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

THIS WEDNESDAY THE 1ST DAY OF JUNE, 2022.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI -- JUDGE

SUIT NO: CV/1380/18

BETWEEN:

BARR. AMAKA EKE.....CLAIMANT

AND

EMERGING MARKETS TELECOMMUNICATIONS LTD....DEFENDANT

JUDGMENT

By an Amended Statement of Claim dated 3rd June, 2019 and filed same date at the court's Registry, the Claimant claims against the Defendant as follows:

"1. **A Declaration of this Honourable Court that any unsolicited subscription made by the Defendant on behalf of the Claimant, without the Claimant's knowledge and consent is a breach of the Claimant's right to privacy.**

2. **A Declaration of this Honourable Court that the Defendant's act of deducting the Claimant's airtime each time the Defendant subscribes the Claimant to services without her knowledge and consent is fraudulent, unlawful, illegal and a breach of the Claimant's right to the quiet enjoyment of the airtime she paid for.**

3. **An order of this Honourable Court restraining the Defendant from subscribing the Claimant to any service whatsoever without the Claimant's knowledge and consent.**

4. **An order of this Honourable Court restraining the Defendant from making any further deduction whatsoever from the Claimant's airtime for any subscription made without her knowledge and consent.**

5. **An order of this Honourable Court mandating the Defendant to publish a written apology to the Claimant in any of the National Newspapers for the unsolicited subscriptions and deductions made on her account.**

6. **An order mandating the Defendant to pay the Claimant the sum of N50,000,000.00(Fifty Million Naira Only) as General Damages for the Defendant's breach of the Claimant's right to privacy, right to a quiet enjoyment of the airtime she purchased, for the harassment, distress and discomfort suffered by the Claimant while the fraudulent deductions and unsolicited subscriptions lasted.**

7. **The sum of N200,000,000.00(Two Hundred Million Naira) Only against the Defendant as punitive damages.**

8. **The sum of N500,000.00(Five Hundred Thousand Naira) Only as the cost of the proceedings."**

The Defendant in response filed an Amended Defendant's Statement of Defence dated 13th June 2019 and filed same date at the court's Registry. The Claimant then filed a Claimant's Reply to the Defendant's Statement of Defence on 4th July, 2018.

Hearing then commenced. In proof of her case, the **Claimant** testified in person as **PW1** and the only witness. She deposed a witness statement on oath dated 3rd June, 2019 which she adopted at the hearing. She tendered in evidence the following documents as follows:

1. **Copy of online chat message between Claimant and Defendant's agent dated 1st July, 2017 was admitted as Exhibit P1.**

2. **Copy of text messages covering eight(8) sheets of paper over a period of time admitted as Exhibit P2.**

3. **Certificate of compliance for Exhibit P1 and P2 admitted as Exhibit P3.**

4. **Letter of complaint by claimant of unsolicited subscription, illegal and fraudulent deductions to Defendant dated 16th March, 2018 admitted as Exhibit P4.**

5. **Copy of Defendants reply to Exhibit P4 dated 22nd March, 2018 was admitted as Exhibit P5.**

6. **Letter of complaint by Claimant to Nigerian Communications Commission dated 23rd March, 2018 admitted as Exhibit P6.**

She was then cross examined by counsel to the Defendant and with her evidence, the Claimant closed her case.

The Defendant opened its defence and also called one witness, **Emmanuel Chinweze** of the Product Marketing Department of Defendant who testified as **DW1.** He adopted his witness deposition dated 13th October, 2021 and tendered in evidence a letter to clamant titled **Re: Complaint of consolicited subscription, illegal and fraudulent deductions, demand for compensation which was admitted as Exhibit D1.** He was duly cross-examined by Claimant and with his evidence, the Defendant close its case.

At the close of the case, parties filed, exchanged and adopted their final written addresses. The final written address of Defendant is dated 22nd February, 2022 and filed same date. In the address, only one issue was raised as arising for determination:

Whether the Claimant has proved her case against the Defendant on the preponderance of evidence adduced in this suit.

On the part of Claimant, her address is dated 24th February, 2022 and filed same date at the Court's Registry. Two(2) issues were identified as arising for determination:

i) **Whether there is any defence to the Claimants suit?**
ii) **Whether having regard to the circumstances of this case and the totality of the evidence before this Honourable Court, the Claimant has proved her case and is therefore entitled to Judgment in this suit?**

I have set out above the issues as distilled by parties. It seems to me that **issue 2** raised by Claimant can be conveniently taken with **issue 1** raised by Defendant as the arguments on both issues traverse the same compass even if differently worded.

It is however legally difficult to situate the basis of **issue 1** raised by the Claimant to the effect that the witness statement adopted by the sole witness for the Defendant is invalid and cannot be relied upon because it relates according to Claimant to the 1st Defendants Amended Statement of Defence filed on 28th November, 2018 which was further amended and replaced by the 2nd Amended Defendant's Statement of Defence filed on 13th June, 2019

Without going into unnecessary details, there is no dispute that the amendment of pleadings counsel to the Claimant referred to predated the taking over of the defence of Defendant by the Law firm of **Advocaat Law Practice** on 20th October, 2020. As at the time the law firm took over, pleadings of parties had long been streamlined and settled.

This law firm then subsequently applied on 20th October, 2021 to substitute its sole witness, one **"Eshaleku Ogbole"** with **"Mr Emmanuel Chinweze"** on the ground that the said Mr Eshaleku Ogbole is no longer available to testify and to avoid any undue delay, that the Defendant has authorised Mr. Emmanuel Chinweze to replace the said Mr. Ogbole as its witness in the suit. The Claimant was in court herself and did not oppose the application. The application was granted.

The Defendant defended the case by relying on the evidence of the said Emmanuel Chinweze. The Claimant extensively cross-examined this witness and her address incorporates the answers from this same witness.

It is clear that there is some legal misconception as to what constitutes a witness deposition as distinct from the pleadings even though it is conceded that they are sometimes used interchangeably. The two must not however be confused and they serve two different purposes in the trial process. The pleadings are statements in writing delivered by each party alternately to his opponent, stating what his contentions will be at the trial, and giving all such details as his opponents needs to know in order to prepare his case in answer.

It is settled that one of the aim or functions of pleadings is to enable parties in the case give a fair notice of their respective cases to each other; thereby circumscribing and fixing issues in respect of which they are in agreement and those in respect of which they are not in agreement. See **UBA Plc V. Godon Shoes Ind (Nig) Plc (2011)8 N.W.L.R (pt.1250)590 at 614-615 HA; Bunge V. Governor Rivers State (2006)12 N.W.L.R (pt.995)573 at 598-599HB**

The **witness statement on oath** is the evidence in support of the pleadings and it is not strictly the pleadings itself. Hitherto and before the coming into effect or operation of the salutary Rules of Court 2014 and 2018, there was no provision for filing of witness deposition(s). A witness will have to appear in court and give oral evidence in support of his or her pleadings. The process was no doubt cumbersome and time consuming as everything had to be taken in long-hand. The Rules of court vide order 2 Rule 2(2) 2018 for example now makes provision for the filing of a witness deposition as part of the frontloading mechanism process which will then be formally adopted by the witness at trial. The witness statement is however not the pleadings and does not streamline or define issues in dispute. Any amendment of the pleadings has nothing to do with the witness statement which has an independent existent even though related to it as it is the evidence to support the averments in the pleadings. Without it, the pleadings will be deemed to not have been supported or backed up with evidence and deemed abandoned. There is however no limitation protocol as to how many statements a party can file in a case. How a case pans out may determine how many statements may be filed and ultimately utilised. It may be one or more. A party may choose to rely or adopt one or all or even none at all. It is a Judgment call to be made by the party and his counsel. A witness may be alive and well when a case is filed and the dynamic may change at the time of trial with respect to his availability? Is the claimant saying that a party cannot apply to substitute or file a new witness statement with leave of court as done here? The answer is an emphatic No.

The validity of the extant witness deposition of **Emmanuel Chinweze** was therefore not impugned in any manner. One more point. There can be no doubt that once pleadings are duly amended by the order of court, what stood before the amendment is no longer material before the court and no longer defines the issue to be tried before the court. This proposition does not and has not laid down any such principle that an original pleading which has been duly amended by an order of

court automatically ceases to exist for all purposes and must be deemed to have been expunged or struck out of the proceedings. The clear principle of law established is that such original pleading which has been duly amended no longer determines or defines the two issues to be tried before the court. No more. See **Aghahomaso V. Eduyegbe (1999)3 N.W.L.R (pt.594)170 at 186-187.**

Issue 1 raised by Claimant is accordingly discountenanced. As stated earlier, the two(2) remaining issues raised by parties are identical and the same, even if worded differently. In the circumstances, I will adopt the issue formulated by Defendant as the issue on which the contested assertions in this case shall be resolved.

The issue conveniently accommodates all issues formulated by parties. Let me quickly make the point that it is now settled principle of general application that whatever course the pleadings take, an examination of them at the close of pleadings should show precisely what are the issues upon which parties must prepare and present their cases. At the conclusion of trial proper, the real issue(s) which the court would ultimately resolve manifest. Only an issue which is decisive in any case should be what is of concern to parties. Any other issue outside the confines of these critical or fundamental questions affecting the rights of parties will only have peripheral significance, if any. In **Overseas Construction Ltd V. Creek Enterprises Ltd &Anor (1985)3 N.W.L.R (pt13)407 at 418,** the Supreme Court instructively stated as follows:

"By and Large, every disputed question of fact is an issue. But in every case there is always the crucial and central issue which if decided in favour of the plaintiff will itself give him the right to the relief he claims subject of course to some other considerations arising from other subsidiary issues. If however the main issue is decided in favour of the defendant, then the plaintiff's case collapses and the defendant wins."

It is therefore guided by the above wise exhortation that I will now proceed to determine this case based on the **issue** the Defendant formulated and also consider the evidence and submissions of counsel. In furtherance of the foregoing, I have carefully read the final written addresses filed by parties. I will in the course of this judgment and where necessary make references to submissions made by counsel.

ISSUE 1

Whether the Claimant has proved her case against the Defendant on the preponderance of evidence adduced in this suit?

I had at the beginning of this Judgment stated the claims of Claimant. The background facts of this case are largely not in dispute. The case may have not been specifically pivoted as one in contract but it clearly has some elements of a contract and its precise parameters. The Plaintiff has patronised the service of Defendant for a period of time during which she alleged that she experienced unsolicited subscription, fraudulent and illegal deductions of airtime as streamlined in her pleadings; she complained about the actions of the Defendant and the complaints were not remedied and this then provides the basis for the Reliefs sought in this case. On the other side of the aisle, the Defendant wholly denied these allegations and contends that the Claimant is not entitled to the reliefs she seeks.

It may therefore be necessary in resolving this dispute to establish if there was any relationship and its boundaries as this would provide a template in resolving some of the key questions in the course of this Judgment.

Let me then quickly define some terms and situate the principles that will guide my evaluation of the evidence. As stated earlier, this case on the pleadings was not specifically pivoted on contract but it has some feautures. To that extent, it may be apposite to start by defining what a contract means. 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 VsA.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.

Having stated briefly above what a contract entails in law, it appears germane before proceeding to evaluate the evidence to restate some settled principles. It is now settled principle of general application that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. **Section 131(1) Evidence Act.** By the provision of **Section 132 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, 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.**

I must also add here that under out civil jurisprudence, the burden of proof has two connotations.

1. **The burden of proof as a matter of law and pleading that is the burden of establishing a case by preponderance of evidence or beyond reasonable doubt as the case may be;**

2. **The burden of proof in the sense of adducing evidence.**

The first burden is fixed at the beginning of the trial on the state of the pleadings and remains unchanged and never shifting. Here when all evidence is in and the party who has this burden has not discharged it, the decision goes against him.

The burden of proof in the second sense may shift accordingly as one scale of evidence or the other preponderates. The onus in this sense rests upon the party who would fail if no evidence at all or no more evidence, as the case may be were given on the other side. This is what is called the evidential burden of proof.

In succinct terms, it is only where a party or plaintiff adduces credible evidence in proof of his case which ought reasonably to satisfy a court that the fact sought to be proved is established that the burden now shifts to or lies on the adversary or the other party against whom judgment would be given if no more evidence was adduced. See **Section 133(2) of the Evidence Act.** It is necessary to state these principles to allow for a proper direction and guidance as to the party on whom the burden of proof lies in all situations.

I had earlier emphasized on the importance of the **pleadings** of parties. Anything outside the purview of the pleadings cannot be relevant. In resolving the issues presented by this dispute, it is to the pleadings and evidence led that we shall beam a critical judicial search light. The pleadings in this case are very important to precisely situate the case made out on each side of the aisle. The relevant paragraphs of the Amended Statement of Claim of the Plaintiff are as follows:

"**3. The Claimant is a long time subscriber of the Defendant with Mobile No:08184859036**

4. The Claimant avers that she usually subscribes to the Defendant's Night and Weekend data plan for N2,000.00(Two Thousand Naira Only) and that most times, she opts for auto renewal at the expiration of her data.

5. The Claimant further avers that she began to notice that any time she recharges her line to enable her data plan to be auto renewed, a part of her airtime will be deducted by the Defendant for unknown reasons and this would leave the Claimant with no other option than to buy more airtime to make up for the one that had been fraudulently deducted by the Defendant.

6. On the 1st day of July, 2017 around after 5 in the evening, the Claimant recharged her line with the sum of N2,000.00 (Two Thousand Naira Only) and immediately she did so, the Defendant deducted the sum of N1,000.00(One Thousand Naira Only) from her airtime.

7. The Claimant quickly engaged one of the Defendant's customer care service agents in an online chat message in a bid to find out why the Defendant deducted her airtime without her consent.

8. The Defendant's customer care service agent, who identified herself as Stella, when confronted by the Claimant, admitted that the Defendant deducted the sum of N1,000.00 (One Thousand Naira Only) from the Claimant's airtime.

9. The said customer care service agent tried to justify the Defendant's act of fraudulently deducting the Claimant's airtime by claiming that the Claimant was given an unsolicited bonus with the airtime that was deducted from her account without her consent. (a copy of the Claimant's online chat message with the Defendant's agent is hereby pleaded and will be relied on at the trial. The Defendant is hereby given a NOTICE TO PRODUCE a record of the online chat message which the Claimant had with its customer care agent).

10. On the 9th day of January, 2018 at about 7:31pm, the Claimant recharged her line with N2,000.00(Two Thousand Naira Only) via E-Top up after which she received an sms from the Defendant informing her that her line had been recharged with 2000.00 Naira via E-Top Up

11. Incredibly, at about 7:33pm, the Claimant checked her airtime balance only to receive an sms from the Defendant that her main balance was N1982.80 and when the Claimant saw this message, she was forced to recharge her line with another N50,00(Fifty Naira) airtime to enable her complete her airtime balance to N2,000.00(Two Thousand Naira Only) so as to be able to subscribe for the Defendant's Night and Weekend data plan.

12. The same thing happened on the 4th day of March, 2018 when the Claimant recharged her line with the sums of N500.00(Five Hundred Naira), N1,400.00(One Thousand, Four Hundred Naira) and N100.00(One Hundred Naira Only) respectively, coupled with the N32.80 (Thirty Two

Naira, Eighty Kobo) she had on her line before she made these recharges which meant that her main balance ought to have been the sum of N2032.80(Two Thousand and Thirty Two Naira, Eighty Kobo Only).

13. After the Claimant made these recharges stated in paragraph 12 above, she checked her balance and received an sms from the Defendant that her main balance was N1932.80(One Thousand, Nine Hundred and Thirty Two Naira, Eighty Kobo) which meant that the sum of N100.00(One Hundred Naira) had been fraudulently deducted from the Claimant's airtime.

14. As usual, the Claimant was forced to top-up her airtime with another N100.00(One Hundred Naira) to enable her subscribe for the Defendant's Night and Weekend data plan.

15. On the 15th day of March, 2018 at about 5:51am, the Claimant recharged her line with the sum of N2,000.00(Two Thousand Naira Only) with the aim of renewing her data plan but when she checked her balance, she saw that N100.00(One Hundred Naira Only) had been deducted from her line as usual and that her account balance was now N1932.80(One Thousand, Nine Hundred and Thirty Two Naira, Eighty Kobo).

16. The Claimant also received the below message from the Defendant:

"Dear customer, your request was not successful due to insufficient balance. Please, recharge and try again."

17. With a growing frustration over this issue, the Claimant called the Defendant's customer care line on the same 15th day of March, 2018 at about 5:54am to lodge a complaint about this illegal and fraudulent deductions of her airtime and in the said call, the Claimant informed the 2 agents that attended to her that the airtime that was fraudulently and illegally deducted from her line should be refunded back before the close of business that day.

18. The Claimant also told the Defendant's agents that if the refund was not made within that period, she will petition the Defendant to the office of the Nigerian Communications Commission (NCC).

19. At the end of the Claimant's call to the Defendant's customer care line, the Claimant received the following messages from the Defendant at about 6:14am and 6:15am respectively:

> **"Dear customer, your query with reference no:20180315061445041298 has been created. Feedback will be provided within the next 24hrs. Thank you, 9Mobile Telecom."**
>
> **"We apologise for the inconvenience experienced. Your line has been credited with 50 MB free data bundle as compensation. Thank you."**

20. On the same 15th day of March, 2018, at about 2:33pm and 2:37pm respectively, the Claimant received the following messages from the Defendant:

> **"Dear Subscriber, kindly be informed that you were charged for the TIMWE alert service on your line which has been deactivated and further charges will cease. 9Mobile."**
>
> **"Dear customer, you query with reference no 20180315061445041298 has been resolved. Feedback will be provided within the next 24hrs. Thank you, 9Mobile Telecom."**

21. Due to the Defendant's refusal to refund the airtime it deducted from the Claimant's account, the Claimant wrote to the Defendant on the 16th day of March, 2018 complaining about the unsolicited subscription and fraudulent deductions and also demanding compensation. The letter was copied to the Vice Chairman of the Nigerian Communications Commission. (The letter dated the 16th day of March, 2018 is hereby pleaded and the Defendant is put on NOTICE TO PRODUCE the original copy of the letter at the trial.

22. Despite receiving the letter described in paragraph 17 above, the Defendant refused to refund the airtime it fraudulently deducted from the Claimant's account but instead, it continued to deduct the Claimant's airtime at will.

23. On the 19th day of March, 2018, at about 11:05am, the Claimant checked her balance and discovered that the Defendant had deducted more of her airtime and that her main balance was now N1912.80(One Thousand, Nine Hundred and Twelve Naira, Eighty Kobo Only).

24. On the 22nd day of March, 2018, the Defendant replied the Claimant's letter and in the Defendant's letter which was received by the Claimant on 23rd March, 2018, they stated that they were investigating the allegations of the Claimant. They also undertook to revert to the Claimant within the shortest possible time upon conclusion of their investigation. (The letter written to the Claimant by the Defendant is hereby pleaded and will be relied upon at the trial).

25. On the 27th day of March, 2018, the Claimant received a letter from the Nigerian Communications Commission dated March, 23, 2018 wherein the commission acknowledged receipt of the Claimant's letter of 16th March, 2018 and also promised to investigate the issues raised by the Claimant in her letter. (The letter written to the Claimant by the Nigerian Communications Commission is hereby pleaded and will be relied upon at the trial).

26. On the 29th day of March, 2018 at about 2pm and 3:44pm respectively, the Claimant received the following sms from the Defendant:

> **"Dear Customer, your Ring Back Tune service has been de-activated. Please dial 251 to activate and enjoy latest tunes."**
>
> **"Dear Customer, your refund request has been completed and your line credited with 270 Naira today. Please dial *232# to view your account balance. Thank you for choosing 9Mobile."**

30. The Claimant avers that the Defendant's subscription of her line to both the TIMWE alert service and the Ring Back Tune service without her knowledge and consent as well as the incessant deductions of her airtime by the Defendant is fraudulent, illegal, unlawful.

31. PARTICULAR OF FRAUD:

i. The Defendant purportedly subscribed the Claimant for a service without the Claimant's knowledge and consent while a Do not Disturb, (DND) was active on her line.

ii. The Defendant subscribed the Claimant for services she never requested for, all in a bid to justify its act of fraudulently and illegally deducting the Claimant's airtime every time she recharged same.

iii. The Defendant, with an intent to deceive, subscribed the Claimant to the TIMWE alert service and Ring Back Tune service without her knowledge and consent and started appropriating the Claimant's airtime to itself in the guise of payment for the unsolicited subscription to the said services.

iv. The Defendant extorted the Claimant by fraudulently deducting her airtime for the purported subscription to the said TIMWE alert service and Ring Back Tune Service.

v. The Claimant only became aware of the fact that the Defendant subscribed her to the TIMWE alert service when, after she had called the Defendant's customer care line to complain about the incessant deductions being made on her airtime, the Defendant sent her an sms that she was charged for the TIMWE alert service on her line which has been deactivated and further charges will cease.

32. The Claimant avers that she have never heard of the said TIMWE alert service which the Defendant claimed she was being charged for.

33. The Claimant also states that she has never subscribed for any alert service whatsoever on her line that would justify her airtime being deducted by the Defendant and that in fact, some time in 2017, she had activated a Do not Disturb on her line."

The evidence of the Claimant and PW1 largely followed the narrative above and it is based on these assertions that she found her cause of action and the basis for the Reliefs sought.

The Defendant as stated earlier joined issues with Plaintiff and wholly denied any infractions. The relevant paragraphs of the defence are as follows:

"**2. The Defendant admits the averments in paragraphs 2, 4, 10, 16, 19, 20 and 24 of the Statement of Claim only to the extent that the Defendant is currently trading under the name and style of "9Mobile" and is engaged in the business of providing telecommunications services in Nigeria. The Defendant denies all other allegations contained in paragraph 2 of the Statement of Claim and will, at the trial of this suit, put the Claimant to strict proof of the averments contained in the aforesaid paragraphs.**

3. The Defendant admits the averments contained in paragraph 3 of the Statement of Claim only to the extent that the Claimant is a subscriber to the Defendant's network.

4. The Defendant denies the averments contained in paragraphs 5, 7, 8, 9,11, 12, 13, 14,15,17,18,21,22,23,25,26,27,28,29,30,31,32,33,34,35,36,37 and 38 of the Statement of Claim and shall, at the hearing of this suit, put the Claimant to strict proof of the allegations contained therein. In specific response to the averments in the aforementioned paragraphs of the Statement of Claim, the Defendant states as follows:

(a) The Claimant's airtime has never been deducted or utilized for unknown reasons, as wrongfully alleged by the Claimant. Rather, the deductions in the Claimant's airtime was as result of services which the Claimant subscribed to and/or activated by herself and enjoyed on her

9mobie phone line number 08184859036 (the Claimant's Line") during the relevant period.

(b) The Defendant has never deducted the Claimant's airtime fraudulently, as falsely alleged by the Claimant as the Defendant always communicated the purpose of any deductions made on the Claimant's line to the Claimant.

(c) The Defendant admits that N1000 was automatically deducted from the Claimant's airtime on July 1, 2017 after the Claimant recharged her 9mobile telephone line with N2000. However, the Defendant further states that the N1000 was deducted for a Winback Promo under which the Claimant was credited with N5000 instead. The Winback Promo/Campaign was an automated reward scheme for all prepaid customers on various prepaid packages that have spent 30 days and above on the network without making any recharge. Under the promo, the customers will get an automatic one-off bonus upon attaining the required recharge condition during the defined period.

(d) Upon satisfying the required recharge condition, the Defendant was debited N1000 and credited with N5000. However, when the Claimant engaged THE Defendant's customer care representative, indicated that she was not interested in the promo and requested for a refund of her N1000, the N1000 was refunded to the Claimant's line. Document confirming the refund of the N1000 to the Claimant is hereby pleaded and shall be relied on during trial.

(e) The Defendant states that any service or services which were active on the Claimant's line during the relevant period were activated by the Claimant herself and/or further to her request for the said services.

(f) Although there were deductions o airtime from the Claimant's Line in the total sum of N100.000(One Hundred Naira) between March 4, 2018 and March 5, 2018, as stated in paragraphs 9 and 10 of the Statement of Claim, the deductions were due to charges of N50.00(Fifty Naira) for Caller Ring Back Tune Service Fee and a further charge of N50.00

(Fifty Naira) as a Downloaded Tune Fee for the download of a song called "Sarkin Agadas", which was subscribed to by the Claimant and was not illegal or fraudulent, as alleged by the Claimant

(g) Although there were deductions of airtime from the Claimant's Line in the total sum of N70.00(Seventy Naira) on March 15, 2018 as stated in paragraph 11 of the Statement of Claim, the deductions were due to a charge of N20.00(Twenty Naira) as Caller Ring Back Tune Service Fee and a further Fee of N50.00(Fifty Naira) as a Downloaded Tune Fee for the download of a Song called "Sarkin Agada", which was subscribed to by the Claimant and the deductions were not illegal or fraudulent, as alleged by the Claimant.

(h) Contrary to the Claimant's allegations as contained in paragraphs 19 and 20 of the Statement of Claim, the Claimant's balance as at March 19, 2018 was the sum of N1,932.80(One Thousand, Nine Hundred and Thirty-Two Naira, Eighty Kobo) and only the sum of N20.00 was deducted from the Claimant's account as Caller Ring Back Tune Service Fee.

(i) The Claimant's Line was credited with 50MB(Megabyte) free data bundle, as alleged in paragraph 15 of the Statement of Claim; which free data is worth about N100.00(One Hundred Naira) but the gesture was in line with the Defendant's long standing, customer-centric and usual practice of compensating its customers who have made complaints and have thereby given the Defendant the opportunity to amicably resolve the issue and in appreciation of their patronage of the Defendant's services, and not due to an admission of liability for the Claimant's claim of fraudulent deductions or any threat made by the Claimant to report the Defendant to the Nigerian Communications Commission (the "NCC").

(j) In addition to crediting the Claimant's Line with the said 50MB(Megabyte) free data bundle, the Defendant refunded all charges on the Claimant's Line between January 2018 to April 13, 2018 in respect of all value added services subscribed by the Claimant in the

total sum of N260.00(Two Hundred and Sixty Naira) to the Claimant's Line in form of airtime on the 29th of March 2018. This gesture is also in line with the Defendant's long standing, customer-centric and usual practice of compensating its Customers who have made complaints and have thereby given the Defendant the opportunity to amicably resolve the issue and in appreciation of their patronage of the Defendant's services, and not due to an admission of liability for the Claimant's claim of fraudulent deductions or any threat made by the Claimant to report the Defendant to the NCC, which is contrary to the Claimant's averment in paragraphs 17 and 18 of the Statement of Claim. The Defendant shall rely on its letter to the Claimant dated April 16, 2018 by which it communicated its decision to give a refund to the Claimant.

(k) The Defendant categorically denies deducting the Claimant's airtime at will and without reason and states that the Defendant has a practice of refunding airtime to its customers not only for the reason stated above but also where a customer was erroneously debited as a result of a technical glitch, but states categorically that this was not the case in the Claimant's circumstance as the Claimant was only debited for services subscribed to by her.

(l) The Defendant did not communicate the outcome of its investigation to the Claimant because she did not give the Defendant sufficient time and opportunity to conclude its investigation into her complaint. Rather, the Claimant took out this suit against the Defendant barely three (3) weeks after lodging her complaint with the Defendant, thereby making it clear that the Claimant was not interested in an amicable resolution of the matter but was merely focused on the anticipated financial gain to be derived from her claims against the Defendant.

m. The Claimant took out this suit against the Defendant barely a week after the Defendant effected a refund of N260.00(Two Hundred and Sixty Naira) to the Claimant and while the Defendant was still investigating her unfounded claims, thereby effectively foreclosing possible amicable resolution of the matter.

n. **Although the Claimant received an sms indicating that the Claimant was charged for the TIMWE Alert Service on the Claimant's Line, the sms was inadvertently sent to the Claimant by the Defendant's Customer Care Agent as the Claimant was never billed for TIMWE Alert Service. The Defendant hereby pleads and will, at the trial of this suit, rely on the Claimant's Billing Record in proof of the above assertion.**

The evidence of the sole witness for the Defendant followed largely the structure of the defence. As stated earlier, the Plaintiff filed a reply to the statement of defence which sought to accentuate points earlier raised.

I have deliberately and in-extenso set out the salient averments in parties respective pleadings as it has clearly streamlined or delineated the issues subject of the extant inquiry. The importance of parties pleading need not be over-emphasised because the attention of court as well as parties is essentially focused on it as being the fundamental nucleus around which the case of parties revolve throughout the various trial stages. The respective cases of parties can only be considered in the light of the pleadings.

Now a convenient starting point is to understand the precise situational basis of the relationship of parties. By the **pleadings and evidence**, it is not in dispute that the Defendant is a telecom services provider and that the Plaintiff is a subscriber to the Defendants network. This relationship is not in dispute and thus an established fact.

On the pleadings and evidence as highlighted above in some detail vide **paragraphs 5-21**, the Claimant began to notice that anytime she recharges her line with Defendant, deductions are made from her airtime without her consent leaving her with no option but to buy more airtime to make up for the deduction made. She laid a complaint with an agent of the customer service of the Defendant and **Exhibit P1**, a copy of the online chat message with the agent situates the complaint made by Claimant.

The Claimant further stated that dispite this complaint, the deductions continued and by **Exhibit P4**, she formally laid a complaint of unsolicited subscription and illegal and fraudulent deductions to the Regional Manager of Defendant and also similarly laid a complaint to the Nigerian Communications Commission(NCC)

which acknowledged her complaint vide **Exhibit P6**. The Defendant acknowledged the complaint vide **Exhibit P5** and indicated that they have **"commenced"** investigations and upon completion will get back to claimant within the shortest possible time.

By the defence highlighted above, the case of Defendant as streamlined is not one **denying that these deductions were made** on Claimant's line but that they were based on services allegedly subscribed to by Claimant. The legal dynamic of proof clearly in the circumstances was now on Defendant to justify their actions or positively prove or show that these services were indeed subscribed to by Claimant or that they offered the services and which was accepted. I had earlier situated the onus of proof. The law is he who asserts must prove. In civil cases, the onus of proving a particular fact is not fixed by the pleadings. It does not remain static but shifts from side to side. See **Gbaife V. Gbaife (1996)6 N.W.L.R (pt.455)417 at 432 D-F.**

In this case, I had earlier at some length situated the averments of Claimant. Her evidence particularly with respect to the succinct narrative account of the deductions was credible and not impugned or challenged in any material particular during cross-examination.

The law is settled that where the evidence of a witness is unchallenged under cross-examination, the court is not only entitled to act on or accept such evidence, but it is in fact bound to do so provided that such evidence by its very nature is not incredible. Thus where the adversary fails to cross-examine a witness upon a particular matter, the implication is that he accepts the truth of that matter as led in evidence. See **Gaji V. Paye (2003)8 N.W.L.R (pt.123)583 at 605 AC; Oforlete V. State (2000)12 N.W.L.R (pt.681)415 at 436 B-C**

With the unchallenged narrative of claimant relating to unlawful deductions and unsolicited subscriptions, the onus of proof shifted to the Defendant to prove by credible evidence the content of the contrary assertions made by them. By the nature of the relationship and being the service provider, it was in better and or vantage position to prove affirmatively the contentions that the services in question were indeed subscribed for, the nature of the service offered and the consideration, if any, to justify the deductions. These contested assertions cannot be a matter for guesswork or conjecture.

I will at length highlight the assertions made by Defendant in their defence and then the evidence, if any, to support same. As stated earlier, averments in a pleading must be backed up with evidence, if not, the pleadings will ultimately be of no value and deemed unproven or abandoned. In **paragraph 4(a)** of the defence, the Defendant alluded to the fact that the deductions in Claimants airtime was as result of **"services which Claimant subscribed to and/or activated by herself and enjoyed on her 9mobile line during the relevant period."**

There is however nothing in the **entire evidence of DW1 to provide** or show that the Claimant subscribed her line to any such **"services"**. The **"services"** were not also identified by Defendant and when they were subscribed to and the consideration to support any deductions. If the Claimant subscribed to or was offered any service(s), surely there must be evidence of such relationship.

Again, if as suggested, in **paragraph 4b** of the defence that the Defendant always communicated the purpose of any deductions made on Claimant's line, no evidence of same was tendered which most surely be with Defendants, if it indeed exists.

In **paragraphs 4(c) and (d)** of the defence, the Defendant admits essentially the averments in **paragraphs 6-11**of the claim that **₦1000** was automatically deducted from Claimants airtime on 1st July, 2017 after Claimant recharged the line with N2000 but that the sum of N1000 was deducted for a **Winback Promo** under which Claimant was credited with N5000 instead. That the promo was an automated reward system for all prepaid customers who fulfilled certain criteria. That the Claimant met the criteria, was debited with N1000 and credited with N5000. However that when Claimant indicated that she was not interested in the promo and requested for the refund of her N1000, same was refunded. The Defendant specifically pleaded in **paragraph 4(d)** that it would rely on the document confirming the refund of N1000 but this was not tendered. Again, the point must be underscored at the risk of prolixity that facts deposed to in pleadings must be substantiated and proved by evidence, in the absence of which the averments are deemed abandoned. See **Aregbesola V. Oyinlola (2011)9 N.W.L.R (pt.1253)458 at 594 A-B**

Furthermore, no evidence of the **Winback Promo** was established or defined and it clearly does not appear logical that an unsolicited reward scheme of N5000 will

be created and given and at the same time N1000 will be deducted from a customer's airtime. If it is indeed a **reward scheme** as argued, there should then be no basis for any deduction from airtime paid for by the customer. An unsolicited reward scheme predicated on withdrawal of airtime paid for appear to me rather opaque and suspicious.

The Defendant in **paragraphs 5(e), (f), (g) and (h)** highlighted services between **March 4, 5, 18 and 19 2020** which they claim were activated by Claimant further to her request and the deductions made. Unfortunately for the Defendant, **no iota of evidence** was presented in support of the representation that the Claimant **subscribed** for the services to support the deductions made in those paragraphs. I venture to ask at this early stage how the Defendant conducts its business in such fluid and unclear manner and without records of any kind. This really beggars belief.

It is not a matter for dispute that **subscription by a customer** for a **Ring back tune** for example does not occur in the air or in a vacuum but records should exists to back up such transaction(s). The process as alluded to by **Defendant or DW1** usually involves an offer of the service with the amount and if accepted by the customer, the ring back tune is then made available. If there is no acceptance that ought to be the end of the matter with respect to that particular service. A party cannot be compelled to accept a service he or she did not subscribe for and deductions cannot be made accordingly. This must be made clear. It is strange that absolutely no evidence of when any service was subscribed for and activated was produced by Defendant, but then deductions they concede were made. What is interesting in this case is that the Defendant's sole witness stated in his deposition that they never subscribed Claimant to any service(s) without her consent and or knowledge and that the services were activated by Claimant further to her request but when asked for proof during cross-examination, he stated "**that he does not have any evidence to show that Claimant actually subscribed for the services**." The **evidence of DW1** is compelling and damning and undermines completely the credibility of Defendants narrative that the services were subscribed for which then led to the deductions.

Now on the pleadings and further to the complaints of Claimant situated within paragraph 19 of the Claim, the Defendant agreed that it credited the Claimant's

line with **50MB(Mega byte) free data worth N100** but that the gesture was in line with the Defendant's policy of compensating the customers who have complaints and not due to an admission of liability or the threat by Claimants to report the matter to NCC.

Now the complaint of Claimant as itemised in the pleadings clearly goes beyond the ₦100 free data which the Defendant described as **"compensation".** The deductions complained of certainly is not to the tune of ₦100. There cannot be any equivalence between the deductions complained of and the N100 worth of free data given. Now the question to even ask is compensation for what? In the Oxford Advance Learners Dictionary (New edition) at Page 227, compensation was defined as **"something especially money that somebody gives you because they have hurt you or damaged something that you own, the act of giving this to somebody."**

It is difficult on the evidence to accept the contention of Defendant that this **₦100 worth of free data bundle given to Claimant** was out of benevolence on charity. I incline to the view that what the Defendant termed **"compensation"** clearly had the strategic objective of reducing the bad effect(s) of the unwarranted deductions made. Even at that and as stated earlier, there is no equivalence between the value of deductions complained of by claimant and the N100 worth of free data given. It appears to me that the slant to the act as **"customer centric" or "free gesture"** as stated by DW1 under cross-examination is essentially an afterthought and it could only mean that the deductions made were unwarranted.

As already alluded to, but it must be repeated for purposes of clarity DW1 under cross-examined stated that **caller tunes** or **different services** must be **subscribed** for and that **the charges or prices vary depending on whether they are daily, weekly or monthly**. It follows as a logical corollary that caller tunes or indeed any service(s) are usually subscribed for by customers and paid for. It is not an act of charity. There is nothing on the evidence to suggest that Defendant compensates customers with refund of money for services enjoyed by the customer. The Defendant is obviously a business concern and not some sort of Father Christmas. Let me say that it is not out of place for the Defendant to award bonuses or free data to deserving customers but that must be distinguished from

when charges or deductions are made on services not subscribed for by a customer as demonstrated in this case.

Again on the pleadings and evidence, the Defendant which claimed that the N100 naira worth of free data given to Defendant was not an acknowledgment of liability after the complaint of Plaintiff to NCC which was received vide **Exhibit P6** on 16th March, 2018 now on **29th March, 2018** deactivated the Ring back tune of Claimant and credited N270 to her line according to them **"on request of Claimant"** but no such request was again presented to support the alleged request for deactivation. Is this ₦270 credited to claimant also another compensation? The Defendant was curiously silent on what this payment represented.

In **paragraph 4n** of the defence, the Defendant admitted the averment in paragraph 20 of the claim that they sent a message to claimant that they charged her **"FOR Timwe Alert service which has been deactivated and further charges will cease"** but that the SMS was inadvertently sent. DW1 repeated this assertion in his deposition via paragraph 5n but when asked whether he knew the customer agent who sent the SMS message, he admitted he does not know. He also agreed that he does not know the contents of the SMS message and he does not know when the Defendant became aware of the SMS message said to have been sent inadvertently. When asked whether he knew if the Defendant sent a message to Claimant that the said SMS was inadvertently sent in error, he said he does not know.

It is again clear that the **defence witness** knows nothing about the circumstances leading to the sending of the SMS message in question and confirms that he simply signed his deposition without knowing the true details, perhaps as an obligation to his employers. If he knows nothing about the circumstances leading to the sending of the SMS, how can he creditably give credible evidence of what he does not know about. I just wonder

I am in no doubt that like the **Ring back tune services**, the **timwe alert service** was not subscribed for and deductions were illegally made and when she complained, the Defendant realising that such service was never subscribed for by Claimant sent this SMS thus: **"...timwe alert service on your line has been deactivated and further charges will cease."** This for me is another clear indication or admission that the Defendant charged for services not subscribed for.

The question to ask is why would further charges **"cease"** if they were no deductions or charges been made?

Despite this clear admission, it again beggars belief that the Defendant had the moral clarity to contend that they never billed Claimant for Timwe Alert Service.

In paragraph 4n of the defence and 5n of the deposition of DW1, the Defendant stated that they will be relying on **Claimants billing record** in proof of the assertion that the Claimant was **never billed** for **Timwe Alert Service** and that the **SMS alert sent was in error but** again as in almost all aspects of Defendant's case the billing record was never tendered in proof. The implication of this stand taken by Defendant we have already stated. The Defendant clearly and deliberately has something to hide by the way they have defended this action. How it seeks to project a defence without evidence is baffling.

The bottom line is that **contrary to the case** made out by the Defendant, there is absolutely no evidence of any kind to support the case made by them that Claimant subscribed for services and deductions made as a consequence of the service rendered based on the subscription. In rounding up on this important question of the parameters for subscription, I prefer to allow the Defendant have a final say on the matter. In **paragraph 5(c) to (e)** of the defence which finds expression in paragraphs 5(r)-(t) of the witness deposition of DW1, the Defendant stated thus:

"(5r): I know that the Defendant has a double opt-in functionality which was developed and deployed specifically to prevent any forced subscriptions. Thus, whenever any of the Defendant's Subscribers clicks on a subscription link on an internet advert, the Subscriber is directed to Defendant's 9Mobile double opt-in page. On that page, the user must take some steps on the page (which is a plain page to avoid confusion and present all relevant information, like the name of the service, the cost of the service, the validity period of the service, and the Terms and Conditions of the Service).

(s) For a subscription to be consummated or completed, the User or Subscriber must click the button signifying his agreement to use the service. Once a User clicks on the button, a token is generated which confirms that the user subscribed to the service. A token is generated which allows the Service Provider to bill the Subscriber and proceed to offer the service.

(t): I am aware that in all instances of this case, banners were presented to the Claimant and that the double opt-in functionality was presented to the Claimant, and she took action by agreeing to the Terms and Conditions of the Service and was not forcefully subscribed to any service.

Again no **scintilla** of evidence was tendered to support the case made out above in the above paragraphs. The above paragraphs situates clearly that the nature of the relationship between the service provider and the customer is akin to a contractual relationship. There is therefore no room within the above protocol for any unwarranted or forced subscription and deductions predicated on services not subscribed for. The relationship is a product of free choice and that cannot be overstated or undermined under any circumstances. In this case, the defendant has highlighted clearly above special feautures known to it and unique to the services offered but has refused to tender them in evidence to support the case that there was **subscription by claimant** for any of the services rendered by them for which the deductions complained of were generated. Where for example is the evidence of the double opt-in functionality, how it works and its operational dynamics? Where is the plain page of Claimant which will have shown the service she subscribed for, the cost, validity period and the terms and conditions of the service? Where is the evidence of the banner presented to Claimant? All these critical pieces of evidence were withheld for reasons that are not clear. Nobody begrudges the choice made by Defendant but this allows for the application of the presumption under **167(d)** of Evidence Act that such evidence, if available will be unfavourable to the case of Defendant. Under cross-examination and with specific reference to his deposition under paragraph 5(t) of his deposition to support paragraph 5e of the defence above, the defence witness stated as follows:

"I don't have any evidence in court to support my paragraph 5t but we have what we call the double opt-in in our service. It is to get the subscribers consent as to whether he wants to subscribe or not with a particular service."

The above is self inculpatory.

The evidence of DW1 for the Defendant above in the absence of any credible evidence to the contrary has dealt a final fatal blow to the case constructed by the Defendant. To the clear extent that there is no credible evidence to support the

case of Defendant that the **deductions were for services subscribed for by claimant**, the case of Defendant stands undermined.

The case of Defendant clearly is one strong on pleadings but completely bare in terms of the evidence to support the averments. It is trite law that pleadings however strong and convincing the averments may be without evidence in proof thereof goes to no issue. Through pleadings, people know exactly the points which are in dispute with the other. Evidence must be led to prove the facts relied on by the party to sustain allegations raised in pleadings. See **Union Bank Plc V. Astra Builders (W/A)Ltd (2010)5 N.W.L.R (pt.1186)1 at 27 F-G**

At the risk of prolixity, the point to underscore is that averments in pleadings are not evidence. They mainly highlight the case that a party is likely to present so that the other side would not be caught unawares or unprepared or to eliminate surprise. The law is that pleadings are the body and soul of any case in a skeleton form and are built and solidified by evidence in support thereof. Without evidence, they remain in the skeleton form without any value. See **Monkon V. Odili (2010)2 N.W.L.R (pt.1179)419 at 443 A-B.**

The case made out of the Defendant clearly cries out for evidence of quality to support their pleadings and the case they have elaborately set out in their statement of defence. The set of evidence and facts given in evidence by claimant is more preferable and credible compared to the evidence put forward by Defendant. In the circumstances, I have no difficulty in holding that the Plaintiff has creditably on a preponderance of evidence established its case against the Defendant with respect to the unsubscribed services and the unlawful deductions made.

Having resolved all contested assertions this then leads me to whether their reliefs sought by Plaintiff are availing. In treating the reliefs, it is important to state that two of the principal reliefs are declaratory in nature. In law faced with a declaratory relief, the court draws inspiration from consecrated principles, one of which is that the party seeking the reliefs must adduce evidence upon which the relief is granted or denied. The burden is on the party to succeed on the strength of his own case and not on the weakness of the defence, if any. Such relief will not be granted even on admission made by the other party. See **Nyesom V Peter side (2016) 7 NWLR (pt.1512) 452; Onovo V Mba (2014) 14 NWLR (pt.1427) 1319; Akande V Adisa (2012) 15 NWLR (pt.1324) 538**.

Reliefs (1) and (2) of Plaintiff's claims seek for declarations as streamlined at the beginning of this judgment.

Having found as already demonstrated that there is no evidence to support that the Plaintiff subscribed to the services for which deductions were made by Defendant, the unsolicited subscription and deductions are clearly wrongful. Deductions must be predicated on services chosen by the subscriber and on terms as agreed. There cannot be a forced conscription or subscription. Any unsolicited subscription for which deductions and charges are made apart from been unlawful will also amount to a breach of Claimant's right to privacy. It would appear and I will say this advisedly that telecom service providers operate oblivious of the provision of **Section 37 of the 1999 Constitution.** It may then be relevant to say some few words on the provision to underscore its relevance and importance and why telecom service provides must be aware of its situational existence and application. **Section 37** provides thus:

"The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."

The above provision is clear and is to the effect that every citizen has the right to private and family life, and that every individual shall be entitled to privacy without intrusion of any kind from any person(s) or body or organisation. The right covers the person, homes, correspondence, telephone conversations, telegraphic communication, internet information and communications etc. The rights are not exhaustive but the rights can be said to cover three aspects that include right to privacy of the physical person, right to privacy of the home and right to privacy of communication.

In the context of this dispute, the privacy of telegraphic, internet and other forms of communication must not be invaded without lawful justification. Forced subscription to any telephone or internet services followed by unlawful deductions will amount to an invasion of privacy within the context of **Section 37** and entitles the complainant to damages except the Defendant has a defence. In **Bowers V. Hardwick 478 us 186 198(1986)** referred to in the book law and procedure for the

Enforcement of Human Rights by Mohammed Baba Idris and Yemi Oke, Justice Blackburn referred to the right to privacy as the "**most comprehensive of rights and the right valued most by civilised man"**. Its importance cannot therefore be overemphasised and as such service providers must be guided by this provision. I leave it at that..

Reliefs (1) and (2) are availing.

With the success of Reliefs (1) and (2), **Reliefs (3)** and **(4)** predicated on these successful reliefs are equally availing.

Relief (5) seeking for an apology to be placed in National Newspapers has no factual or legal basis. The relationship between Plaintiff and Defendant clearly has no involvement of a third party or the public. The wrong complained of and established is to the Plaintiff and no one else. Indeed the case presented was equally on behalf of the Plaintiff. No more. I really cannot situate on the evidence any basis for a written apology to be published in the National Newspapers. It is refused.

Relief (6) claims N50,000,000 as general damages.

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 right(s). 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.**

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.**

In this case, I have found already that the act of Defendant in making deductions for services not subscribed for and making unwarranted deductions for airtime paid

for was wrongful and unjustified. The Claimant has clearly been deprived of use of airtime legitimately paid for. The disruption of the quiet enjoyment of the airtime, hardship and discomfort caused in having to pay more for services already paid for cannot be understated. The forced subscription to services not subscribed for along with attendant deductions without the customers knowledge and consent clearly amounts to an unjustified interference with the privacy of Claimant and suggests abuse of powers by the Defendant service provider and lack of respect to the customer. There should be some element of good faith and trust in the relationship between a customer and his service provider. Without it, the relationship would be bereft of meaning. The fact that customers patronise their products is not a licence or a carte blanche for them to make charges willy nilly for services not subscribed for. The protocol for subscription to services which they have beautifully described, they did not abide with in this case. They (the Defendant) observed the protocol more in breach.

The investigations they said they will conduct after the complaint was laid was at best perfunctory without definitive findings or conclusions. The fact that the Defendant complained to the NCC is no reason **to abandon** such a serious investigation. It for me reflects the unseriousness or lack of concern shown or exhibited towards the complainant and customers generally and that does not speak well of any serious minded corporate and business concern. There is as yet and till date no explanation as to how deductions to airtime will just be made and for services not subscribed for. This is clearly an intolerable situation and completely unacceptable. The court has taken all the above into consideration in assessing the quantum of damages to be awarded. 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.

In the circumstances, while damages is availing, I cannot however situate the factual and legal basis for the humongous claim of ₦50M in the specific context of the facts of this case. Taking into account the totality of the factors adumbrated above, it is my considered view that sum of N5,000,000 will be just and reasonable

as general damages in the circumstances. It appears to me a dispassionate and sober assessment of the entire case and a fair recompense.

Relief 7 seeks for N200,000.000 as punitive damages. Having already granted general damages in Relief 6, and for reasons stated which I equally adopt here, I don't really see the basis for any further award of punitive damages. The principle is *restitution integrum*; not *restitution in opulentia*. In other words the purpose of award of damages is to restore the Plaintiff, as far as money can do it, into the position in which he would have been if the breach had not occurred as opposed to giving the Plaintiff a financial windfall. See **Savannah Bank of Nig. Plc V. Oladipo Opanubi (2004)15 N.W.L.R (pt.890)431; Sinyeofori Umoetuk V. UBN Plc (2002)N.W.L.R (pt.755)647.** Put differently, it is the law that where a man has been fully compensated under one head of damages for a particular injury. It is improper to award him damages in respect of the same injury under another head. See **Raymond Inyang & Ors V. Engr. Dr M.A Ebong (2002)2 N.W.L.R (pt.751)284 at 339.**

On exemplary damages, the Supreme Court in **Allied Bank of Nigeria V. Akubueze (1997)6 N.W.L.R (pt.509)1** stated thus:

"Exemplary Damages properly so called may only be awarded in actions in tort but only in three categories; these are:

(i) In the case of oppressive, arbitrary or unconstitutional action by the servants of the government.

(ii) Where the Defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the Plaintiff.

(iii) Where there is an express authorization by statue.

See also **Guardian Newspaper V. Ajeh (2005)12 N.W.L.R (pt.938)pg 205 at 215.** Where it was held that:

"Punitive or exemplary damages are damages on an increased scale, awarded to the Plaintiff over and above what will barely compensate him for his loss

where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud or wanton and wicked conduct on the part of the Defendant and are intended to solace the Plaintiff for mental anguish and punish the Defendant."

It is correct that Exemplary Damages convey a positive element because its object is to punish the Defendant. However the primary objective of an award of damages is to compensate the claimant for the injury or loss done to him. Once that objective is achieved, the need for recourse to the positive secondary objective of punishing the Defendant for the injury hardly arises except of course where the Defendants conduct is sufficiently outrageous to merit further punishment as where it discloses malice, fraud, cruelty or insolence or the like. The actions of Defendant including giving Claimant free data of 50 mega byte worth N100, the refund of N270 and the deactivation of the Ring back tune service and other unsubscribed services and the disposition to look into the matter when a complaint was laid initially, even if little was done subsequently, in the overall narrative of this case shows some element of remorse and acknowledgment of their actions as not been right. For these reasons, I don't consider it right to make a further award of punitive damages believing that it is now an opportunity for the Defendant to do some critical self-evaluation on how they conduct business in order to provide quality and efficient services to their customers based on clearly streamlined terms and conditions and best practices worldwide.

Relief 8 is for cost **of N500,000.00(Five Hundred Thousand Naira) Only as the cost of the proceedings.**

Let me state that in law, costs are no more than an indemnity to the successful party to the extent that he is justly damnified for costs reasonably incurred in the ordinary course of the suit or matter having regard to its nature but not to any extra-ordinary or unusual expenses incurred arising from rank, position or wealth or character of either of the parties or any special desire on his part to ensure success. See generally the book **Civil Procedure in Nigeria (2nd Edition) by Fidelis Nwadialo at pages 752-753**.

It is not in doubt that cost follow events and a successful party like the Claimant should not be deprived of cost unless for good reasons. As already alluded to, the essence of cost is to compensate the successful party of the loss incurred in

litigation. Cost cannot cure all the financial loss sustained in the litigation. It is not meant to be a bonus to a successful party and it cannot be awarded on sentiments or extraneous considerations. See **Ero V. Tinubu (2012)8 N.W.L.R (pt.1301)104; Salby V. Olaogun (1999)14 N.W.L.R (pt.637)128 and Akinbola V. Plisson Fisko Nig. Ltd & Ors (1991)1 N.W.L.R (pt.167)270.**

In awarding cost, the court will look at reasonable cost incurred, the prosecution of the action, number of appearances etc and award cost accordingly. See **Theobrus Auto Link Ltd V. B.I.A.E Co Ltd (2013)2 N.W.L.R (pt.1338)337.** Accordingly having considered the totality of relevant factors, I assess cost in the sum of **₦50,000** Naira Only.

On the whole, the single issue raised is answer substantially in favour of the Claimant. For the avoidance of doubt, I hereby enter judgment for the Claimant in the following terms:

1. **It is hereby declared that any unsolicited subscription made by Defendant on behalf of the Claimant, without the Claimant's knowledge and consent is in breach of the Claimant's right to privacy.**

2. **It is hereby declared that the Defendant's act of deducting the Claimant's airtime each time the Defendant subscribed the Claimant to services without her knowledge and consent is wrongful and a breach of the Claimant's right to quiet enjoyment of the airtime she paid for.**

3. **The Defendant is restrained from subscribing the Claimant to any service whatsoever without the Claimant's knowledge and consent.**

4. **The Defendant is further restrained from making any deduction whatsoever from the Claimant's airtime for any subscription made without her knowledge and consent.**

5. **The Plaintiff is awarded the sum of N5,000,000(Five Million Naira Only) as general damages for the Defendant's breach of Claimant's right to privacy, right to quiet enjoyment of the airtime she purchased and the distress and discomfort caused while the wrongful deductions and unsolicited subscriptions lasted.**

6. **Reliefs 5 and 6 fail and are dismissed.**

7. **I award cost of action assessed in the sum of N50,000 (Fifty Thousand Naira Only) payable by Defendant.**

…….
Hon. Justice A. I. Kutigi
(Hon. Judge)

Appearances:

1. **Amaka Eke, Esq., appears in person for the Claimant.**

2. **Margareth Okpo-mfom for the Defendant**