

**IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA-ABUJA
ON THURSDAY THE 9TH NOVEMBER, 2023**

SUIT NO: FCT/HC/CV/878/2022

BEFORE HIS LORDSHIP: HON. JUSTICE A. I. AKOBI

BETWEEN

BRAND CONCEPT STORES LIMITED.....CLAIMANT/APPLICANT

AND

NEXT CASH AND CARRY LIMITED.....DEFENDANT/RESPONDENT

JUDGMENT

The Claimant initiates this action vide a writ of summons against the defendant on the 19/12/22. The claimant sought for the claim of Twenty Two Million, Eight Hundred and Thirty Two Thousand, Nine Hundred and Six Naira, Seventy One Kobo (N22, 832, 906.71) against the defendant being the alleged balance payment of the goods the claimant supplied to the defendant since 31st December, 2021 which said balance remains unpaid. The claimant is also claiming Two Million Naira Only (2,000,000.00) being the cost incurred in filling and prosecuting this suit and 15% post judgment interest from the date of judgment till the entire sum is liquidated.

The claimant also filed a motion ex parte with motion no: 2832/2022 for the transfer of the writ of summons to the undefended list. The motion was heard and ruling delivered on the 27th day of March 2023 wherein the court marked the writ as undefended. Upon being served with the writ marked undefended the defendant filed a Notice of Intention to defend with supporting affidavit of 21 paragraphs deposed to by one Chioma Okoye of Kado Kuchi Road, the manager of the defendant.

The writ of summons marked undefended list is supported with affidavit of 22 paragraphed deposed to by one Adeniyi Kazeem, the head of audit of the applicant, annexed with exhibits 1 – 11 in urging the court to enter judgment under order 35 of the rules of this court in favour of the claimant having transferred it to undefended list by the ruling of the court.

The claimant/applicant acknowledged the receipt of the defendant's notice of intention to defend wherein the court is urged to transfer the matter to the general cause list. The position of the claimant is that a careful study of the notice of intention to defend, accompanied with the affidavit shows that the defendant admitted the claim of the claimant. The learned counsel further stated that facts in the affidavit in support of the notice of intention to defend are not supported by any document, hence, that there is nothing to persuade the court to transfer the writ to general cause list.

Having listened to the argument of the learned counsel to claimant, I want to submit that the rules of this court under order 35 made adequate provision for undefended list procedure. For ease of reference

I reproduced order 35 rule 1 of the High Court of the Federal Capital Territory Civil Procedure Rules 2018 as follows:

Oder 35 of the High Court of Federal Capital Territory Civil Procedure Rules 2018 provide as follows:

1. Where an application in Form 1, as in the Appendix is made to issue a writ of summons in respect of a claim to recover a debt or liquidated money demand, supported by an affidavit stating the grounds on which the claim is based, and stating that in the deponent's belief there is no defence to it, the judge in chambers shall enter the suit for hearing in what shall be called the "Undefended List".

The learned counsel, E. I. Eneh Esq who represented the claimant in court on the 23/10/23, contended that the court having transferred the writ to undefended list by its ruling should proceed to enter judgment in favour of the claimant. Order 35 of the rules of this court is clear as to the procedure for placing a writ under the undefended list which did not include bringing ex parte application as done in this case by the claimant. The motion ex parte filed, moved and ruling delivered will not invalidate the process; it is a surplusage. It is trite that when an application is heard ex parte, the other party has no opportunity to be heard. Based on the one sided application and the only facts before this court, the court placed the writ under the undefended list. However, that will not foreclose the court from hearing the other party if the need arises. Now that there is a notice from the opposing side seeking to be heard, it is incumbent on the court to critically examine the affidavit in

support of the notice of intention to defend in line with the rules of this court to see if it discloses defence on merit. To refuse to look at the Notice of intention to defend and the affidavit in support on the basis that the court had placed the writ under the undefended list upon ex parte application will in my view amount to shutting out the defendant from being heard which is a violation of its fundamental right under section 36 of the Constitution of the Federal Republic of Nigeria 1999 as amended.

The affidavit evidence in support of the writ shows that there was contract of supply of goods by the claimant to the defendant at its Abuja retail outlet to a tune of N31, 167,094.73 (Thirty One Million, One Hundred and Sixty Seven Thousand Ninety Four Naira, Seventy Three Kobo), and some payment made but leaving an outstanding indebtedness in favour of the claimant to the tune of N22, 832,906.71 (Twenty Two Million, Eight Hundred and Thirty two Thousand, Nine Hundred and Six Naira, Seven One Kobo and that the outstanding balance remains unpaid until date. The claimant attached six sales invoice as **exhibit 1 - 6** as evidence of supply. These facts are disclosed in paragraphs 6 – 11 of the affidavit in support of the writ. It is further averred by the claimant in its affidavit, paragraph 17 and 18 that the claim of the claimant against the defendant is for a liquidated money demand and that the defendant has no defense to the claim. It is further alleged that for refusal to pay the debt the claimant had to incur additional debt of N2, 000, 000.00 (Two Million Naira) to engage the

service of the Law Firm of Jegede Oarhe & Co. to file and prosecute this suit.

I also meticulously read the Notice of intention to defend filed by the defendant; throughout the averment of its affidavit in support of the notice of intention to defend the defendant did not deny the supply of goods by the claimant to its nor deny the outstanding indebtedness of N22, 832,906.71 (Twenty Two Million, Eight Hundred and Thirty two Thousand, Nine Hundred and Six Naira, Seven One Kobo against it, instead, it raised the defense of **force majeure or frustration** of contract caused by inferno.

The Undefended List Procedure under which this suit is brought is a special procedure which an aggrieved litigant employs in order to get a quick judgment in a subject matter that borders on liquidated money demand. "Liquidated claim or liquidated demand" is defined in Black's Law Dictionary 7th edition as: "A claim for an amount previously agreed on by the parties or that can be precisely determined by operation of law or by the terms of the parties' agreement". In **MAJA VS SAMOURIS (2002) 7 NWLR (Pt. 675) 78 at page 102** the apex Court pronounced thus: "A liquidated demand is a debt or specific sum of money usually due or payable and its amount must be already ascertained or capable of being ascertained as a mere matter of arithmetic without any other or further Investigation. Whenever therefore, the amount to which plaintiff is entitled can be ascertained by calculation or fixed by any scale of charges or other positive data, it is said to be liquidated or made clear. Again, where the parties to a contract as part of the agreement

between them fix the amount payable on the default of one of them or in the event of breach by way of damages, such sum is classified as liquidated damages where it is in the nature of genuine pre-estimate of the damage which would arise from breach of the contract so long as the agreement is not obnoxious as to constitute a penalty and it is payable by the party in default"...

After careful reading of the affidavit in support of the writ of the claimant and the exhibits attached thereto and considering the above judicial authority, I have no doubt in my mind and I so hold that the outstanding balance of N22, 832,906.71 (Twenty Two Million, Eight Hundred and Thirty two Thousand, Nine Hundred and Six Naira, Seven One Kobo claimed by the claimant against the defendant is a liquidated money demand.

Our superior courts have come up in their decisions to state clearly what affidavit in support of notice of intention to defend should contain. In **NWANKWO & ANOR v. ECUMENICAL DEVELOPMENT CO-OPERATIVE SOCIETY (supra)** the Supreme Court stated that "an affidavit in support of a notice of intention to defend must set out a defence on the merit, and not a sham one intended to delay and frustrate justice. In **ATAGUBA & CO v. GURA NIGERIA LTD (2005)2 SC (PT 11) 101** the Supreme Court also held that "It is sufficient if the affidavit discloses a triable issue or that a difficult point of law is involved, that there is dispute as to the facts which ought to be tried, that there is a real dispute as to the amount due which

requires the taking of an account to determine or any other circumstances showing reasonable grounds of a bona fide defence."

It is obvious from the facts stated in the affidavit attached to the Notice of intention to defend that there is no conflict or contradiction to the averment of the claimant that requires explanation. The affidavit of the defendant in my opinion did not disclose defence on the merit in respect of the case of the claimant. However, as earlier pointed out the defendant raised the defense of frustration or force majeure. The Black Law Dictionary 8th Ed , defined force majeure as an event or effect that can neither be anticipated nor controlled. It includes both natural and human acts. There is no doubt that force majeure is a defense under contract. But in the instance case, the evidence before me shows that the contract of supply was effectively executed long before the outbreak of fire in the defendant business outlet. There is nothing before the court to show that there is an agreement between the parties as to the length of time that will take the defendant to pay for the goods after the supply. If there is no such agreement it is therefore presumed that the payment ought to have been made immediately after the supply. To that extend, I hold that the defence of force majeure cannot avail the defendant because the contract was executed long before the unfortunate incident.

However, assuming the court ought to have considered the defence of act of God, the defendant will also not succeed because for the defence of force majeure to succeed, it must be specifically provided for in parties' contract as a defence for non performance of contract. In

the instance case, there is nothing put before the court to show that the parties had agree to the defence of force majeure for any unforeseen situation caused by nature or act of human that is beyond their control. If there is such clause in their agreement then the court will be called upon to enforce same; but that is not the case here.

Having come to the above conclusion, I hold that the claimant is entitle to his outstanding balance of N22, 832,906.71 (Twenty Two Million, Eight Hundred and Thirty two Thousand, Nine Hundred and Six Naira, Seven One Kobo which should be paid installmentally for a period of 18 months which should begin to count from the date this judgment is delivered.

Relief for cost of litigation of N2, 000, 000 is refused.

Post judgment interest/sum is statutorily provided under Order 39 Rule 4 of the rules of this court I therefore award 10% of post judgment sum in favour of the claimant until the total sum is liquidated.

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HON. JUSTICE A. I. AKOBI
09/11/2023

Appearance: Oarhe Jegede for the Claimant
I. A. Onwubuya for the Defendant