IN THE HIGH COURT OF THE FEDERALCAPITALTERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI, ABUJA.

THIS THURSDAY THE 16TH DAY OF JANUARY, 2025.

BEFORE: HON. JUSTICE ABUBAKAR ADRIS KUTIGI - JUDGE

SUIT NO: FCT/HC/CV/165/2024

FCT/HC/GAR/M/535/2024

BETWEEN:

ZIKONI INTEGRATED SERVICES LTD …….. CLAIMANT

AND

1. POWERUP PROJECT INT'L LTD
2. SUNDAY SIMON **…… DEFENDANTS**

JUDGMENT

The Claimant's Reliefs as contained in the Writ of Summons and Statement of Claim dated 12th February, 2024 and filed same date in the Court Registry are as follows:

i. **AN ORDER of this Honourable Court mandating the Defendants to jointly and severally pay to the Claimant, the sum of N12, 000,000.00 (Twelve Million Naira) only being a friendly interest-free loan given to the 2nd Defendant by the 1st Claimant and Guaranteed by the 1st Defendant.**

ii. **AN ORDER mandating the Defendants to jointly and severally pay the Claimant the sum of N64, 800,000.00 (Sixty Million Eight Hundred Thousand Naira) only being the default charges of 3% on the**

outstanding sum of N12, 000,000.00 (Twelve Million Naira) from the 29th day of September 2023 to the 10th day of February 2024.

iii. **AN ORDER mandating the Defendants to jointly and severally pay to the Claimant the sum of N360,000.00 (Three Hundred and sixty Thousand Naira) only every day from the 11th day of February, 2024 as contained in clause 5 of the tripartite agreement dated 28th September, 2023 until judgment is delivered in this suit.**

iv. **AN ORDER directing the Defendants jointly and severally to pay to the Claimant, the sum of #6,000,000.00 (Six Million Naira) for legal fees and costs as contained in clause 6 in the legal agreement between both parties.**

v. **The sum of #10,000,000.00 (Ten Million Naira) only as General damages against the Defendants for breach of Contract.**

vi. **10% (Ten Percent) interest per annum on the judgment sum until the final liquidation.**

The Defendants were duly served with the originating court processes but they never filed a response or appeared in court all through the proceedings.

The Claimant also filed a Motion on Notice for summary judgment pursuant to the provisions of **Order 11 Rule 1 of the Rules of Court** and prayed for the following Reliefs:

1. **AN ORDER of this Honourable Court entering Summary Judgment as per the relief(s) contained on the face of the Writ of Summons.**

2. **AND FOR SUCH other Order(s) that this Honourable Court may deem fit to grant in this circumstance.**

The grounds upon which the application is predicated are as follows:

i. **That the Defendants are indebted to the Claimants by virtue of a mutual agreement.**

ii. **That the 2nd defendant guaranteed to repay the friendly loan together with the 1st Defendant.**

iii. **That up till now the defendants have not repaid the loan given to them by the Claimant despite all the demands.**

iv. **That the rules of this court empower this Court to enter summary judgment in this instance case.**

v. **That it will be in the interest of justice to grant this Application.**

In support of the application is a 22-paragraphs affidavit deposed to by one Okani Emmanuel, of Plot 28, Oka Akoka Street, Garki 11, F.C.T. Abuja. The affidavit is dated 12th February, 2024 and filed same date in the Court Registry. Annexed to the affidavit are four (4) exhibits, marked as A – D. They are:

Exhibit A: Legal Agreement between the parties

Exhibit B: Legal Invoice

Exhibit C: Demand Letter.

Exhibit D: Certificate of Compliance

A brief written address was filed in support of the application in which one issue was raised as arising for determination to wit:

Whether this Honourable Court can grant this application having regards to the facts and evidence before it?

The substance and gist of submissions made which forms part of the Record of Court is that the claimant has fulfilled all requirements, both on the facts and the law to entitle claimant to the grant of all the Reliefs prayed for. The provision of Order 11 Rule 1 of the Rules of Court was referred to and the case of **Matab Oil and Gas Ltd & Anor V Fundquest Financial Services Ltd & 1 Anor (2020) 31 WRN 143 at 157 and Peter Onyeachonam Obanye V UBN PLC 4 WRN 50** were cited.

The defendants on the record were equally served with the application, but they again did not file any reaction.

At the hearing, counsel to the claimant relied on the paragraphs of the supporting affidavit and the annexures, and adopted the submissions in the written address in urging the court to grant the application and enter summary judgment in favour of claimant. Counsel however withdrew **Relief V**, the claim on general damages in the course of making submissions and it was accordingly struck out.

From the writ of summons, statement of claim, and the application for summary judgment, the facts on which the case is based on can be situated in clear specific terms as follows:

1. That sometime in August 2023, the Defendants approached the Claimant for an interest-free and friendly loan of ₦12,000,000.00 (Twelve Million Naira) to meet pressing personal needs and for the execution of a contract awarded to the Defendants.

2. That the Defendants/Respondents agreed to all the terms of the Contract and the **Agreement** was reduced into writing by the parties and mutually executed. This agreement was annexed as **Exhibit A**.

3. That after the agreement was executed by the parties and the 1st Defendant agreed to guarantee that the 2nd Defendant would return the entire funds of N12, 000, 000 (Twelve Million Naira) on the due date and to be personally liable on the failure of the 2nd Defendant to pay back the entire sum, the Claimant disbursed an interest-free loan of **N12, 000, 000 (Twelve Million Naira)** only to the 2nd Defendant and same was guaranteed by the 1st Defendant in line with the legal Agreement of the parties.

4. That the Defendants agreed to be jointly and severally bound by the agreement and to pay back the entire sum of **N12, 000, 000 (Twelve Million Naira)** only and the **default charges** in the event of their failure to meet up with the repayment terms.

5. That the Defendants agreed with the Claimants by **clause 5** of the Legal Agreement, that on default of returning the entire sum, the Defendants shall

pay 3% every day on the outstanding balance to the Claimant as default charges from the 29/9/2023 until the final liquidation of the outstanding sum.

6. That on the due date, the Defendants failed and refused to pay the outstanding sum borrowed to the Claimant.

7. That the Managing Director of claimant contacted the Defendants and pleaded for the Defendants to pay back and the Defendants refused and neglected to pay back their indebtedness up till this moment.

8. That the 3% as default fees which the Claimant is entitled to by the mutual agreement of parties on the outstanding sum every day from the 29th day of September 2023 is the sum of #360, 000.00 (Three Hundred and Sixty Thousand Naira) only.

9. That the Defendants as of the 10th day of February 2024 have defaulted for a total of 180 (One Hundred and Eighty) days amounting to the sum of N64,800, 000 (Sixty Million, Eight Hundred Thousand Naira) only which the Claimants are entitled to from the Defendants as default fees.

10. That the failure and refusal of the Defendants to pay back the sum loaned has caused loss and severe damages to the business of the Claimant.

11. That the defendants also agreed to pay the sum of **#6, 000, 000.00 (Six Million Naira)** to indemnify the claimant for all costs, expenses, legal fees incurred as a result of the failure of the defendants to pay back the loan on due date and that this clause was to be activated once the claimant takes any legal steps whatsoever to recover the outstanding sum not paid. The receipt issued by claimant to his solicitors for the prosecution of this case was annexed as **Exhibit B**.

12. That the claimant wrote letters of Demand vide **Exhibits C-E** which the defendants did not positively respond to.

The above as stated earlier are the facts situating the case of claimant. The issue here is whether on the basis of these facts and the law, the claimant is entitled to the Reliefs claimed.

Before dealing with these uncontested facts, let me briefly situate the purpose of a summary judgment procedure.

The summary judgment procedure is designed to enable a party obtain judgment especially in liquidated cases without the need for a full trial where the other party cannot satisfy the court that he should be allowed to defend the action. See **Grand Systems Petroleum Ltd V Access Bank Plc (2015) 3 NWLR (pt.1446) p.317.**

The procedure allows for disposing with dispatch cases which are virtually uncontested. It also applies to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment and where it is inexpedient to allow a defendant to defend for the mere purpose of delay. It is for the plain and straight forward, not for the devious and crafty. See **Woodgrant Ltd V Skye Bank Plc (2011) 12 NWLR p.61.** See **also UBA V Jargaba (2007) 11 NWLR (pt.1047) 247.**

Now, the essential facts of this case highlighted in detail above situating the thrust of the **agreement** between parties remain unchallenged or contradicted and thus are deemed to be correct. See **Kotoye V Saraki (1993) 5 NWLR (pt.296) 710 at 723 par. 4.** Indeed an adversary such as defendants have a duty to controvert fails in an affidavit, otherwise it is regarded as established. See **Long John V Blakk (1998) 6 NWLR (pt.555) 524 at 547 H.**

Therefore where as in this case, the defendants have chosen or elected not to controvert the affidavit of claimant situating the terms they agree will situate their relationship, the court is bound to accept those facts as established and as facts deemed to have been admitted. Those facts must be taken as true by the court unless they are obviously false to the knowledge of the court. See **Honda Place V Globe Motor Holdings Nig. Ltd (2005) 14 NWLR (pt.945) 273 at 289-294**. There is nothing before the court to situate the falsity of these undenied depositions contained in the affidavit particularly with respect to the agreement parties executed.

The bottom line is that there is absolutely no dispute that the 2nd defendant by **Exhibit A** was indeed granted a friendly loan of **N12, 000, 000** by claimant. The agreement situates that **2nd defendant is the borrower** while 1st defendant

served as a **guarantor**. The agreement situates clearly the tenor of the loan and or when the loan was to be repaid; the agreement also contained terms for 3% default payment daily on the outstanding balance from day of default to final liquidation and payment of **N6, 000, 000** for all cost, expenses and legal fees incurred as a result of failure to pay back the loan on the due date. The defendants did not live up to their commitments and by **Exhibit C**, the claimant wrote a demand letter to 1st defendant which guaranteed the facility. Also by letter dated 7th November, 2023 forming part of the documents frontloaded with the writ of summons and statement of claim, the claimant also wrote the 2nd defendant for payment of the loan facility. The defendants did not respond to these demand letters. The claimant vide **Exhibit B** had to brief their lawyers to take action against defendants to recover the debt and incurred legal expenses in the process.

Now generally a contract such as **Exhibit A** situating these clear terms voluntarily entered into by parties are binding on them and a court will not sanction an unwarranted departure unless they have been lawfully abrogated or discharged. See **FGN V. Zebra Energy Ltd (2002) 3 NWLR (pt.754) 471 at 491 E-F**.

Let me equally make the point that since the agreement of parties situates that the 1st claimant **guaranteed the debt**, it follows that once a debt has been guaranteed, and the original debtor fails to pay, the guarantor becomes a debtor and the creditor can proceed against either the original debtor or the surety or both of them. The creditor may equally decide to proceed against only the guarantor independent of the principal debtor. Once a principal debtor fails to pay his debt, the liability of the guarantor crystallizes. See **I.T.B. Plc V Okoye (2021) 11 NWLR (pt.1786) 163 at 194; Chami V UBA Plc (2010) 6 NWLR (pt.1191) 474 at 501; Skye Bank (Nig) Plc V Sept Invest. Ltd (2017) 13 NWLR (pt.1581) 62 at 96 D-F.**

Indeed the law is settled that where a principal debtor and surety are both sued jointly in respect of the debt of the principal debtor, they remain principal and surety to be liable solely or jointly with any other person, firm or company. Where a principal debtor and surety are sued severally for the debt, each stand as principal debtor liable to pay, in which case each party shall be entitled to a

formal demand for payment before any action can commence to enforce payment of the debt. See **A.I.B Ltd V L.D.S. Ltd (2012) 17 NWLR (pt.1328) 1 (SC).** I leave it at that.

Now as stated earlier, where there is a valid agreement as in this case, parties must be held bound by the agreement and by all the terms and conditions. There should be no room for departure from what is stated thereon. **Jeric (Nig) Ltd V UBN Plc (2000) 15 NWLR (pt.691) 447.**

Flowing from the above, the defendants are bound by this agreement vide **Exhibit A** and the terms contained therein which situated the factual and legal basis for the Reliefs claimed. The wordings of **Exhibit A** therefore serves as the basis for the mutual reciprocity of legal obligations between parties and since they are clear and unambiguous, the operative words in it ordinarily should be given their simple and ordinary grammatical meaning. It is not the business of the court to make a contract for parties before it or to write one already made by them, neither can the court legally or properly read into the agreement, the terms on which parties have not agreed. See **Dalek Nig. Ltd V O.M.P.A.D.C (Ompadec) (2007) 7 NWLR (pt.1033) 441 A.B.**

In law where there is a disagreement with respect to a written agreement on any point, the authoritative and legal source of information for the purpose of resolving the disagreement or dispute is the written agreement. See **132 (1) of the Evidence Act**. Indeed where a contract specifically provides for liability in the case of a breach as in **Exhibit A**, the court will not go outside the contract in search of more palatable terms for one of the parties, to the detriment of the other. The court cannot go outside a written document in search of the intention of parties. See **Nneji V Zakhem con (Nig.) Ltd (2006) 12 NWLR (pt.994) 297 at 319-320 G-A.**

On the basis of the clear uncontroverted and unchallenged factual evidence before the court, the claimant is entitled to judgment in the sum of **N12, 000, 000** only being the amount owed by 2nd defendant to the claimant and guaranteed by 1st defendant. **Relief (i)** succeeds and is granted and ordered as prayed.

Now with respect to **Reliefs (ii) and (iii),** the claimant relied on the agreement of parties vide **Exhibit A**, particularly **clause 5**, which states as follows:

"The borrower and the Guarantor shall on failure to return the entire sum borrowed from the lender, pay 3% (three percent) everyday on any outstanding balance from 29th day of September, 2023 until the final liquidation of the outstanding sum."

In support vide **paragraphs 10**, **13** and **14,** the Applicant stated thus:

"10. That the Defendants agreed with the Claimants by clause 5 of the Legal Agreement, that on default of returning the entire sum, the Defendant shall pay 3% of the outstanding sum to the Claimant as default charges.

13. That the 3% on default which the Claimant is entitled to by the mutual agreement of parties on the outstanding sum as agreed by the parties every day from the 29th day of September 2023 is the sum of N360, 000.00 (Three Hundred and Sixty Thousand Naira) only.

14. That the Defendants as of the 10th day of February, 2024 have defaulted for a total of 180 (One Hundred and Eighty day) amounting to the sum of N64, 800, 000 (Sixty Four Million, Eight Hundred Thousand Naira) only which the Claimants are entitled to from the Defendants."

Despite the above unchallenged averments, these set of reliefs vide **Reliefs (ii)** and **(iii)**, described as default fees. I must confess here gave me some considerable difficulties and for obvious reasons too.

I had earlier situated the clear principle that courts do not make it a habit to rewrite contract for parties and that they are bound by the terms of the agreement they freely entered into. I had also situated the principle that where parties have agreed on the question of liability, they are equally bound by the terms situating this liability. If that is the situation, then ordinarily there should not be any problem granting these reliefs. The difficulty here is reconciling these principles with the justice of the **default clause** which has transformed a debt of **12 Million** into a very fluid and humongous amount of **N64, 800, 000 (Sixty Four Million, Eight Hundred Thousand Naira)** as at **10th February,**

2024 and which on the basis of the default clause of the agreement continually increases daily with the sum of **N360, 000 (Three Hundred and Sixty Thousand Naira)** until the indebtedness is fully paid.

Now in course of working on this judgment and because of this expressed concerns, I caused parties to address me on the enforceability of the clause on which **Reliefs (ii)** and **(iii)** were predicated.

Again, it was only the claimant's counsel who respondedand filed its address dated 4th December, 2024 which counsel further adopted in addressing the court on 9th December, 2024. The address raised one issue as arising for determination to wit:

"Whether clause 5 of the legal agreement between the parties upon which Reliefs 2 and 3 are predicated is enforceable in law?"

Submissions were made in support and the above question was answered in the positive. It was submitted that the obligations of parties to a contract are determined by the terms freely agreed upon by the parties. And that they are bound by the terms, particularly where there is no vitiating element as in this case. The case of **Olanrewaju Comm. Service Ltd V Sogaulu (2015) 12 NWLR (pt.1473) 31** was cited. It was submitted that the wordings of clause 5 of the agreement are clear and represents the agreement of parties devoid of any vitiating element and thus enforceable.

I have carefully considered the further submissions made and the authorities referred to. The submissions, as I see it, only reinforces the general principles on the binding nature of contract which I had already addressed in some detail. I need not repeat the submissions.

It is important that I make some prefatory remarks as I deal with the important point.

Now a debt is a definite sum of money which the defendant, under the terms of the contract, is due to pay to the claimant, as in the extant case. It is therefore distinct from a claim of damages. The principal claim here on the basis of the materials is to recover the money given out in the sum of **12 Million**. This type of action enjoys certain procedural advantages, for example the ability to obtain

summary judgment under Order 11 of the Rules of Court. There is no problem with this.

In this case, in the agreement as highlighted already, the **debtor/creditor relationship** between parties was prepared with a **default** clause under clause 5 (supra). It is this clause that provides the basis for the claim or the Reliefs under **(ii) and (iii)**. This type of clause I must concede clearly helps eliminates uncertainty because parties know well in advance the extent of their potential liability.

However, the courts have in limited situations, retained the jurisdiction to control the content of such clauses. I concede that the existence and scope of the remit of this jurisdiction is not free from debate but it exist and this has backing from the highest court in the land. In **Maja V Samouris (2002) F.W.L.R (pt.98) 81**, the Supreme Court, per Iguh JSC stated thus:

"A liquidated demand is a debt or other specific sum of money usually due and payable and its amount must be already ascertained or capable of being ascertained as a mere matter of arithmetic without any or further investigation. Whenever therefore, the amount to which a plaintiff is entitled can be ascertained by calculation or fixed by any scale of charges or any positive data, it is said to be "liquidated'' or made clear. Again, where the parties to a contract, as part of the agreement between them, fix the amount payable on the default of one of them or in the event of breach by way of damages, such sum is classified as liquidated damages where it is in the nature of a genuine pre-estimate of the damage which would arise from breach of contract so long as the agreement is not obnoxious as to constitute a "penalty'' and it is payable by the party in default.

The above discerning dictum is instructive.

The courts have always drawn a distinction between a **liquidated damages clause** (which was enforceable and fixed, the sum payable in the event of breach) and a **penalty** clause (which was not enforceable with the consequence that the party seeking damages was relegated to a claim for damages in which it has to prove its loss in the usual way).

A **liquidated damages clause** was defined for this purpose as a genuine or reasonable pre-estimate of the loss likely to be occasioned by the breach. See **Dunlup Pneumatic Tyre Co. Ltd V New Garage & Motor Co. Ltd (1915) AC 79**. A **penalty clause** on the other hand, was a term designed to **punish the party in breach** rather than compensate the innocent party for its loss. While a penalty clause will not be struck out of the contact, it would not be enforced by the court beyond the actual loss of the party seeking to rely on the clause. See **Johson V Johnson (1989) 1 All ER 621.**

The distinction between a **liquidated damages clause** and a **penalty clause** rested ultimately on the intention of parties at the time of the entry into the contract and was a question of substance, not form, so that the fact that parties may have described the clause as a "liquidated damages clause" or a "penalty clause" was a relevant factor but not conclusive as to the status of the clause.

The courts over time have developed some rules of construction in deciding whether a particular clause was a **penalty clause** or **liquidated damages clause**. In the very old case of **Dunlop Pneumatic Tyre Ltd V New Garage & Motor Co. Ltd (supra),** the rules set out in the case is that a clause will be held to be a penalty clause:

1. **If the sum stipulated for, is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach or;**

2. **If the breach consists only in not paying a sum of money and the sum stipulated is a sum greater than the sum which ought to have been paid and;**

3. **A presumption (but no more) that a clause is a penalty clause when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others trifling damage.**

In the more recent case of **Lavendish Square holding B.V. V Talal El Makdessi and Parking Eye Ltd V Beavis (2015) UKSC 67 (2016) AC 1172**, the Supreme Court stated that instead of asking whether the clause in dispute is

a liquidated damages clause or a penalty clause, the real question to be asked is whether the agreed damages clause "is penal", and not whether it is a "pre estimate of loss."

The court held and defined a penalty clause **"as a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation"**

Where a contract exhibits these feautures of **a penalty clause** as situated above, it will not be enforced. Therefore, while the courts recognize the latitude and freedom parties have to agree and set level of damages payable in respect of a breach, the courts have extant jurisdictional powers to oversee and oversight these clauses that are on the facts, wholly disproportionate and unconscionable and where a contracting party overstep the limit and seeks to impose an obligation to make a payment which is exorbitant in comparison with its own legitimate interest or loss.

I am in no doubt that **clause 5** in **Exhibit A** which imposes an obligation of 3% per day on the indebtedness on failure to pay the loan or debt is a **penalty clause**.

I agree in principle with the proposition that default of payment of agreed sum in a transaction such as this should be able to attract some form of penalty, but the penalty must be reasonable and in proportion to the fair interest of the innocent party in the enforcement of the primary obligation. I consider the penalty in this case unconscionable in comparison to the greatest loss that the claimant could conceivably be said to have followed the breach or failure to pay the indebtedness. The detriment imposed by the claimant on the contract breaches on the defendants are indeed completely out of proportion to any legitimate interest of the claimant in the enforcement of the primary obligation.

I find further support for this position in the case of **Oyeneyin V Akinkugbe 4 NWLR (2010) pt.1184, 265 SC**, where the Supreme Court held that the clause which provided that the tenant pay the sum of N100 per day as default fee where his annual rent was 1000 per annum is unfair and therefore unenforceable. Notably the court in delivering its judgment held as follows:

"Penalty clauses are generally unenforceable, particularly when clauses of the nature are designed to terrorise or frighten the party into performance, for example a contract may provide that the promissory is to pay N5 on a certain event but if he fails to do so he must then pay N500. A clause of that kind is called a penalty clause by lawyers. For several years, it has been the law that such promises can't be enforced on the ground that it is unfair and unconscionable to enforce such classes which are designed to terrorise."

I say no more. **Reliefs (ii)** and **(iii)** are thus not availing.

With respect to **Relief (iv)** for legal fees and costs, the claimants again relied on the agreement **Exhibit A** particularly **clause 6** which situates as follows:

"The Borrower and the Guarantor, undertake to indemnify the Lender for all costs, expenses, legal fees incurred as a result of the failure of the Borrower and the Guarantor to pay back the interest free loan on or before 28th day of September, 2023 which legal fee shall be fixed mutually by parties at N6, 000, 000.00 (Six Million Naira) only, which shall be activated immediately once the lender takes any legal step(s) whatsoever to recover the outstanding sum not paid."

Flowing from the above, the claimant in paragraph 17 of the affidavit in support averred thus:

"That Claimant agreed to pay the sum of N6, 000, 000.00 (Six Million Naira) only to our Solicitors to bring a criminal and civil prosecution against the Defendants in respect of this case. The receipt issued to the claimant for the prosecution of this case by the law chambers of Storm Brakes Solicitors is attached and marked as Exhibit B."

Again this averment flowing from the agreement of parties situates the amount of legal fees which the defendants undertook to indemnify the claimant if they failed to pay back the loan as at 28th September, 2023 and it was also agreed by parties that the clause shall be activated immediately once the lender takes step(s) whatsoever to recover the outstanding sum not paid.

This extant action is conceivably one such step activating clause 6. **Exhibit B** attached to the application shows the amount paid by claimant to take legal steps to recover the indebtedness. This averment also stands uncontroverted.

This relief again, I must confess is one in which on the authorities, there is still no clarity with respect to its availability. The claim for solicitors fees is in the nature of special damages, but what is the jurisprudence on this type of Relief.

I had course to address this issue in the unreported case of **Suit No. HC/CV/1499/14 – Between: Mr. Ibrahim Mohammed & 1 Anor and Minister FCT and 2 ors** delivered on 17th December, 2020. I prefer to repeat what I stated therein as follows:

"Let me however state that in law, costs are no more than an indemnity to the successful party to the extent that he is justly damnified for costs reasonably incurred in the ordinary course of the suit or matter having regard to its nature but not to any extra-ordinary or unusual expenses incurred arising from rank, position or wealth or character of either of the parties or any special desire on his part to ensure success. See generally the book **Civil Procedure in Nigeria (2nd Edition) by Fidelis Nwadialo at pages 752-753**. Indeed the learned author in the same book at **page 753** posited and referred to a decision in **Smith Vs Butler (1875) LR 19Eq.475** where it was held that any charges merely for conducting litigation more conveniently may be called luxuries and must be paid by the party incurring them.

I now come to the question of whether a claim for solicitors fees is one that can be granted under the present state of Nigerian Law. In **Guinness Nigeria Plc V Nwoke (2000) NWLR (pt.689) 135 at 150**, the Court of Appeal held unequivocally that a claim for solicitors fees is outlandish and should not be allowed as it did not arise as a result of damage suffered in the course of any transaction between parties. After this decision, there are however now a plethora of cases from the Court of Appeal which appear to have adopted a clear radical position contrary to that espoused in the **Nwoke** case. These later decisions postulates or recognises that a claim for solicitors fees forms part of Nigerian Legal Jurisprudence and where established can be granted. See the cases of **International Offshore Construction Ltd & ors V Shoreline**

Liftboats Nig. Ltd (2003) 16 NWLR (pt.845) 157; Divine Ideas Ltd V Umoru (2007) All FWLR (pt.380) 1468, Lonestar Security Ltd (2011) LPELR – 4437 (CA).

It appears to me apposite here to specifically refer to the case of **Naude V Simon (2014) All FWLR (pt.75) 1878**, where the Court of Appeal made these interesting pronouncements when endorsing the point that a claim for solicitors fees is in the realm of special damages and is cognisable under Nigerian Law. In the said case, one of the issues submitted to the court for determination, was whether the trial court was right in awarding costs of charges incurred by the Respondent in the prosecution of its case against the appellants. In determining this issue in the affirmative, the Court of Appeal considered the earlier cases that held that a claim for solicitor's fees are unethical and unrecoverable and held that they do not represent the current position of the law. The Court per **Akomolafe-Wilson JCA at pp. 1904-1906H-H** stated as follows:

"The authorities cited by the appellants' counsel in my view have been overtaken by more recent authorities that permit the payment of solicitor's fees as expenses for litigation in Nigeria. The principle of law is that a successful party is entitled to be indemnified for costs of litigation which includes charges incurred by the parties in the prosecution of their cases. It is akin to claim for special damages. Once the solicitor's fee is pleaded and the amount is not unreasonable and it is provable, usually by receipts, such a claim can be maintainable in favour of the claimant… Having regard to the above recent cases, it is no more in doubt that damages for cost, which includes solicitor's fees and out of pocket expenses, if reasonably incurred are usually paid by courts if properly pleaded and proved. In short, the decision of this honourable court in the cited cases Ihekwoaba V ACB Ltd and Guinness (Nig.) Plc V Nwoke, where this court held that the payment of solicitor's fees as damages is not supported in this country does not represent the present state of mind of the courts in this country. In more recent times, it is common for solicitors to include their fees for prosecution of cases and pass same to the other party as part of claims for damages, which have been awarded by the courts once the claims are proved."

I had specifically referred to this very clear pronouncement for the important reason that it specifically referred to the Court of Appeal cases of **Nwoke (supra)** and that of **Ihekwoaba V ACB Ltd (1998) 10 NWLR (pt.571) 590** which is in agreement with the decision in **Nwoke** and her lordship Akomolafe-Wilson J.C.A stated that these cases do not **"represent the present state of the mind of the courts in this country."**

The cases unfortunately "**on the present state of the minds of court with respect to claim for solicitors fees"** may not with the greatest respect be availing in view of the pronouncement of the Apex Court which affirmed the position in **Ihekwoaba's case (supra)** on the impropriety of a claim for solicitors fees. In **Nwanji V Coastal Services Ltd (2004) 36 WRN 1 at 14-15**, His noble Lordship Samson Odenwigie Uwaifor JSC expounded the law on this point in the following graphic and instructive terms:

> ***"There is the award of N20,000.00 as professional fees allegedly paid by the respondent in respect of Fougerolle's case. It was fees said to have been paid by the Respondent to defend a suit brought against it by Fougerolle in regard to non-delivery of the goods in question. I can find no basis for this award… Secondly, it is an unusual claim and difficult to accept in this country as things stand today because as said by Uwaifo, JCA in Ihekwoaba V ACB Limited (1998) 10 NWLR (pt.571) 590 at 610-611:***
>
> ***"The issue of damages as an aspect of solicitor's fees is not one that lends itself to support in this country. There is no system of cost taxation to get a realistic figure. Costs are awarded arbitrarily and certainly usually minimally. I do not therefore see why the appellants will be entitled to general or any damages against the auctioneer or against the mortgage who engaged him in the present case, on the ground of solicitor's costs paid by him."***

It is needless to say that the above decision is binding on the Court of Appeal and all subordinate or lower courts to the Apex Court under the doctrine of *stare decisis*. See **Osakwe V FCE (Technical) Asaba (2010) 10 NWLR (pt.1201) 1.** I also note that this decision was not referred to in the decisions of

the Court of Appeal which gives an indication that their conclusions may have been different if their attention was drawn to it. Before rounding up, it is important to draw attention to the case of **Rewane V Okotie-Eboh (1960) NSCC (vol.1) 135 at 139** where the Supreme Court per Ademola CJF, page 135 at 139 stated thus:

"Costs will therefore be awarded on the ordinary principles of genuine and reasonable out of pocket expenses and normal counsel cost usually awarded for a leader and one or two juniors"

I am not sure that this pronouncement can be over stretched to apply to a claim of solicitors fees as special damages. The pronouncement was not made in the context of legal fees as special damages expended by a litigant which is passed on to the adversary. The cost the court was referring too here is the usual cost or indemnity the courts award to a successful party for costs reasonably incurred in the course of the suit or proceedings but not to any extra-ordinary or unusual expenses incurred arising from rank or position or wealth or character of either of the parties or indeed any special desire on his part to ensure success.

Even if I am wrong with respect to the correct import of the said decision in **Rewane V Okotie-Eboh (supra),** it is clear that the decision of **Nwanji V Coastal Services Ltd (supra)** is clearly a later decision and in law where there are conflicting decisions, lower courts are bound by the latter or last decision of the Supreme Court. See **Osakue V F.C.E (Technical) Asaba (supra)**."

After I made the above pronouncement, my attention has now been drawn to the decision of the **UBN Plc V Chimaeze (2014) 9 NWLR (pt.1411) 166 at 75-76**, where the Supreme Court appears to recognize solicitors fees as special damages which are recoverable once proven or unchallenged. The Court per Kekere-Ekun JSC (as she then was) stated thus:

> **"The respondent pleaded in paragraphs 21 and 22 of his amended statement of claim and proved through exhibit MOC 7 that he was charged a fee of N250, 000.00 (two hundred and fifty thousand naira) by his solicitors, out of which he had paid N150, 000.00, leaving a balance of N100, 000.00 (one hundred thousand naira). His claim was for the total solicitor's fee of N250, 000.00. Even if he had only**

paid N150, 000.00 (one hundred and fifty thousand naira), he was still liable for the balance. The appellant/cross-respondent made a general denial of the averments in paragraphs 21 and 22 of the amended statement of claim in paragraphs 2 and 20 of its statement of defence. A general traverse is not an effective denial of essential or material averments in the opposing party's pleading… In the instant case, the appellant/cross-respondent failed to rebut the credible evidence led by the respondent in this regard. I therefore agree with the concurrent findings of the two lower courts that the respondent/cross-appellant was entitled to his claim for special damages. No reason has been advanced to warrant interference with these findings as they are fully supported by the evidence on record."

I read the above decision carefully and the earlier decision of the Supreme Court in **Nwanji V Coastal Services Ltd (supra)** was not referred to. If it is taken that this decision represents the position of the Supreme Court, been a later decision, the implication is that the Relief for solicitors fees can be recovered if proven.

On the unchallenged facts and on the basis of **Exhibit B, Relief (iv)** will be availing.

Relief (v) as stated earlier was withdrawn and struck out.

The final relief of 10% interest on the judgment sum until final liquidation is one to be made at the discretion of the court within the remit of the provision of **Order 39 Rule 4 of the Rules of Court**. Having carefully considered the facts of the case, particularly the failure of defendants to meet up with their obligations which tenor lapsed on 28th September, 2023, I incline to the view that this arm of the claim should be availing. Agreements will be useless and have no meaning if parties renege on terms of the agreement. It cannot be right or fair that more than a year after taking benefit of the agreement, the defendants have done nothing to live up to their commitments. **Relief (vi)** on the judgment sum vide **Relief (i)** is thus availing.

In summation, pursuant to **Order 11 Rule 1 of the Rules of Court**, I must proceed to enter judgment summarily in favour of the claimant as follows:

1. **The Defendants are to jointly and severally pay to the Claimant, the sum of N12, 000,000.00 (Twelve Million Naira) only being a friendly interest-free loan given to the 2nd Defendant by the 1st Claimant and Guaranteed by the 1st Defendant.**

2. **Reliefs (ii) and (iii) fail and are dismissed.**

3. **The Defendants are to jointly and severally to pay to the Claimant, the sum of #6,000,000.00 (Six Million Naira) for legal fees and costs as contained in clause 6 in the legal agreement between both parties.**

4. **10% (Ten Percent) interest per annum on the judgment sum (Relief 1) is granted until the final liquidation.**

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Hon. Justice A.I. Kutigi

<u>Appearances:</u>

Jennifer Ugwuoke, Esq., for the Claimant/Applicant.