IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT JABI

THIS MONDAY. THE 31ST DAY OF JANUARY, 2022

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: GWD/CV/73/17

BETWEEN:

MR. ABUBAKAR M. IDU .....PLAINTIFF

AND

UNITED BANK FOR AFRICA PLC .....DEFENDANT

JUDGMENT

The Plaintiff's claims against the Defendant as endorsed on the statement of claims dated 19th October, 2017 are as follows:

a. **A Declaration that the creation of the 2nd Loan Account NS037911000028 without the consent of the Plaintiff is illegal, null and of no effect.**

b. **A Declaration that all deductions from January 2016 in the sum of (N28.401.13 (Twenty Eight Thousand, Four Hundred and One Naira and Thirteen Kobo) based on the 2nd loan account NS037911000028 be reversed to the Plaintiff's Account Number: 1016421449 domicile with the Defendant.**

c. **The sum of N500,000,000.00(Five Hundred Million Naira) general damages for emotional trauma and breach of the contract**

d. The sum of N450,000.00 (Four Hundred and Fifty Thousand Naira) only being the cost of this action.

The Defendant then filed in defence on 5th February, 2018.

In proof of his case, the Plaintiff testified as PW1 and the only witness. He deposed to a witness statement on oath dated 19th October, 2017 which he adopted at the hearing. He tendered in evidence the following documents, to wit:

1. **Document titled Fin1, loan details: 03791010009433 was admitted as Exhibit P1.**

2. **Copy of UBA loan restructure approval dated 3rd September, 2015 was admitted as Exhibit P2.**

3. **Letter of Plaintiff titled Re: complaint for Non restructuring of loan No:1016421449 was admitted as Exhibit P3**

4. **Copy of UBA customer account ledger report from 29th December, 2003 to 29th December, 2016 was admitted as Exhibit P4**

5. **Letters by the law firm of I.A. Aliyu & Co dated 4th October, 2016 and 25th November, 2016 to the Defendant were admitted as Exhibit P5a and b**

6. **Two (2) UBA statements of Account of Plaintiff was admitted as Exhibit P6a and P6b.**

Plaintiff was then cross-examined by counsel to the Defendant and with his evidence the Plaintiff closed his case.

On the part of the Defendant, they also called only one witness, **Michael Chigbundu**, Branch Manager at Defendant's Gwagwalada Branch who testified as DW1. He adopted his witness statement dated 5th February, 2018 and tendered in evidence the following documents; to wit:

1. **Customer loan application form was admitted as Exhibit D1.**

2. **UBA letter of offer of credit facility "No Wahala Loan" dated 13th September, 2013 was admitted as Exhibit D2.**

3. **Letter by Plaintiff titled "Requesting a Reschedule of loan payment" dated 19th August, 2015 was admitted as Exhibit D3.**

4. **UBA offer letter of loan restructure dated 3rd September, 2015 was admitted as Exhibit D4**

DW1 was then cross-examined by counsel to the Plaintiff and with his evidence the Defendant closed its case.

At the close of the case, parties then filed and exchanged final written addresses. In the final address of defendant filed on 27th March, 2021, four issues were raised as arising for determination to wit:

"

1. **Whether the creation of the second loan account No: NS027911000028 was done without the consent of the Plaintiff.**

2. **Whether deduction from January 2016 based on 2nd loan account No: NS027911000028 should be reversed and credited to account No.10164214498.**

3. **Whether the Plaintiff is entitled to the damages claimed**

4. **Whether the Plaintiff has discharged the burden of proof in this case to warrant the court to grant the reliefs claimed."**

In the final address of Plaintiff filed on 24th June, 2021, the same issues identified by Defendant was similarly formulated as the issues arising for determination as follows:

"

1. **Whether the creation of the 2nd loan account No:NS027911000028 was done without the consent of the Plaintiff.**

2. **Whether deduction from January 2016 based on the 2nd loan account No:NS027911000028 should be reversed and credited to account No.10164214498 (belonging to the plaintiff)**

3. **Whether the Plaintiff is entitled to the damages claimed**

4. **Whether the Plaintiff has discharged the burden of proof in this case to warrant the court to grant the reliefs claimed."**

I have set out above the similar issues distilled by parties as arising for determination. In the court's considered opinion, all the issues can be conveniently taken or accommodated under issue 4 raised by parties which the court will hereunder slightly modify as follows:

Whether the Plaintiff has proved his claims on a balance of probabilities to entitle him to all or any of the Reliefs claimed.

The above broad issue is not raised as an alternative to the issues raised by parties, but the issues canvassed by parties can as stated earlier be conveniently and cumulatively treated under the above sole issue. See **Sanusi V. Amoyegun (1992)4 N.W.L.R (pt.237)527.**

The issue thus raised has brought out with sufficient clarity and focus, the pith of contest which has been brought for adjudication and it is on the basis of this issue, that I will now proceed to consider the evidence and submissions of counsel.

In furtherance of the foregoing, I have carefully read the final written addresses filed by parties and I shall in the course of this Judgment and where necessary make references to the submissions made by counsel.

ISSUE 1

Whether the Plaintiff has proved his claims on a balance of probabilities to entitle him to all or any of the Reliefs claimed.

I had at the beginning of this Judgment stated the Reliefs claimed by Plaintiff. The crux of the complaints or grievance situated within the pleadings is predicated on the alleged creation of a second loan account without the consent of the Plaintiff

and the unlawful deductions made from this account which Plaintiff wants reversed. The claim for damages and cost of action were predicated on these defined complaints.

On the other side of the aisle, the Defendant essentially denied these claims with respect to creation of a second account without Plaintiff's consent and absolved itself of any wrong doing in the circumstances. It is therefore to the pleadings which has streamlined the facts and issues in dispute and the evidence led that we must beam a critical judicial search light.

Indeed in the resolution of this dispute there is no better template to situate the respective position of parties than the pleadings and evidence on record. These are the two critical elements that will be pivotal in the resolution of the extant dispute. The respective cases of parties can only be properly considered in the light of the pleadings and ultimately the quality of the evidence led.

Now flowing from the pleadings on both sides of the aisle, there are undoubtedly common grounds. The Defendant in **paragraph 2** of its defence admits to the fact that the Plaintiff is its customer and operates a current account No: 10164211449. It is equally admitted by the Defendant that sometime in 2013, the Plaintiff requested and was granted a **"No wahala loan"** vide **Exhibit D2** in the sum of **N530,000** with a **tenor of 36 months**.

There are no real dispute with respect to the above primary facts. The crux of the dispute relates to the subsequent actions taken by parties with respect to the restructure of the facility; what was infact restructured and the different contentions made with respect to the precise nature, remit and parameters of the restructure.

Before going into this contested assertions, let me quickly state that as a consequence of the admitted facts earlier highlighted, it is logically flows that there exist a banker/customer relationship between parties and it is essentially contractual in nature and this may arise in a number of ways in the course of carrying on business of banking. See **UBN V. Ajabule & Anor (2001)LPELR-8239 (SC) at 39, UBN V. Chimaeze (2014)LPELR-22690(SC) at 42.** It is in the

context of this precisely defined contractual relationship that the crux of this dispute and the contested assertions shall shortly be determined.

Now by virtue of the provision of **Section 131(1) of the Evidence Act,** whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist. By **Section 132 of the Evidence Act** the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Also by **Section 133(1) of the Evidence Act,** in civil cases, the burden of first proving existence or non-existence of a fact lies on the party against whom the Judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.

It is equally important to state that in law, it is one thing to aver a material fact in issue in one's pleadings and quite a different thing to establish such a fact by evidence. Thus where a material fact is pleaded and is either denied or disputed by the other party, the onus of proof clearly rests on he who asserts such a fact to establish same by evidence. This is because it is now elementary principle of law that averments in pleadings do not constitute evidence and must therefore be proved or established by credible evidence unless the same is expressly admitted. See **Tsokwa Oil Marketing co. ltd. V. Bon Ltd. (2002) 11 NWLR (pt 77) 163 at 198 A; Ajuwon V. Akanni (1993) 9 NWLR (pt 316)182 at 200.**

Before evaluating the evidence to determine whether the grievance of Plaintiff has been made out, it may be necessary to again underscore the essence of the relationship between the parties which as stated earlier is contractual and which may arise in a number of varied ways.

The Apex Court in **Bank of the North Ltd V. Yau (2001)LPELR-746 (SC) at 45-46** instructively streamlined or identified the contractual relationship that may arise in the course of carrying on business of banking and the need to be clear on which of the contractual relationship forms the basis of an action thus:

"In the course of carrying on business of banking, a bank enters into several contractual relationships and performs various roles. It is important in an action between bank and customer to be clear which of the several contractual

relationships forms or form the basis of the action. In this case, it is pertinent to note only four of these possible relationships, namely: (i) the relationship of creditor and debtor that arises in regard to the customer's funds in the hands of the bank; (ii) the relationship of creditor and debtor that arises when the bank loans money to the customer or allows him to overdraw on his account; (iii) the relationship that arises from the role of the bank as a collecting bank of cheques drawn on other banks or branches of the same bank by a third person, and (iv) the possible role of the bank as a holder for value of a negotiable instrument.'' See also Eco Bank V. Anchorage Leisure Ltd & Ors (2018)LPELR-45125 (SC) at 28-31 (F-A). In whatever manner the relationship of a banker and customer arises, the law imposes a duty on the bank to exercise reasonable and skill in carrying out the customers instruction or in the performing of its own side of a contract."

A convenient starting point is to understand the precise situational basis of the relationship of parties and its precise parameter. On the state of the pleadings and as already identified, it is not in dispute that the Plaintiff is a customer of the Defendant Bank. It is equally not in dispute that the Plaintiff vide **Exhibit D1** applied for a facility which the Defendant granted vide **Exhibit D2** dated 13th September, 2013 in the sum of **N530,000**. The tenor of the **"No Wahala Loan"** was 36 months to expire on 30th August, 2016. The Plaintiff duly accepted this offer.

On the pleadings and evidence, the Plaintiff at a time, had difficulties in meeting repayment terms of **Exhibit D1** and accordingly by letter vide **Exhibit D3** dated **19th August, 2015**, he applied to the Defendant to restructure or to use his words **"reschedule the loan payment".** I find it relevant to quote the contents of his letter thus:

"Letter Requesting a Reschedule of Loan Payment"

I hereby write to request your Bank to kindly re-schedule the mode of loan payment.

I had failed to service my loan payment for a period of ten months (10 months). This was as result of some losses I had with employee.

This issue has been resolved and my salary will start coming into my account from this month of August.

My principal request is for the bank to help in start deduction from this month August instead of the back months not paid.

I pray my request will be given a positive response and sympathy as it will help in finding a safety valve for the condition I will find my self if otherwise.

Thank you sir.

Yours faithfully

Abubakar Mohammed Idu

Signed"

The above letter speaks for itself and is indeed self explanatory. What I essentially understand this letter to be saying is that he wants a modification of the loan terms and conditions of the existing loan vide **Exhibit D1** because he was not able to service his loan payment for about **"then months (10 months) due to issues he had with his employer which has now been settled."** Indeed the letter specifically requested that the deductions to start from **"this month of August."** It must be noted that **Exhibit D3** was written on 19th August, 2015 and when the Defendant was not forthcoming, with respect to his request to restructure the loan facility, he wrote a reminder vide **Exhibit P3** dated 31st December, 2015 complaining about the failure to restructure the loan despite the fact that his salary was now been paid into his account. The Defendant did not challenge or impugn the contents of either **Exhibits D3 and P3. Exhibit P3** therefore clearly denotes the position that after the difficulties Plaintiff recounted with respect to the payment of his salaries in **Exhibit D3,** which was stopped for about ten months, the issue was now resolved as per **Exhibit P3.** This therefore meant that by the time plaintiff wrote Exhibit P3 dated 13th December, 2015 the Defendant continued or had resumed making the usual repayment deductions as per **Exhibit D1. Exhibit P3** unquestionably was also a request for the restructure of the existing loan facility granted Plaintiff.

A **loan** restructuring as sought here by plaintiff is a process which a borrower for whatever reason including where he is facing financial distress or difficulties may renegotiate and modify the terms of the loan with the lender to avoid default. If the lender accepts to restructure, it helps to maintain continuity in servicing the debt and gives the borrower a certain degree of flexibility to restore financial stability and put the borrower in a secure and safe position to discharge his or her contractual obligations to the lender.

Now in this case and on the pleadings and evidence, the Defendant accepted to restructure this loan vide **Exhibit D4** dated 1st September, 2012. Let me here again refer to aspects of the contents of **Exhibit D4** thus:

"With reference to your approval dated 19th August, 2015, United Bank for Africa Plc is pleased to offer you a LOAN RESTRUCTURE of your outstanding "no wahala loan of N532,140.15 under the following terms and conditions as specified below:

Facility type- No wahala loan

Amount- N522,140.15

Tenor-Twenty Four (24) months…"

The above **restructured offer letter** is again clear and self explanatory. There is no doubt that the above letter unequivocally refers to and specifically restructured the existing loan facility granted to Plaintiff vide **Exhibit D1** on 13th September, 2013.

Flowing from the above, **Exhibit D1** which was restructured vide **Exhibit D4** will clearly in the circumstances provide or situate the terms guiding the relationship of parties.

I have above and at some length made an inquiry into the genesis of the relationship as a fair resolution of this case must involve carefully examining the documents in the context of the entire trajectory of the narrative of the transaction to fully appreciate their legal purport and to enable a proper discernment of the intention of parties.

Accordingly it follows that where parties enter into a precisely defined contractual agreement or document vide **Exhibits D1 and D4**, these documents necessarily provides the fulcrum or basis for the mutual reciprocity of legal obligations as between parties and our attention must be focused on it. It is the law that in construction of agreements or contracts such as **Exhibits D1 and D4**, the duty of court is to carefully construe the terms of the agreement so as to discover the intention of parties in the event of an action arising therefrom. See **Ajay Ltd V AMS Ltd (2003) 7 N.W.L.R (pt.820) 577 at 634 A-D.**

By virtue of **Section 128 (1) of the Evidence Act**, oral evidence would not be admitted to prove, vary, alter or add to the terms of any contract which has been reduced into writing when the document is in existence except the document itself. See **Scoa .V. Bondex Ltd (1991) N.W.L.R (pt.138) 389 F-G.**

I am therefore in no doubt by the confluence of facts as found above that the relationship of parties was in respect of a loan transaction vide **Exhibit D1** which was restructured via **Exhibit D4. Exhibit D4** is therefore not a new offer or loan facility as contended by Defendant but a continuation of the outstanding **"no wahala loan".** At the risk of prolixity but for purposes of clarity. **Exhibit D4** states clearly that **"…UBA Plc is pleased to offer you a LOAN RESTRUCTURE of your outstanding no wahala loan of N532,140.15…"** the word used here is **"outstanding."** In the **Oxford Advance Learner's Dictionary** at Page 630, outstanding was defined as **"(of payment, work, problems etc) not yet paid, done, solved, etc."** There should therefore be no confusion as to what outstanding means in respect of the loan transaction.

The attempt by Defendant to deliberately obfuscate the true import of **Exhibit D4** will therefore not fly. It must be underscored at this early stage that any conclusion reached by any party having regard to the existence of documentary evidence as in this case, cannot be seen to fly in the face of the accepted relevant document or documents. If it is, such conclusion will be contradictory and per verse. No party therefore is entitled to assume that it is within his exclusive province to draw any conclusion(s) where such conclusions depend entirely on documentary evidence. The document or documents in question must justify such conclusion.

As stated earlier, if parties enter into an agreement, they are bound by the terms. It is not the business of the court to make a contract for the parties before it or to rewrite one already made by them. The court cannot legally or properly read into the agreement, the terms on which the parties have not agreed. See **Dalek Nig Ltd V. Oil Mineral Producing Areas Dev. Comm. (Ompadec) (2007)7 N.W.L.R (pt.1033)441 A-B, Larmie V. D.P.M & Services Ltd (2005)18 N.W.L.R (pt.958)88**

Indeed, where there is any disagreement between parties to a written agreement on any particular point, the authoritative and legal source of information for the purpose of resolving the disagreement or dispute is the written contract executed by parties. The reason for this position is to ensure that a party to a contract in writing does not change his position midstream in his underserved advantage and to the detriment of the unsuspecting adverse party. See **Larmie V. D.P.M & Services Ltd (supra).**

Now in this case, it is obvious that after the initial loan on 13th September, 2013 **(Exhibit D1)** and prior to the restructure on 3rd September, 2015 **(Exhibit D4)** and as already alluded to, the Plaintiff would appear to have been meeting to the terms of the initial offer except for the period of **"ten months"** when he had issues with his employer as Plaintiff indicated in his letter or application for the restructure vide **Exhibit D3** dated 19th August, 2015 and which by **Exhibit P3** was resolved by his employers as they had resumed payment of his salaries to the Defendant Bank. The Defendant as stated earlier approved the restructure.

The restructure facility was described as outstanding balance in both Defendant's pleadings and evidence which is indicative of the fact that the initial loan facility of N530,000 **(Exhibit D1)** had since been disbursed to Plaintiff even if there is no clarity in the pleadings of both parties as to when this disbursement was made. I note that the defence counsel has in his written address provided dates of the disbursement but his address is neither the pleadings or evidence. It only suffices to say that it is logical to hold that if there was no initial disbursement, Plaintiff would have not started paying back through deductions from his salary as agreed.

Indeed if there was no initial disbursement, the Defendant could not reasonably be talking of any outstanding balance. Again at the risk of prolixity, there is no confusion that both **Exhibit D1 and D4** all are dealing with the initial loan of N530,000 given as far back as 2013 and then restructured in 2015.

Now it is the case of Plaintiff vide paragraph 8 of his claim that about 5 months after the restructure, vide **Exhibit D4,** he received an alert of N500,000 in his UBA Account which then altered the trajectory of the narrative and precipitated the present dispute. Let me here allow the parties speak to the issue. I will only refer to the relevant paragraphs. In paragraphs 8-15 of the claim, the Plaintiff pleaded as follows:

"**8 The Plaintiff further avers that about 5 months after the restructuring offer was accepted particularly in January he received an alert of N500,000.00(Five Hundred Thousand Naira) Only in his UBA Bank Account with no transaction summary at the time he was expecting his DTO Allowance having being transferred from Jalingo to Lafia and honestly believing it was the said allowance, he proceeded to transfer the sum of N250,000.00 (Two Hundred and Fifty Thousand Naira) only out of the sum of N500,000.00(Five Hundred Thousand Naira) only.**

9 The Plaintiff avers that, after sometime, he received a call from the bank that the money was sent into his account as a routine procedure for restructuring.

10 The Plaintiff expressed his surprise and that he was not aware and no one informed him of such routine procedure.

11 The Plaintiff also informed the Defendants that he was expecting his DTO Allowance of N400,000.00(Four Hundred Thousand Naira) and two month salary which will amount to N500,000.00(Five Hundred Thousand Naira) only and had thought that the money was for same but agreed to pay back the exact amount of Two Hundred and Fifty Thousand Naira he withdrew from his account.

12 The parties were still discussing above matter in paragraphs 5-10 was when the Defendants unilaterally and without consent or acceptance of the Plaintiff created another loan facility with loan account NS037911000028 in the sum of N532,140.15 (Five Hundred and Thirty Two Thousand, One Hundred and Forty Naira, Fifteen Kobo) on the same account operated by the Plaintiff despite the fact that the amount withdrawn by the Plaintiff was N250,000.00(Two Hundred and Fifty Thousand Naira) Only from the alleged routine deposit.

13 The Plaintiff avers that he did not receive or sign any document neither did he request or consent to any other loan facility.

14 On the enquires from the Legal and Loan Recovery Department at the 1st Defendant Headquarters it was revealed that the said second loan has no documentation.

15 The Plaintiff's account now bears two loan accounts which run simultaneously, but has long liquidated or paid loan which was the only loan he entered into a contract with Defendant, hence the Plaintiff consulted his Solicitor, Messrs I.A. Aliyu & Co. The Plaintiff pleads the Statements of Account showing the debits of the two loans from the Plaintiff's account and the various correspondences and same shall be relied on in the trial of this suit."

In response, the Defendant pleaded as follows:

" **With particular reference to paragraph 8 of the claim, the Defendant avers categorically that the Plaintiff is demonstratively evasive and economical with the truth with respect to the N500,000.00 credited to his account by the Defendant Bank because he was informed that the Defendant had credited his account with the said sum or amount which was a routine procedure of the bank for restructuring.**

6 In further response to paragraph 10 of the claim, the Defendant avers that the Plaintiff has no reason to feign surprise or ignorance of the transaction because the restructuring of the facility for the sum of N532.140.15 was

done with the consent of the Plaintiff based on his application letter to the Defendant Bank dated 19th August 2015 and the Memorandum of Acceptance of the offer was equally signed by the Plaintiff on 3rd September, 2015.

7 The outstanding balance of N532.140.15 was restructured NS037911000028) in September, 2015 for 24 months (2years) tenor based on the formal application received from the Plaintiff via his letter to the Defendant dated 19th August, 2015.

8 The accounting entry for the restructured loan facility was credited on the 6th January, 2016 but before the debit entries could be passed for the regularization of the outstanding Finnone Loan the Plaintiff acting without caution or necessary inquiry from his employers or the Defendant bank, made reckless withdrawals/transfers totaling the sum of N252,300,00 (Two Hundred and Fifty Two Thousand, Three Hundred Naira) only.

9 The said reckless withdrawals/transfers perpetrated by the Plaintiff made it practically impossible for the Defendant Bank's Credit Operations Team to close the Original Loan Account No.0379C010009433 because the remaining balance of N250,170.70 in the Plaintiff's operative current account No.1016421449 was insufficient to clear the outstanding balance as at that date.

10 With particular reference to and in further response to paragraph 11 of the claim, the Defendant avers categorically that the Plaintiff did not inform the Defendant, whether orally or in writing, that he was expecting his DTO allowance of N400,000.00 and two months' salary or any other money whatsoever and shall put the Plaintiff to the strictest proof of same at the trial of the case.

11 In further answer to paragraph 12 of the claim, the Defendant avers categorically that the Restructured Loan Facility with loan account No. NS037911000028 in the sum of N532,140.15 was done with the consent of the Plaintiff based on his formal application letter to the Defendant dated

19th August, 2015 and the Memorandum of Acceptance of the offer was equally signed by the Plaintiff on the 3rd day of September, 2015."

Let us interrogate these contested assertions.

I had earlier in this judgment found that the initial offer of loan to Plaintiff vide **Exhibit D1** was restructured vide **Exhibit D4.** I had also earlier explained what a restructuring of the loan facility meant in the context of the extant dispute.

Now reading the pleadings and evidence of the Defendant, the case sought to be made that the restructure facility is a different and distinct contract or agreement or a second or new loan facility certainly will not fly precisely because **Exhibit D4** is only a medium renegotiating the terms of the existing loan facility and as the exhibit itself says it is **"LOAN RESTRUCTURE of your outstanding no wahala loan of N532,140.15."**

Exhibit D4 thus speaks for itself and it is too late in the day for the Defendant to seek to make any additions or interpolations to suit a particular purpose. The documents in evidence show that the Plaintiff vide **Exhibit D3** applied for a restructure of his existing loan which was granted vide **Exhibit D1** by Defendant. **Exhibit D3** equally speaks clearly for itself and no additions can equally be made to it. This position was reiterated vide **Exhibit P3.** The Plaintiff never thus on the evidence applied for a new loan or additional facility to the existing loan and the defendant never gave or produced any evidence situating such a situation. Learned counsel to the Defendant has made so much of the acceptance of **Exhibit D4** by Plaintiff. I fail to see how the acceptance without more translates **Exhibit D4** to a new 2nd loan to Plaintiff or how it alters the legal status of **Exhibit D4** in relation to **Exhibit D1.**

The request by Plaintiff to have the loan he received restructured is in the nature of an invitation to treat. If the Defendant agrees to restructure, they logically will have to prepare new terms and offer to Plaintiff who will now accept or reject as it were. There is nothing novel or complicated about this.

Learned counsel to the Defendant has on this point tried so much and so hard to construct a scenario of a case not based on the structure of the pleadings and most importantly the evidence presented. And cases are never decided on the address of counsel. The address of counsel is no more than a handmaid in adjudication and cannot take the place of hard facts required to constitute credible evidence. No amount of brilliance in a final address can make up for the lack of evidence to prove and establish or disprove and demolish points in issue. See **Iroegbu V. Mr. Calabar Carrier (2008)5 N.W.L.R (pt.1079)146 at 167, Tapshang V. Lekret (2000)13 N.W.L.R (pt.684)381.**

In the circumstances, it is difficult to situate the factual and legal basis for the unilateral **N500,000** paid into the Account of Plaintiff nearly 5 months after the restructuring.

The contention of the Defendant that the restructured after facility vide **Exhibit D4** provided basis for this additional lodgment of N500,000 to the Account of Plaintiff is with profound respect disingenuous and lacking any factual basis. It is difficult to reconcile how a restructured facility suddenly transmutes to a second, different and new loan. The sole witness for the Defendant during cross-examination agreed that **Exhibit D4** was given to restructure the previous loan given to Plaintiff. In effect, this is an admission that it was not a new loan.

If that is the position, what then was the basis for the additional **N500,000** given to the Plaintiff after the restructuring particularly since the case of Plaintiff on the pleadings and evidence which was not impugned or challenged is that he never at any time applied for any additional facility from Defendant. As stated earlier, the Defendant never tendered any document showing any such application. **Exhibit D3,** the letter by Plaintiff applying for a restructure sought to be relied on by them does not support such contention as earlier stated. If the case sought to be made by Defendant is that Defendant defaulted in keeping to the terms of **Exhibit D1,** the initial offer, there is nothing in **Exhibit D1** stating or even remotely suggesting that the remedy open to the Bank is to grant a further loan. The indemnity clause in **Exhibit D1** provides clearly for enforcement of the terms and conditions and in cases of a default provides the legal recourse open to Defendant. This same clause is retained in the restructured offer facility, **Exhibit D4.**

Exhibit D3, at the risk of prolixity, never stated that Plaintiff wanted an additional loan facility to the existing facility. The Defendant cannot therefore expect the court to believe it was based on that letter that it made or extended a new loan facility to Plaintiff. If Plaintiff could not fulfill his obligations on the first loan, it is clear to me that the bank would not offer any gratuitous and unsolicited second loan as contended. The bank whatever its pretentions is not a father Christmas notwithstanding the name given to the loan as a **"no wahala loan".** If it were otherwise, there would have been no interest element to the facility. I say no more.

The Defendant has not really explained how a simple loan facility of **N530,000** transformed into a **second loan of N500,000** leaving the Plaintiff open to nearly an exposure of a **million naira**, minus the interest, which on the evidence was not a product of **agreement by parties**. The clear agreement on the evidence was only in respect of the initial loan offer.

The bottom line is that however the imagination is stretched, the restructure of an existing loan to make it more lender friendly cannot mean a creation of a second loan as contended, particularly in a situation where there is no clarity as to which of the contractual relationship forms the basis of the new second loan relationship. See **Bank of the North Ltd V Yau (supra)**

As stated earlier, the relationship of Bank and customer is contractual but the basis for the relationship must be streamlined and clear. If it was a situation of the bank given an additional loan to its customer, at what point did the Plaintiff apply for the additional facility or new facility in the sum of N500,000? Indeed at what point did the Defendant make this additional offer and when was it accepted? The Defendant did not provide any answer(s) to these relevant questions and this is fatal. With respect to this second lodgment of N500,000, it is really difficult on the rather scanty and fluid evidence presented by Defendant to situate basis of this particular action. It is certainly on the evidence not a product of any agreement between parties.

Generally in law, a contract is an agreement between two or more parties which creates reciprocal legal obligations to do or not to do a particular thing. To bring a contract to fruition where parties to the contract confer rights and liabilities on themselves, there must be mutual consent and usually this finds expression in the

twin principles of offer and acceptance. The offer is the expression of readiness to contract on terms as expressed by the offeror and which if accepted by offeree gives rise to a binding contract.

It should be pointed out clearly that the offer itself is not the contract in law but the taking of preliminary steps that may or may not ultimately crystallize into a contract where the parties eventually become ad-idem and where the offeree signifies a clear and unequivocal intention to accept the offer. See **Okubule Vs Oyegbola (1990)4 N.W.L.R (pt. 147) 723.**

Putting it more succinctly, the basic elements in the formation of a contract are:

1. The parties must have reached agreement (offer and acceptance)

2. They must intend to be legally bound, that is an intention to create legal relation.

3. The parties must have provided valuable consideration.

4. The parties must have legal capacity to contract.

See Alfotrim Ltd Vs A.G Fed (1996)9 NWLR (pt.475) 634 SC; Royal Petroleum Co. Ltd. Vs FBN Ltd (1997)6 NWLR (pt.570) 584: UBA Vs. Ozigi (1991)2 NWLR (pt.570)677.

The key essential ingredients or elements of a contract are conspicuously absent with respect to this **N500,000 additional loan payment** said to have been made by defendant into plaintiffs account. The overriding consideration in determining if there is a binding contract between the parties is to ascertain whether there was a meeting of the minds between parties; that is *consensus ad-idem*. In all cases of contracts, there must be *consensus ad-idem*. See **A.G. Rivers State V. Akwa Ibom State (2011)8 N.W.L.R (pt.1248)3 at 49.** There was none with respect to this N500,000 additional payment into Plaintiff's account and the contrasting narrative on the issue derogates in significant manner to any pretention to a *consensus ad-idem* on the issue.

It is true that on the evidence, the defendant may have paid in **N500,000** into plaintiffs' account and he used part of it rightly, in my view, believing they were part of his due entitlements from his employers but this as I have demonstrated cannot turn this unsolicited payment into a second loan for the Defendant to be charging or debiting the Plaintiff for the **two loans** at the same time.

It is clear to me that on the facts, somebody in the Defendant bank chose to make this payment for reasons that are not clear or salutary. I say no more. Under cross-examination, DW1 stated thus:

"As at today, the Plaintiff does not have any repayment to make. He has completed all payments. As at 2017, we were debiting the Plaintiff from two loans, the original or initial loan and the restructured loan. The two loans ran simultaneously."

As I have, I hope, demonstrated, the actions of Defendant cannot be justified. The documents forming the basis of the mutual reciprocity of legal obligations vide **Exhibits D1 and D4** do not provide template for two loans as submitted by Defendant. The applications for restructure by Plaintiff vide **Exhibits D3 and P3** which are unambiguous did not situate an application for a new loan or additional facility. **Exhibit D4,** the approval by Defendant underscores in clear and specific terms that it was **"a loan restructure of your outstanding no wahala loan of N532,140.15…"** No more. What is interesting here is that if the Plaintiff only used part of the N500,000, what then happened to the balance. All sides kept quiet on the issue so I will keep my peace.

These documents (**Exhibits D1 and D4)** individually and collectively cannot be used as a basis to create another second loan extrinsic to the written agreements and any such creation will lack legal validity. This then leads us to the question of whether the reliefs are availing. It is important to state that Reliefs (a) and (b) are **declaratory Reliefs**. In law, a court faced with a declaratory Relief draws inspiration from settled principles, one of which is that the party seeking the relief must adduce evidence upon which the relief is granted or denied, not withstanding an admission in the defendants pleadings. The court has to be satisfied on the evidence led by the plaintiff that he is entitled to the Relief he seeks. The claimant must succeed on the strength of his case, and not on the weakness or even

admission of his opponent. See **Onovo V Mba (2014) 14 NWLR (pt.1427) 391; Morunwase V Sorungbe (1988) 5 NWLR (pt.92) 90**.

Flowing from my consideration above that there was no legal or factual basis to situate the creation of a new or second loan account No. N5037911000028, by the defendant, it meant logically that **Relief (a)** sought by the plaintiff is **availing**.

Relief (b) seeks for a Declaration that all deductions from January 2016 in the sum of (N28.401.13(Twenty Eight Thousand, Four Hundred and One Naira and Thirteen Kobo) based on the 2nd loan account NS037911000028 be reversed to the Plaintiff's Account Number: 1016421449 domicile with the Defendant.

This relief is not particularly clear and borders on being vague. In seeks **certain deductions** to be reversed from January, 2016 with no defined terminal date or streamlined period that the deductions sought covers. Is the deductions monthly or quarterly? This was not stated.

In the evidence of **Plaintiff** vide paragraph 18, he stated that the sum of N28,401.13 (Twenty Eight Thousand, Four Hundred and One Naira, Thirteen Kobo) was debited from his account from January 2016, up till the filing of this suit which was on the record filed on 19th October, 2017. Again there is no clarity as to the period the deductions cover and it is no duty of the court to speculate.

The point to note is that this relief appears to be a relief in the realm of special damages which have not only to be specially pleaded but strictly proved. On the authorities, special damages have been defined as damages of the type as the law will not infer from the nature of the act; they do not flow in the ordinary course; they are exceptional in their character and therefore, they must be claimed specially and strictly proved. See **A.T.E. Co. Ltd V M.L. Gov. Ogun State (2009) 15 N.W.L.R (pt.1163) 26 at 71; Ekennia V Nkpakara & 2 ors (1997) 5 SCNJ 70 at 90.**

The Apex Court in **X.S (Nig.) Ltd. Vs. Tasei (W.A) Ltd**. **(2006)15 N.W.L.R. (pt.1003) 533 at 552 B-E; 552 E-G** Mohammed J.S.C. stated as follows:

"With regard to how to plead and prove special damages, the law is quite clear that special damages must be specifically pleaded and proved strictly…In this respect, a plaintiff claiming special damages has an obligation to plead and particularise any item of damage. The obligation to particularise arises not because the nature of the loss is necessarily unusual, but because the plaintiff who has the advantage of being able to base his claim on a precise calculation must give the defendant access to the facts which make such calculation possible"

Also in **Neka BBB Manufacturing Co. Ltd V A.C.B. LTD (2004) 2 NWLR (pt.858) 521** the Apex Court stated thus:

"A damage is special in the sence that it is easily discernable. It should not rest on a puerile conception or notion which would give rise to speculation, approximation or estimate or such like fractions."

In the extant pleadings, there is nothing to situate pleadings in the realm of special damages to support **Relief (b).** In paragraph 15, the Plaintiff pleaded thus:

"15. The Plaintiff's account now bears two loan accounts which run simultaneously, but has long liquidated or paid loan which was the only loan he entered into a contract with defendant, hence the plaintiff consulted his solicitor, Messrs I.A. Aliyu & Co. The plaintiff pleads the Statement of Account showing the debits of the two loans from the Plaintiff's account and the various correspondences and same shall be relied on in the trial of this suit."

This pleading in my opinion is grossly insufficient as it does not give the necessary particulars providing the basis for (1) the amount defined as the deduction (2) the total amount deducted, and (3) the period covered.

Now even if out of caution, we accept that there was proper pleading by Plaintiff, the next question is the evidence to support the Relief. In paragraph 18 of his deposition which I had earlier quoted, the Plaintiff stated as follows:

"18. The plaintiff has continued to debit the sum of N28, 401, 13 (Twenty Eight Thousand, Four Hundred and One Naira Thirteen Kobo) from the January 2016 up to the time of filing the present suit. The bank Statements of Account showing the deductions of the sum of from my account is hereto attached and marked as Exhibit F1 and F2."

I have already stated that even in his evidence, there is no clarity as to the period the deductions cover. It is true that the Plaintiff tendered in evidence **Exhibits P6a and P6b** to support the deductions but neither the Plaintiff or indeed anybody spoke to the documents. It is the bounded duty of the Plaintiff to tie his evidence to the documents or to explain the contents of documents as it affects the position being put forward to court. The statements of account were dumped as it were, on the court without the necessary back up evidence to explain if deductions were made, when and the period covered. The court cannot in chambers begin an inquiry as to what the contents of the Accounts connote or mean. It needs be emphasised that the duty of a court is to decide between the parties on the basis of what has been demonstrated, tested, canvassed and argued in court. It is not the duty of the court to do cloistered justice by making an inquiry into the case outside court even such inquiry is limited to examination of documents which were in evidence, when the documents had not been examined in court and their examination out of court disclosed matters that had not been brought out and exposed to test in court and were not on matters that, at least, must have been noticed in court. See **Alhaji I.A. Onibudo & Ors V Alhaji A.W. Akibu & ors (1982) 7 SC 60 at 62 – 63**.

The court cannot as it were, proceed to project or inject its own views for matters on which there should be, but which there was no evidence before the court.

The explanations here becomes necessary or indeed even imperative because the amount of **N28,401,13** Plaintiff claimed was been wrongly deducted appears in **Exhibit D4,** the restructured offer facility as the same amount due for his monthly repayment on the restructured facility granted to him. In the face of even this unclear evidence, it is difficult to award the Relief (b) sought by claimant. It is unavailing.

Relief (c) is for the sum of N500,000,000.00 (Five Hundred Million Naira) general damages for emotional trauma and breach of the contract.

Now it is true that general damages flow from the wrongful act complained of and the claimant is not required to strictly prove general damages as in the case of special damages. A trial court has the discretionary powers to award general damages and when exercising such powers, it has the duty to calculate what sum of money will be reasonably awarded in the circumstances of the case. See **Taylor V. Ogheneovo (2012)13 N.W.L.R (pt.1316) 116; Garba V. Kur (2003)11 N.W.L.R (pt.831)280.**

In awarding general damages, the court would simply be guided by the opinion and judgment of a reasonable man. General damages are losses which flow naturally from the Defendants act. Its quantum therefore need not be pleaded or proved as it is generally presumed by law. See **Taylor V. Oghenevo (supra) and Garba V. Kur (supra).** The Supreme Court in **Lar V. Stirling Astaldi (Nig) Ltd (1977)11-12 SC 53 at 63** defined general damages as such damages as may be given when the judge cannot point to any measure by which they may be assessed, except the opinion and judgment of a reasonable man. See also **Elf Petroleum Nig V. Umah (2006) AII FWLR (pt.343)1761.**

The law presumes that general damages flow from the wrong complained of and is usually awarded to assuage loss suffered by the plaintiff from the alleged act of defendant complained of. Put in another way, general damages are the kinds implied by law in every breach of legal rights. Its quantification however been a matter for the court. See **Cooperative Dev. Bank Plc V. Joe Golday Co Ltd (2000)14 NWLR (pt.688)506; UBA V. BTL Industries Ltd (2001)AII FWLR (pt.352)1615; Musa Yau V. Maclean D.M Dikwa (2001)8 NWLR (pt.714)127.**

In the circumstances, the Plaintiff will be entitled to some measure of damages for the clearly wrongful creation of a second loan account outside the context or remit of the clear agreements between parties vide **Exhibits D1 and D4** and the simultaneous unclear deductions been contemporaneously made on both accounts by Defendants.

I have also noted the fact that the sole witness for the Defendant has stated that the Plaintiff has fully settled his obligations under the loan agreement but for reasons that are not clear, nothing was said about this second loan. If it is a second loan as claimed, what happened to it? Has it been also fully liquidated? All these are matters within the knowledge of Defendant but they have kept silent so I keep my peace too. The Plaintiff is therefore entitled to general damages in the circumstances but the humongous amount of **N500 Million** claimed is rather outlandish particularly in this case where going through the entire evidence of Plaintiff, no where was evidence given of the alleged **emotional trauma** he suffered caused by actions of Defendant. Yes, the actions of Defendant may have impacted him one way or the other but evidence of the impact must be given to allow for an evaluation of same to situate whether the huge amount claimed as general damages can be granted. Without evidence, the court is put in an impossible situation of doing its job because there will then be no measure of assessing the evidence and determining whether the amount claim is available. As stated earlier, the court will resort to what is reasonable in such circumstances.

Again with respect to the second leg of the prayer of general damages for breach of contract, there is again on the pleadings and evidence, no streamlined facts delineating which contract the Defendant breached. What happened here is the unilateral creation of an opaque and unclear arrangement outside the remit of the agreements parties executed vide **Exhibits D1 and D4** for which Plaintiff suffered unfair deductions.

On the evidence, there are 2 letter of offers vide the initial offer **Exhibit D1** and the restructured offer **Exhibit D4.** The Defendant essentially complied with the terms. Indeed on the evidence, it was because Plaintiff was unable to fulfill the terms of the initial letter offer that he applied for a restructure which was granted. No case was thus made out by Plaintiff for breach of these offer letters.

Now it is true that on the evidence, the Defendant sought to **create or form a new contract** or **a second loan** which we have already found to lack validity. If Plaintiff has argued and rightly, too, that there was no consensus ad-idem in respect of this **second loan**, then it follows that general damages can equally not lie for a breach of a non-existent contract. It is impossible to situate a breach of contract when no contract exist or has been positively identified to exist. In **A.G.**

Rivers V. A.G Akwa-Ibom State (supra), the Apex Court stated further as follows:

"There can be no breach of a non-existent contract. Once it has been determined that no enforceable contract exists between the parties or that what took place between the parties did not translate to a contract between them, the foundation of the relief claimed collapse with the absence of a cause of action, that is, breach of contract. There can be no consequence of a breach of contract when no contract exists. In the instant case, the appellant did not prove any enforceable contract which was binding on the respondent. Therefore, there was no plausible reason for an award of general damages for breach of contract in the circumstance. (Best Nig. Ltd V. Blackwood Hodge (Nig) Ltd. (2011)5 N.W.L.R (pt.1239)95 Reffered to) (pp.427, para F-H; 429, para E-G).

The point I have tried to make is that while I consider general damages as availing in this case for the wrongful actions of Defendants, they cannot be made at large or for purely sentimental reasons. In **Access Bank Plc V. Maryland Finance Co. and Consultancy Service (2005)3 NWLR (pt.913)460,** the Court of Appeal advised that courts should not be carried away in making award of damages; that the court must not allow its mind to be affected by any high sounding figure claimed but that the court must look at the whole case dispassionately and let its award be a proper and sober assessment of the entire case.

Taking into account the totality of the factors adumbrated above, it is my considered opinion that the sum of **N1,500,000** will be just and reasonable as damages in the circumstance. It appears to me a dispassionate and sober assessment of the entire case and a fair recompense.

The final Relief (d) is for N450, 000 cost of this action. There is absolutely no evidence to situate Plaintiff's claim for N450, 000 cost of action. The Rules of Court vide **Order 56 Rule 1 (3)** however provides that in fixing the amount of costs, the principle to be observed is that the party who is in the right is to be indemnified for the expenses to which he has been necessarily put in the proceedings as well as compensated for his time and effort in coming to court. The court may also take into account all the circumstances of the case. In the

circumstances, costs will be availing as awarded hereunder but certainly not in the amount claimed.

In the final analysis and for the avoidance of doubt, judgment is entered for the Plaintiff against the Defendant in the following terms:

1. **It is hereby Declared that the creation of the second loan Account NS037911000028 by Defendant without the consent of the Plaintiff is wrongful.**

2. **Relief (b) fails.**

3. **Flowing from Relief (1) above, the sum of N1,500,000 (One Million, Five Hundred Thousand Naira) only is awarded as general damages in favour of Plaintiff in the circumstances and for the wrongful action of Defendant in creating a second loan account.**

4. **I award cost assessed in the sum of N50, 000 payable by Defendant to Plaintiff.**

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Hon. Justice A.I. Kutigi

Appearances:

1. **M.A. Alemeru, Esq., for the Plaintiff.**

2. **Sir P.O. Aihiokhai, Esq., for the Defendant.**