In The Supreme Court of Nigeria

On Tuesday, the 22nd day of June 2004

S.C. 151/1999

Before Their Lordships

Salihu Modibbo Alfa Belgore	.....	Justice, Supreme Court
Sylvester Umaru Onu		Justice, Supreme Court
Samson Odemwingie Uwaifo	.....	Justice, Supreme Court
Dennis Onyejife Edozie	.....	Justice, Supreme Court
Ignatius Chukwudi Pats-Acholonu	.....	Justice, Supreme Court

Between

Christopher U. Nwanji *(Trading in the name and style of Firestone Enterprises)*	.....	Appellant

And

Coastal Services (Nigeria) Limited	.....	Respondent

Judgement of the Court

Delivered by

Samson Odemwingie Uwaifo, J.S.C.

The facts of this case are simple. The plaintiff who is engaged in the business of shipping, warehousing, clearing and forwarding of goods entered into a contract with the defendant, a transporter of goods. The contract was for the defendant to transport some iron rods and bags of cement from the Warri Port to be delivered to the Fougerolle (Nig) Limited at Ajaokuta. It was alleged that those goods were not delivered, whereupon, the plaintiff claimed for:

1.	Cost of goods…..	74,254.60 (sic)
2.	Loss of commission from contract with Fougerolle (Nig) Ltd.	140,000.00
3.	Expenses incurred in making inquiries	10,000.00
4.	Cost of defending action by Fougerolle (Nig) Ltd	20,000.00
5.	General Damages	90,000.00
	Total	**334.254.00 (sic)**

The defendant contended that it delivered the goods and counterclaimed for ₦7,165.50 as special damages which he alleged the plaintiff deducted from his entitlement and ₦88,924.44 as general damages which, however, did not add up to the ₦100,000.00 stated as the total counterclaim.

On 27th January, 1995, Narebor, J., sitting at the High Court, Warri, in an inordinately long judgment, having regard to the simple nature of the case, found for the plaintiff and awarded damages as follows:

a.	General damages	85,000.00
(i)	41 trucks of cement and iron rods lost	74,000.00
(ii)	Cost of making searches and inquiries	10,000.00
(iii)	Professional fees of Fougerolle's case against plaintiff	20,000.00
	Total	**189.000.00"**

The counterclaim was dismissed. The defendant appealed against the judgment.

On 8th July 1999, in an equally inordinately long judgment by Ba'bba, JCA, with which Salami and Tabai, JJCA., agreed, the Court of Appeal, Benin Division upheld the decision of the High Court. The defendant (hereinafter referred to as appellant) has further appealed to this court and raised five issues for determination of this appeal. I must say that the issues were most inelegantly framed. I do not think I ought to reproduce them all except issue 3 which appears most relevant. It reads:

> 3. Whether the learned Justices of the Court of Appeal were justified in holding that the trial Judge was right in awarding the sum of ₦74,000.00 *(Seventy-Four Thousand Naira)* as proven items of special damages not specifically pleaded and/or strictly proved as cost of the alleged missing goods, ₦20,000.00 *(Twenty Thousand Naira)* as alleged legal fees paid in an alleged suit which proceedings were not tendered before him as well as ₦10,000.00 *(Ten Thousand Naira)* as alleged costs of searches respectively in the absence of

any valid receipts tendered by the alleged recipients of the said amounts and or a detailed inventory shown with mathematical quantification to that effect.

On the other hand, the plaintiff (hereinafter referred to as the respondent) seemed to have well paraphrased the said issues raised by the appellant, except that he failed to mention the amount of ₦74,000.00 in issue (iii), as follows:

(i) Whether Exhibit 'A', the photocopy of the agreement between the parties was rightly admitted in evidence.

(ii) Whether the learned Justices of the Court of Appeal were correct in the decision that the learned trial Judge properly evaluated the evidence called on either side before arriving at his decision.

(iii) Whether the award on the footing of special damages of ₦20,000.00 being legal fees paid by the respondent in a suit arising out of the appellant's breach of contract and ₦10,000.00 being costs of making searches and enquiries for the goods not delivered by the appellant were rightly upheld by the court below.

(iv) Whether the decision of the learned trial Judge that the appellant did not deliver the goods in accordance with the terms of the contract was rightly affirmed by the court below.

(v) Whether the dismissal of the appellant's counter claim was correctly affirmed by the learned Justices of the Court of Appeal.

Beginning with issue 1, the contention of the appellant is that a photocopy of the agreement instead of the original between the parties was wrongly admitted in evidence. The respondent argues that the existence of that agreement was specifically admitted by the appellant in his Statement of Defence and so a copy of the agreement is admissible as secondary evidence. I have no doubt that there is no merit in issue 1. The respondent pleaded the agreement in paragraph 4 of its Statement of Claim thus:

> By an agreement in writing entered into in Warri, dated the 1st day of July 1981, and made between the plaintiff of the one part and the defendant of the other part, the plaintiff engaged the services of the defendant in the transportation of the plaintiff's goods from the port of Warri to any designated destination in the relevant Waybill; the said Agreement titled 'Conditions of Carriage of Goods by the Transporter' shall be founded upon at the trial of this action.

The appellant responded in paragraphs 2 and 3 of the Statement of Defence as follows:

2. Defendant admits paragraphs 1, 2, 3 and 4 of the statement of claim only to the extent of the corporate status of the plaintiff and the legal status of the defendant. The other averments therein are vehemently denied and plaintiff is put to the strictest proof of the same at the trial of this action.

3. In further traverse of paragraph 4, the defendant avers that the agreement pleaded therein was scrupulously complied with by deposit on behalf of the defendant of a 'Goods-in-Transit Insurance Policy' in respect of all the goods *in transitu* as an indemnity by the Insurance Company to the plaintiff for any loss or losses occasioned by loss and/or destruction during carriage by defendant. The same will be relied upon at the trial.

A photocopy of such an agreement is admissible as the appellant did not suggest that the contents were different from those of the original see *Sections 95(b) and 97(1) (b) of the Evidence Act.* Even so. It would have been up to him to tender the original to contradict the photocopy if he felt the photocopy was at variance with the original.

As regards issue 2, I think by and large the two courts below did the evaluation of the evidence adduced in this case. However, I must add here that even though the two courts below apparently evaluated the evidence, they completely overlooked the worth of such evidence having regard to the quality of the pleading by the respondent. The problem naturally arises whether they could possibly have done the evaluation with the necessary insight. The argument canvassed by the appellant in respect of this issue is quite revealing to some extent in this regard. It is the contention of learned counsel for the appellant, Mr. Odje, that it was wrong to award special damages as claimed by the respondent when they were neither specifically pleaded nor strictly proved. In this respect, the argument is that since parties are bound by their pleadings, evidence adduced when not based on pleaded facts goes to no issue; and the evidence must be rejected and the case decided on legally admissible evidence. The case of *Qkonji v Njokanma (1991) 7 NWLR (Pt. 202) 131 at 146* was cited. It was further emphasised in the brief of argument that the awards, particularly that of ₦74.000.00 for iron rods and cement, were wrong, basing this on the fact that

> The iron and cement had no mathematical quantification in numbers, kilo weight and/or pound weight and thus were totally bereft of material particulars and were Irrecoverable and wrongly claimed.

I shall discuss the essence of this argument in the course of this judgment when dealing with issue 3.

Issue 4: The evidence is that the appellant did not deliver the goods. The appellant pleaded how delivery was done in paragraphs 5 and 6 of the Statement of Defence as follows:

5. By way of contradiction, the defendant avers that at any time defendant loaded plaintiffs goods into its vehicles during the currency of the contract for delivery to any destination, the plaintiff prepared a waybill of 4 (four) copies, 1 (one) which plaintiff kept and 3 (three) of which were handed over to defendant's drivers who on arrival of the consignment at the appropriate destination on delivery of the said consignment, causes plaintiff's agent and/or consignee to sign each of the said (3) three waybills as evidence of receipt and then the goods are passed on to their possession and/or custody:

6. The duly signed triplicate set of waybills are then lodge (sic) in duly designated offices of plaintiff's as follows: -

   (a) 1st copy (white in colour) is retained by the consignee (Fourgerolle Nigeria Limited, Ajaokuta).

   (b) The second copy (usually blue in colour) is lodge (sic) with plaintiff's security personnel and/or officer at the delivery site at plaintiff's Ajaokuta yard.

   (c) The third copy (pink) is handed back to the defendant's driver who return (sic) same to defendant's Warri headquarters for processing and/or accounting purpose to obtain payments for each and every such haulage. The defendant shall rely on photocopies of the pink colour Waybills original which has since been handed over to plaintiff's company for processing and/ or accounting purposes.

The learned trial Judge failed to accept the evidence led in this regard. It would appear the said copies were not tendered. I have examined the exhibits admitted at the trial and could not find such documents among the exhibits. In the absence of documentary evidence, the two courts below would have nothing to base the claim that there had been delivery on. However, it is the contention in issue 3 that really determines the question of liability.

Issue 5: This deals with the counterclaim which was dismissed. The appellant had counterclaimed for some specific amounts as special damages on the ground that the respondent deducted them from his entitlement for services rendered as a transporter. The trial court found that his allegation was not proved, as indeed it was not. The court below upheld that finding. There is no merit, in my view, in issue 5 and I answer it in the affirmative.

I now go back to issue 3. This concerns some of the sums awarded to the respondent in his claim against the appellant. The claim in full reads thus:

(1)	Special Damages		
	(i)	Cost of goods lost	74.254.60 (sic)
	(ii)	Loss of commission from contract dated 10/7/81 with Fougerolle Nigeria Ltd.	140.000.00
		Particulars	
		Period of contract from 10/7/83 When contract was terminated on 19/8/82 and the commission on contract per month was N20.000.00 per month making a total loss on contract	140.000.00
	(iii)	Cost of expenses incurred in making searches and enquiries for the lost goods	10,000.00
	(iv)	Cost of defending action instituted by Fougerolle (Nig) Limited and NICON Insurance Company in suit No LD/586787 in *Fougerolle and NICON v. Coastal Service*	20,000.00
(2)	General Damages		90,000.00
		Total	**334,254.00 (sic)**

The appellant contends in respect of costs of goods said to have been lost, that the ₦74,000.00 awarded for missing iron rods and cement cannot be justified since those items were not specifically pleaded and value assigned to each of them. The respondent's reaction in its brief of argument was that

> none of the grounds of appeal filed against the judgment of the learned trial Judge challenged the finding of the learned trial Judge on the sum of ₦74,000.00. It was therefore not an issue before the Court of Appeal and hence, cannot be an issue before this court. Even in the grounds of appeal from the decision of the Court of Appeal to this court, the award of ₦74.000.00 is not mentioned anywhere.

It is not quite correct to say that the award of ₦74,000.00 was not an issue before the Court of Appeal. It was an issue raised, even though obliquely by learned counsel's unfortunate style of writing and argument, as part of his issue 2 in that court. He then urged the court below "to interfere by setting aside the said awards, particularly that for ₦74,000.00 *(Seventy-Four Thousand Naira)* for the alleged missing *Iron Rods* and *Cement* which items were *Neither specifically*

pleaded and/or strictly proved" - see page 172 of the Record of Proceedings. The court below, per Ba'aba, JCA., said in the leading judgment:

> There is evidence by 1st P. W. that plaintiff demanded ₦74,000.00 *(Seventy-Four Thousand Naira)* from defendant being cost of the goods lost. ₦74,000,66k (sic) is pleaded in paragraph 13(i) of the plaintiff's amended statement of claim. There is also credible evidence that bags of cement and iron rods were not delivered as agreed and were and are still missing.

The court below overlooked the fact there was no specific pleading of the quantity of iron rods and bags of cement all allegedly not delivered and the value of each item. And no evidence was given as to the value of each item. So the question remained whether the judgment on that amount which was claimed as special damages could be said to be supported by evidence.

The law is clear that special damages must be pleaded and proved strictly see *B. E. O. O. Industries (Nigeria) Ltd, v. Maduakor (1975) 12 S. C. 91 at 108* where this court approved Lord Donovan's observation in *Perestrello & Companhia Limitada v. United Paint Co. Ltd (1969) 1 WLR 570 at 579*, and a passage in *Mayne and MacGregor on Damages 12th Edn. (1961), para. 1970*. It is there stated that a plaintiff claiming special damages has an obligation to plead and particularise any item of damage and that the said obligation to particularise arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim on a precise calculations must give the defendant access to the facts which make such calculation possible: per Lord Donovan in *Perestrello's case* (supra) at pages 579-580. The said paragraph 970 in *Mayne and MacGregor* (supra) says *inter alia*:

> "Special damages consists in all items of loss which must be specified by (the plaintiff) before they may be proved and recovery granted."

See also *Obimiami Brick & Stone (Nig) Ltd v. A.C.B. Ltd (1998) 3 NWLR (Pt. 229) 260 at 312*. The respondent had the obligation to state the number of iron rods which he claims as an item of loss and the price of each in the Statement of Claim relied on. The same must be done in regard to the bags of cement. The respective price of each must also be stated and then given in evidence to justify the amount claimed.

The appellant now argues before this court urging us to interfere with the awards made against him "particularly that for ₦74,000.00 *(Seventy-four Thousand Naira)* for the alleged missing *Iron Rods* and *Cement* which items were *Neither specifically pleaded and/or strictly proved* " see page 20 of the appellant's brief of argument. I think it must be acknowledged that even under the omnibus ground of appeal complaining that the Judgment is against the weight of evidence, this submission must be regarded as correct because there was no proper pleading as to the quantities of the iron rods and cement and evidence was not given as to their respective values. The only part of the Statement of Claim where iron rods and cement were mentioned was the final claim paragraph. There it is simply stated thus:

> "41trucks of cement and iron rods lost ₦74,000.00."

Even if this had been made an averment and not just part of the particulars of claim, it would still have been woefully inadequate and lacking in specificity. There is no indication as to how many bags of cement and number of iron rods in one truck. The question remains how ₦74,000.00 stated was calculated. No court can determine this without an averment as to the number of iron rods and bags of cement and the cost of each. In the circumstances, therefore the evidence adduced must be considered inadmissible.

The law is that for special damages to be awarded, apart from being specifically pleaded, they must be in respect of claimable heads of damage; and the special damages should easily lend themselves to quantification or assessment, and supported by credible evidence: see *Okulaja v Haddad (1973) 11 S. C. 357 at 362*; *West African Shipping Agency (Nig) Ltd v Kalla (1978) 3 S.C. 21*. In any event, the special damages must be strictly proved since without such proof no award can be made: *Shell B. P. v Cole (1978) 3 S. C 183*; *Osuji v Isiocha (1989) 6 S.C. (Pt III) 158, (1989) 3 NWLR (Pt. 111)623 at 633, 636*. It is true that, as said in *Imana v Robinson (1979) 3 & 4 S.C. 1 at 23*, "strict" proof does not mean "unusual proof; but the observation at page 23 of that same authority goes on to say that it implies that

> "a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible"

citing Lord Donovan in *Perestrello's case* (supra). Therefore, in essence, there must be particulars upon which special damages are based, there must be evidence in proof and the evidence must be credible. The award of ₦74,000.00 has failed to meet these criteria.

There is the award of ₦20,000.00 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 the non-delivery of the goods in question. I can find no basis for this award. First, facts about the alleged suit were not pleaded at all. So there is nothing to show that Fougerolle succeeded in the alleged suit. This is important because if it was a spurious suit which Fougerolle lost, how can the appellant be made liable for the fees paid by the respondent to defend it? 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. A.CB. Ltd(1998) 10 NWLR (ti. 570) 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 costs taxation to get a realistic figure. Costs are awarded arbitrarily and certainly usually minimally. I do not therefore see why the appellant will be entitled to general of any damages against the auctioneer or against the mortgagee who engaged him, in the present case, on the ground of solicitor's costs paid by him.

I think the above observation remains valid and do endorse it. Chief Clarke, learned counsel for the respondent, thought that the *Ihekwoaba's case* was inapplicable, furthermore, he thought the observation above-quoted was an *obiter*. I have to say that in my view, he is wrong. I find the case applicable here. One of the issues canvassed in that case which gave rise to the said observation was issue 4 which was:

> Whether the appellants, if successful, are entitled to damages for expenses, including legal actions occasioned by breach of duty owed by a mortgagee to a mortgagor for wrongful exercise of power of sale.

The claim for legal fees paid to conduct a case was eventually disallowed upon the observation so made. It is a misconception to regard the said observation as an *obiter* in that case. Thirdly, it was a litigation the respondent should have prevented the said Fougerolle from engaging in by simply undertaking to pay for the alleged lost goods since, according to the present action, the goods were said not to have been delivered. What was it then the respondent had to defend by paying legal fees, which it later decided to pass on to the appellant, when it was obvious he would have no defence to the claim by Fougerolie for its goods or their value? I am quite satisfied that the claim for the fees paid by the respondent to counsel to defend that action is unreasonable and the amount involved cannot be recovered from the appellant.

There is also the award of ₦10,000,00 being| "cost of making searches and inquiries." Again, there is no single averment pleaded in the Statement of Claim, even after it had been amended, as to the type of searches and inquiries the respondent undertook and where he went to for such searches and inquiries. Rather, out of the blue, the amount of ₦10,000.00 was simply placed under particulars of special damages in the last paragraph of the Statement of Claim. The documentary evidence (Exhibits C, C1 and C2) shows that ₦10,000.00 was spent for hotel accommodation and transport. Exhibit C is cash debit of ₦3,500.00 being cost of hotel accommodation and transport bill from Warri to Okene, Ajaokuca and Ilorin in search of bundles of iron rods, and bags of cement lost in transit from Warri to Ajaokuta. Exhibit C1 is for ₦3,500.00 for the same purpose. Exhibit C2 is for ₦3,000.00 for that same purpose. But all three documents are cash debits of the respondent itself. There are no hotel bills attached. They are simply self-serving documentary evidence for a total amount of ₦10,000.00 the facts of which were not pleaded.

It is clear to me that on a broad but fundamental perspective, the evidence led in respect of the amounts of ₦74,000,00, ₦20, 000.00 and ₦10,000.00 are inadmissible having regard to the state of the pleading by the respondent, quite apart that it is inadequate and too general. Such evidence must be discountenanced as it goes to no issue: see *George v. Dominion Flour Mills Ltd (1963) 1 All NLR 71 at 77; National Investment and Properties Co. Ltd. v. Thompson Organisation Ltd (1969) NMLR 99 at 104; Emegokwue v. Okadigbo (1973) 4 S. C. 113 at 117; Nwawuba v. Enemuo (1988) 1 NSCC (Vol. 19) 930 at 940; (1988) 2 NWLR (Pt. 78) 581 at 595-596.* The two courts below had an obligation to expunge the said evidence from the record and decide the case on properly and legally admissible evidence but failed in this regard. This court is now entitled to do so: see *Ajayi v.Fisher (1956) SCNLR 279 at 281; Owonyin v Omotosho (1961) 2 SCNLR 57 at 61; Chigbu v. Tonimas (Nig) Ltd (1999) 3 NWLR (Pt. 593)115 at 144.*

I have come to the conclusion that the respondent failed to establish his claim and that there is merit in this appeal even though, it was clumsily presented, and the appellant's brief of argument was written by Mr. Okiemute Mudiaga Odje in what, to use a fair, though inadequate expression (for which I have no apology), is a bombastic and highly offensive grandiloquent language. Mr Odje is seriously advised to reconsider his approach to advocacy otherwise it will earn him nothing but reproach and professional disablement. I allow the appeal and set aside the judgments of the two courts below together with the costs awarded. I award ₦2,000.00 as costs in the High Court, ₦3,500.00 as costs in the court below and ₦I0,000.00 as costs in this court to the appellant.

Judgement delivered by
Salihu Modibbo Alfa Belgore, J.S.C.

In our procedure for trying civil matters the position has always been that all items claimed must be clearly pleaded. In claiming special damages, the pleading must be clear as to what is being claimed. In this matter on appeal, a lump sum was pleaded as cement and iron rods lost without specifically averring to quantity and cost of each material. The court must rely on what parties claim specifically and as impartial arbiter must not embark on doing the arithmetic the parties never put forward. The purpose of pleading is to clearly alert the opponent as to what he is to meet. Certainly pleading must contain facts, only facts, the opponent is to meet and not the evidence; but in situation where loss of certain items is claimed, quantity of such items and the value in money must be clearly averred in pleading. This will obviate doubt and allow parties to the suit make preparation to meet the averment. That is why specific damages must be clearly pleaded and strictly proved by evidence. *B.E.O.O. Industries (Nig.) Ltd. v. Maduakor (1975) 12 SC 91, 108; Obimiami Brick & Stone Ltd. v. A.C.B. Ltd. (1992) 3 NWLR (Pt. 229) 260, 312; Odulaja v. Haddad (1973) 11 SC 357, 362; Osuji v. Isiochi (1989) 3 NWLR (Pt. 111) 623; 633; 636.* All evidence received in respect of matters not pleaded properly amount to illegally admitted evidence and go to no issue. *Ferdinand George v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117, (1963) 1 All*

NLR 71,77; Emegokwue v. Okadigbo (1973) 4 SC 113, 117; National Investment and Properties Co. Ltd. v. Thomson Organisation (1969) NMLR 99,104.

It is therefore clear that the two lower courts overlooked the defects in pleading of plaintiff and illegally received evidence on matters not properly pleaded. It is for this reason that I adopt the judgment of my learned brother, Uwaifo, JSC in allowing this appeal and I make the same orders as to costs as made by him.

Judgement delivered by
Sylvester Umaru Onu, J.S.C

Having been privileged to read in draft the judgment of my learned brother, Uwaifo, JSC. I am in complete agreement with his reasoning and conclusions that the appeal is meritorious. Accordingly, I too, allow the appeal and make similar consequential orders inclusive of costs as therein awarded.

Judgement delivered by
Dennis Onyejife Edozie, J.S.C

I had read before now the leading judgment just delivered by my learned brother, Uwaifo, JSC. I agree with his reasoning and conclusion in allowing the appeal. I also allow the appeal with costs as assessed by him.

Judgement delivered by
Ignatius Chukwudi Pats-Acholonu, J.S.C

I have read the leading judgment of my learned brother, Uwaifo, JSC and I agree with him. In particular, I express my reservations about the comments and the type of language and expression used by the appellant's counsel which appear not only characterised by the use of obscure and abusive words that are unnecessary, but almost render incomprehensible the message he is sending across in canvassing the appellant's case. Such inordinate resort to a base language could have done irreparable damage to the cause of the appellant's case.

However, the above observation notwithstanding, I agree that the appeal be allowed and I abide by the consequential orders made in the leading judgment.

Counsel

Not represented (Appellant absent)	.....	For the Appellant
Chief Robert Clarke	.....	For the Respondent