

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY**

**IN THE ABUJA JUDICIAL DIVISION**

**HOLDEN AT JABI, ABUJA**

**BEFORE HIS LORDSHIP: HON. JUSTICE D. Z. SENCHI**

**HON. JUDGE HIGH COURT NO. 13**

**COURT CLERKS: T. P. SALLAH & ORS**

**DATE: 17/09/2020**

**FCT/HC/CV/2285/2019**

**BETWEEN**

**MATHAN NIGERIA LIMITED----**

**CLAIMANT**

**AND**

**1. JOHNSON CONSTRUCTION COMPANY**

**2. MR. CHARLES ORIE**

**DEFENDANTS**

### **RULING**

By a writ of summons dated 20<sup>th</sup> June, 2019 and filed on 26<sup>th</sup> June, 2019 was marked and issued by this Honourable Court on the Defendants on 19<sup>th</sup> September, 2019 pursuant to the undefended list procedure. The claimant claims against the Defendants jointly and severally as follows:-

- (1) An order of this Honourable Court directing the Defendants to pay the claimant the total sum of ₦88,517,369.74 only being the remnant of the unspent contract sum awarded to the Defendants by the Plaintiff.
- (2) An order of this Honourable Court directing the Defendants to pay 20% interest rates on the judgment sum until the Defendants pay up the whole money in full.
- (3) And such order or other orders as the Honourable Court may deem fit to make in the given circumstances.

In support of the writ of summons under the undefended list is an affidavit of six (6) paragraphs duly sworn to by one Ugo A Jacinta, a

litigation secretary in the firm of EcooSolicitors of No 19 GwaniStreet, Wuse Zone 4, Abuja. In further support are documents exhibited and marked as exhibits JA1 to JA16 respectively.

The writ of summons marked and issued was served on the 1<sup>st</sup> Defendant on 20<sup>th</sup> September, 2019 while the 2<sup>nd</sup> Defendant was served on 16<sup>th</sup> October, 2019. Both Defendants were equally served with hearing notices. The proof of service of the processes filed and served on the Defendants were filed in Court as evidence of such services.

Consequently upon the service of Court processes on the Defendants, the Defendants on the 22<sup>nd</sup> October, 2019 filed a notice of intention to defend the suit together with an affidavit disclosing a defence of 56 paragraphs duly deposed to by one Chief Charles Orie, the Managing Director of Messrs Johnsons Construction (Abuja) Limited of No. 14(b) AltaraCrescent, Wuse 2, Abuja. Attached in support of the affidavit disclosing a defence are thirteen (13) exhibits marked exhibits J1,J2,J3,J4(a)J4(b)J4(c)J4(d), J4€, J4(f),J5(a), J5(b)J6 and J7 respectively. The Defendants on 28<sup>th</sup> October, 2019 filed a motion on notice for extension of time to regularize their processes i.e notice of intention to defend and an affidavit disclosing a defence earlier filed on 22<sup>nd</sup> October, 2019. The Defendants further filed on 28<sup>th</sup> October, 2019 a motion on notice praying the Court for an order striking out the name of the 2<sup>nd</sup> Defendant.

The above are the processes filed by both the claimant and the Defendants in the instant case. Thus, having put the records as they were, on the 9<sup>th</sup> June, 2020 the case was heard under the undefended procedure.

Now before I proceed to consider and determine the claims of the claimant vis- a-vis the notice of intention to defend and the affidavit disclosing a defence, as I said earlier, the Defendants filed two motions i.e one for extension of time to regularize their notice of intention to defend together with an affidavit and the 2<sup>nd</sup> one is an

application seeking for an order striking out the name of the 2<sup>nd</sup> Defendant from this suit.

Firstly, from the records or proceedings in this suit, this suit came up for hearing on 15<sup>th</sup> January, 2020 and 9<sup>th</sup> June, 2020. On the 15<sup>th</sup> January, 2020 the Defendants Counsel P. C Ugochukwu appearing with C.E Ozongwu, O.P Audu (Miss) and H.C Okoro did not move their application for extension of time to regularize their processes. Also on the 9<sup>th</sup> June, 2020 when the main suit was heard, the Same Counsel P.C Ugochukwu Esq appearing with Toba FishinOlulu Esq still did not move the said application. In otherwords, the motion No. FCT/HC/M/490/2019 filed on 28<sup>th</sup> October, 2019 is still not moved and or granted by this Honourable Court.

In any event, the Claimant's Counsel did not file any process in opposition. Thus, therefore pursuant to the inherent power of this Honourable Court as provided by the Constitution of the Federal Republic of Nigeria 1999 (as amended) and rules of this Court, in the interest of justice and to allow the Defendants contest the suit on its merit, the application of the Defendants is hereby deemed as properly moved, argued and accordingly granted as prayed.

The second application by the Defendants is a motion No. M/489/2019 urging this Court to strike out the name of the 2<sup>nd</sup> Defendant.

The law is trite that undefended list procedure is a procedure that is sui generis. It is a procedure that is in its class of its own different and distinct from matters under the general cause list and thus, its requirement must be strictly followed. By order 35 Rule 3(1) Rules of this Court, it provides as follows:-

*"Where a party served with the writ delivers to registrar, before 5 days to the day 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."*

The interpretation or implication of the above rule is that a defence on the merit or triable issues include jurisdictional issues. In other words any objection whether it is based on law or facts by the Defendant in a suit commenced by undefended list procedure, must be raised in the affidavit disclosing a defence and that in itself will constitute a defence or a triable issue.

Thus, the objection by the Defendants that the 1<sup>st</sup> Defendant has a separate legal personality from the 2<sup>nd</sup> Defendant and that the suit discloses no reasonable cause of action against the 2<sup>nd</sup> Defendant ought to be raised in the affidavit disclosing a defence and not for Counsel to file a separate process i.e motion on notice as done in the instant case. I however observed that after a careful perusal of the Defendants affidavit disclosing a defence, at paragraphs 4,9,50 (i) and (ii), the Defendants raised the same objections that culminated into filing the instant motion on notice under consideration. This is wrong in law and I have no hesitation in declaring the motion on notice FCT/HC/M/489/2019 as an abuse of Court process and therefore incompetent. Accordingly, it is hereby struck out.

The coast having been cleared, what is to be determined now is whether from the affidavit disclosing a defence filed in support of the notice of intention to defend, the Defendants have disclosed a defence or a triable issue?

The claim of the claimant on the writ of summons is for the total sum of N88,517,369.74 only being the remnant of the unspent contract sum awarded to the Defendants by the Plaintiff.

Order 35 (1), Rules of this Court provides thus:-

“Where an application in form 1 as in the appendix is made to issue a writ of summons in respect of a claim to recover a debt or liquidated money demand, supported by an affidavit stating the grounds on which the claim is based, and stating that in the Deponent’s belief there is no defence to it, the judge in chambers shall enter the suit for hearing in what shall be called the “undefended list.”

By virtue of the above provision, for the Claimant to be entitled to judgment, the following must be satisfied:-

1. That the claim is a debt or liquidated money demand;
2. An affidavit stating the grounds upon which the claim is based;
3. An averment that the Defendant has no defence to the claim.

On the first condition or ingredient i.e that the claim must be a debt or liquidated sum, it has been defined to mean claim that is certain or readily ascertainable and it is specific by arithmetic or other means of calculation.

See **LIBRA IMPORTS (NIG) LTD V ACCESS BANK (2018) LPELR 46795 (CA), DIGITAL SECURITY TECHNOLOGY LTD & ANOR V ANDI (2017)LPELR 43446 (CA)**. In the case of **ABDULMUMINU& ORS V GTB (2017) LPELR 43140**, the Court of Appeal held:-

*"Liquidated money demand was explained in **WEMA SECURITIES & FINANCE PLC V NIGERIA AGRICULTURAL INSURANCE CORP, (2015)16 NWLR (pt1484) page 93 at 144-145, FABIYI JSC**(as he then was) said as follows:-*

*"It is now clear that the factors for determining a liquidated sum are as follows:-*

- (a) *The sum must be arithmetically ascertainable without further investigation*
- (b) *If it is in references to a contract, the parties to same must have mutually and unequivocally agreed on a fix amount payable on breach;*
- (c) *The agreed and fixed amount must be known prior to the breach."*

In otherwords, 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 other or further investigation.

A close look or perusal of the claimant's claim of N88,517,369.74 being the remnant of unspent contract sum awarded to the Defendants the question now is whether grounds exist in the affidavit of the Claimant to support the claims?

The Defendants have at paragraphs 12,13,14,29, 33,35,37 and 38 of their affidavit disclosing a defence raised issues or facts disputing the claim of N88,517,369.74 of the Claimant. And in fact even the averments of the claimant at paragraphs 5(f) (i) (j) and exhibits JA 13 JA14 and the memorandum of understanding, exhibit JA15 did not in clear terms disclose how the claimant arrived at the figure and claim of N88,517,369.74. This figure or claim, from the affidavit of the Claimant and that of the Defendants, appears to exist only in the figment imagination of the claimant. In other words by paragraphs 4,9,29,33,35,37,38, and 50 (i) and (ii) the Defendants had raised a defence or triable issues that cannot be conveniently treated and determine on affidavit evidence but pleadings are required and evidence led.

In the instant case therefore this suit ought to be transferred or removed from the undefended list to the general cause list. Accordingly this suit is hereby transferred to the general cause list and pleadings are hereby ordered to be filed and exchanged between the parties.

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**HON. JUSTICE D.Z. SENCHI**  
**(PRESIDING JUDGE)**  
**17/09/2020**

Parties:- Absent.

NNamdiAkuneto:- For the Defendants with me is A.T  
Ololu  
Claimant's Counsel absent.

Nnamdi:-Case is for ruling.

Court:- Case adjourned to the 3<sup>rd</sup> November, 2020 for hearing.

**Sign**  
**Judge**  
**17/09/2020**