IN THE SUPREME COURT OF NIGERIA

Suit No: SC115/1975

Petitioner: Messrs Lewis & Peat (N.R.I.) Ltd
And
Respondent: A.E. Akhimien

Date Delivered: 1976-06-18

Judge(s): George Sodeinde Sowemimo, Chukwuweike Idigbe, Andrews Otutu Obaseki

Judgment Delivered

This appeal as allowed on the 17th May, 1976 for reasons which we now give.

In the High Court of Bendel State holden at Ubiaja the appellants claimed from the respondent the sum of Nl,637,31 as money due from, and owing by, the respondent. Pleadings were exchanged and delivered and relevant portions thereof read:

'Statement of Claim

(1) The plaintiffs are a trading company registered in Nigeria with their headquarters in Ogbarefe in the Midwestern State.

(2) The plaintiffs buy rubber lumps and process them for export.

(4) The defendant has been a customer of the plaintiffs from April 1966.

(5) The plaintiffs at the request of their customers of whom the defendant was one, make cash advances to them for the supply of rubber lumps to the plaintiffs.

(6) The plaintiffs at the request of the defendant made cash advances by cheques drawn on Barclays Bank Benin City for the supply of rubber lumps to the plaintiffs by defendant.

(7) The advances made to the defendant were defrayed from commissions payable to the defendant by the plaintiffs and which said commissions were calculated on the rubber lumps supplied to the plaintiffs by the defendant. Such commissions are credited to the account of the defendant with the plaintiffs company in the ledger to the knowledge of the defendant.

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(14) The plaintiffs avers that of the total advance made to the defendant he has repaid Nl,070.68 by way of commission payable to him for the supplies he made to the plaintiffs company, and which said commissions have been credited to his account as is shown in Annexure \'A\' hereto.

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(16) The plaintiffs say that after deducting . . . the sum of N1,070.68 due and credited to the defendant as commission for his supply of rubber lumps to the plaintiffs, the defendant still owes to them the sum of N l,637.31 which he has failed and or refused to pay . . . despite repeated demands.\"

'Statement of Defence

(1) Save and except as hereinafter specifically admitted the defendant denies each and every allegation of fact contained in the . . . statement of claim as if every such allegation of fact were set out seriatim and specifically traversed.

(2) The defendant admits paragraphs 3 & 4 of the plaintiffs\' statement of claim.

(3) The defendant is not in a position to admit or deny paragraphs 1 & 2 of the statement of claim and would put the plaintiffs to the strictest proof thereof.

(5) The defendant denies paragraph 7 of the statement of claim and says further in answer to the paragraph that the cash advances made to the defendant were defrayed with rubber lumps supplied to the plaintiffs and that the defendant was entitled to commission from the plaintiffs on the rubber lumps supplied to the plaintiffs.

(6) The defendant denies knowledge of Annexure \"A\" attached to the plaintiffs\' statement of claim and says further that it is not a true account of the defendant\'s transaction with the plaintiffs.

(7) The defendant avers that his trading transaction with the plaintiffs has long come to an end.

(9) The defendant denies paragraph 14,16 & 17 of the statement of claim and would put the plaintiffs to the strictest proof thereof.\"

Pleadings having been exchanged and delivered the learned trial judge (Akpovi Ag. J.) took evidence from the parties and in the course of the address of counsel, learned counsel for the respondent for the first time raised the question of capacity of the appellants to sue. He submitted that there was \"no legal person before the court as there is no averment that the plaintiff is a legal person.\" Continuing his submissions he pointed out that no certificate of incorporation of the appellants\' company was exhibited at the trial and that in the circumstances the appellants could neither sue nor be sued.
The learned trial judge in a considered judgment held that the appellants, having failed to establish their corporate personality, could not maintain the claim, which must be dismissed. Parts of his judgment read:

\"In this case pleadings were exchanged, one advantage or necessity for ordering pleadings is to put the case of the parties clearly before the court so that no party springs a surprise at the other at the trial. When the corporate existence of the plaintiff was impugned by the defendant, it became necessary for the plaintiff to adduce evidence in proof thereof of the fact of incorporation. Oral assertion by a junior employee of the company is not enough. The certificate of incorporation or registration under the Companies Act. . .should be tendered or evidence of its non-existence given.

In our law, only a corporate body or person can sue or be sued. Where the corporate existence of a company is challenged the onus rests on that company to prove its legal status . . . This is enough to dispose of this case, but in case the conclusion I have reached is impeachable, I proceed to consider the case on its merits. The claim as finally pruned down in the statement of claim is for the balance of advance of Nl,637.31. The defendant obtained advances to buy rubber lumps and (sic) sold to the plaintiffs . . . By July 31st 1968 he was owing this amount but ceased completely to supply more rubber, The defendant admitted he traded with the plaintiffs and . . .obtained (cash) advances which was offset when he made the next delivery of lumps. He admitted that the three cheques (from the plaintiffs) were cashed by him but (said) he had repaid fully the advances ... I ... reject the defence. On the merits therefore, I would give judgment in favour of the plaintiffs but in view of my earlier conclusion on the
status of the plaintiffs, I hereby dismiss the claim . . , N50 costs to the defendant.\"

(Brackets and italics supplied).

This appeal is from this judgement.

The main contention of the appellants is that the question of capacity, or - to use the language of the court of trial - \'Status\' of the appellants, was not \'an issue\' in the case in hand, and that in any event it was not an issue on which the success of the claim rested; the respondent contends the contrary and he relies on paragraphs 1 and 3 of his statement of defence. When as a result of exchange of pleadings by parties to a case a material fact is affirmed by one of the parties but denied by the other, the question thus raised between the parties in an \'issue of fact\'. We must observe, however, that in order to raise an issue of fact in these circumstances there must be a proper traverse; and a traverse must be made either by a denial or non-admission either expressly or by necessary implication. So that if a defendant refuses to admit a particular allegation in the statement of claim, he must state so specifically; and he does not do this satisfactorily by pleading thus: \"defendant is not in a position to admit or deny (the particular allegation in the statement of claim) and will at the trial put the plaintiff to proof.\" As was held in Harris v. Gamble (1878) 7 Ch. D. 877 a plea that \"defendant puts plaintiff to proof amounts to insufficient denial; equally a plea that the \"defendant does not admit correctness\" (of a particular allegation in the statement of claim) is also an insufficient denial - see Rutter v, Tregent (1879) 12 Ch. D. 758. We are, of course, not unmindful of the first paragraph of the statement of defence. Nowadays almost every statement of defence contains such a general denial (see Warner v. Sampson (1959) 1 Q.B. 287 at 310 - 311). However, in respect of essential and material allegations such a general denial ought not be adopted; essential allegations should be specifically traversed (see Wallerstein v. Moir(1974) 1 W.L.R. 991 at 1002 per Lord Denning M.R.; also Bullen & Leake & Jacobs: Precedent of Pleadings 12th Edition p. 83). In this connection also we draw attention to Order 13, rules 9 & 10 of the Rules of the High Court Western Region of Nigeria Cap. 44 of Vol. 2 of the 1959 edition of the Laws of Western Region of Nigeria applicable in the former Midwestern State (now Bendel State). We are, therefore, of the opinion that paragraph 3 of the statement of defence did not deny the facts alleged in paragraphs 1 & 3 of the statement of claim sufficiently to raise any issue in respect of the said facts. It is not, however, every issue of fact raised on the pleadings and which although \"in issue\" that is \"an issue\" in the sense used in the contentions of learned counsel on both sides, set out above. In every litigation a number of issues of fact may arise but unless they have a bearing on the principal question for determination they certainly do not by themselves or together form \"an issue\" in the sense in which the expression is used in the contention of learned counsel or in the sense impliedly referred to in the judgment of the learned trial judge when he held that the burden was on the appellants to prove their corporate existence and unless they discharged this burden their claim was bound to fail. As was stated in a case in which it was necessary to consider the true meaning of the expression \"issue\":

\". . . Litigation is concerned only with legal rights and duties of the parties thereto. It is concerned with facts only in so far as they give rise to legal consequences. The final resolution of a dispute between the parties as to their respective legal rights or duties may involve the determination of a number of different \'issues\' that is to say, a number of decisions as to the legal consequences of particular facts, each of which decisions constitutes a necessary step in determining what are the legal rights and duties of the parties resulting from the totality of the fact. To determine an \'issue\' in this sense, which is that in which I shall use the word \'issue\' throughout this judgement, it is necessary for the person adjudicating on the issue first to find out what are the facts, and there may be a dispute between the parties as to this. But while an issue may thus involve a dispute about facts, a mere dispute about facts divorced from their legal consequences is not an \'issue .\"

(Italics supplied).

See Fidelitas Shipping Co. Ltd. v. V/C Exportchleb (1965) 2 A.E.R. 4 per Diplock L.J. at pp. 9 & 10. Although the case of Howell v. Bering deals with the expression \'issue\' as used in the Rules of the Supreme Court (England) 1883, Order 65 rule 1 (now revoked) it is useful to note the observations of Buckley L.J. According to him:-

\"It is impossible to say that every question of fact which is in dispute between a plaintiff and a defendant is \'an issue\'. The word can be used in more than one sense. It may be said that every disputed question of fact is an issue. It is in a sense, that is to say, it is in dispute. But every question of fact which is \'in issue\' and which a jury has to determine is not necessarily an issue within the meaning of the rule. I shall define \'issue\' for the purposes of this rule in some such words as these:

An issue is that which, if decided in favour of the plaintiff, will in itself give a right to relief, or would, but for some other

consideration, in itself give a right to relief: and if decided in favour of the defendant will in itself be a defence.\"

(Italics supplied)

See Howell v. Dering (1915) l K.B. 54 at 62.

Although intended for the particular rule (Order 56, rule 1 Rules of the Supreme Court of (England) 1883, we think the definition of the expression \'issue\' in Howell\'s case (supra) is, indeed, germane to the contentions of learned counsel in this appeal. One need only take a close look at the pleadings in this case to be satisfied that, by paragraphs 1 & 3 of his statement of defence, the respondent, at most made a half hearted attempt to question the corporate existence of the appellants company; he did not succeed in raising an issue of fact on the allegation of corporate existence. Had he succeeded in doing this by a specific denial of the relevant averment in the statement of claim and so successfully made the question \'an issue of fact\' it cannot seriously be contended that the question so raised amounts to \'an issue\' within the definition of the expression in Howell\'s case (supra). The respondent in admitting that he is a trade customer of the appellants company from whom he has received cash advances for purchases of rubber lumps, and having asserted that he has delivered lumps to the value of the cash advances received by him cannot seriously contend that the corporate existence of the appellant company is \'an issue\' in the case in hand. Surely, the question in the case in hand is:

has the defendant supplied sufficient or any rubber lumps as should entitle him to enough commission to offset the total cash advances allegedly outstanding against him in the books of the company' In other words does he or does he not owe the appellants the sum of Nl,637,31 allegedly outstanding against him'

On the onus of proof referred to in the judgment of the learned trial judge, the rule may be stated thus:

(1) Where there is no issue the question of burden of proof does not arise.

(2) On the burden of proof on the pleadings:
the rule is that the burden of proof rests on the party whether plaintiff or defendant who substantially asserts the affirmative of the issue. (Joseph Constantine Steamship Line v. Imperial Smelting Corporation (1942) A.C. 154 at 174).

As we have stated before the issue in this case is whether the purpose for which the cash advances was made has been fulfilled by the respondent; he (respondent) asserts the affirmative of this issue and the burden, therefore, is on him to prove this assertion. In the settled state of the pleadings the question of corporate existence of the appellants company can possibly have no material bearing on this vital point.

(3) On the burden of adducing evidence:

Used in this sense the burden of proof may shift depending on how the scale of evidence preponderates. Subject to the scale of evidence preponderating, the burden of proof rests squarely on the party who would fail if no evidence at all or no more evidence, as the case may be, were given, on either side. In other words it, again, rests - before evidence is taken by the court of trial - on the party who asserts the affirmative of the issue. In the case in hand the party asserting the affirmative of the issue is the respondent and we fail to see that the incidental issue of fact on the corporate existence of the appellants company has on the settled pleadings in any way displaced this burden of proof.

We are satisfied, therefore, that the learned trial judge misdirected himself on the issue between the parties in the case in hand and erred in law when he held that on the state of the pleadings the appellants claim should fail because they did not discharge the burden of proof of their corporate existence. The learned trial judge has, however, held that in the event of this Court taking the view that he erred on the question of burden of proof, he was satisfied on the merits of the case that appellants were entitled to judgment on their claim. Accordingly, we allowed this appeal on 17th May, 1976 and ordered that the judgment of the learned trial judge dated the 10th day of December, 1973, dismissing the appellants\' claim together with the order for costs to be set aside and, in substitution therefore, there will be judgment for the appellants against the respondent in the sum of Nl,637.31 and this shall be the judgment of the lower court. The

appellants will have the costs of N235.00 whereof N50.00 represents costs in the lower court and N185.00 costs of this appeal.