IN THE COURT OF APPEAL
ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

ON FRIDAY, THE 29TH DAY OF DECEMBER, 2017

BEFORE THEIR LORDSHIPS:

TINUADE AKOMOLAFE-WILSON — **JUSTICE, COURT OF APPEAL**
EMMANUEL AKOMAYE AGIM — **JUSTICE, COURT OF APPEAL**
MOHAMMED MUSTAPHA — **JUSTICE, COURT OF APPEAL**

CA/A/722/2013

BETWEEN:
ACCESS BANK PLC } **APPELLANT**

AND

DR. TIMOTHY NDUBUISI MENAKAYA } **RESPONDENT**

JUDGMENT DELIVERED BY
HON. JUSTICE TINUADE AKOMOLAFE-WILSON, (JCA)

By a writ of summons filed in the High Court of the Federal Capital Territory, Abuja on 22nd December, 2009, the respondent as plaintiff sued Intercontinental Bank Plc (which has now metamorphosed to Access Bank Plc) as 1st defendant and Intercontinental Securities Limited as 2nd defendant for the following reliefs –

a. A Declaration that the defendants owe a special duty of care to the plaintiff under the Share Purchase Facility between the plaintiff and the 1st defendant.

b. *A Declaration that the defendants have breached the duty of care owed to the plaintiff under the Share Purchase Facility.*

c. *A Declaration that on account of the defendants' negligence, breach of duty and mismanagement of the Share Purchase Facility, the plaintiff is not liable to the defendants in any manner whatsoever.*

d. *An Order directing the defendants to account for any profits/proceeds realized from the shares purchased under the said Share Purchase Facility.*

e. *The sum of ₦10,000,000 (Ten Million Naira) being punitive/exemplary damages against the defendants for breach of duty and negligence in the management and control of the Share Purchase Facility.*

f. *An Order of injunction restraining the defendants by themselves, their servants, agents, officers, privies or otherwise however described from reporting, submitting and or forwarding the name of the plaintiff to any law enforcement agency including the Economic and Financial Crimes Commission (EFCC) on account of any alleged debt owed by the plaintiff to the defendants on account of and/or in relation to the Share Purchase Facility.*

The 2nd defendant, though served with all court processes never participated in the proceedings. On 9th April, 2013, the trial court delivered its judgment and upheld all the claims of the respondent. Dissatisfied with the judgment, the appellant, by an Amended Notice of Appeal, filed on 8th April, 2015 deemed as properly filed and served on 7th April, 2016 appealed against the decision of the trial court on five grounds; to wit:-

GROUND 1

The entire judgment is against the weight of evidence.

GROUND 2

The learned trial court erred in law when it entertained and heard this matter outside its jurisdiction.

PARTICULARS OF ERROR

a) All matters concerning sale, purchase, management or trading in shares are Capital market issue which is item 12 on the Exclusive Legislative List.

b) By the express provisions of Sections 284(1)(a) (ii) and 294 of the Investment and Securities Act, 2007 only the Investment and Securities Tribunal has jurisdiction to entertain matters relating to issues of Shares, Capital Market and its operation to the exclusion of any other court.

GROUND 3

The learned trial court misdirected itself when it held thus in Paragraph 2 of page 23 of the judgment.

> **"The 1st defendant having covenanted or undertaken in Exhibit B and C to manage the shares acquired with the share purchase facility cannot validly in these proceedings seek to renege from it on the premise that it is not a professional investment adviser or stock broker."**

PARTICULARS OF ERROR

a. Parties to Exhibit B and C have in their implementation of the agreement they entered revealed their clear intentions and understanding of the agreement they entered into.

b. Evidence abound in the entire proceedings that the plaintiff drew down the entire loan that is ₦190,000,000.00 (One hundred and ninety Million Naira) for the purchase of First Inland Bank shares; ₦5,000,000.00 (Five Million Naira) for the purchase of Acorn Petroleum Shares; ₦650,000,000.00 (Six hundred and fifty Million Naira) to Intercontinental Securities Limited for the purchase of other shares.

c. The court cannot make contract for parties.

d. It is a term of the contract that 1st appellant reserves the right to vary, alter or amend any of the terms and conditions of the facility covered by the agreement should the need arise for it to do so at any time.

GROUND 4

The learned trial court came to a wrong conclusion when it held thus in Paragraph 2 and 3, page 27 of the judgment

"That what was offered and accepted by the 1st defendant and the plaintiff respectively was not an ordinary loan facility under which the 1st defendant was not under any obligation to manage the facility prudently. It was a facility which had a duty of management of the shares acquired under it, thrusted on it and duly accepted by it.... The 1st defendant's counsel's above contentions are misconceived and not tenable..."

PARTICULARS OF ERROR

a. The respondent under cross examination admitted issuing and drawing a cheque of ₦650,000,000.00 in

favour of the 2nd defendant who is the operator of the loan.

b. The respondent further informed the court that he withdrew the ₦650,000,000.00 (Six hundred and fifty Million Naira) out of the ₦750,000,000.00 (Seven hundred and fifty Million Naira) term loan.

c. The respondent admitted drawing the sum of ₦190,000,000.00 (One hundred and ninety Million Naira) to purchase First Inland Bank Shares.

d. The respondent confirmed to the lower court under cross examination that ₦650,000,000.00 (Six hundred and fifty Million Naira) + ₦190,000,000.00 (One hundred and ninety Million Naira) + ₦5,000,000.00 (Five Million Naira) amounts to ₦845,000,000.00 (Eight hundred and forty five Million Naira) which is well over the sum advanced to the respondent as loan.

GROUND 5

The learned trial court erred in law when it held in Paragraph 3 page 32 of the judgment thus:

> **"In the light of this, the court considers it proper and do hereby in the exercise of its discretion grant an order or injunction restraining the defendants by themselves, agents, servants or privies from forwarding or submitting the plaintiff's name to any regulatory financial or economic agency on account of the matters or issues connected with the share purchase facility."**

PARTICULARS OF ERROR

1. It is the inalienable right of citizens, whether natural or corporate, including the appellant to report any wrong

or crime committed against her to law enforcement agents.

2. Law enforcement or regulatory agencies have a corresponding right to receive allegations or reports from members of the public, including the appellant herein of any wrong or crime committed against them with a view to investigating and establishing the culpability of the person complained against.

Parties filed their respective briefs of argument. On 3/5/2016 the respondent filed a Notice of Preliminary Objection; argued in his brief of argument which was to the competence of the appeal for want of jurisdiction. It is apt to first deal with the objection.

The grounds for the objection are as follows –

1. The Notice of Appeal contravenes Order 6 Rule 2(1) of the Court of Appeal Rules 2011, in that the said Notice fails to state the names and addresses of all the parties directly affected by this Appeal, to wit: Intercontinental Securities Limited.

2. The Notice of Appeal, therefore, contravenes Order 2 Rule 3 of the Court of Appeal Rules 2011, by failing to have endorsed on it the address for service of a party directly affected by this Appeal.

3. This Appeal has not been initiated in accordance with due process of law.

It was contended for the respondent that this appeal is incompetent for failure to join Intercontinental Securities Limited

(hereafter referred to as "Intersec") as a party having also been a defendant in the suit and against whom judgment was delivered in the suit. It is his contention that the names and address for service of Intersec ought to have been endorsed on the Notice of Appeal. The court was urged to strike out the Notice of Appeal, ipso facto, the entire proceedings in this appeal for having not been initiated by due process of law. Reliance was placed on **Nestoil v. Onuoha (2011) LPELR-4950 CA at 10 A-G and Ihedioha v. Okorocha (2015) LPELR -25645 (CA) at 13-14 E-A.**

Order 6 Rule 2(1) and **Order 2 Rule 3 of the Court of Appeal Rules, 2011** (now **Order 7 Rule 2(1)** and **Order 2 Rule 3 of Court of Appeal Rules, 2016)** provide thus –

Order 6 Rule 2(1) 2011 Rules -

"All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called "the notice of appeal") to be filed in the registry of the court below which shall set forth the grounds of appeal, stating whether the whole or part only of the decision of the court below is complained of (in the latter case specifying such part) and shall state also the exact nature of the relief sought and the names and addresses of all the parties directly affected by the appeal, which shall be accompanied by a sufficient number of copies for service on all such parties; and it shall also have endorsed on it an address for service."

Order 2 Rule 3 of 2011 Rules –

> **Where under these Rules, any notice or other process is required to have an address or service endorsed on it, it shall not be deemed to have been properly filed unless such address has been endorsed on it".**

The learned senior counsel for the appellant, in response to the Appellant's Reply brief has explained that the 2nd defendant, Intersec, in the suit was finally wound up by the order of court on the 13th of May 2013, that is five weeks after judgment was delivered in this court, while the original notice of appeal was filed on 28/5/2013, two weeks after the company had been fully wound up. The notice of the death of the company was brought to the attention of this court by the publication in the Federal Government Gazette dated 20/6/2013. Citing **C.B.C.L. (Nig.) Limited v. Oholi (2009) 5 NWLR (Pt. 1135) 446 at 461,** learned Senior Counsel submitted that in order to maintain an action in court, the litigant must have legal capacity. He contends that Intersec had become dead before the Notice of Appeal was filed. A dead person, natural or artificial is not a juristic person. He can neither sue nor be sued; can neither appeal nor be a respondent in an appeal. The law is trite that a company fully wound up and dissolved loses its legal entity and cannot be the same company as before. A company **"dies"** upon its final dissolution. See **C.C.B. (Nig.) Plc v. Mbakwe (2002) 3 NWLR (Pt. 755) 523, C.C.B. (Nig.) Ltd. v. Onwuchekowa (2000) 3 NWLR (Pt. 647) 65 CA.**

Learned senior counsel for the appellant referred to Public Notice 114 of 20th June 2013, concerning Suit No. FHC/L/CP/221/13. The gazette is reproduced hereunder -

1. Access Bank Plc
2. Chief Oluwotemi Williams
(Appointed Liquidator pursuant } Applicants
to Order of Court dated
25th day of March, 2013

AND

Intercontinental Securities Ltd ... Respondent
(In liquidation pursuant to Order of Court
dated 25th day of March

Upon the applicants application made the following

1. AN ORDER is hereby made for the final Dissolution of the Respondent Company, intercontinental Securities Limited having had its affairs fully wound-up by the liquidator pursuant to the order of his Honourable court of 13th May, 2013.

2. AN ORDER IS HEREBY made for the release of Chief Olurotimi Williams, the Liquidator appointed to the Respondent, Intercontinental Securities Limited pursuant to the order dated 25th day of March, 2014.

A perusal of the gazette shows that the first Order granted by the court is merely for the Final Dissolution of the company, Intersec upon it being wound up. The company is therefore merely **"sleeping"** or in comatose but not yet **"dead",** so it can conveniently sue and be sued in an action. However, in my view, the essence of **Order 6 Rule 2(1) and Order 2 Rule 3** of the Court of Appeal Rules 2011 is to ensure that the names and addresses of all parties directly affected by the appeal, as shown on the Notice of Appeal are stated on the Notice of Appeal and are served accordingly. The *raison d'etre* is for the interest of justice to be met on the principle of law that a party should be

aware of a suit against him so as to prepare his defence. However, the provisions of **Order 6 Rule 2(1)** of the 2011 Rules is not to force any person to be part of an appeal proceedings. In the instant case, even though there were two defendants in the trial court when the judgment was delivered, the two defendants do not necessarily have to appeal. A right of appeal is constitutional. It is not mandatory for any person to appeal or force anyone to be a respondent in an appeal. In my view, the objection lacks merit. It is hereby dismissed.

In the main appeal, the learned senior counsel for the appellant, A.T. Kehinde (SAN) formulated three issues for determination thus –

a. **Whether the learned trial Judge was right to have assumed jurisdiction to determine the control of capital issues listed as No. 12, Second Schedule, Exclusive Legislative Powers of the 1999 Constitution of the Federal Republic of Nigeria (as amended). (Ground 2)**

b. **Whether the judgment of the trial court is supportable having regards to the totality of the evidence adduced. (Grounds 1, 3 and 4)**

c. **Whether the trial court was right in granting an injunction restraining the inalienable right of the appellant to report any wrong or crime to the law enforcement agency. (Ground 5)**

In the brief settled by Isaiah Bozimo, Esq. of learned counsel for the respondent three similar issues were couched for the determination of this appeal. I will adopt appellant's issue as distilled for the determination of this appeal.

On issue one, it was contended for the appellant that the dispute between the parties in this appeal, are predicated on sale, management or trading of shares, capital market and its operation and therefore the High Court of the Federal Capital Territory has no jurisdiction to entertain the matter. He noted particularly that the 2nd defendant at the trial court being a capital market operator and the reliefs claimed fall under the control of capital issues. It was argued that by virtue of **Section 284(1)(a)** (ii) and virtue of **S. 315** of the Investment and Securities Act, 2007, the issue in disputes falls exclusively within the jurisdiction of the Investment and Securities Tribunal (hereinafter referred to as 1st). Reliance was placed on **Ajayi v. SEC (2009) 13 NWLR (Pt. 1157).** On jurisdiction, learned counsel relied on **Madukolu v. Nkemdilum (1962) 2 SCNL 341, Marvina Ojigho v. Engr. Eme Mukoro** (Unreported) Appeal No. CA/LD/179/2011 delivered on 20/6/13, **AG of Bendel State & 2 Ors. v. Aideyan (2009) 13 NWLR 9 SC 127.** According to learned senior counsel, the act of the respondent in instituting this action outside the Investment Securities Tribunal amounts to a nullity, citing **U.A.C. v. MCFOY (1961) 2 All E.R. 169 at 172.**

On his part, it was contended for the respondent that upon proper construction of the Investment and Securities Act, the jurisdiction of the Tribunal is engaged only where the question of law or dispute involves a decision or determination of the Securities and Exchange Commission in the operation and application of the Investment and Securities Act 2007. According to his learned counsel, Bozimo Esq, having regard to the writ of summons and the Statement of claim, the respondent's claims are founded on the tort of negligence and not a capital dispute. He placed reliance on **Okorocha v. UBA PLC (2011) 1 NWLR (Pt. 1228) 348 at 375 A-C**. It was submitted that by virtue of S. 257(10 of the 1999 Constitution which gives unlimited

jurisdiction to Federal Capital Territory High Court, subject only to sections 232, 239, 251, 285(1) and 285(2) of the Constitution, the Federal Capital Territory High Court has the jurisdiction to entertain the respondent's suit.

It was further argued, pointedly, that the jurisdictional provisions in the Investment and Securities Act, 2007 cannot prevail over the jurisdictional provisions in the 1999 Constitution; citing in support **Okeke v. SEC (2013) LPELR-20355 (CA) at 28 A-G; Valve Line v. Anakwe (2015) LPELR-24486 (CA) 28-31.** Mr. Bozimo distinguished the case of **SEC v. Kasunmu (supra)** cited by the appellant as inapplicable.

What calls for determination herein is whether the Federal Capital Territory High Court has the jurisdiction to entertain this matter, the subject of this appeal, having regard to **Sections 284(1) (a) (ii) and 294** of the Investment and Securities Act, 2007. For purposes of comprehension and clarity, I will reproduce in full **sections 284** and **294** of the Investment and Securities Act, 2007.

S. 284 The Tribunal shall, to the exclusion of any other court of law or body in Nigeria, exercise jurisdiction to hear and determine any question of law or dispute involving:

(a) a decision or determination of the Commission in the operation and application of this Act, and in particular, relating to any dispute:

(i) between capital market operators;

(ii) between capital market operators and their clients;

(iii) between an investor and a securities exchange or capital trade point or clearing and settlement agency;

(iv) between capital market operators and self regulatory organization;

(b) the Commission and self regulatory organization

(c) a capital market operator and the Commission;

(d) an investor and the Commission;

(e) an issuer or securities and the Commission; and

(f) disputes arising from the administration, management and operation of collective investment schemes.

(2) The Tribunal shall also exercise jurisdiction in any other matter as may be prescribed by an Act of the National Assembly.

(3) In the exercise of its jurisdiction the Tribunal shall have the power to interpret any law, rules or regulation as maybe applicable.

S. 294. The Tribunal shall have exclusive jurisdiction on matters specified in this Act.

*S. 315 In this Act: **"Capital market operator"** means any persons (individual or corporate), duly registered by the Commission to perform specific functions in the capital market".*

The law is trite that a court is competent when -

a) It is properly constituted as regards members and qualifications of members of the bench and no member is disqualified for one reason or another.

b) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction.

c) The case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

See **Madukolu v. Nkemdilim (1962) 2 SCNLR; Emeka v. Okadigbo (2012) 18 NWLR (Pt. 1331) 55.**

It is also an established law, that it is the claim of the plaintiff that must be examined in order to determine whether the subject matter of a case is within the jurisdiction of a court. See **Anigboro v. Sea Trucks Nig. Ltd (1995) 6 NWLR (Pt. 399) 35.**

Let me now state the relevant facts of this case as evinced by the respondent's pleadings at the lower court. It is his case that the appellant, then known as Intercontinental Bank held out itself as a competent financial/investment adviser so much as to gain the confidence and trust of his clients including the respondent. The appellant offered to the respondent and it obtained a Share Purchase Facility described as "Term Loan" in the sum of ₦750,000,000.00 (Seven hundred and fifty million naira) (Exhibit B) which was restructured by Exhibit C to ₦770,000,000.00, for the purchase of blue chip companies quoted in the Nigerian Exchange Market and that the disbursement of the facility shall be made directly to Intercontinental Securities Limited (Intersec) (2nd defendant at the trial court). The respondent utilized ₦190,000,000.00 (One hundred & ninety Million naira) from the loan, with the approval of the appellant for the purchase FinBank shares and ₦5,000,000 (five million naira) for Acorn Petroleum Plc. The offer for purchase of Fin Bank Shares was rejected and Central Bank returned the sum of ₦228,971,192.01 (Two hundred and twenty-eight million, nine hundred and seventy-one thousand, one hundred and ninety-two naira and one kobo); comprising the capital and interest to the appellant. At all material times, the appellant in

accordance with the terms in Exhibits B & C retained the share certificate issued to the respondent. The disbursement of the facility was to be made by Intersec (a capital market operator) for the purchase of shares from the Secondary Market and the appellant was to manage all shares sought with the facility. The appellant also reserved the right to sell the shares, subject to two days notice if by the appellant's reading, the market suggests that it is pertinent to do so, and it had an irrevocable right to sell the shares if their value fell below 130% of the facility amount. The contention of the respondent is that he relied on the competence and expertise of the appellant and Intersec in the shares purchase transaction and the appellant owed him a duty of care to properly manage and control the facility, which was breached by its negligent management of same causing colossal loss to the respondent.

On a calm perusal of the pleadings and the evidence led at the trial, it is clear without any equivocation whatsoever that the transaction between the parties, that is the respondent on one party and the appellant and its subsidiary, Intersec, a capital market operator, on the other part, involves shares and the disputes between the respondent and the appellant and Intersec is one between market operators and their clients.

The Investment and Securities Act, 2007 was enacted to purposely repeal the Investment and Securities Act, 1992, establish the Securities and Exchange Commission (SEC) as the apex regulatory authority for the Nigerian Capital Market, as well as the regulation of the market to ensure the protection of investors, maintain fair, efficient and transparent market and reduction of systematic risk etc. See **Okorocha v. UBA Plc (2011) 1 NWLR (Pt. 1228) 348.** Hence, section 294 gives the Investment and Securities Tribunal (1ST) the exclusive jurisdiction on matters specified in this Act. The contention of the

appellant is that by virtue of **Section 284(1) (a) (ii)** of the Act, hereinbefore quoted, the Investment and Securities Tribunal has the exclusive jurisdiction to entertain matters **between capital operators and their clients.** The nagging question is whether the nature of this dispute is what is envisaged under the Act (1ST). A calm and close scrutiny of **section 284(1) (a)** reveals that the operative phrase is **"a decision or determination of the Commission"** {that is Securities and Exchange Commission (SEC)}. The next paramount question to be answered is whether the dispute between the parties in this appeal is one that involves **a decision or determination of the Commission in the operations and application of this Act.** As I said earlier, there is no doubt that the dispute in this matter is one between capital operators (appellant and 2nd defendant) and their client (respondent). However, it is also clear, without any contradiction whatsoever that the dispute in this appeal has nothing to do with any decision or determination of SEC on the operation of the Act. I agree, as submitted by Mr. Bozimo that section 284(1) (a) (ii) of the Act does not give blanket jurisdiction to the Tribunal in respect of **any** dispute between a capital market operator and **its** client. Rather the Tribunal's jurisdiction is triggered only where a dispute arises out of a decision or determination of SEC.

In the interpretation of statutes, one of the accepted canons is that an enactment must be read as a whole. Thus, in seeking the interpretation of a particular section of a statute, the court must not take the section in isolation but as part of a general whole. See **Adewunmi v. A-G Ekiti State (2002) 2 NWLR (Pt. 751) 474 at 522, Nigerian Ports Authority Plc v. Lotus Plastics Ltd. (2005) 19 NWLR (Pt. 959) 158 at 182.** The appellant, seems to be interpreting sub paragraph (ii) of Section 1(a) 284 without due regard to the operative provisions in paragraph **1(a)** of S. 284. A community reading of all the sub paragraphs of Section 284 of the Investment and Securities Act

2007 evinces the fact that the **apparent exclusive jurisdiction** of the Tribunal is only in respect of a decision or determination of the Security and Exchange Commission of any dispute between the parties itemized in sub-paragraphs (a) to (f) of S. 284(1) of the Act. I employed the phrase ***"apparent exclusive jurisdiction"*** intentionally. I will come back to explain the purpose later. With regard to this appeal, **S. 284(1) (a) (ii)** is inapplicable because the dispute in this case does not involve any decision of the commission (SEC) irrespective of the fact that the transaction is related to share purchase. It is not in doubt that the complaint of the respondent centres around a breach of duty of care in the management of his shares and also an account for profits realized from his shares managed by the appellant. The dispute borders on a simple civil action of tortious liability. By virtue of **Section 257(1)** of the Constitution of Federal Republic of Nigeria, the High Court of the Federal Capital Territory has **unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of legal right, power, duty, liability, privilege, interest, obligation or claim is in issue.**

The Federal Capital Territory High Court therefore has the jurisdiction to determine the action leading to this appeal

Let me now go further, to state categorically that even, on the assumption that the dispute in this appeal is based on the decision of SEC on a capital market issue, the Federal Capital Territory High Court is still seized with the jurisdiction to determine the matter. The appellant has argued strenuously that the jurisdiction of the Investment Securities Tribunal is not concurrent with that of the State High Court, but exclusive to it by virtue of **S. 284** of the Investments and Security Act, 2007. I am afraid, with due deference to the learned senior counsel for the appellant, this argument is not tenable. The jurisdiction of the High Court of Federal Capital Territory is as donated by the

Constitution of the Federal Republic of Nigeria, 1999. By Section 257 of the Constitution, the High Court of the Federal Capital Territory has **unlimited** jurisdiction to determine any civil proceedings only subject to the provisions of **Sections 232, 239, 251, 285(1)** and **285(2)** of the Constitution. The Constitution of the Federal Republic of Nigeria is the supreme law of the land. **Section 1(1)** of the Constitution specifically states that its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. While **Section 1(3)** provides that if any law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and any other Law to the extent of the inconsistency shall be void. See **F.R.N. v. Osahon & 2 Ors. (2006) 5 NWLR (Pt. 973) 361; A.G Fed. V. Abubakar (2007) 10 NWLR (Pt. 1041) 1; Saraki v. FRN (2016) LPELR-400B SC**. It is an aberration of the Supremacy of the Constitution for a law enacted by National Assembly to derogate or limit the jurisdiction donated to the Federal Capital Territory court by the Constitution. The law is trite that the jurisdiction of the High Court cannot be circumscribed or whittled down by any Act of the National Assembly nor a State Law. It can only be curtailed by the constitution itself. See **National Union of Electricity Employees & Anor v. Bureau of Public Enterprises (2010) 7 NWLR (Pt. 1194) 538, ALhaji Karimu Adisa v. Emmanuel Olayiwola & Ors (2008) 10 NWLR (Pt. 674) 116 at 173.**

Specifically as regards this appeal, the High Court of the Federal Capital Territory by virtue of its unlimited jurisdiction empowered by **Section 257** of the 1999 Constitution has the jurisdiction to entertain any dispute that is covered by the provisions of the Investment and Securities Act, 2007, including **any** dispute **between capital market operators and their clients,** irrespective of the fact that the Act was enacted specifically to establish the Securities and Exchange Commission

as the apex regulatory authority for the Nigerian Capital Market. Where there is any inconsistency with the jurisdictional provisions of the Securities and Investment Act 2007 and **Section 257** of the Constitution, the provisions of the Constitution shall prevail to the extent of the inconsistency. See the cited case of **Okeke v. Securities and Exchange Commission & Ors (2013) LPELR -20335 (CA) at 28 A-G, Value Line v. Anakwube (2015) LPELR -24486 (CA) at 28-31.**

I am in full agreement with Mr. Bozimo that section 284(1) (a) (ii) of the Investment and Securities Act 2007 is inapplicable to this case. Issue one is resolved in favour of the respondent.

ISSUE 2

Whether the judgment of the trial court is supportable having regards to the totality of the evidence adduced. (Grounds 1, 3 and 4)

The learned senior counsel for the appellant, after reviewing the evidence presented at the trial submitted that from the totality of the evidence, the learned trial Judge was wrong to hold that the respondent is not liable to the appellant in any manner whatsoever. It was argued that as opposed to the terms of the agreement between the parties in Exhibits B and C, the respondent by his conduct took over the management of the loan by purchasing shares for himself without the express approval of the appellant. Further that the Acorn Petroleum Shares were not listed on the Nigerian Stock Exchange; but that the respondent purchased them vide private placement. It was their submission that the law should not allow the respondent to take benefit from an act of his own making. Relying on **Adetoro v. UBN (2008) 13 NWLR (Pt. 1104) 255,** it was submitted that where a person by his conduct has presented himself to another person to act in reliance thereon, he would be bound by the fair inference to be drawn from his word or action; and therefore the

respondent is estopped by his conduct from saying there is a breach of duty of care. He noted that the respondent in his pleadings admitted, by his calculation of the principal and interest in respect of the ₦190,000,000.00 (One hundred and ninety million), he was to repay the sum of ₦256,184,282 (Two hundred and fifty-six million, one hundred and eighty-four thousand, two hundred and eighty-two naira), and he testified that he repaid the total sum of ₦228,971,192.01 (Two hundred and twenty-eight million, nine hundred and seventy-one thousand one hundred and ninety-two naira, one kobo) to the appellant. He then wondered how the respondent could turn around and ask for a declaration that he is not liable to the appellant in any manner whatsoever.

Responding, Mr. Bozimo submitted that the appellant neither pleaded nor established that there was a breach of the terms of the facility nor equitable defence of estoppel by conduct. Citing **Awuse v. Odili (2003) 18 NWLR (Pt. 851) 116 at 161 C-E and Ajide v. Kelani (1985) 16 NSCC (Pt. 11) 1298 at 1316,** it was submitted that a party must be consistent in stating his case. The respondent denied the contention that there was no authorization for the purchase of First Inland Bank and Acorn Petroleum Shares and that there was no acknowledgement of any debt. While making references to the terms of the facility, the respondent maintained that the appellant owed the respondent a duty of care over the management of his shares but acted negligently by allowing the value of the shares under its care and management to deplete to such an extent to cause injury to the respondent. He submitted that the findings of fact by the lower court on the issue of breach of duty of care are sound and the appellant has not provided any material to warrant a departure from the said findings. He placed reliance on the cases of **Nwokearu v. State (2010) 15 NWLR (Pt. 1215) 1 at 23; Udo v. R.T.B.C. & S. (2013) 14 NWLR (Pt. 1375) 488 at 500 G-H.**

Civil cases are decided on the preponderance of evidence and balance of probabilities predicated on the pleadings of the parties before the court. The nutshell of the respondent's case against the appellant at the trial court is that by the purchase share facility as embodied in Exhibit B, as restructured in Exhibit C, the respondent relied on the expertise and competence of the appellant in the management of the facility and it owes him a duty of care to manage the facility so as to have profits but that the appellant was negligent in the shares purchase transaction.

The appellant on the other hand denied liability, and that the appellant is a bank and not an investment or share purchase adviser or share broker/manager and never held itself out as such to the respondent. That the appellant did not owe any duty of care to the respondent for the management of the shares of the respondent, rather the respondent is indebted to the appellant on the term loan granted and is under an obligation to settle his outstanding debts.

It is clear that at the trial court, the appellant neither pleaded nor led evidence to show that the respondent breached the terms of the agreement in Exhibit C, as is now being contended in this appeal. His argument that the respondent, contrary to paragraph 2 & 11 of the **other conditions** in Exhibit C personally disbursed ₦650,000,000.00 part of the loan, drew down ₦5,000,000.00 for the purchase of shares of Acorn Petroleum Plc and his withdrawal of ₦190,000,000.00 to purchase shares from FinBank is of no moment as these contentions are at variance with the case presented at the lower court. The law is trite that a party is not permitted to make a case contrary to his pleadings and evidence led at the trial. In other words, it is settled law that a party is not permitted to maintain on appeal a different case from that pursued at the trial court. He must be consistent in stating his case. See the cited cases of **Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248; Oshoboja v. Amida**

(2009) 18 NWLR (Pt. 1172) 188; Aiyeola v. Pedro (2014) 13 NWLR (Pt. 1424) 409.

Now, the case at the trial is whether the transaction between the parties was merely a bank/customer relationship based upon a loan agreement in which the appellant owed no special duty of care to the respondent. The rights and obligations of both parties are embodied in Exhibits B and C. The terms of exhibits B and C are exactly the same, except that the loan was restructured from ₦750,000,000.00 to ₦770,000,000.00. The law is settled that parties are bound by the terms of an agreement they voluntarily entered into. See **Hillary Farm Ltd. & Ors v. M. v. Mahtra & Ors (2007) 14 NWLR (Pt. 1054) 210; Best (Nigeria) Ltd. v. Blackwood Hodge (Nig.) Ltd (2011) 5 NWLR (Pt. 1239) 95.** The appellant and the respondent are therefore bound by the terms of the agreement in Exhibit C. The following under-mentioned clauses are very salient to the determination of the nature of relationship of the parties in their transaction –

"CONDITIONS PRECEDENT TO DRAWDOWN

7. Irrevocable Letter from the Borrower authorizing intercontinental to sell the shares pledged and remit the proceeds into the account of the Borrower if the value of the shares pledged falls below 130% of the facility amount.

OTHER CONDITIONS

2. Disbursement of the facility shall be made directly to Intercontinental Securities Limited (Intersec) for the purchase of shares from the Secondary Market.

3. Intersec shall open a joint trading account for the Customer and Intercontinental shall manage all shares bought with the facility.

17. **Intercontinental reserves the right to sell the shares pledged/purchased at anytime within the facility tenure subject to two days notice to the Borrower, if Intercontinental reading of the market suggests that it is prudent to do so".** (Pages 30-31 of Record of Appeal)

A calm perusal of these clauses shows glaringly that the contractual relationship between the appellant and the respondent is clearly beyond the mere banker and customer relationship predicated on debtor-creditor relations. The appellant has put itself in a position of an investment adviser or a professional manager of shares. The mere fact that Exhibits B and C were tagged *"Term Loan"* simplicta does not remove the transaction from the precincts of a Share Purchase Facility, having regard to the contents of the agreements themselves. I agree entirely with the submission of the respondent's counsel that the appellant owed the respondent a duty of care to properly manage the shares, bought with the facility. The appellant had an obligation to **monitor** the market price value by virtue of the agreement in Exhibit C since the appellant was to **manage** all the shares bought by the facility, and to sell the shares if the value of the shares fell below 130%. The evidence at the trial showed that the appellant along with the Intersec were in absolute and complete control of the entire facility. (See paragraphs 34, 35, 36, 37 and 38 the respondent's witness Statement on Oath at pages 20-21 of the record of appeal). The learned trial Judge was right when he held that –

"The 1st defendant (Intercontinental) having covenanted or undertaken in Exhibits B and C (the original and restructured facilities) to manage the shares acquired with the share purchase facility cannot validly in these proceedings seek to

renege from it on the premise that it is not a professional Investment Adviser or Stock Broker. The 1st defendant's contention in this regard is therefore unavailing and accordingly rejected". (Page 385 of the Record of Appeal)

The cited case of **FCMB v. P-Tech Construction Company Limited (2015) LPELR-25006 (CA) 84-86 G-C** is very apt regarding the special relationship created by Exhibits B & C between the parties, where this court held –

"Indeed another learned author, Professor K.I. Igweike put the position of the law beautifully in his book Law of Banking and Negotiable Instruments, 2nd Edition, at p. 88 when he posited that:

"A bank as a going concern undertakes numerous and highly professional services for its customer. It normally would act as agent for its customers in all circumstances where there is a relationship with third parties, such as ... the purchase of property or of stocks and shares ... These services may sometimes extend beyond the traditional confines of banking into those that the banker has willingly undertaken to transact or held himself out to perform for a customer. Examples of this are the rendering of financial or investment advice ... and the keeping of customers' valuables. In the performance of these services, the law sets and expects from a banker a minimum standard of conduct, care and skill. Where there is a short-fall from this standard, in the course of performing a service, the tort of negligence becomes relevant. Thus, a banker owes to his customer a further duty

> **to execute these functions with a reasonable standard of professionalism. If the banker is found careless of wanting in dealing with the affairs of the customer, he is liable to the customer for breach of his contractual duty".**

The evidence adduced at the trial showed glaringly that the appellant breached the duty of care owed to the respondent by its negligence in managing the facility. For instance, the evidence of DW1 under cross-examination is that –

> **"I agree the value of the shares as at January 2008 was ₦41.00".** (P. 354 of the record of appeal)

However, by August 2008, the value of the shares was now ₦1,36K (See DW1's cross-examination at p. 354). Yet the appellant did nothing about the downward trend of the value of the shares until they became almost worthless despite the terms of the agreement to sell the facilities if the value of the shares fell below 130% of the facility amount or if the market suggests that it was prudent to do so.

In law, there are three main ingredients of negligence:- (a) The defendant owed the plaintiff a duty of care. (b) That the defendant failed to exercise due care. (c) The defendant's failure was the cause of the injury suffered by the plaintiff. **See Osagwe v. Unipetrol (2005) 5 NWLR (Pt. 918) 261; Edok Eteh Mandilas Ltd. v. Ale (1985) 3 NWLR 43 CA; A.C.B. Ltd. v. A.G. Northern Nig. (1969) NMLR 231.** All these three ingredients featured in the transaction between the appellant and the respondent. The learned trial Judge was therefore on safe ground when he held thus –

> **"Again, I have given a serious consideration to the contentions of the parties. The court had earlier**

found that the 1st defendant offered and the plaintiff accepted from it a Share Purchase Facility. The intention of the parties was that the facility would be used to trade in shares in blue chip companies under the management of the 1st defendant. That what was offered and accepted by the 1st defendant and the plaintiff respectively was not an ordinary loan facility under which the 1st defendant was not under any obligation to manage the facility prudently. It was a facility which had a duty of management of the shares acquired under it thrusted on it and duly accepted by it.

The court having so found, it does not appear to me that the 1st defendant's counsel's above contentions (that the Bank did not owe Dr. Menakaya any duty of care and, therefore, did not breach any duty of care) are misconceived and not tenable. It is therefore rejected.

It is the plaintiff's case and I do agree with him that by this the defendant did not give him information regarding his shares which they were obliged to give him. Likewise it does show lack of prudent management of the shares as the defendants appeared to have stood by and watched the value of the shares drop till they could only realize the sum of ₦125,733,412.78

.....

There is no evidence placed before the court by the defendants that they or the 1st defendant took

care to sell the shares and remitted the money to the plaintiff when the value fell below 130% of the facility amount. Likewise, there is no evidence placed before the court to show the 1st defendant at anytime read the capital market and found it imprudent to sell the shares hence if failed to dispose of the shares when it was necessary to forestall a loss of value. What is rather deducible to the court is that the defendants were contented with holding back the shares till the value crashed. It was thereafter that they sold the shares and considered it proper to send Exhibit D to the plaintiff demanding of it to settle an outstanding indebtedness of ₦715,389,610.35 when a prudent and profitable management of the shares as aforesaid would have yielded profits and not the present purported liability to the plaintiff. I do hold that by the foregoing acts of omission, the defendants were negligent in the management of the said plaintiff's shares".

The findings of fact by the learned trial Judge are right and his judgment is supported by the evidence adduced at the trial. It is trite law that evaluation of evidence and making finding of facts is the primary duty of the trial court. An appellate court will only interfere if such duty was properly carried; and the findings are perverse and lead to a miscarriage of justice. See **Woulechem v. Gudi (1981) 5 SC 291, Igago v. The Estate (1999) 14 NWLR (Pt. 637) 1.**

In the cited case of **Udo v. R.T.B.C. & S. (2013) 14 NWLR (Pt. 1375) 488 at 500,** the Supreme Court held thusly –

> **"It remains generally the duty of the trial court to make primary findings of fact. Where the duty of the trial court is discharged and the findings are made by the trial court, the appellate court remains slow in departing from those findings and relies on the trial court's opinion in determining the appeal before it. Fundamentally, the jurisdiction of the appellate court.... is limited to the correction of the errors of the court from which the appeal it determines emanates".**

I have no reason to depart from the conclusion reached by learned trial Judge.

Issue two is resolved in favour of the respondent.

ISSUE THREE

Whether the trial court was right in granting an injunction restraining the inalienable right of the appellant to report any wrong or crime to the law enforcement agency. (Ground 5)

It is the contention of the appellant that the trial court impugned on his inalienable right to report any wrong or crime committed against her to law enforcement agents on its perception that *"the respondent took a loan which was unpaid till date"* and therefore the *"Appellant is duty bound to periodically send a report to the Credit Risk Department of the Central Bank on Customers that have habitually defaulted in repayment of loans".* He called in aid the case of **Fajemirokun v. Commercial Bank of Nigeria & Anor (2009) 5 NWLR (Pt. 1135) 588.**

On his part, the respondent distinguished the case of **Fajemirokun v. Commercial Bank of Nigeria (supra)** as inapplicable as it is based on the commission of a crime; hence

this case cannot fetter the discretion by the trial Court to grant an injunction.

Again, I am in agreement with the learned counsel for the respondent that the cited case is not apposite to the facts and circumstances of the instant appeal. In the first place, there is no allegation that the respondent committed a crime. More importantly is the fact that I have upheld the finding of the learned trial Judge that the appellant was negligent in the manner it managed the respondent's shares. In the circumstance, the aggrieved party here in fact, is the respondent and not the appellant. No wrong or crime has been committed against it. Better still, the respondent has not been found to be a defaulter in the repayment of any loan. There is therefore no basis whatsoever for forwarding or submitting the respondent's **"name to any regulatory financial or economic agency on account of the matters or issues connected with the share purchase facility",** as rightly held by the learned trial Judge (Page 395 of the record of Appeal). In the circumstances, there is no basis for the prayer for an order of this Honourable Court to set aside the order of injunction made against the appellant at the lower court.

Issue three is also resolved in favour of the respondent.

Now, having resolved all the issues in this appeal against the appellant, this appeal is hereby dismissed for lacking in merits.

I award cost of ₦50,000.00 against the Appellant in favour of the Respondent.

TINUADE AKOMOLAFE-WILSON
Justice, Court of Appeal

COUNSEL:

Eloka J. Okloye for Appellant. With him Mosun Akinsomi and Esther Egbaza.

P.I.N. Ikwueto (SAN) for Respondent, with Isaiah Bozimo, N. Odimegwu, C. Ndubuaku

APPEAL NO: CA/A/722/2013
EMMANUEL AKOMAYE AGIM, JCA

I had a preview of the judgment just delivered by my Learned brother, **TINUADE AKOMOLAFE-WILSON, *JCA.*** I agree with the reasoning, conclusions and orders therein.

EMMANUEL AKOMAYE AGIM
JUSTICE, COURT OF APPEAL

APPEAL NO: CA/A/722/2013
MOHAMMED MUSTAPHA, JCA.

I read a draft copy of the judgment just delivered by my learned brother, **Tinuade Akomolafe-Wilson, JCA.**

I agree with the comprehensive reasons adduced in dismissing the appeal. I also dismiss the appeal for lack of merit.

I abide by the order as to costs in favour of the Respondent, against the Appellant.

MOHAMMED MUSTAPHA
JUSTICE, COURT OF APPEAL