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

THIS TUESDAY, THE 17TH DAY OF MAY, 2022.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/2629/2020

BETWEEN:

DAN MAIKARFI CONSTRUCTION CO. LTD …… CLAIMANT

AND

UNIVERSITY OF ABUJA ..... DEFENDANT

JUDGMENT

The Plaintiff's claims against the Defendant as endorsed on the Statement of Claim dated 9th July, 2020 and filed on 15th September, 2020 at the Court's Registry are as follows:

a. **A DECLARATION that there is an existing contract between the claimant and defendant and that same is still subsisting.**

b. **A DECLARATION that the Arbitral award delivered on the 16th day of November, 2019 by the sole arbitrator nominated by the parties is final and same is binding on all parties.**

c. **A DECLARATION that the purported letter of termination of contract dated the 13th day of March, 2020, issued by the Defendant whom the Arbitral Panel adjudged to have breach the terms of contract between it and the claimant is illegal, null and void having submitted to the jurisdiction of the Arbitral panel.**

d. An ORDER of this Honourable Court setting aside the Defendant's letter of 13th day of March, 2020 same being illegally issued.

e. An ORDER of court directing the defendant to comply with the Arbitral Award made by the Sole Arbitrator of 16th November, 2019 same having not been challenged and to urgently appraise/avail the claimant with the complete and clear Architectural drawings of the project to enable it proceed with the construction work at the site and ensure completion of same.

ALTERNATIVELY

AN ORDER of court directing the defendant to accept the accessed work already done by the claimant and pay the claimant off in line with the valuation report turned in by A.B. Ndagi (Registered Licences Quantity Surveyor) dated 11th May, 2020.

f. AN ORDER of court directing the defendant to pay the sum of N25, 000, 000.00 (Twenty Five Million Naira) only as exemplary damages to the claimant for refusing to comply with or/and obey the Arbitral award of 16th November, 2019 as provided for in the Contract Agreement between the parties on resolution of dispute between the parties in the event of any.

g. AN ORDER of court directing the defendant to pay the sum of N23, 083,796.30 (Twenty Five Million, Eighty Three Thousand Seven Hundred and Ninety Six Naira, Thirty Kobo) as special damages to the claimant comprising of:

PARTICULARS OF SPECIAL DAMAGES

I. N21, 583, 796.30 (Twenty-One Million, Five Hundred and Eighty-Three Thousand, Seven Hundred and Ninety Six Naira, Thirty Kobo) only being the value of already completed job at the site of the defendant that is yet to be paid for by the Defendant as valued by A.B. Ndagi (Registered licensed Quantity Surveyor) dated 11th May, 2020.

II. The sum of N1, 500, 000.00 (One Million, Five Hundred Thousand Naira) only paid to A.B. Ndagi (Licensed Quantity Surveyor) engaged for the valuation of the work.

h. **AN ORDER of court directing the Defendant to pay the sum of N50, 000, 000.00 (Fifty Million Naira) only to the Claimant as general damages for breach of contract for wrongful termination of contract.**

i. **AN ORDER of this Honourable Court directing the Defendant to pay N3, 000, 000.00 (Three Million Naira) only as the cost of the action.**

j. **AN ORDER of this Honourable court directing the defendant to pay 10% interest on all sums awarded by the court as post judgment interest until the entire judgment sum is fully liquidated.**

k. **AN ORDER of this Honourable Court directing the Defendant to pay any sum awarded by the court through the law firm of Efegov & Associates, the solicitor to the claimant in this suit.**

The Defendant filed its statement of defence dated 22nd December, 2020 and filed on 23rd December, 2020.

With the settlement of pleadings, hearing commenced. The Plaintiff called only one witness, **Ilyasu Abdu**, the Managing Director/CEO of plaintiff who testified as **PW1**. He adopted his witness deposition dated 15th September, 2020 and tendered in evidence the following documents as follows:

1. Letter of award of contract by University of Abuja dated 6th November, 2014 was admitted as **Exhibit P1**.

2. Copy of document titled "University of Abuja Construction of 500 capacity Lecture Theatre Lot 3" was admitted as **Exhibit P2.**

3. Letter by the Defendant titled "determination of contract for the construction of 500 capacity Lecture Theatre, Lot 3, Main Campus" dated 12th July, 2017 was admitted as **Exhibit P3**.

4. Letter by Nigerian Institute of Quantity Surveyor (NIQS) dated 29th January, 2018 titled "in the matter of arbitration of dispute between Dan Maikarfi Construction Co. Ltd and University of Abuja" was admitted as **Exhibit P4.**

5. Letter by NIQS dated 12th March, 2018 was admitted as **Exhibit P5**.

6. Copy of Arbitral Award dated 16th November, 2019 was admitted as **Exhibit P6**.

7. Letter by Dan Maikarfi Construction Co. Ltd dated 3rd February, 2020 to the Vice Chancellor Uni-abuja was admitted as **Exhibit as P7**.

8. Letter by University of Abuja titled "Construction of 500 capacity Lecture Theatre – Arbitration Award" dated 6th March, 2020" admitted as **Exhibit P8.**

9. Letter by Defendant dated 13th March, 2020 was admitted as **Exhibit P9**.

10. NIPOST parcel/receipt No. PC 001/841 NG together with the letter by the law firm of Efegov & Associates dated 16th march, 2020 was admitted as **Exhibits P10 a and b**.

11. Document titled "Construction of 500 capacity Lecture Theatre Lot 3 – valuation No 6 – final payment at determination" dated 11th May, 2020 was admitted as **Exhibit P11**.

PW1 was then cross-examined by counsel to the Defendant and with his evidence, the plaintiff closed its case.

On the part of defendant, they also called only one witness. **Architect Khadijat Umar**, Chief Architect in the Physical Planning and Development Department of Defendant testified as DW1. She adopted her witness deposition date 23rd December, 2022 and tendered in evidence a letter of Undertaking by Dan Maikarfi Construction Co. Ltd dated 11th October, 2016 which was admitted in evidence as **Exhibit D1**. She was equally cross-examined by counsel to the plaintiff and with her evidence, the defendant closed its case.

At the conclusion of trial, parties filed, exchanged and adopted their final written addresses. The final address of defendant is dated 29th October, 2021 and filed same date at the Court's Registry. In the address, four (4) issues were raised as arising for determination as follows:

i. **Whether the termination of the Claimant's contract is not justifiable and therefore valid having regard to the contract agreement and the claimant's undertaking of 11th October, 2016.**

ii. **Whether having not challenged or appealed the decision of the sole arbitrator, the claimant can re-litigate issues already determined by the sole arbitrator before this Honourable Court.**

iii. **Whether special damages can be granted by this Honourable Court on speculative claims without the claimant furnishing detailed particulars as required by law.**

iv. **Whether the claimant has not failed to prove its claims as per the writ of summons and therefore disentitled to the Declaratory reliefs sought.**

On the part of the plaintiff, the final address is dated 11th November, 2021 and filed same date at the Court's Registry. In the address, two (2) issues were raised as arising for determination:

1. **Whether there exists any contractual relationship between the claimant and the defendant which was breached by the Defendant act of unilateral cancellation of the contract after the Arbitral Award?**

2. **Whether the Claimant is not entitled to the entire reliefs sought in this suit having successfully proved his case vis-a-vis the clearly stated dispute resolution clause in the Contract Agreement between the parties?**

The Defendant then filed a Reply on points of law to the plaintiffs address on 15th November, 2022.

I have set out above the issues as distilled by parties as arising for determination. Issue (2) raised by claimant and Issues (i), (iii) and (iv) raised by defendant revolves around whether there was an agreement between parties and whether it was breached to entitled plaintiff to any or all of the Reliefs sought. Issue 1 raised by plaintiff and issue (2) raised by defendant then raises the important threshold issue of whether the **arbitral award** arising from the extant contract impacts in anyway with the determination of the extant dispute.

The **arbitration** parties submitted to and the award made would in the circumstances appear to have some bearing, one way or the other, on how this case would ultimately be determined. In the circumstances, from a careful evaluation of the pleadings and evidence led, the issues for determination can be

succinctly accommodated under the following broad issue and questions formulated by court, to wit:

1. **Whether the plaintiff has proved its case on a balance probabilities to entitle it to all or any of the Reliefs sought.**

The above will be predicated on a resolution of the following fundamental sub-questions:

i. **How many contract(s) did parties on Record have or enter into?**

ii. **Was there a dispute arising from any of the contract(s) and did parties submit to arbitration?**

iii. **If parties submitted to arbitration, and there was an arbitral award; what did the award state and can this court properly determine the present action in the light of the subsisting arbitral award?**

iv. **Depending on the answer to (iii) above, whether the plaintiffs' reliefs are availing?**

The above issue and the question raised are not raised as alternatives to the issues raised by parties, but the issues canvassed by parties can and shall be cumulatively considered under the above broad issue and the sub-issues raised. See **Sanusi V Amoyegan (1992) 4 N.W.L.R (pt.237) 527.** The issues thus raised will be taken together as it has in the courts considered opinion brought out with sufficient clarity and focus, the pith of the contest which has been brought to court for adjudication.

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 would proceed to determine this case based on the issues I have raised 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.

Now to the substance and as stated earlier, the lone issue and the sub-questions raised will be taken together because of the connection they share.

I had at the beginning of this judgment stated the claims of plaintiff. The cause of action of plaintiff seems to be predicated in contract. In resolving this dispute, it is critical to situate the contract, and if more than one, how many contract parties had, the precise nature and parameters of the contract(s) and which was breached. The plaintiff contends that they had a **contractual relationship** which was breached by defendant and which was subject of arbitration and an arbitral award. That after the **arbitral award**, the defendant again unilaterally cancelled the contract parties have which now entitled it to the present reliefs sought in this action.

On the other side of the aisle, the defendant contends that the plaintiff is not entitled to any of the reliefs sought. The defendant contends that it only had **one contractual relationship** with plaintiff and that it was plaintiff that did not meet up with the contractual obligations and this led to the termination of the contract which was then subject of an arbitration and an arbitral award. That the plaintiff has not challenged the **arbitral award** and is thus still binding and that the present action is simply an attempt to relitigate reliefs which were not granted by the arbitral tribunal.

It is therefore to the pleadings which has streamlined the facts and issues in dispute and the evidence that we must now beam a critical judicial search light to situate the nature of the agreement(s) parties had in resolving the contested assertions.

The pleadings are even more critical here because, I note sadly, that in the addresses, submissions were made at large that cannot be situated within the confines of the issues joined on the pleadings. The relevant paragraphs of the statement of claim are as follows:

"3. The Claimant avers that pursuant to an advertisement by the Defendant requesting for qualified indigenous construction companies in Nigeria to bid for the construction of a 500 capacity Lecture Theatre at its Main Campus along Nnamdi Azikiwe International Airport Road at Gwagwalada, Abuja, it bided for the job and was adjudged qualified for same whereupon, a letter of award was issued to it.

4. The Claimant avers that pursuant to the averment stated in paragraph 3 above, the Defendant awarded the contract for the construction of a 500 capacity Lecture Theatre, Lot 3 under the TETFUND NEEDS Assessment Special Intervention to it vide a letter reference No.UA/R/CON/04 dated the 6th day of November, 2014 in the sum of N157, 483, 072.75 (One Hundred and Fifty Seven Million, Four Hundred and Eighty Three Thousand, Seventy Two naira, Seventy Five Kobo). The Claimant herein pleads the copy of the letter of award of contract dated 6th November, 2014 issued in its favour by the Defendant and same shall be relied upon at the hearing of this suit.

5. The Claimant avers that pursuant to the award and the letter stated in paragraph 4 above, the Defendant prepared a Construction Contract Agreement dated the 17th day of November, 2014 stating the terms and conditions of the contract and same dully executed by the parties as a working/binding documents on all parties. The Claimant herein pleads the copy of the Construction Contract Agreement and same shall be relied upon at the hearing of this suit.

6. The Claimant avers that in the Agreement stated in paragraph 5 above, parties agreed at Clause 35 particularly sub-clause 35.1 and 35.2 that in the event of any dispute or difference shall arise between the parties in the course of the contract, such dispute shall be referred to an Arbitrator appointed by the president of either The Nigerian Institute of Architects (NIA), The Nigerian Institute of Quantity Surveyors (NIQS),

The Nigerian Society of Engineers (NSE) or the Nigerian Institute of Building (NIOB) whose award shall be final and binding on all parties. The Claimant herein pleads the copy of the Contract Agreement dated 17th December, 2014 between the parties and same shall be relied upon at the hearing of this suit.

7. **The Claimant avers that sometimes on the 12th day of July, 2017, the Defendant in flagrant violation of the terms of the Contract Agreement between the parties stated in paragraph 6 above unilaterally revoked the contract and followed up with letter dated 21st August, 2017 without due consideration to the provision of Clause 35.1, 35.2 and 35.3 of the terms of the Contract Agreement stated in paragraph 6 above. The Claimant herein pleads the copy of the Defendant letters dated 12th July, 2017 titled determination of contract for the construction of 500 capacity Lecture Theatre, Lot 3, Main campus and same shall be relied upon at the hearing of this suit.**

8. **The Claimant avers that pursuant to the Defendant's letters stated in paragraph 7 above, the Claimant invoked the Arbitration clause in the Agreement between the parties stated in paragraph 6 above which led to a meeting between the parties that culminated into a joint decision to write to the President of the Nigerian Institute of Quantity Surveyors to arbitrate on the dispute in line with the provision of the contract agreement between the parties. The Claimant herein pleads the copy of the minute of meeting held between it and the representatives of the Defendant wherein it was resolved to appoint an Arbitrator as same shall be relied upon at the hearing of this suit.**

9. **The Claimant avers that following the agreement to appoint an Arbitrator in consonance with the terms of the Contract Agreement, the Defendant letter of termination of Contract stated in paragraph 7 above automatically became ineffectual, null and void.**

10. **The Claimant avers that in response to the request of the parties to the Nigerian Institute of Quantity Surveyors stated in paragraph 9 above, the President of the Institute on the 29th day of January, 2018 nominated 3 Quantity Surveyors in a letter in person of:**

a. **Mr. Jim Okey Nwagbara**
b. **Mrs. Adenike Lydia Ayanda**
c. **Mr. Paul Osikhena Ogbiti**

for the parties to choose one but out of the three (3) as the Arbitrator of their choice to sit and arbitrate on the matter. The Claimant herein pleads the copy of the letter of the President of the Nigerian Institute of Quantity Surveyors dated the 29th day of January, 2018 addressed to parties as same shall be relied upon at the hearing of this suit.

11. The Claimant avers that pursuant to the letter stated in paragraph 9 above, parties jointly nominated Chief Okey Jim Nwagbara out of the 3 (three) suggested names of Quantity Surveyors sent to the parties by the President of the Nigerian Institute of Quantity Surveyors in the letter and he was subsequently appointed by the Institute vide a letter reference No. NIQS/AB/DU/38y/18/03 dated 12th March 2018 as the sole Arbitrator to hear and determine the dispute that had arisen between the parties under the Agreement in connection with the contract. The Claimant herein pleads the copy of the Institute letter of appointment of the sole Arbitrator as agreed by parties in the matter and same shall be relied upon at the hearing of this suit.

13. The Arbitrator after hearing the dispute between the parties finally made his award on the 16th day of November, 2019 in a 53 pages document. The Claimant herein pleads the copy of the letter the Sole Arbitrator wrote to parties to inform them of the date of presentation of the award and the venue dated 28th day of November, 2019 as well as the copy of the final award of the Sole Arbitrator and same shall be relied upon at the hearing of this suit.

14. The Arbitrator at page 33 paragraph 85, page 37 paragraph 106, page 39 paragraph 118, pages 41 and 42, paragraphs 131, 132, 133,, 134, 135, 136, 137,, 138, 140, 141 and page 50 on issue 1, 2, 3, 4, 5 and 6 in the final ward held that it was the failure of the Defendant to furnish the Claimant with appropriate and relevant (clear/legible and properly dimensioned) contract/construction working drawings for the execution of project was a breach of the Agreement by the Defendant under

Clause 3.2.2 and 3.4 at page CC/2 and CC/3 of the Agreement and that the Defendant letter of determination of the contract was in error.

15. The Arbitrator went further at the last paragraph of page 52 of the award and directed that the Defendant should pay the sum of N2,834,695.31 (Two Million, Eight Hundred and Thirty Four Thousand, Six Hundred and Ninety Five Naira, Thirty One Kobo) to the Claimant being the total amount deducted as liquidated and ascertained damages from the amount due to the Claimant in Architect/Project Managers payment valuation and certificate No.4 dated 30th November, 2016 and 5th December 2016 respectively within 60 days from the date of award.

16. The Claimant avers that pursuant to the final award of the Arbitrator, it wrote a letter of notification to resume construction works at site dated the 3rd day of February, 2020 to the Defendant stating that it will mobilize back to site on the 5th day of February, 2020 and thereafter requested for reviewed drawings. The Claimant herein pleads the acknowledged copy of the letter in question and same shall be relied upon at the hearing to this suit even as the Defendant is put on notice to produce the original copy of Claimant's letter of 3rd February, 2020 at the hearing of this suit.

17. The Claimant avers that pursuant to the averment stated in paragraph 14 and in part compliance with the Arbitral award, the Defendant wrote a letter dated the 6th of march, 2020 addressed to the Claimant with evidence of its compliance with the Arbitral award as it relates to payment previously paid to the Claimant in-respect of Certificate No.4 dated 30th November, 2016 and 5th December, 2016 together with 5% post award interest ordered by the Arbitrator in the sum of N2,847,897.51 (Two Million, Eight Hundred and Forty Seven Thousand, Eight Hundred and Ninety Seven Naira, Fifty One kobo). The Claimant herein pleads the copy of the letter of the Defendant evidencing payment of the refund in favour of the Claimant as ordered by the Arbitrator in his final award and same shall be relied upon at the hearing of this suit.

18. The Claimant avers that in response to the above stated letter in paragraph 15, the Defendant again for the 3rd time wrote a letter dated

13th March, 2022 terminating the contract wherein it allegedly rely on a letter of undertaking written by the Claimant sometime 2017 (two years before parties went to Arbitration and 3 years after the Award) as the ground upon which it terminates the contract. The Claimant herein pleads the letter of termination of contract dated 13th March, 2020 issued by the Defendant to it as same shall be relied upon at the hearing of this suit.

22. The Claimant avers that the Defendant had earlier issued it with a letter dated the 12th day of July, 2017 wherein it unilaterally terminated same contract without recourse to the mode of dispute resolution clearly provided in the contract Agreement between the parties that culminated into the appointment of Arbitrator. The Claimant herein pleads the copy of the letter of Termination of Contract dated 12th July, 2017 issued by the Defendant as same shall be relied upon at the hearing of this suit.

23. The Claimant avers that following the averment stated in paragraph 17, the Claimant was constrained to engage the Services of A.B. Ndagi (a license quantity surveyor) to go to the site and quantify the job so far carried out by it vis-à-vis payments that the Defendant had made to it in the course of the job with a view to ascertaining the commitment of either party.

24. The Claimant avers that following the averment stated in paragraph 22 above, A.B. Ndagi went to the site and clinically and professionally quantified the value of the job done so far and also the payments made to it by the Defendant and arrived at N21, 583,796.30 (Twenty One Million, Five Hundred and Eighty Three Thousand,. Seven Hundred and Ninety Six Naira, Thirty Kobo) as the amount due to it from the Defendant. The Claimant herein pleads the copy of the valuation report turned in by A.B. Ndagi (licensed Quantity Surveyor) and same shall be relied upon at the hearing of this suit."

The evidence of PW1 largely followed the structure or narrative above.

The defendant joined issues with the above averments in their defence and the relevant paragraphs are as follows:

"3. The defendant admits paragraph 7 of the statement of claim to the extent ONLY that she terminated her contract with the plaintiff but asserts that she was forced to so do when the plaintiff failed/neglected to honour an undertaking that she separately and voluntary made to the Defendant under which the Defendant was at liberty to terminate the contract and blacklist the claimant.

4. The Defendant avers in answer to paragraphs 9, 14 and 15 of the statement of claim that the Claimant had prayed for the following reliefs before the Arbitration Tribunal;

i. A declaration that actions of the Respondent against the Claimant were a breach of, an infraction of various terms and clauses of the Agreement entered between the parties.

ii. A claim in the sum of Two Billion Five Hundred Thousand Naira (2.5B) only for exemplary, special, general and punitive damages for breach of contract.

iii. An order of the Tribunal to the Respondent to pay prevailing interest rate on award sum from the date the Award is delivered until the sum is liquidated by the respondent.

iv. An additional sum of Seven Million Eight Hundred and Seventy-Four Thousand One Hundred and Fifty-Three Naira Sixty Four Kobo (N7, 874,153.64) only as ten percent Retention Fund illegally deducted by the Respondent from the claimant's certified works.

v. Order of the Tribunal directing the Respondent to pay to the Claimant the sum of Two Million Eight Hundred and Thirty Four Thousand Six Hundred and Ninety Five Naira Thirty One Kobo (N2,834,695.31) only as ascertained damage illegally deducted by the Respondent from the Claimant's certified works, and

vi. The order of the Tribunal directing the Respondent to pay to the claimant accrued interest on the whole amount at the prevailing interest rate from the date the money was illegally deducted till date.

5. **The defendant avers further that upon hearing both parties, the arbitrator in his award granted reliefs I. iii and v of the claimant's claims, when he held on page 28 paragraph 57; and page 44 paragraphs 154 and 155 of the arbitral Award that the defendant's actions were in breach of the agreements between the parties. The defendant pleads and shall rely on the Arbitral award dated 16th November, 2019.**

6. **The Defendant avers further that Arbitrator on page 45, paragraph 165 of the Award granted the sum of N2,834,695.31 (Two Million Eight Hundred and Thirty Four Thousand Six Hundred and Ninety Five Naira Thirty One Kobo) in favour of the claimant as ascertained damages deducted by the defendant from the claimant's certified works.**

7. **The defendant avers further that the arbitrator clearly refused the claimant's reliefs 2, 4 and 6 on page 44 paragraphs 156, 157, 158 and 159; and 159; and page 45 paragraphs 160, 161, 162, 163 and 164 of the Award.**

8. **The Arbitrator in so refusing the reliefs 2, 4 and 6 was of the considered view that the claimant failed to demonstrate or show empirical evidence of individuals loses he suffered, and that lumping of all heads of claims in one sum makes his prayers speculative. The claimant did not appeal against the award.**

9. **The defendant avers that the claimant's prayers 2, 4 and 6 before the Arbitral Tribunal were for damages purportedly occasioned by the respondent's alleged wrongful termination of the contract, but which she sailed to prove before the Tribunal.**

10. **The Defendant emphatically avers that nowhere in the Award was the claimant ordered to be allowed back on site.**

11. **The defendant states in response to paragraphs 16, 17 and 18 of the statement of claim that in compliance with the Arbitral Award, she caused the sum of N2, 847, 897.51 (Two Million Eight Hundred and Forty-Seven Thousand Eight Hundred and Ninety-Seven Naira Fifty-One Kobo) to be paid to the claimant with a forwarding letter dated 6th**

March, 2020. The letter is hereby pleaded, whilst notice is given to the claimant to produce the original thereof at the hearing.

12. The defendant in specific response to paragraph 18 of the statement of claim avers that its letter of 13th March, 2020 was not a termination of contract letter per se as misleadingly pleaded by the claimant, but a response to the claimant's letter of 3rd February, 2020 by which the claimant was indicating a will to return to site.

13. The defendant avers that its said letter of 13th March, 2020 merely stated the subsisting state of affairs between the parties, on the basis of a separate agreement/undertaking between the parties under which the claimant was obligated to have completed the project within 18 weeks from 11th October, 2016, the defendant having fulfilled its own side of the separate Agreement by the release of the performance Bond to the claimant. The defendant pleads the said separate undertaking and shall found upon the same at the hearing.

14. The defendant avers that by the undertaking made by the claimant, the company was already blacklisted as at time of its indication of willingness to return to site and the defendant's letter of 13th March, 2020 merely restated that state of affairs.

15. The defendant avers further and will at the hearing lead evidence to show that the claimant's undertaking of 2016 which is the basis of the defendant's letter of 13th March, 2020 constitutes a distinct understanding for which the defendant had altered its own position.

17. By its said award, particularly paragraphs 182, 183, 184 and 185 thereof, the Arbitral Tribunal expressly left the issue of the claimant's undertaking live, undecided and enforceable by the defendant.

21. The defendant avers in the premises that the claimant is not entitled to any claim for work allegedly carried out unless and until same is verified, certificated and jointly measured.

22. The defendant avers further that on account of the black-listing of the claimant in line with its own undertaking, the project has since been re-awarded to another contractor.

23. The defendant avers that the reliefs sought herein are essentially a repackage of the claimant's relief 2 which was refused by the Arbitral Tribunal for want of proof and against which there was no appeal."

The evidence of DW1 was equally largely in line with the above structure of the defence.

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.

With the above pleadings and evidence providing a credible legal and factual basis, I shall now proceed to determine the questions earlier posed.

Before situating the precise agreement of parties from the pleadings, let us define what a contract entails and also refer to some germane principles that must necessarily guide our evaluation of the evidence led on record by parties in support of their pleadings.

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.

It is 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 N.W.L.R (pt 77) 163 at 198 A; Ajuwon V. Akanni (1993) 9 N.W.L.R (pt 316)182 AT 200.**

I must also add here that under our 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.

Now a convenient starting point is to understand the **precise situational basis** of the relationship of parties.

Now on the pleadings and particularly the admission by defendant vide **paragraph 1** of the defence of paragraphs 2-6 of the statement of claim, there is no dispute that the defendant vide **Exhibit P1** awarded a contract to plaintiff for the construction of a 500 capacity lecture theatre, dated 6th November, 2014 in the sum of One Hundred and Fifty Seven Million, Four Hundred and Eighty Three Thousand, Seventy Two Naira, Seventy Five Kobo (N157, 483, 072.75) only.

Pursuant to this letter of award, parties executed a construction contract agreement dated the 17th November, 2014 vide **Exhibit P2** containing the terms and conditions of the contract. These documents, **Exhibit P1** and particularly **Exhibit P2** encapsulates the agreement between parties and clearly contains the terms or basis for the mutual reciprocity of legal obligations between them.

Parties to an agreement are bound by the terms of the agreement they enter into freely and the court will not sanction an unwarranted departure from them unless they have been lawfully abrogated or discharged. See **Artra Ind. (Nig.) Ltd V NBCI (1988) 4 NWLR (pt.546) 357 at 376 E; V FGN V Zebra Energy Ltd (2002) 3 NWLR (pt.754) 471 at 491 E-F**.

It is not the business of the court to make a contract for parties before it or to rewrite one already made by them. Once the conditions precedent to the formation of the contract are fulfilled by parties thereto, they are bound by it. Where parties as in this case have embodied the terms of the contract in a written agreement, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument. See **Larmie V D.P.M. & Services Ltd (2005) 18 NWLR (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 that agreement or dispute is the written contract executed by the parties. See **Larmie V D.P.M & Services (supra).**

The bottom line here is that the court cannot go outside the confines of **Exhibits P1** and **P2** in search of the intention of parties or to search for terms that may be palatable to one party at the detriment of the other.

Flowing from the above and from the entirety of the pleadings and evidence led, I find it as established that the only contract awarded to plaintiff by defendant is that for the construction of a 500 capacity lecture theatre, lot 3 vide **Exhibits P1** and **P2**. There is therefore on the evidence no other distinct contract or different contract outside the contract covered by these exhibits. I will return to this point again in the judgment.

Now it is not in dispute that one of the terms of the agreement vide clause 35.1 of **Exhibit P2** provides for **recourse to arbitration** in the event of a dispute arising. Indeed the arbitration clause is very **expansive in terms** and I find it relevant to produce the clause thus:

"Provided always that in case any dispute or difference shall arise between the Employer or the Architect/Project Managers on his behalf and Contractor, either during the progress or after completion or abandonment of the Works as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter of thing left by this Contract to the discretion of the Architect/Project Managers) or the withholding by the Architect/Project Managers of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in clause 30.5.1 or the rights and liabilities of the parties under clauses 25, 26, 32 and 33, the same shall not be allowed to interfere with or delay the execution of the

Work but either party shall forthwith give to the other notice in writing of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties to act as Arbitrator. Such a person shall be an experienced professional in the building industry or failing agreement, a person appointed (at the request of either party) by the president of any of the under mentioned professional bodies: The Nigerian Institute of Architects (NIA), The Nigerian Institute of Quantity Surveyors (NIQS)."

Now on the pleadings and evidence which again the defendant did not deny, a dispute arose when the defendant terminated the **contract** vide **Exhibit P3** dated 12th July, 2017 according to them due to the violation by plaintiff of **clause 25** of the agreement. For purposes of clarity, **Exhibit P3** reads thus:

"DETERMINATION OF CONTRACT FOR THE CONSTRUCTION OF 500 CAPACITY LECTURE THEATRE, LOT 3, MAIN CAMPUS

Kindly refer to the contract between the University and your Company on the Construction of 500 Capacity Lecture Theatre, Lot 3, Main Campus awarded to you on 6th November, 2014.

Your Company is in breach of section 25 of the contract provisions between the University and yourselves which stipulate among others:

1. ***If the Contractor shall make default in any one of more of the following respects, that is to say :-***

    a. ***If he without reasonable cause wholly suspends the carrying out of the Works before completion thereof, or***
    b. ***If he fails to proceed regularly and diligently with the Works, or…***

We therefore write to inform you that, based on the above breeches (sic) the University Council, at its 76th Regular Meeting held on Wednesday, 22nd and Thursday, 23rd March, 2017, deliberated on the status of the contract and directed the determination of the contract for Construction of 500 Capacity Lecture Theatre, Lot 3, Main Campus project.

By this letter, the University Council's decision is hereby conveyed to you that the contract awarded to your Company has been determined from the date of this letter. This determination is without prejudice to any subsisting rights you or the employer have under this contract.

Thank you."

The above letter is clear and unambiguous. It clearly dealt with or terminated the agreement of parties covered by **Exhibits P1 and P2.**

Flowing from the letter, the claimant now invoked the **arbitration clause provision** which culminated in the writing of a letter to the President of the Nigerian Institute of Quantity Surveyors to arbitrate in line with the contract agreement.

In **paragraph 9** of the claim and **paragraph 11** of the witness deposition of PW1, the contention was made that following the agreement to appoint an arbitrator in line with the contract agreement, that the letter of termination vide **Exhibit P3** automatically became "ineffectual, null and void".

No law, statutory or judicial was cited to support such proposition. There was equally no evidence proffered or tendered perhaps to support the contention that recourse to arbitration makes the letter of termination ineffectual. As stated earlier, the terms of **Exhibits P1 and P2** cannot be altered or additions made to suit any purpose. The claimant in paragraph 8 of the claim pleaded that it will rely on the minute of meeting where parties resolved to appoint an arbitrator but this minute was not tendered. There is therefore nothing to situate what was or was not agreed when parties met on the appointment of an arbitrator and the court cannot speculate. In the absence of evidence to support the preparation of minute of meeting, that aspect of the pleading is deemed as abandoned.

The question that however arises from the contention of claimant is this: If **Exhibit P3**, is rendered ineffectual, null and void because of the fact that parties agreed to go to arbitration, why then proceed with the arbitration? The plaintiff may as well have simply returned to site to continue the construction works. It is precisely because the **termination was not ineffectual, null and void**, that the call for arbitration became imperative in line with the agreement of parties. The propriety or the rightness or otherwise of the actions of defendant in terminating the contract became now a defined issue for **determination** by the **arbitrator**. It was at that point no more open to the claimant to make a determination that the letter of termination was **"ineffectual, null and void**".

On the pleadings and evidence, it is common ground and not in dispute that the Nigerian Institute of Quantity Surveyors vide **Exhibit P4** furnished the parties three (3) names and parties jointly nominated **Mr. Jim Okey Nwagbara** to

arbitrate the dispute between parties and he was officially appointed as sole arbitrator vide **Exhibit P5**. He duly met with parties where modalities for the hearing were arranged and agreed to by parties. Parties accordingly filed their claims and responses and the arbitrator accordingly heard the dispute and made his award on 16th November, 2019 vide **Exhibit P6**. This award too speaks for itself and no additions or interpolations can be made to it.

Because of the impact this arbitration and the arbitral award may or may not have on this case, it is important to produce the claims of the claimant in the arbitral proceedings. The claimant sought for the following reliefs against defendant as contained in the award (Exhibit P6) at **pages 10-11** thus:

1. **A Declaration that actions of the Respondent against the Claimant were a breach of, and an infraction of various terms and clauses of the Agreement entered between the Parties.**

2. **A Claim in the sum of Two Billion Five Hundred Thousand Naira (N2.5B), only for exemplary, special, general and punitive damages for breach of contract.**

3. **An Order of the Tribunal to the Respondent to pay prevailing interest rate on Award sum from the date the Award is delivered until the sum is liquidated by the Respondent.**

4. **An additional sum of Seven Million, Eight Hundred and Seventy-Four Thousand, One Hundred and Fifty-Three Naira, Sixty-Four Kobo (N7,874,153.64), only as Ten Percent Retention Fund illegally deducted by the Respondent from the Claimant's certified works.**

5. **Order of the Tribunal directing the Respondent to pay to the Claimant the sum of Two Million, Eight Hundred and Thirty-Four Thousand, Six Hundred and Ninety-Five Naira, Thirty-One Kobo (N2, 834,695.31), only as ascertained damage illegally deducted by the Respondent from the Claimant's certified works, and**

6. **The Order of the Tribunal directing the Respondent to pay to the Claimant accrued interest on the whole amount at the prevailing interest rate from the date the money was illegally deducted till date.**

The defendant in the arbitration proceedings equally set up a **counter-claim** against plaintiff which I need to reproduce here.

At the conclusion of hearing, parties filed and exchange addresses. From the addresses, the arbitrator distilled the following (6) issues for determination at **pages 13-14** of the **award** as follows:

1. **Whether the Letter of Award of Contract (Award) is inseparable or intertwined with the Agreement between Parties. In other words, between the Award and the Agreement which is superior to the other and binding on the Parties under the circumstances of this case?**

2. **Whether taking into consideration the circumstances of the Agreement, as well as the Project, which included failure of the Respondent to furnish the Claimant with all necessary drawings for the building, and this Arbitral reference, the Respondent was in breach of the Agreement?**

3. **Whether given the circumstances of the case the Claimant's application for variation of the Contract was justified?**

4. **Whether taking into consideration the exigencies that led to the award of the Contract, as well as the Project, and this Arbitral reference, the Claimant preformed the contract timeously, which performance led to loss of accreditation of some academic programmes of the Respondent, the Claimant was not in breach of the Contract?**

5. **Whether the Respondent is not entitled to enforce the terms of Claimant's undertaken dated 11th October, 2016 when it requested for the release of its performance bond to enable it recover money tied down in the bank which it needed to plough back on the project; whether the Respondent acted in error in the determination of the Claimant's employment for non-performance?**

6. **Whether given the circumstances of the case both the Claimant and Respondent are entitled to the reliefs and claims sought?**

The Arbitrator at **pages 49-51** of the award gave a succinct summary of his decision vis-à-vis the issues he raised above in the following terms:

"203. Summary of Award

204. I found, rule and/or held as follows:

205. On Issue No. 1

1. **The Agreement dated the 17th day of November, 2014, and executed by the Respondent and the Claimant is the foundation of the Contract between the Parties for the Project.**

2. **The Respondent and the Claimant are proper parties in the Agreement.**

3. **The Arbitration is contained in Clause 35 at page CC/35 of the Agreement.**

4. **The Letter of Award is neither expressly mentioned nor implied in the Agreement.**

206. On Issue No. 2

1. **That the failure of the Respondent to furnish the Claimant with appropriate and relevant (clearer/eligible and properly dimensioned) contract/construction working drawings for the execution of Project was a breach of the Agreement by the Respondent under Clauses 3.2.2, and 3.4 at pages CC/2 and CC/3 of the Agreement.**

207. On Issue No. 3

1. **The Claimant did breach the contract of the Agreement.**

2. **The Claimant's Application/request for variation was defective on account of paucity of relevant facts and procedural errors. It is neither sustainable nor justified under the circumstances of the case on account of Claimant's failure to comply with the relevant provisions of the Agreement.**

208. On Issue No. 4

1. **The inaction of the Claimant and the Respondent's Architect/Project Manager, and the consequent absence and/or non-availability of the**

Programme/Progress chart right from the onset of commencement of construction works on site put the completion period of the Project at "large".

2. **Neither the Claimant nor the Respondent complied with relevant provisions of the Agreement. It is also my considered view that under the circumstance. The Respondent and Claimant cannot approbate and reprobate at the same time.**

209. On Issue No. 5

1. **The Tribunal does not have the authority to adjudicate on issue relating the Performance Bond, and thereby refused to grant the reliefs sought by the Respondent in connection the Performance Bond.**

2. **The Respondent acted in error in the determination of the Claimant's employment for non-performance.**

210. On Issue No. 6

1. **The failure of the Respondent to furnish the claimant with appropriate (clearer/eligible and properly dimensioned) contract/construction working drawings for the execution of project was a breach of the Agreement by the Respondent under Clauses 3.2.2 and 3.4 at pages CC/2 and CC/3.**

2. **The Claimant's head claim of Two Billion Five Hundred Thousand Naira (N2.5B), only for exemplary, special, general and punitive damages for breach of contract is speculative, and I thereby refused same.**

3. **By the provisions of APPENDIX TO THE CONDITIONS OF CONTRACT at page CC/36 of the Agreement the Percentage for Certified Value to be retained as Retention Money is Ten Percent (10%) to a limit of Five Percent (5%) of the Contract Sum in accordance with Clauses 30 (3) and 30 (4) the Agreement.**

4. **The Claimant claim under this head being held by the Respondent as Retention money is the limit Five Percent (5%) of the Contract Sum in accordance with 30 (4) the Agreement.**

5. **The application of the requirement of this clause of the Agreement by the Architect/Project manager on the said payment Valuation and Certificate No. 4 was in order.**

6. **I found no merit on the Claimant's claim and the same is thereby dismissed same.**

7. **I ordered the Respondent pay to the Claimant the sum of Two Million, Eight Hundred and Thirty Four Thousand, Six Hundred and Ninety Five Naira, Thirty One Kobo (N2,834,695.31), only deducted as Liquidated and Ascertained Damages from the amount due to the claimant in Architect/Project Manager's payment Valuation and Certificate No. 4 dated 30th November, 2016 and 5th December, 2016 respectively.**

8. **I allowed to the Claimant, interest of Five (5%) per annum on Two Million, Eight Hundred and Thirty Four Thousand, Six Hundred and Ninety Five Naira, Thirty One Kobo (N2,834,695.31), the total amount awarded. The interest shall be applied to the total amount awarded, sixty (60) days after the date of this Award, until the same is totally satisfied by the Respondent."**

In the final analysis, the arbitrator made the following orders on page 52-53 of the award as follows:

"1. NOW THEREFORE, I, Chief Okey Jim Nwagbara, as Sole Arbitrator in this Arbitration, having read, considered and taking note of Points of Claim and Defence to Counter Claim, Points of Defence and Counter claim, written submissions by Counsel of the Parties, as well as the oral testimonies of their witnesses finds the Claimant's Claim succeed as held above by me.

2. I HEREBY AWARD AND DIRECT that the sum of sum of Two Million, Eight Hundred and Thirty Four Thousand, Six Hundred and Ninety Five Naira, Thirty One Kobo (N2,834,695.31), only be paid to the

Claimant by the Respondent, being the total amount deducted as Liquidated and Ascertained Damages from the amount due to the Claimant in Architect/Project Manager's payment Valuation and Certificate No. 4, dated 30th November, 2016 and 5th December, 2016 respectively.

3. **I FURTHER DIRECT that Respondent pays interest of Five (5%) per annum on the total amount awarded to the Claimant within Sixty (60) days after the date of this Award, until the same is totally satisfied by the Respondent."**

I have at some length above situated the clear complaints of the claimant at the arbitral tribunal further to the termination of the agreement covered by **Exhibits P1** and **P2** which was effected through **Exhibit P3**. I have also above streamlined the clear findings of the arbitrator with respect to specific complaints and the final award made by him. In real terms, the arbitrator granted only **Reliefs (1), (3) and (5)** in favour of the claimant. **Reliefs 2, 4** and **6** were clearly not granted as streamlined above in some detail. On Relief 1, and in the context of the counter-claim, the arbitrator found both parties to have breached the terms of the agreement.

There is however no doubt or dispute that the huge claim for damages (under Relief 2 claimed by claimant) clearly arose from the wrongful termination of the contract Exhibits (P1 and P2) which the arbitrator found not to have been established. The decision of the arbitrator is again clear and unambiguous.

In this case, there has been no **challenge** of any kind to the said decision by either party. Now this **decision or award** by the arbitrator clearly is a decision touching on the respective rights and claims of the parties to the arbitration and **binding** without any shadow of doubt. A voluntary reference to arbitration as done here by parties operates between parties as a final and conclusive judgment upon all matters referred to. An arbitral award has a *res-judicata* effect and it then rests on the court to enforce the award or set it aside on matters arising out of the arbitration and the award.

An arbitral award such as **Exhibit P6** is recognized as binding. By virtue of **Section 31 (1), (2) and (3) of the Arbitration and Conciliation Act**, an arbitral award shall be recognized as binding and subject to **Sections 31** and **32** of the Act shall upon application in writing, be enforced by the court. Also, an

award may, by leave of court or a judge, be enforced in the same manner as a judgment or order to the same effect.

Thus, an award made pursuant to arbitration proceedings, constitutes a **final judgment** on all matters referred to the arbitrator and it has a binding effect. See **Mutual Life & Gen Ins. Ltd V Iheme (2014) 1 NWLR (pt.1389) 671.**

In law, when parties to a dispute submit to having a dispute decided by an **arbitrator**, two consequences flow from the making of the award. First, unless there is an express contrary provision in the arbitration provision or unless it is only an interim award, it operates as a final and **conclusive judgment**. Second, the award constitutes a final judgment upon all matters referred to the arbitrator. If an **award** is not challenged as in this case, then it becomes a final and binding determination of the matters between the parties. See **Mutual Life & Gen. Ins. Ltd V Iheme (supra); Raspal Gazi Const. Co. Ltd V FCDA (2001) 10 NWLR (pt.722) 559**.

Now on the pleadings and evidence and after the award, the plaintiff vide **paragraph 16** of the claim notified the defendant vide **Exhibit P7** dated 3rd February, 2020 of its plans to mobilize back to site following the award by the arbitral tribunal. The defendant in **paragraphs 10** and **11** of the defence stated that there was no where in the award where the plaintiff was ordered back to site and that in compliance with the arbitral award, it had made all the payments and accrued interest as ordered by the arbitrator vide **Exhibit P8**.

Now, I have again carefully gone through the entire arbitral award and there is indeed no where that an order was made that **the claimant** can return back to site and continue with the construction works. Indeed the claimant never made such a claim. It would rather appear that the claimant misconstrued the correct import of the decision of the arbitrator. I have earlier in this judgment delineated the clear findings and decision of the arbitrator. The arbitrator may have found aspects of the case of the claimant proven and the agreement in certain respect breached by defendant but that does not translate or tantamount in law to mean without more that the agreement subsist or that it automatically translates to a return to status-quo.

I incline to the view that it was because of the realization by claimant that its remedy for breach of contract by defendant lies in **damages** for breach that it sought for the huge sum of **"Two Billion, Five Hundred Thousand Naira (N2.5 Billion) only for exemplary, special, general and punitive damages**

for breach of contract" in addition to other sums claimed. Unfortunately for claimant, the arbitrator found that the claim for damages were "speculative" and not proved and accordingly refused to grant same. Some of the other monetary claims were equally not granted.

The logical question to ask is this: if the claim for damages were granted, would the claimant still go back to site? Your guess is as good as mine.

On the facts, the contract between parties was terminated by defendant. The claimant **challenged the termination** at the arbitral tribunal and a binding decision given. That decision is final. Indeed that effectively then ends the **dispute** subject of course to a challenge as allowed by the **Arbitration and Conciliation Act** and on clearly **streamlined grounds**.

I am therefore not persuaded on the basis of the arbitral award to read into it that it allowed the claimant to report back to site to continue its work. If that was the relief claimant wanted, it ought to have specifically and in clear terms made such claim allowing the arbitrator to pronounce on it. Nobody can now read into **Exhibit P6** what is not contained in it. See **Section 128 of the Evidence Act**.

The claimant in paragraph 18 averred that further to its letter of notification to defendant to resume construction works vide **Exhibit P7**, that the defendant "again for the 3rd time wrote a letter dated 13th March, 2020 terminating the contract" which was tendered vide **Exhibit P9**.

Now **Exhibit P9** reads as follows:

"RE: CONSTRUCTION OF 500 CAPACITY LECTURE THEATRE LOT 3, NOTIFICATION OF RESUME CONSTRUCTION WORKS AT SITE

Your letter on the above dated 3rd February, 2020, refers, please.

We wish to note that there is nothing in the Arbitration Award that directed your resumption of work at the site.

However, based on the separate agreement entered into by your undertaking of 11th October, 2016 (a copy hereby attached), you supposed to have completed the job by 10th December, 2016, being about 6 weeks after your request for release of performance Bond was granted.

By virtue of number 3 of your undertaking, you stand black listed, hence the issue of returning to site does not arise.

You are therefore advised to be rightly guided.

Thank you.

Signed

Dr. (Barr.) Makolo Hassan (JP), AMNIM, ANUPA, FSWA
Legal Officer
For: Vice-Chancellor"

I have read this letter and again as much as I have sought to be persuaded, I have not been persuaded that it has anything to do with termination of contract (Exhibit P2) which has since been terminated vide **Exhibit P3** and over which there has been a binding pronouncement by an **arbitral tribunal**.

Again this letter starts clearly by saying in response to the letter by claimant planning to resume work at site that **"there is nothing in the arbitration award that directed your resumption of work at site."**

The reference in the **Exhibit P9** to an undertaking given by claimant on 11th October, 2016 vide **Exhibit D1** even before the termination of the contract on 12th July, 2017 vide **Exhibit P3** and the arbitral award vide **Exhibit P6** dated 16th November, 2019 does not give rise to a **new contract** between parties and neither can it overturn the clear decision of the arbitral tribunal. It is to be noted that the arbitrator rightly or wrongly made a pronouncement on the performance bond referred to in **Exhibit P9**. In the award at page 50, he stated as follows:

"The tribunal does not have the authority to adjudicate on issue relating to the performance Bond, and thereby refuse to grant the reliefs sought by Respondent in connection with the performance bond."

The above is a binding pronouncement by the arbitrator and neither party has challenged the decision. Reference to the undertaking in **Exhibit P9** does not therefore alter the character of the termination of the agreement effected vide **Exhibit P3** or give new life to it. A contract remains a product of agreement and not otherwise. **Exhibit P9** cannot therefore alter the clear effect of the **arbitral award**.

Indeed **Exhibit P9** clearly sought to situate and inform claimant of the existing state of affairs and concluded by informing claimant that the **"issue of returning to site does not arise. You are therefore advised to be rightly guided."**

I really don't see any confusion in this letter, **Exhibit P9** and I don't believe that the claimant is confused. This must be so because if the argument proffered by plaintiff is that the arbitral award somehow gave back "life" to the terminated agreement of parties (Exhibit P2), the implication is that the terms of **Exhibit P2** still regulates the contract and any dispute arising from the agreement must then be referred to **arbitration** first and not the court as done presently. The fact that this step was not taken clearly supports the fair conclusion that **Exhibit P9** did not terminate any contract between parties. The act of termination was infact achieved years earlier by **Exhibit P3** and that termination was challenged which culminated in the arbitral award vide **Exhibit P6**. The simple and clear message of **Exhibit P9** is that within its clear purview, there is no room or allowance to read that claimant was ordered back to site by the arbitrator.

On the pleadings, the claimant in **paragraph 23** stated that following the refusal of the defendant to allow it back to site, it now engaged the services of a licence Quantity Surveyor to go to site and quantify the job so far carried out by it vis-à-vis the payment made in the course of the job with a view to ascertaining the commitment of either party. The report of the Surveyor was tendered as **Exhibit P11**.

Now it is correct that the maker of the valuation report was not produced in court and was therefore not open to be cross-examined as to the contents and parameters of how he arrived at his conclusion, but for me the key point is that this is simply a speculative attempt to have the court determine again the question of the claim of **Two Billion, Five Hundred Thousand Naira exemplary, special, general and punitive damages claimed by claimant in the arbitral tribunal which failed for complete lack of evidence**. If the claimant had perhaps produced this **valuation report** at the arbitral proceedings, the narrative with respect to the failed claims for damages may have been different. This is so because, since the termination of the contract vide **Exhibit P3**, the claimant has not been on site. The refusal to allow him to return back to site after the arbitral award did not add or change anything on site. The state of affairs remained the same from the termination up to arbitration and the award and the claimant has never gone back to site on the

evidence since the termination and even up to when the prayer to return to site was refused. Any report by a **Quantity Surveyor** ought to have been prepared and presented at the arbitral tribunal to enable the arbitrator evaluate it and access the quantum of damages to award. Having failed to present the necessary evidence at the arbitral proceedings, and having not challenged the award, the present action is one of doubtful validity.

Having resolved the key contested assertions above, this provides broad factual and legal template to now determine whether the **claimant's reliefs** are availing.

In treating the reliefs, it is important to state that the reliefs claimant seek are essentially **Declaratory Reliefs**. 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**.

Relief (a) seeks for a Declaration that the contract agreement dated 17th December, 2014 between the parties is still subsisting and that same is binding on the parties.

Flowing from our consideration of the substantive issues, it is clear that the contract vide **Exhibit P2** dated 17th December, 2014 was terminated vide **Exhibit P3** and parties submitted the dispute to an arbitral tribunal which made an award vide **Exhibit P6**. That decision was not challenged and is thus binding. This case is not a challenge of the type recognized in respect of an arbitral award. There is no template for this court to make any other pronouncement on the validity of the contract agreement again. **Relief (a) fails**.

Relief (b) seeks for a Declaration that the arbitral award delivered on 16th November, 2019 by the sole arbitrator nominated by the parties is final and same is binding on all parties.

This relief seeks for a pronouncement on what is self evident. As I have stated severally, the decision of an arbitral tribunal is final and binding and any

challenge must be as circumscribed by the Arbitration and Conciliation Act. There is nothing in the said law allowing for this type of claim. **Relief (b) fails**.

Relief (c) is a Declaration that the purported letter of termination of contract dated the 13th day of March, 2020, issued by the Defendant whom the Arbitral Panel adjudged to have breach the terms of contract between it and the claimant is illegal, null and void having submitted to the jurisdiction of the Arbitral panel.

This Relief clearly has no basis as already demonstrated. In addition to the reasons given under **Reliefs a** and **b**, I found that there was no new contract award and therefore no new letter of termination as erroneously conceived by claimant and that the said letter or Exhibit P9 cannot add to or alter the contents of the arbitral award which has made clear pronouncements on the validity of the contractual relationship between parties vide the award **Exhibit P6**. The award never stated that the claimant can resume work at site and he never made such claims. If there was no new award of contract after the arbitral award, what contract is then been terminated? I just wonder. If it is the same terminated contract that was terminated again as conceived by claimant, then it must have recourse to the arbitration clause before it can come to court. It never did. An award as stated earlier constitutes a final judgment upon all matters referred to the arbitrator. **Relief (c) fails**.

Flowing from **Relief (c)**, **Relief (d) seeking to set aside the letter by defendant, Exhibit P9** has no foundation and must fail.

Relief (e) is for an ORDER of court directing the defendant to comply with the Arbitral Award made by the Sole Arbitrator of 16th November, 2019 same having not been challenged and to urgently appraise/avail the claimant with the complete and clear Architectural drawings of the project to enable it proceed with the construction work at the site and ensure completion of same.

As stated in the course of addressing the contested issues, I had stated that an arbitral award shall be recognized as binding and subject to Sections 31 and 32 of the Arbitration and Conciliation Act shall upon application in writing, be enforced by the court. This case is clearly not one for enforcement of an arbitral award. I had earlier in this judgment stated the terms of the award. I had also referred to **Exhibit P8** wherein the defendant stated that in compliance with the

terms of the award, it had made all necessary payments with interest to claimant.

This averment was not challenged or impugned. Infact it was admitted. If there are any other aspects of the award not complied with, then the claimant should identify them clearly, back it up with credible evidence and seek to enforce it as allowed by law. **Relief (e)** however fails.

With the failure of the substantive Reliefs, the law allows the court to determine the alternative Reliefs. The law is settled that where a claim is in the alternative, the court should first consider whether the principal or main claim ought to have succeeded. It is only after the court may have found that it could not, for any reason, grant the principal or main claim that it should consider the alternative claim. See **Idufueko V Pfizer Products Ltd (2014) 12 NWLR (pt.1420) 96; Goldmark (Nig.) Ltd V Ibefon Co. Ltd (2012) 10 NWLR (pt.1308) 291**.

The first Relief seeks for order directing the defendant to accept the accessed work already done by the claimant and pay the claimant off in line with the valuation report turned in by A.B. Ndagi (Registered Licences Quantity Surveyor) dated 11th May, 2020.

Reliefs (f), (g) and (h) then seeks monetary claims for exemplary, special and general damages for breach of contract. These reliefs are essentially the same reliefs sought at the arbitral tribunal notwithstanding the subtle and not so subtle changes which claimant could not prove and which the tribunal described as "speculative" and accordingly failed. The claimant did not produce evidence of the value of work it carried out before the arbitrator. The Report by the licence surveyor now after the determination of the issue of damages by the arbitrator is clearly belated. If the claimant is not satisfied with the decision, then it should look at the law and decide on appropriate steps to take. Filing a fresh action to reventilate and ask for the same reliefs is not an option open to claimant. All the **Reliefs** thus fail.

With the failure of all the Reliefs in this case, the Relief for cost of action, 10% interest and any sum that may be awarded by court clearly have no foundation and must collapse. The legal principle is where the principal is taken away, the adjunct is also take away. See **Adegoke Motors V Adesanya (1989) 3 NWLR (pt.109) 150 at 269**.

As I round up, the point must be emphasised that arbitration commences as a private agreement between parties and persists by way of private proceedings with the parties having a great say on how the process pans out. It terminates with the award of the arbitrator which is final and binding subject of course to any challenge however as allowed by the Arbitration and Conciliation Act (ACA). It is the intendment of the ACA as well as other international conventions on arbitration to limit court interference as much as possible in order to free arbitration from the shackles associated with normal court proceedings and to essentially defer and respect the wishes of parties who have chosen or elected to settle their dispute that way. That choice which produced the award vide **Exhibit P6** must be respected by all. I say no more.

On the whole and for the avoidance of doubt, the Claimants case fails and it is hereby dismissed.

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Hon. Justice A.I. Kutigi

<u>Appearances</u>:

1. ***Efe G. Daniel, Esq., with E.A. Efe Kemaraye and Collins Marshal, Esq., For the Claimant.***

2. ***K.T. Sulyman with K.O. Lawal, Esq., Charity C. Ibezim and Abdullahi Ahmed, Esq., for the Defendant.***