

IN THE SUPREME COURT OF NIGERIA

Suit No: SC102/2002

Petitioner: United Bank for Africa Plc Alhaji Ibrahim El- Rufai

And

Respondent: Alhaji Babangida Jargaba

Date Delivered: 2007-05-11

Judge(s): Aloysius Iyorgyer Katsina-Alu, Niki Tobi, Francis Fedode Tabai, Ibrahim Tanko Muhammad, Pius Olayiwola Adere

Judgment Delivered

With the leave of the trial court, the plaintiff, who is the respondent in this appeal, filed a writ of summons on the undefended List against the defendants. The defendants are now the appellants before this court. They filed their Notice of Intention to Defend and attached to it an affidavit setting out the grounds of their defence. 1st appellant is a Commercial Bank with its Head Office in Lagos. 2nd appellant is a Manager with the Kaduna North Branch of the 1st appellant. The respondent is a businessman resident in Funtua. Sometimes in 1999 the respondent was introduced to the 2nd appellant in Kaduna for the purposes of purchase of fertilizers in commercial quantities. When the plaintiff met the 2nd defendant, the plaintiff inquired from the 2nd defendant if there were fertilizers for sale in commercial quantities and he said yes, but that the 1st defendant was selling the fertilizers. The 2nd defendant informed the plaintiff that a truckload of fertilizers was sold at N600,000.00 (six hundred thousand naira) i.e. N1,000.00 per bag. The Plaintiff purchased a Bank draft from Funtua branch of the 1st defendant for seven truckloads of fertilizers. The draft was made payable to the Kaduna North office of the 1st defendant where the 2nd defendant has an office. With further assurances from the 2nd defendant to the plaintiff that the 2nd defendant was having fertilizers in large quantities to dispose of the plaintiff purchased another Bank draft from Afribank Malumfashi branch, made payable to the 1st defendant for another sets of truck loads of fertilizers. In all, the plaintiff made payment in Bank drafts to the tune of N12,690,000.00 for the truckloads of fertilizers to the 1st defendant on the instruction and directives of the 2nd defendant. When the plaintiff went to the 2nd defendant in order to evacuate his truckloads of fertilizers, the 2nd defendant directed the plaintiff to the warehouse/premises of a Company called Barmani Holdings Company (Nig.) Ltd., in Kaduna. When the plaintiff got to Barmani Holdings in his bid to evacuate his fertilizers, he was told that there was a price increment of N50.00 per bag. The plaintiff conceded to pay the increment for the truckloads of the fertilizers despite his initial protest and reluctance. The plaintiff, at a later date, started the evacuation of the truckloads of fertilizers and on evacuating the 9th truckloads of fertilizers at Barmani Holdings, the plaintiff was informed that there were no more fertilizers to evacuate.

At the time of evacuating the 9th truckload of fertilizers the plaintiffs' outstanding balance was N6,960,000.00, hence, the plaintiff went back to the 2nd defendant to demand a refund of the said balance. On this demand the plaintiff was paid the sum of N5 million, leaving a balance of N1,960,000.00. On several occasions when the plaintiff visited the 2nd defendant to ask for the payment of his money, the plaintiff only succeeded in getting an undertaking to pay from the 2nd defendant. In 1999, the 2nd defendant wrote a memo, reminding the 1st defendant the plaintiffs' balance yet unpaid. Nothing was forthcoming from the defendants. The Plaintiff averred that the defendants have no defence to his claim. In their supporting affidavit of Notice of Intention to Defend the action, the defendants denied paragraphs 7-24 of the plaintiffs' affidavit in support of the writ of summons. The defendant informed the plaintiff that the remaining stock of fertilizers had been sold to Barmani Holdings Ltd and that the plaintiff was advised by the 2nd defendant to contact Barmani Holdings Ltd, if he wished to buy fertilizer. The defendants averred further that the plaintiff bought some Bank drafts in the sum of N4.2 million and N7.8 million, payable to Barmani Holdings Ltd for the purchase of 20 trucks of solar urea fertilizer. The plaintiff collected only 9 truck loads of fertilizers from Barmani Holdings Ltd and Barmani Holdings Ltd refunded to the plaintiff the sum of N5 million in respect of 11 truck loads of fertilizers which were not supplied to the plaintiff. The defendants claimed that they were not responsible for this balance but Barmani Holdings Ltd, since the defendants were never part of transactions between the plaintiff and Barmani Holdings Ltd. The defendants, they claimed, only acted as Bankers to both the plaintiff Barmani Holdings Ltd and it ought to account for that balance of payment due to the plaintiff. The defendants denied ever making an undertaking to pay the plaintiff. After considering the

arguments of learned Counsel for the respective parties and the affidavit evidence and documents tendered in evidence before him, the learned trial Judge found that there was no defence on the merit made by the defendants. He accordingly entered judgment against the defendants and in favour of the plaintiff. The defendants were dissatisfied with the trial court's judgment and they appealed to the court below. The court below affirmed the decision of the trial court. Dissatisfied further, the defendants appealed to this court on four grounds of appeal as set out in their Notice of Appeal contained on pages 12 to 133 of the printed Record of appeal now before this court. Parties filed and exchanged briefs of arguments in compliance with this Court's Rules. The appellant formulated two issues for our determination, which read thus:

1. whether the court below was right in holding that the appellants' affidavit did not disclose a defence on the merit.

2. whether there was admission of the respondent's case. The respondent adopted the two issues formulated by the appellant as set out above. It is the submission of learned Counsel for the appellants that the facts in the affidavit in support of the writ disclosed triable issues. The respondent contended, however, that the appellants bought the fertilizers from Barmani Holdings Nigeria Ltd and the appellants only acted as Bankers to Barmani Holdings Nigeria Ltd and the respondent in effecting payment. If there is a shortage in the delivery of the fertilizers, it is from Barmani Holdings Nigeria Ltd that the respondent should look for redress. Learned Counsel questioned the propriety at that stage of the trial court to look at proof of the defence raised in the affidavit evidence, when the requirement of the law for such action is to raise triable issues and that complete defence need not be shown by the defence. He referred to the case of *Federal Military Government v. Sani* (1990) 7 SCNJ 159. It was further argued for the appellants that they raised the defence to the effect that the respondent did not buy fertilizers from them but from a third party Barmani Holdings Nigeria Ltd and that the appellants acted as agents to the respondent and Barmani Holdings (Nig.) Ltd. Learned Counsel submitted that these facts, if proved, would constitute triable issues. Learned Counsel relied on the case of *Federal Military Government v. Sani* (supra) to contend that once a defendant deposes to facts which cast doubt on the claim of the plaintiff, such a defendant ought to be granted leave to defend. In his submissions, learned counsel for the respondent contended that the respondent purchased and paid for the truckloads of fertilizers from the appellant for which there was an outstanding sum of N1, 960,000.00. The appellants, he argued further, failed and refused to tender the drafts referred to by the respondent in his affidavit in support of the writ of summons, which negates the provisions of Section 149(d) of the Evidence Act. Learned Counsel stated further that the appellants' affidavit in support of their notice of intention to defend in relation to exhibits ABJ 1-3 reveals that the alleged defence on the appellants' part was meant to waste the precious time of the courts. The cases referred to by the appellants: *Federal Military Government v. Sani* (supra); *Macaulay v. NAL Merchant Bank Ltd* (1990) 6 SCNJ 117 are dissimilar with the facts of this appeal. He contended that the trial court exercised its discretion judicially and judiciously and hence, this court is urged to affirm decisions of the two lower courts and decline to make any order transferring this appeal to the general cause list, as there is nothing to be heard on the merit. Summary judgments are resorted to by courts and given to the plaintiff without the necessity of a plenary trial of an action. They are devices available for prompt and expeditious disposal of controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only a question of law is involved. The plaintiff before the trial court filed and moved an Ex-parte Motion on 9th March 2000. Among the relief asked for were: -

(2) An order of court granting leave to plaintiff/applicant to file his writ of summons against the defendant/respondent under the undefended list procedure.

(3) A consequential order making the annexed writ of summons as undefended suit. The learned trial Judge granted the relief and granted leave to the plaintiff/applicant to file writ of summons against the defendants/respondent under the undefended list procedure. He further ordered that it be marked as 'Undefended' and be served on the defendants along with other court processes. The defendants filed a notice of intention to defend supported by an affidavit of 7 paragraphs. At the end of his consideration of the whole matter, the learned trial Judge concluded in the following words: - "It is true that a defence that I am not liable is a defence. But from the facts of their case and the affidavit evidence and documents there is no defence on the merit. I accordingly enter judgment against the 2nd defendant in favour of the plaintiff in the sum of N1, 960,000.00 against 1st and 2nd defendant" (sic). The court below affirmed the trial court's judgment. In his contributory judgment, Salami, JCA, commented as follows: - "All the appellants need do is to show that there is a triable issue or a defence that is not vague or sham... Before a matter is transferred to the general cause list the affidavit accompanying the notice of intention to defend must disclose a defence

on the merit and not a mere denial. I agree with both courts. For a matter to be transferred from undefended list to the general cause list, the affidavit in support of notice of intention to defend must show or disclose enough facts to satisfy a reasonable tribunal that the defendant has a defence to the action. Such a fact must be one that will require the plaintiff to proffer explanation for certain matters with regard to his claim or which seriously questions the plaintiffs' claim. Such a defence must not be a

Sham, frivolous, vague or fanciful or designed to delay the trial of the action. It must show that there is a dispute between the contending parties to be tried. That is the tenor of Order 22 Rule 3(1) of the Kaduna State High Court (Civil procedure) Rules, 1987 which provides as follows: - "If a party served with the writ of summons and affidavit as in Rules 1 and 2 hereof delivers to the Registrar not less than 5 days before the date fixed for hearing a notice in writing that he intends to defend the suit together with an affidavit disclosing a Defence on the Merit the court may give him leave to defend upon such terms as the court may think just." (Emphasis and underlining provided by me)

Some of the averments made by one Ibrahim Umar, a litigation officer in the law firm of learned counsel for the defendants stated as follows: -

"3(b) That the 1st defendant granted an import finance facility to a certain Drury Industries Ltd to import Solar Urea Fertilizer. Drury Industries Ltd, failed to repay the debt despite several demands made by the 1st defendant who consequently, appointed Otunba Olutola Senbore as a Receiver/Manager over the assets of Drury Industries Ltd and serve as Sales Agent to dispose of the fertilizer pledged to the 1st defendant by Drury Industries Ltd.

(c) That the Receiver/Manager sold the entire stock of fertilizer to various individuals other than the plaintiff with the largest quantity of about 94 trucks being sold to Barmani Holdings Ltd for the total sum of N50, 760,000.00.

(d) That when the plaintiff approached the 1st defendant in order to purchase fertilizer, he was informed by the second defendant that the remaining stock of fertilizer had been sold to Barmani Holdings Ltd and was advised by the 2nd defendant to contact Barmani holdings Ltd if he wished to buy fertilizer.

(e) That thereafter, the defendants are aware that the plaintiff contacted Barmani Holdings Ltd and made arrangement for the purchase of some fertilizer.

(f) The defendants were aware of fact above because, on duly, 1999, (sic) the plaintiff paid a U. B.A. draft in the sum of N4.2 million and an Afribank draft in the sum of N7. 8 million through our Kaduna North branch to Barmani Holdings Ltd for the purchase of 20 trucks of Solar Urea Fertilizer.

(g) That the defendants are also aware, that the plaintiff only collected 9 trucks of fertilizer and that Barmani Holdings Ltd refunded to the plaintiff, the sum of N 5 million for the balance of 11 trucks of fertilizer that was supplied. Consequently, if there are any outstanding balances due to the plaintiff, the defendants are not liable to pay as they were never part of the transactions between the plaintiff and Barmani Holdings Ltd the role of the defendants being simply that of Bankers to both parties in that transaction. Barmani Holdings Ltd ought to account to the plaintiff for any such balance. Further, the 2nd defendant informed the deponent of the following facts:-

"4(b) That paragraph 10 and 11 (sic) of the plaintiff's affidavit are also untrue as the instruments made out by the plaintiff were not made payable to the 1st defendant but to Barmani Holdings Ltd.

(c) That paragraphs 20 and 21 of the plaintiff's affidavit, are also not true. The 2nd defendant never undertook in any manner whatsoever to pay the plaintiff as neither the 1st defendant nor the 2nd defendant is indebted to the plaintiff.

(d) That paragraph 22 of the plaintiff's affidavit is denied as it was not the 2nd defendant who was selling the fertilizer but the Receiver Manager and that the 2nd defendant is not aware of all the fact surrounding the transaction. A clearer picture of what transpired between the Receiver Manager and his customer is contained in a letter dated 31/8/99 written by the receiver manager to the 1st defendant in whom he stated that the memo Exhibit ABJ.3 of the plaintiff does not reflect the true position of the transaction. The letter dated 31/8/99 shown to me is annexed herewith as Exhibit FRI.

(e) That the defendants have (sic) a good defence to this action, as they are not indebted to the plaintiff in any manner howsoever. \ The learned trial Judge x-rayed the above depositions and made far-reaching findings. For instance, paragraphs (d) to (f) are on issue of the actual person from whom the plaintiff purchased the fertilizers. The learned trial Judge held as follows: - \I agree that Exhibit ABJ 3 reads that the fertilizer was bought from defendants directly and that the plaintiff collected from the agents of defendant. I also agree that Exhibit ABJ 1 and 2, attached to the plaintiff's affidavit in support are admissions of liability by the defendants to the plaintiff. There is no doubt that plaintiff purchased from 1st defendant through their agents Barmani Holdings Ltd.\n paragraphs (b) and (c) the depositions were made in favour of the plaintiff as he was neither linked with the company known as Drury Industries Ltd nor with Barmani Holdings (Nig.) Ltd. This was further confirmed by Exhibit FR. 1 which emanated from Otunba Olutola Senbore, who was shown in paragraph (6) to be a Receiver/Manager over the assets of Drury Industries Ltd and who served as Sales Agent to dispose of the fertilizer pledged to the 1st defendant by Drury Industries Ltd. This document (Exhibit FR.I) was addressed to the Managing Director of the 1st appellant. Let me observe here that the relationship that existed, if any, between the plaintiff and Drury Industries Ltd and Barmani Holdings (Nig.) Ltd, from the affidavit evidence considered by the learned trial Judge, is that as far as the plaintiff is concerned, both Drury Industries Ltd and Barmani Holdings (Nig.) Ltd, were third parties to the transaction between him and defendants/appellants. The doctrine of privity of contract is all about the sanctity of contract between the parties to it. It does not extend to others outside. The doctrine will not apply to a non-party to the contract who may have, unwittingly, been dragged into the contract with a view to becoming a shield or scape-goat against the non-performance by one of the parties. Barmani Holdings (Nig.) Ltd is a complete stranger in the contract between the appellants and the respondent. Barmani was never joined as a party as rightly observed by the court below. Courts of law do not make orders in vain or in vacuum. Court orders affect directly, those persons who have had course to either directly or by necessary extension of such processes. See: Eperokun v. University of Lagos (1986) 4 N.W.L.R (pt. 34) 162; Ukejianya v. Uchendu (1950) 13 W.A.C.A ;W.L.R.(pt.723)23; Kokoro-Owo v. Lagos State Government (2001) 11 N page 246 D-E. There is, certainly, a failure of and indeed non-performance by appellants of their own part of the contract between them and the respondent.

In considering the averments in paragraphs (b) and (c) of the deponent as sourced from the 2nd defendant the learned trial Judge made the following finding: -"The bank draft No. 288452/BO. 20/026676 and bank draft No. 020049/BO. 3500072 H were given but copies of this bank draft (sic) were not attached as exhibits to help this court to examine them.\ The court below gave strong legal backing, with which I agree, to the above holding of the trial court. This is what the court below said: -"The burden of tendering the drafts whereby the money was paid was on them. Firstly they have to produce the drafts whereby the money was paid for the fertilizer or the refund was made otherwise judgment would be given against them even if the matter were to be placed on the general cause list and the respondent failed, refused or neglected to produce the cheques as he would still not be saddled with the burden because they are the ones asserting the positive of payment being made to Barmani. The cheque issued by United Bank for Africa PLC, Funtua by banking practice in Nigeria is in the custody of the appellant who had asserted that the payment was made to Barmani Holdings. I take judicial notice that cheque drawn by a customer on his bank is kept or retained by his or its bank after clearance. The only cheque, which would not probably be in the appellant's custody, through the normal course of banking, is the respondent's second draft drawn on Afribank Plc Malumfashi branch. Even that too must be produced in evidence by the appellant who had alleged that payment was made to Barmani Holdings Company Nigeria Limited and not to them to establish the assertion. \ The proposition of the law in such circumstances is that proof always lies on him who asserts not upon him who denies. See: section 135 of the Evidence Act. Again, section 136 thereof states clearly that the burden of proof in a civil suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Thus, the argument put forward by the appellants' that the drafts were not paid to them but to Barmani Holdings (Nig.) Ltd is plausible and porous. No reasonable court or tribunal will base its findings and decisions on such porous or rather non-existent evidence. Another factor which worked very strongly in favour of the respondent is the appellants' admission through the second appellant who wrote exhibits ABJ 1 and ABJ 2 which, in my opinion, made it no longer necessary for the respondent to substantiate the averments contained in his affidavit in support of his writ of summons. The exhibits are recited severally hereunder. Exhibit ABJ1 was written on the second appellant's official headed note pad and read thus: -"Alhaji Babangida Jargaba kindly give us one week in relation to the refund of fertilizer purchase from UBA PLC through Barmani Holdings regarding the balance of N1, 960,000.00. Signed 9/9/99.\ (Underlining supplied for emphasis). Precisely, a week later Exhibit ABJ 2 was written to the respondent. It reads as follows:- \Alhaji Babangida Jargaba kindly gives us a grace period of 15 days for your balance of N1,960.000.00 being payment routed for Barmani Holdings for purchase of Drury Fertilizer. igned

16/9/99. (Underlining supplied for emphasis). Exhibit ABJ 3 is a memorandum written jointly by the 2nd appellant and one Nasiru M. Abubakar, Head, Funds Transfer of the 1st appellant. It reads follows: - "Memo

From: Kaduna North Branch

KDN/MST NMA/721/99

TO: The Group Head National Corporate

Corporate Branch, Lagos.

18th August 1999

Drury Sales of Fertilizer

We write to notify your good-selves that the following individuals/corporate bodies are yet to receive the balance of their fertilizer stock bought from us nor refund of funds collected by Barmani Holdings Limited through Plc Kaduna North branch.

1. Alh. Salisu & Sons N9,450,000.00
2. Alh. Shulden Natatu/Alh. Nura N1,860,000.00
3. Alh. Babangida Jargaba N1,960,000.00
4. Alh. Sarki Zaria N1,260,000.00

Kindly expedite action in ensuring that these clients are refunded as some of them are planning a legal action against the company and our bank.

We await your urgent response,

(SGD)

Ibrahim El-Rufai

Branch Manager (SGD)

Nasiru M. Abubakar

Head, Funds Transfer

Cc: Alh. Suleiman Garba Nuru - CEO Barmani Holding Ltd

Cc: Otunba Olutola Senbore - The Receiver/Manager Drury Industries Ltd.'

(Underlining supplied for emphasis). When admissions are made they are considered relevant. Section 75 of the Evidence Act provides that no fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings. See: Daniel v. Iroeri (1985) 1 N.W.L.R. (pt.3) 541; Din v. African Newspapers (1990) 3 RW.L.R. (pt 139) 392; Narindex Trust Ltd v. N.I.M.B. Ltd (2001) 10 N.W.L.R. (pt 721) 321. The 2nd appellant having admitted that the payment was made to the 1st appellant, there will no longer be a burden to prove what the appellants have admitted. See: Onobruchere & Anor. v. Esegine (1986) 2 SC 385 at p. 397. The onus of proof now shifted on the appellants squarely to show that they had no obligation to pay the balance of the money owed by them. See: Seldon v. Davidson (1968) 1 WLR 1083. Although the general approach of the courts is that some liberality should be brought to bear by trial courts while considering whether to grant leave to a defendant to defend an action filed against him, there has to be revealed, on the other hand, by the defendant in his affidavit in support of his Notice of Intention to defend, facts which will disclose the existence of triable issues. All that is required is that there should be some doubt in the mind of the trial court. See: Peak Marwick Ani, Ogunde & Co. v. Okike (1995) 1 N.W.L.R (pt. 369) 71; Macaulay v. NAL Merchant Bank Ltd; (1990) 4 N.W.L.R : (pt. 144) 283; Jipreze v. Okonkwo (1987) 3 N.W.L.R. (pt 62) 737; Nashizawa Ltd v. Jethwani (1984) 12 SC 234. The learned trial Judge in this

case had no doubt in his mind in arriving at the inescapable conclusion that appellants' affidavit in support of their intention to defend plaintiff /respondent's action, disclosed no triable issues. *ACB Ltd v Gwagwada* (1994) 4 SCNJ (pt. 11) 267 at p. 277-278. Order 22 Rule 3(1) of the Kaduna State High Court (Civil Procedure) Rules, is designed to relieve the courts of the rigour of pleadings and burden of hearing tedious evidence on sham defences mounted by defendants who have no defence and are just determined to dribble and cheat plaintiffs out of reliefs they are normally entitled to. See: *Planwell Ltd v. Ogala* (2003) 12 SCNJ 18 at page 68. A summary judgment is a procedure 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 mere purpose of delay. It is for the plain and straight forward, not for the devious and crafty. See; *Sodipo v. Leminkaimen* (1986) 1 N.W.L.R. (pt. 15) 220; *Mac Gregor Associates v. N.M.B.* (1996) 2 SCNJ 72 at page 81. On the issue of whether bare denial of liability amounts to a reasonable defence, a plethora of decided cases shows that a bare denial of liability or indebtedness to the plaintiff or vague allegation of fraud against him without more does not suffice for that purpose. See: *Sanusi .v. Cotia* (2000) 6 Sc (pt.3) 43 at page 53. I resolve the first issue in favour of the respondent. Appellants' issue No. 2 is on whether there was an admission of the respondent's case. Learned Counsel for the appellants contended that the court below were wrong in holding that Exhibits ABJ 1, 2 and 3 constituted admission by the appellants of the respondent's claim. An admission in law is referred to as a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact. See: section 19 of the Evidence Act. Section 20 of the same Act provides: -"20(1) Statements made by a party to the proceeding or by an agent to any such party, whom the court regards in the circumstances of the case as expressly or impliedly authorized by him to make them are admissions. \" There is a finding by the trial court that Barmani Holdings (Nig.) Ltd and the 2nd respondents were agents to the 1st respondent. Below is what the trial court said: -\"I agree that Exhibit ABJ 3 reads that the fertilizer was bought from defendants directly and that the plaintiff collected front the Agents of the defendant. I also agree that Exhibit ABJ 1 and ABJ 2 attached to the plaintiffs' affidavit in support are Admissions of liability by the defendants to the plaintiff. There is no doubt that plaintiff purchased from 1st defendant through their Agents Barmani Holdings Ltd.

... The use of the word fertilizer where bought (sic) from the 1st, 2nd and even the Agents of the 1st defendant. Payment was made to the 1st defendant. I see no how the 1st defendant and 2nd defendant who is also an Agent of the 1st defendant can avoid liability. \"(Emphasis supplied by me). I quoted Exhibits ABJ 1, ABJ 2 and ABJ 3 earlier. I agree with the court below that the 2nd appellant, who was found by the trial court to be an agent to the appellants made admission through these exhibits that the money in question was collected through their Bank i.e. 1st appellant. I agree with the learned counsel for the respondent as well, in his submission that the Exhibits were made by the agents of the 1st appellant. The 2nd appellant was at all material times, the Branch Manager of Kaduna North branch of the 1st appellant. The co-author of Exhibit ABJ 3 was at all material times, the 1st appellant's Head, Funds Transfer. The 1st appellant never countered these facts. It is the prevailing law that admissions where made freely and voluntarily, they are relevant and can be relied and acted upon by the court. I resolve issue No 2 in favour of the respondent. Finally, this appeal lacks merit and I dismiss it. The respondent is entitled to N10, 000.00 (ten thousand naira) costs from the appellants.

Judgment delivered by
Aloysius Iyorgyer Kats1na-Alu. J.S.C.

I have had the advantage of reading in draft the judgment of my learned brother Muhammad JSC in this appeal. I agree entirely with it and for the reasons he has given, I too dismiss the appeal. I also abide by the order as to costs.

Judgment delivered by
Niki Tobi, J.S.C.

The undefended list procedure is a truncated form of ordinary civil hearing peculiar to our adversary system where the ordinary hearing is rendered unnecessary due in the main to the absence of an issue to be tried or the quantum of the plaintiff's claim disputed to necessitate such a hearing. See *Agwuneme v. Eze* (1990) 3 NWLR (Pt. 137) 242. The undefended list procedure is designed to secure quick justice and avoid the injustice likely to occur when there is no genuine defence on the merits to the plaintiff's case. See *Bank for West Africa Limited v. Unakalamba* (1998) 9 NWLR (Pt. 565) 245. The procedure is to shorten the hearing of a suit where the claim is for liquidated sum. See *Co-operative and Commerce Bank (Nigeria) Plc v. Samed Investment Company Limited* (2000) 4 NWLR (Pt. 651) 19. In other words, the object of the rules relating to actions on the undefended list is to ensure quick despatch of certain types of cases, such as those involving debts or liquidated money claims. See *Bank of the North v. Intra Bank SA* (1969) 1 All NLR91. For an action to be transferred from the undefended list to the general cause list there must be a defence on the

merit and details and particulars of defence must be set out. It must not be a half-hearted defence. It must not be a defence, which is merely fishing for skirmishes all over the place. See *Diamond Bank Nigeria Limited v. GSM Agro Allied Industries Ltd.* (1999) 8 NWLR (Pt. 616) 558. A case is riot transferred to the general cause list as a matter of course or routine but on proper scrutiny of the averments in the affidavit in support of the notice to defend. For this purpose, no flimsy, fanciful or frivolous defence adduced to prolong the case or play for time will suffice. It must be a real defence on the merits and not a caricature of it. See *Grand Cereals and Oil Mills Ltd. v. As-Ahel International Marketing and Procurement Ltd.* (2000) 4 NWLR (Pt. 652) 310. See also *China Geo Engineering Co. v. Nambativ* (2001) 2 NWLR (Pt. 698) 529; *Calvenply Limited v. Pekab International Limited* (2001) 9 NWLR (Pt. 717) 164. Under the undefended list procedure, the defendant's affidavit must condescend upon particulars and should, as far as possible, deal specifically with the plaintiff's claim and affidavit and state clearly and concisely what the defence is and what facts and documents are relied on to support it. The affidavit in support of the notice of intention to defend must of necessity disclose facts, which will, at least, throw some doubt on the case of the plaintiff. A mere denial of plaintiff's claim and affidavit is devoid of any evidential value and as such would not have disclosed any defence which will, at least, throw some doubt on the plaintiff's claim. See *Agro Millers Limited .v. Continental Merchant Bank (Nigeria) Plc* (1997) 10 NWLR (Pt. 525) 469. A defendant's affidavit in support of notice of intention to defend raises a triable issue where the affidavit is such that the plaintiff will be required to explain certain matters with regard to his claim or where the affidavit throws a doubt on the plaintiff's claim. See *United Bank for Africa Plc v. Mode Nigeria Limited* (2001) 13 NWLR (Pt. 730) 335. The decision as to whether or not a defence under the undefended list procedure raises a triable issue does not depend so much on the discretion of the court. Rather, it involves the evaluation of the affidavit evidence before the court for it to determine whether or not a triable issue has been made out by the defence. See *General Securities and Finance Company Limited v. Obiekezie* (1997) 10 NWLR (Pt. 526) 577. I have thoroughly examined the affidavit in support of notice of intention to defend and I cannot fault the decisions of the two courts below. They are right. In the circumstances, I entirely agree with my learned brother Muhammad, JSC that this appeal should be dismissed. I also dismiss it. I abide by my learned brother's orders as to costs.

Judgment delivered by
Francis Fedode Tabai, J.S.C.

This suit originated at the Kaduna Judicial Division of the High Court of Kaduna State on or about the 9/3/2000. The claim of the Plaintiff (who is the Respondent in this appeal) against the Defendants (who are the Appellants herein) as endorsed in the writ of summons is as follows:

"(1) Plaintiffs claim against the Defendants jointly and/or severally is the sum of N1,960,000.00 (One million nine hundred and sixty thousand naira only) being an outstanding balance arising from the failure of the Defendants to fully supply to the Plaintiff the required number of trucks loads of fertilizers.

(2) 10 percent interest on the judgment sum and cost of this action.

Take Notice this writ is supported by an affidavit stating the grounds for believing that there is no defence to this suit." There was the 24 paragraph-supporting affidavit showing that the Defendants had no defence to the suit. Paragraphs 12, 17, 18, 19, 20, 21, 22 and 23 are particularly relevant and I reproduce them as follows:

12. That in all, the Plaintiff made payment in bank drafts to the tune of N12, 960,000.00 for the trucks load of fertilizers to the 1st Defendant on the instructions of the second Defendant.

17. That later the Plaintiff started the evacuation of the trucks load of fertilizers and on evacuating the 9th trucks load of fertilizers at Barmani Holdings (Nig) Ltd the Plaintiff was informed that there were no more fertilizers to evacuate.

18. That the time the Plaintiff evacuated the 9th truck load of fertilizers his outstanding balance was N6, 960,000.00, hence the Plaintiff went back to the second Defendant to demand a refund of the said balance.

19. That on Plaintiff demand of a refund, he was paid the sum of N5 million thereby leaving a balance of N 1,960,000.00.

20. That on several occasions when the Plaintiff visited the second Defendant to demand for the payment of his money the Plaintiff only succeeded in getting an undertaking to pay from the second Defendant.

21. That the various handwritten undertakings of the second Defendant to the Plaintiff are hereby annexed and marked as exhibits ABJ1 and 2.

22. That in August 1999 the second Defendant wrote a Memo to the first Defendant in Lagos reminding the first Defendant of the non-payment of the Plaintiffs money. Annexed herewith is a Photostat copy of the Memo and it is marked as Exhibit ABJ3.

23. That the Defendants have no defence to this suit.

On the 18th of April 2000 the Appellants filed their Notice of Intention to Defend the motion and filed a five paragraph affidavit to which was annexed on Exhibit Marked FR1. It was a general denial of any liability to the claim. Specifically they denied the Respondent's paragraphs 20 and 21 in their own paragraph 40 thus:

"(c) That paragraph 29 and 21 of the Plaintiffs affidavits are not true. The 2nd Defendant never undertook in any manner whatsoever to pay the Plaintiff as neither the 1st Defendant nor the 2nd Defendant is indebted to the Plaintiff." On the 17/5/2000 learned counsel for the parties extensively addressed the court. In its ruling on the 22nd of June 2000 the learned trial judge, Gregory S. Lawan. J. held that the Appellants had no defence to the claim and entered judgment for the Plaintiff/Respondent for the sum of N1,960,000.00 against the Defendants/Appellants. The appeal to the Court below as dismissed and the judgment of the learned trial judge affirmed. This was on the 28/6/2001.

Not satisfied, the Defendant/Appellants have now come on further appeal to this Court. The issues formulated by the parties and the arguments proffered thereon have been very well articulated in the leading judgment of my learned brother Muhammad J.S.C. A suit initiated under the undefended list procedure can only be considered appropriate for transfer to the general cause list where the Defendant's Notice of Intention to Defend is supported by an affidavit showing that there is a prima facie case or triable issues that needed to be settled upon pleadings, tried, tested and determined in oral evidence. The Defendant's affidavit evidence must disclose that there is a real dispute and not merely a frivolous and vague defence designed to delay the quick determination of the action. See *African Continental Bank Ltd v. Alhaji Umaru Gwagwada* (1994) 5 N.W.L.R. (Part 342) 25; *Olubusola Stores v. Standard Bank (Nig) Ltd* (1975) N.S.C.C. 137, (1975) 4 Sc 51; *John Holt & Co. (Liverpool) Ltd v. Fajemirokun* (1961) All N.L.R. 518. In his ruling/judgment on the 22/6/2000, the learned trial judge examined the affidavit evidence of both parties and the four exhibits attached thereto and concluded that the Appellants had no defence to the claim and entered judgment for the Respondent. In the judgment at page 28 of the record he had this to say: "I agree that Exhibit ABJ3 reads that the fertilizer was bought from the Defendants directly and that the Plaintiff collected from the agents of the Defendant. I also agree that Exhibit ABJ1 and ABJ2 attached to the Plaintiffs affidavit in support are admissions of liability by the Defendants to the Plaintiff..." The court below also examined the affidavit evidence in details and came to the conclusion that Exhibits ABJ1 and ABJ2 and ABJ 3 were clear admissions of the Appellants' liability to the Respondent and affirmed the decision of the learned trial judge. I have also examined the affidavit evidence particularly the Exhibits attached thereto and I have no difficulty in coming to the conclusion that each of Exhibits ABJ 1, ABJ2 and ABJ3 is an admission of the Appellants' liability to the Respondent. In my view the Appellants had no defence properly so called. This is a case of a frivolous defence put forth by the Appellants manifestly designed to cause a delay in the administration of justice and they succeed in so doing for seven years.

In conclusion I hold there is no basis whatsoever for interfering with the concurrent judgments of the courts below. The appeal has no merit. For the above and the fuller reasons set out in the leading judgment of my learned brother Muhammad JSC. I also dismiss the appeal. I adopt the order on costs contained in the leading.

Judgment delivered by
Pius Olayiwola Aderemi. J.S.C.

I have been privileged with a preview, in draft, of the judgment just read by my learned brother, Muhammad JSC. I agree with his reasoning and conclusions that the appeal is devoid of merit, I now wish to add few words of my own, for emphasis. The facts of the case have been well chronicled in the leading judgment; I need not waste any time in recounting same in full. I shall only state, in minimal form, some salient facts to make my contributions clear. Suffice it to say that the respondent who was the plaintiff at the trial court took out a writ of summons on the Undefended List against the appellants who were the defendants in that court claiming N1, 960,000.00 (one million, nine-hundred and sixty thousand naira only) being an outstanding balance arising for the failure of the appellants, as defendants in that court, to fully supply the respondent the required number of truck loads of fertilizers. The appellants manifested an intention to defend the action by deposing in paragraph 3 (c), (d) and (e) of the affidavit in support of Notice of Intention to defend thus: -

3(c)

"That the receiver/manager sold the entire stock of fertilizer to various individuals other than the plaintiff with the largest quantity of about 94 trucks being sold to Barmani Holdings Ltd for the total sum of N50, 760,000.00."

3(d)

"That when the plaintiff approached the 1st defendant in order to purchase fertilizer, he was informed by the second defendant that the remaining stock of fertilizer had been sold to Barmani Holdings Ltd and was advised by the 2nd defendant to contact Barmani Holdings Ltd if he wished to buy fertilizer."

3(e)

"That thereafter, the defendants are aware that the plaintiff contacted Barmani Holdings Ltd and made arrangement for the purchase of same fertilizer."

The 2nd defendant/appellant, through the deponent of, the affidavit in support of Notice of Intention to defend, denying liability, deposed in paragraph 4 (c) and (d) of the said affidavit as follows: -

Para 4 (c)

"That paragraphs 20 and 21 of the plaintiffs affidavit are not true. The 2nd defendant never undertook in any manner whatsoever to pay the plaintiff as neither the 1st defendant nor the 2nd defendant is indebted to the plaintiff."

Para 4 (d)

"That paragraph 22 of the plaintiffs affidavit is denied as it was not the 2nd defendant who was selling the fertilizer but the Receiver Manager and that the 2nd defendant is not aware of all facts surrounding the transaction. A clearer picture of what transpired between the Receiver Manager and his customer is contained in a letter dated 31/8/99 written by (he Receiver Manager to the 1st defendant in which he stated that the Memo - EX ABJ 3 of the plaintiff does not reflect the true position of the transaction. The letter dated 31/8/99 shown to me is annexed herewith as Exhibit FR1." The respondent had attached three exhibits - ABJ1, ABJ2 and ABJ3 to the affidavit authenticating his claim that the appellants had admitted same. The appellants however attached to their own affidavit Exhibit FR1, showing according to them that they did not owe the respondent. But, does Exhibit FR1 actually exonerate the defendants from liability? I think not, going by the contents of that exhibit, particularly the last paragraph a letter dated 31st August 1999 addressed to the 1st appellant by its agent (Otinba Olusola O. Senbore); that paragraph reads: -"I have tried unsuccessfully to persuade Barmani to refund the monies he collected for undelivered stocks and when I noticed his intransigence, I reported the matter in frustration to his new wife. What I got in return was a horrible shouting match and unprintable words. I am at a loss in understanding his behaviour." Again, Exhibit ABJ3 is a Memo dated 18th August 1999 written by the 2nd appellant to the 1st appellant reminding him that the respondent, among other creditors, has not been paid his entitlement which as at then stood at NI, 960,000.00. On the face of the foregoing exhibits, can it be said that the appellants have demonstrated in clear terms, a defence on the merit that is the requirement of the law for a defendant who desires that the suit be put on the general cause list to enable him defend the suit? I think not. Indeed, Exhibit FR1 is an admission of indebtedness by the appellants. So also Exhibit ABJ3. None of the paragraphs of the affidavit sworn

to on behalf of the appellants has cast the slightest doubt on the plaintiff/respondent's case. See (1) Jipreze v. Okonkwo (1987) 3 NWLR (pt.62) 737 and (2) Macaulay v. Nal Merchant Bank Ltd (1990) 4 NWLR (pt.144) 283. The appellants having failed to satisfy the provisions of the law, the trial court rightly entered judgment in favour of the plaintiff/respondent. And the court below has done true justice by not upsetting that judgment. It is for the foregoing, but more in particular, for the fuller reasons contained in the leading judgment that I will also dismiss this appeal for lacking in merits and affirms the judgments of the two courts below. I abide by all the consequential orders made including the order as to costs.

Counsel

Dr. A. Amuda Kannike For the Appellants

C.O. Enoch-Lucky

With him

A.H. Sanusi

And

E.O. Olowononi For the Respondents