000,000 (One Hundred Billion Naira) general damages.
4. Exemplary and punitive damages in the sum of N150, 000,000,000 (One Hundred and Fifty Billion Naira).
5. N5,000,000(Five Million Naira) for legal fees and expenses.

The Defendant in their Counter-affidavit denied wholly these assertions contending that it did not have any such contractual relationship with Claimant who it contends is not entitled to any or all of the Reliefs claimed.

Generally in law, a contract is an agreement between two or more parties which creates reciprocal legal obligations to do or not to do a particular thing. To bring a contract to fruition where parties to the contract confer rights and liabilities on

themselves, there must be mutual consent and usually this finds expression in the twin principles of offer and acceptance. The offer is the expression of readiness to contract on terms as expressed by the offeror and which if accepted by offeree gives rise to a binding contract.

It should be pointed out clearly that the offer itself is not the contract in law but the taking of preliminary steps that may or may not ultimately crystallize into a contract where the parties eventually become ad-idem and where the offeree signifies a clear and unequivocal intention to accept the offer. See **Okubule Vs Oyegbola (1990)4 N.W.L.R (pt. 147) 723.**

Putting it more succinctly, the basic elements in the formation of a contract are:

1. The parties must have reached agreement (offer and acceptance)
2. They must intend to be legally bound, that is an intention to create legal relation.
3. The parties must have provided valuable consideration.
4. The parties must have legal capacity to contract.

Now it is stating obvious that where there is a valid legally binding contract or agreement, parties must be held bound by the agreement and by all its terms and conditions. There should be no room for departure from what is stated thereon. See **Jeric (Nig) Ltd V. U.B.N Plc (2000)15 N.W.L.R (pt.691)447.**

Indeed where the words of a contract or agreement are clear, the operative words in it should be given their simple and ordinary grammatical meaning. If parties enter into an agreement, they are bound by the terms. They cannot legally or properly read into the agreement, the terms on which parties have not agreed. See **Dalek Nig Ltd V. OMPADEC (2007)7 NWLR (pt.1033)441 A-B.**

Now the pivot of the case of Claimant is the **MOU** in this case. This **MOU** forming the very basis of relationship and the pivot of this case was attached as **Exhibit H**. The court clearly in the context of the demands made by Claimant has to make an inquiry or inquire into the nature of the document to discover what it is meant to achieve. Is it really a clear concluded agreement or is it evidence of a past or future transaction situating that some other transaction has taken place or will take place or that some other things have to be done to situate a proper legal agreement or contract? Unfortunately in this case, the **MOU** is unclear and that is being charitable.

I have tried to make sense out of what is in the MOU and to decipher its essence and it is a difficult, if not impossible task. What was attached as the agreement between parties situates on insurmountable challenge of denoting the terms and or what it really intends to achieve. There is no clarity with respect to the obligations of parties; the tenure of the agreement if any, the consideration amongst others.

There is therefore absolutely no clarity as to what the MOU projects. A document such as **Exhibit H** which ordinarily should serve as a basis for the mutual reciprocity of legal obligations between parties must be clear in its objectives. The question of whether or not parties have agreed to confer rights and impose liabilities on themselves cannot be a matter for speculation or guess work or even the address of counsel no matter how beautifully written and articulated. That question is one of whether the mutual assent between them which must be outwardly manifested can be situated within the evidence. Indeed the test of existence of mutuality is objective and where there is such mutuality, the parties are then said to be *ad-idem*. In the absence of mutuality, then there is no consensus *ad-idem* and therefore any claim or pretention to the existence of a contract in such circumstances is compromised. See **Bilante Int Ltd V NDIC (2011)15 NWLR (pt.1270)407 at 423 C-F**.

In addition, in law a person seeking the enforcement of a contract must show that all the conditions precedent thereto have been fulfilled and that he has either performed his part or is ready and willing to perform all the terms which ought to have been performed by him. See **FGN V. Zebra Energy Ltd (2002)3 NWLR (pt.754)471 at 491-492F-H**

The point is that in the present fluid and unclear narrative or facts, there is nothing to situate what parties may have agreed to or not; what was actually executed on ground; what consideration, if any parties agreed will cover the contract etc. These are matters that would require pleadings and evidence at trial. I am not sure the determination of the question of a binding contract and indeed the questions posed by this action can be done on the basis of speculations or the making of inferences on unclear facts.

A court cannot decide issues on speculation no matter how close what it relies on may seem to be to the facts. Speculation is not an aspect of inference that may be drawn from facts that are laid before the court. Inference is a reasonable deduction from facts whereas speculation is a mere variant of imaginative guess which even when it appears plausible should never be allowed by a court to fill any hiatus in

the evidence before it. See **Overseas Const Co Ltd V. Greek Ent. (1985)3 NWLR (pt.13)409**

The bottom line is that a court cannot draw inference in a vacuum but in relation to facts which justify such inference and any findings, particularly of facts which is made having regards to the existence of documentary evidence such as the extant MOU, cannot be seen to fly in the face of what is in the document. If it is, it will be contradictory and perverse. The MOU in this case unfortunately does not clearly situate the claims made.

In addition, the Claimant has equally made or raised serious allegations of **criminal infractions** against officials of Defendants and alluding to corrupt practices as reasons for the collapse of the programme. Again serious allegations of this nature cannot be determined vide instrument of affidavits that have been challenged or controverted. Criminal allegations by virtue of **Section 135(1) of the Evidence Act** must be proved beyond reasonable doubt. That is the settled standard of proof. The humongous amounts claimed as damages for example specific and special damages in the sum of \$41,428.606; damages for loss of projected earnings in the sum of \$148,734,844.720; exemplary and punitive damage in the sum of N150,000,000,000 are not matters that can readily be decided on affidavit evidence especially in the context of contested assertions as in this case.

Let me explain further using some of the reliefs as a case in point.

On the authorities, special damages have been defined as damages of the type as the law will not infer from the nature of the act; they do not flow in the ordinary course; they are exceptional in their character and therefore, they must be claimed specially and strictly proved. See **A.T.E. Co. Ltd V M.L. Gov. Ogun State (2009) 15 N.W.L.R (pt.1163) 26 at 71; Ekennia V Nkpakara & 2 ors (1997) 5 SCNJ 70 at 90.**

The Apex Court in **X.S (Nig.) Ltd. Vs. Tasei (W.A) Ltd. (2006)15 N.W.L.R. (pt.1003) 533 at 552 B-E; 552 E-G** Mohammed J.S.C. stated as follows:

“With regard to how to plead and prove special damages, the law is quite clear that special damages must be specifically pleaded and proved strictly...In this respect, a plaintiff claiming special damages has an obligation to plead and particularise any item of damage. The obligation to particularise arises not because the nature of the loss is necessarily unusual, but because the plaintiff who has the advantage of being able to base his

claim on a precise calculation must give the defendant access to the facts which make such calculation possible”

Also in **Neka BBB Manufacturing Co. Ltd V A.C.B. LTD (2004) 2 NWLR (pt.858) 521** the Apex Court stated thus:

“A damage is special in the sence that it is easily discernable. It should not rest on a puerile conception or notion which would give rise to speculation, approximation or estimate or such like fractions.”

Also in **Kalu V. Mbako (1988)3 NWLR (pt.80)86**, it was held that loss of earnings is equally a matter which falls in the realm of special damages which must be averred and strictly proved.

In this case, it is difficult on the basis of the affidavits to situate where these particularizations of any item of damage(s) was done. The Claimant who had the advantage of being able to base his claim on a precise calculation must give the Defendant access to the facts which makes such calculation possible.

Even if it is argued that the projections and anticipated profits meets the requirements of the particularization, the next hurdle is that of strict proof. Now in law, strict proof does not mean an unusual proof; it however implies that sufficient facts must be furnished to allow for computation of the claim. In **Neka BBB Manufacturing Co. Ltd V ACB Ltd (supra)**, the Supreme Court per Pats-Acholonu JSC (of blessed memory) stated thus:

“The term “strict proof” required in special damages means no more than the evidence must show the same particularity as it is necessary for its pleading. It should therefore normally consist of evidence of particulars losses which are exactly known as accurately measured before trial. Strict proof does not mean unusual proof... but simply implies that a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.”

The bottom line is that these reliefs for damages are predicated more or **“projections” and “anticipated”** profits and in such very fluid situation, it is difficult if not impossible to assess and quantify special damages except of course the courts decide to engage in a dangerous exercise of speculating on the basis of really unclear and contested assertions in affidavits.

Furthermore in the absence of a clear finding for breach of contract, the other damages prayed for general, exemplary and punitive damages cannot equally be

fairly addressed and dealt with. It is clear that this case at different levels suffers from evidentiary challenges that cannot be resolved on the basis of affidavit evidence.

Parties may have had a relationship of sorts but there is really no template to situate an enforceable contract entered into by Claimant and Defendant on the basis of the challenged or contested facts contained in the affidavits filed on both sides of the divide.

In **AG Rivers State V. Akwa Ibom State (2011)8 N.W.L.R (pt.1248)3 at 49, Katsina Alu C.J.N** (of blessed memory) stated as follows:

“It is the duty of the trial Court to determine whether there is a binding contract between parties and this is done by considering the evidence led. The documentary evidence tendered and accepted by the court and the oral testimony in line with pleaded facts. The terms of a written contract on the other hand are easily ascertained from the written agreement. The traditional view is to look for offer, acceptance and consideration. In the absence of any of them, there is no valid contract. Although that is not always the case. Valid contracts can exist in the absence of offer, acceptance and consideration such as in settlement contracts. The overriding consideration in determining if there is a binding contract between the parties is to see whether there was a meeting of the minds between the parties, that is, consensus *ad-idem*. In all cases of contracts, there must be consensus *ad-idem*.

The point flowing from the above decision is the critical role of evidence as a fundamental basis for any decision relating to the existence and the precise parameters and application of any contractual relationship.

The affidavit evidence here unfortunately did not provide or put the court in a commanding height to resolve the questions raised by the extant action.

The law has always been that once a court recognizes that a case cannot be fairly determined on the basis of affidavit evidence as in this case, rather than to peremptorily dismiss the case, it shall order for parties to file their pleadings.

Even if the case was filed by way of a writ of summons, in recognition of the fact that parties had some sort of relationship which at best is unclear, the court would have not dismissed the case but instead will make an order for non-suit in the interest of justice.

On the whole, as I have demonstrated at some length, the right and proper course of action to take is to transfer the case to the **General Cause List** and order for parties to file their pleadings in compliance with the Rules of Court to properly then ventilate their grievances. I so order.

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Hon. Justice A.I Kutigi

Appearances:

- 1. Hezekiah Ivoke, Esq., with S.L Abia, Esq., for the Claimant**
- 2. Rimasanten Ezekiel, Esq., for the Defendants.**