IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION, HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HONOURABLE JUSTICE E . F. IKPONMWEN - JUDGE

FRIDAY 18TH DAY OF DECEMBER, 2015

BETWEEN: **SUIT N0. B/615/2012**

1. OSANEJI GLOBAL SERVICES LIMITED
2. MR. JOEL OSAHON IDEMUDIA } **CLAIMANTS**

AND

NIGERIA BREWERIES PLC …. …. ….. DEFENDANT

.

J U D G M E N T

The Claimants commenced this action vide a Writ of Summons dated 21st of February, 2013, along with their statement of claim and other processes. By paragraph 17 of the statement of claim filed on 27/11/2012, the Claimants claim from the Defendant the sum of N120,000,000.00 (One Hundred and Twenty Million Naira) only being special and general damages for injuries suffered by the claimants, arising from Gulder Larger Beer bottled and sold by the Defendant on the 2nd day of September, 2011 at Benin City.

PARTICULARS OF SPECIAL DAMAGES

Loss of earning for the months of September 2011 ï August 2021

at N500, 000 per month	N60,000,000.00
Loss of Business Goodwill	N60,000,000.00
Total	N120,000,000.00

The Claimantsô case opened on 5/11/13 with CW1 Endurance Adejube adopting his statement on oath filed on 27/11/2012 wherein he stated that

sometime in June 2011, the 1st claimant took over the management of De Marriote Hotel for a period of 10(ten) years lease with a certain Hon.(DR) Oghomwen Newman Ugiagbe who is the owner of the hotel. The Defendant as part of its sales drive engages various distributors, retailers, agents and dealers throughout Nigeria inclusive of RALFOSA GLOBAL RESOURCES LIMITED of N0. 26 Oba Market Road, Benin City that ensures the sales, distribution chain for ultimate consumption by consumers. RALFOSA GLOBAL RESOURCES LIMITED is one of the Defendantôs distributors in Benin City.

He stated that on or about the 1st day of September 2011 at Benin City the 2nd Claimant sent Ehujor Henrrietta to buy some cartons of assorted drinks from RALFOSA GLOBAL RESOURCES LIMITED which included some cartons of Gulder Larger Beer for on ward sales to the customers. On the 2nd day of September 2011 a bottle of Gulder from the drinks earlier purchased was served to of the customers in the hotel. That before opening the Gulder bottle, the customer noticed an object that turned out to be a condom inside the bottle and raised an alarm. Upon discovery of the object in the Gulder bottle the 2nd claimant pleaded with the customer who was screaming and other customers of the hotel came out of their rooms and were demanding for their money after which checked out. The customers fought with the 2nd claimant saying the object found in the Gulder was a voodoo which the claimant intended to use to ñtieò them to always patronize him. It took the intervention of good samaritans most of whom were co-workers to prevent the angry customers from lynching the 2nd Claimant. CW1 further stated that all prospective customers of the hotel deserted the hotel which inevitably resulted in the 2nd claimantôs inability to pay workers salaries and his eventual sack from the hotel. He stated that the Defendant owed the public a duty to ensure that

its products are free from foreign objects and suitable for consumption. That the Defendant breached the duty of care in offering an unsuitable bottle of Gulder Lager Beer with foreign object for sale to customers.

On 9th of December, 2013 CW2 Henrietta Ebere Ehujor adopted her statement on Oath filed on 27/11/12 wherein she stated that sometime in June 2011 the 1st claimant took over the management of DeMarriote Hotel. The owner of the hotel is Hon.(Dr) Oghomwen Newman Ugiagbe. The Defendant as part of its sales drive engages various distributors, retailers agents and dealers throughout Nigeria inclusive of RALFOSA GLOBAL RESOURCES LIMITED of N0. 26 Oba Market Road, Benin City who ensures the sales, distribution chain for ultimate consumption by consumers. RALFOSA GLOBAL RESOURCES LIMITED is one of the Defendantôs distributors in Benin City. She stated that on or about the 1st day of September, 2011, the 1st claimant sent her to buy some cartons of assorted drinks from one of the Defendants distributors RALFOSA GLOBAL RESOURCES LIMITED which included some cartons of Gulder Larger Beer. The distributor issued Exhibit A to her which she handed over to the 2nd claimant when she returned to the hotel. On the 2nd day September 2011 a bottle of Gulder (Exhibit B) among the drinks purchased from the Defendant through its distributor was served to a customer of the hotel. Prior to the opening of the Gulder bottle the customer noticed an object that was discovered to be a condom inside the said bottle and raised an alarm whilst suggesting that the 2nd claimant intended to poison him. Upon the discovery of the object in Exhibit B the 2nd claimant attempted to plead with the customer which further infuriated the customer who started screaming, this attracted the other customers of the hotel, most of whom were lodgers and they all immediately checked out of the hotel with

some who have barely checked in asking for a refund of their deposits. This resulted in a situation where all the customers wanted to beat up the 2nd claimant as the customers claimed that the object found in Exhibit B was a charm which the 2nd claimant intended to use to tie them to always patronize the hotel. It took the intervention of good samaritans most of which were the co-workers to prevent the angry customers from lynching the 2nd claimant. She stated further that all prospective customers of the hotel deserted the hotel and this inevitably resulted in the 1st claimantôs inability to pay workers salaries. That the owner of the hotel ñdroveò the 2nd claimant away because of this incident. She stated that the Defendant owes the public a duty to ensure that its product is free from foreign objects and suitable for consumption. That the Defendant breached the duty of care in offering an unsuitable Gulder Lager Beer with foreign objects for sale to customers.

2nd Claimant, Mr. Joel Osahon Idemudia on 9th December 2013 adopted his statement on Oath filed on 27/11/12 wherein he stated that he was the managing director of the 1st claimant. That sometime in June 2012, they took over the management of De Marriott Hotel for a period of (10) ten years lease from a certain Hon. (DR.) Oghomwen Newman Ugiagbe who is the chairman of De Marriott Hotel. There was a lease agreement between them and the leasor Exhibit C. In the course of the negotiation between both of them, they sent series of text messages to each other. For the period the said contract was to last, he was not to be answerable to the owner of the hotel apart from servicing the management contract/lease by the payment of the agreed sum which was the sum of N1,200,000.00 (one Million, two hundred thousand naira) only per month with the owner of the hotel. He has carbonized copies of deposit receipts used to pay the

rent. Exhibit E, E1 and E2. The Defendant as part of its sales drive engages various distributors, retailers, agents and dealers throughout Nigeria inclusive of RALFOSA GLOBAL RESOURCES LIMITED of N0. 26 Oba Market Road, Benin City who ensures the sales distribution chain for ultimate consumption by customers. RALFOSA GLOBAL RESOURCES LIMITED is one of the Defendantôs distributors in Benin City. That on or about the 1st day of September, 2011 at Benin City he sent his purchasing officer CW2 to buy some cartons of assorted drinks from one of the Defendantôs distributors namely RALFOSA GLOBAL RESOURCES LIMITED which included some cartons of Gulder Lager Beer. Exhibit A was issued to the CW2 who handed it over to him. On the 2nd day of September, 2011 Exhibit B was served to a customer at the bar of the De Marriotte. Prior to opening of Exhibit B the said customer noticed an object in It. The object was found to be a condom inside Exhibit B and he raised an alarm whilst suggesting that he intended to poison him. 2nd claimant attempted to placate the customer which further infuriated the customers who started screaming, this attracted the other customers of the hotel most of whom were lodgers and they all immediately checked out of the hotel with some who have barely checked in asking for a refund of their deposits. The customer that discovered Exhibit B left in anger and left the Exhibit B behind. According to 2nd Claimant this incident led to a mob action as the customer who discovered Exhibit B and other customers claimed that the object found in the said Gulder bottle was a voodoo which he intended to use to ñtieò them to always patronize the hotel. It took the intervention of good samaritans most of whom were his co-workers to prevent the angry customers from lynching him. He stated that all prospective customers of the hotel, deserted the hotel and this resulted in his inability to service

the management/lease contract with the owner of the hotel due to loss of earnings. He was making as much as N500,000.00 (Five hundred thousand naira) only as profit in a month after all deductions have been made. The owner of the hotel terminated his lease abruptly because of the incident vide Exhibit D. He briefed the Law Firm of MCKKENNY CHAMBERS to write the Defendant. The Defendant relied on the said letter, Exhibit F. According to him the Defendant owed him a duty to ensure that its product is free from foreign objects and it is suitable for consumption. The Defendant breached the duty of care in offering an unsuitable Gulder lager beer with foreign object for sale to customers.
He suffered serious damages from the Defendantôs negligence in breaching itôs duty of care to him and by extension consumers. He urged the court to grant him his reliefs as per his statement of claim.

CW3 Mr. Osabuohien Osagie on 10/2/14, adopted his statement on Oath filed on 20/1/14 wherein he stated that he attended St. Stephenôs Primary School Benin, Oghada Grammar School after which he joined the Bendel Breweries Nigeria PLC and he is vast in brewing and making of drinks. That it is when due diligence and care is not taken during production of drinks that the content of the drinks can be bottled along with foreign objects. According to him brewing takes place twenty-four hours hence the person attached to the brewing machines to watch the brewing process can fall asleep in the course of the brewing. Also the machine for washing the bottles before passing to the machine that will pour the contents into the bottle before covering the bottle can negligently omit some bottles and not wash them. The machine can also negligently omit to remove any particle stuck in the bottle in the course of washing it. That to avoid this shortcoming someone is usually attached to the various machines to be watching

the process and remove any of such bottles from the ones to be supplied for consumption. That the final process of brewing is the labeling process where anything that has not been discovered through the other processes is expected to be discovered and done away with. He stated that for the brewing of drinks to pass through these processes and a foreign element is not discovered by the brewer is an act of negligence and breach of the duty of care.

At the close of the claimantôs case, the Defendant opened their case on 20/3/14. DW1 Bolanle Oladokun adopted his written statement on Oath filed on 28/2/14 and stated that he is the technological controller of Nigerian Breweries PLC. He stated that the Defendant is not a party to the alleged lease agreement neither is it privy to the contents of same. The Defendant is not a position to confirm the terms of the alleged lease agreement between the claimants and Hon. (Dr.) Oghomwen Newman Ugiagbe. He stated that the Defendantôs distributors, agents or retailers do not sell unwholesome products. The Defendant has a closely monitored and regulated distribution network. He stated that the Defendant does not have a plant in Edo State as alleged by the claimant. To ensure and maintain the high standards for which the Defendant is known production is not generalized, hence the reason the Defendant does not have a plant in every state of the Federation. He stated that the Defendant maintains high standards of safety by ensuring proper packaging of its products. The process of bottling and its processes are effectively monitored by the Defendant. The Defendant is able to confirm a product emanating from it and one that has been tampered with. He stated that the Defendant is unable to confirm the authenticity of the products purchased from Ralfosa Global Resources Limited as products produced by and/ or emanating from the Defendant merely by an examination of a photograph. He

stated that the alleged contaminated Gulder was not and is not a product of the Defendant as the Defendant maintains the best and highest standards in the production of all itôs products. He further stated that:- (a) the Defendant is certified on HACCP(HAZARD Analysis critical control points) system by BVQ1, Denmark for more than 6 years running as confirmed by the Bureau veritas certificate 150 22000:2005 and Bureau veritas certification 150 9001:2008; a system that ensures the delivery of wholesome food products to consumers. (b) The Defendant complies with the highest standards as stipulated by the National Agency for food and Drug Administration and Control (NAFDAC) and the Standards Organization of Nigeria (SON) which are the principal regulatory bodies in Nigeria. This is confirmed by SON Revalidation Inspection dated 5th April, 2013.

DW1 stated that the Defendantôs products cannot have sediments, condoms or any foreign bodies as all bottles and crowns used in the production process are thoroughly washed and sterilized by mechanical and manual processes which prevents unwarranted substances from getting into the bottles or drinks. DW1 stated that the procedure adopted in the production of the Defendantôs products is as follows:-

The acquisition for the bottling line which contain de-palletizer unpacker, bottle washing machine, empty bottle inspector (EBI), full bottle inspectors (FBI), filler crowner with inspection unit for metal detection modern fail safe pasteurize, bottle labeler with inspection unit packer and palletizer on each line. This is in line with the Defendantôs production and Quality Manual strictly adhered to at all times

(b) The EBI and FBI machines are capable of detecting foreign bodies in the bottles (if any). The EBI is located before the filler while one FBI each is located after the filler and after the labeler respectively. This is to ensure that no foreign object which finds its way into any of the bottles at any stage in the production process passes without being detected and quarantined.

(c) That the process explained above is strictly employed by the Defendant at all times and is fail safe.

(d) Test bottles are used in confirming the integrity of the EBI for every 30,000 bottles inspected by the EBI and if any failure on integrity is discovered, the batch produced within the time is quarantined and manually inspected.

(e) The microbiological status for every product batch leaving the Defendantôs brewery is checked for wholesomeness.

(f) It is therefore impossible for any foreign object to find its way into the Defendantôs products as compliance with the laid standards is strictly enforced at all times.

DW1 stated that the Defendant supplies its distributors and sales agents upon their application for supply made to the Defendant. The Defendant however does not control the processes employed by the distributors once the products are delivered/supplied to the distributors and agents. The Defendant however monitors its distributors to ensure that safety measures are adhered to by way of paying regular unscheduled visits to its distributors and the warehouses. He stated that the Defendant owes a duty of care to the general public and that duty is discharged without fail at all times. The alleged attitude and/or reaction of the claimantsô customer cannot be attributable to the Defendant. He stated that the Defendant is not responsible for the alleged termination of the Lease Agreement between the

Claimants and Hon. (Dr.) Oghomwen Newton Ugiagbe, D.W.1 tendered Exhibits H, HI, J and K.

Under cross-examination, DW1 tendered Exhibit L. He stated that the label on Exhibit B is the type of label used by the Defendant. It is Nigerian Breweries that produces Gulder beer. He stated that he can see an object inside the bottle Exhibit B but added that, the object can never be inside a product of Nigerian Breweries. He stated that NAFDAC comes on inspection from time to time, same with SON. They issue certificate after inspection. He does not have the certificate issued by SON before Exhibit L. He is not aware that the claimant wrote a letter to the Defendant.

At the close of evidence both learned counsel adopted their written addresses on 13/11/15. Learned Counsel to the Defendant Mrs. O.S. Nwano in her written address raised five issues for determination to wit:-

a) Whether the claimants have proven that they have the legal capacity to institute this action.
b) Whether or not the claimants have proven negligence to entitle them to the reliefs sought.
c) Whether or not the claimants have proven that they are entitled to special or general damages as sought.
d) Whether the claimants have established by credible evidence, a nexus between the unconsumed Gulder beer and their alleged losses.
e) Whether the failure of the claimants to join Ralfosa Global Resources Limited as a party is fatal to their case.

Learned Counsel on issue one contended that in a civil suit, a party who commences an action in court must prove his case on the balance of probability, citing sections 131 and 132 of the Evidence Act 2011. She submitted that the claimants must prove their legal capacity and/or legal standing to institute this action and that mere averment that the 1st claimant is a limited liability company without more, does not satisfy the requirement of the law rather satisfactory proof in law must be by the production of the Certificate of Incorporation. She relied on the cases of A**.C.B. Plc V. Emostrade Ltd (2002) 8 NWLR (Pt. 770) 501; Reptico S.A. Geneva V. Afribank (Nig) Plc (2013) 14 NWLR (Pt. 1373) 172.** She emphasized that there is no evidence that the 1st claimant is duly incorporated, Consequently, the 1st claimant is duly incorporated to prove its legal capacity is not competent to sue. Learned Counsel that the consequence of a finding that the 1st claimant lacks the competence to sue must be that the 2nd claimant who at all times derived his authority from the 1st claimant also lacks the competence to institute this suit as he could not have derived valid authority from a party who itself lacked authority to sue. She relied on the case of **Nduka V. Ezenwaku (2001) 6 NWLR (Pt. 709) 494 at 512 in c**ontending that the claimants have failed to established their competence and/or authority to institute this suit. The effect of this in law is that the claimants cannot be entitled to the reliefs they seek from the court as the suit is incompetent and must thus be dismissed.

Mrs Nwano submitted on issue two that the claimants have failed to prove any form of negligence on the part of the Defendant. Allegations of negligence contained in the claimantsô pleadings without more, cannot be the basis of a finding by the court that the Defendant was negligent, the claimants must by credible evidence establish their allegation of negligence. She submitted that none

of the pieces of documentary evidence tendered by the claimants aids in proof of negligence; the oral evidence of their witnesses as presented in their statements on oath do not establish negligence . Learned Counsel submitted that to successfully prove negligence, the claimants must prove the three ingredients of negligence being:-

a. that there was a duty of care owed to the claimants
b. that the duty of care was breached
c. that the claimants have suffered damage as a result of the breach.

She relied on **Bouygues (Nig) Ltd V. O. Marine Services Ltd, (2013) 3NWLR (Pt.1342)429; UTB(Nig) V. Ozoemena (2007) 3NWLR (Pt.1022) 448 at 465.**

In contrast, the Defendantôs witnessô evidence as to its strict compliance with high standards was not rebutted in anyway. Evidence that is not rebutted is by law deemed admitted. She relied on **Ighreriniovo V. S.C.C. (Nig) Ltd (2013) 10 NWLR (Pt. 1361) 138; R.E.A.N Ltd V. Aswani Textiles Ind. (1991) 2 NWLR (Pt. 176) 639.** Mrs. Nwano contended that having failed to prove negligence as required by law, the claimants cannot be entitled to the reliefs they seek from court or any relief at all and the claims of the claimants are liable to be dismissed.

Learned Counsel submitted on issue three that the award of damages; special or general must be upon proof and this must be done with credible and uncontradicted evidence. She maintained that it is the position of the law that special damages must be specifically proved, citing **Usman V. Abubakar (2001) 12 NWLR (Pt. 728) 685; Dumez V. Ogbolu (1972) All NLR 244; Oshunjirin V. Elias & Ors (1970) all NLR 158 at 161.** Learned Counsel submitted that the

claimantsô evidence on special damages that they were making nothing less than N500,000.00 (Five hundred thousand naira) monthly and they were paying rent of N1,200,000.00 (One million Two Hundred Thousand Naira) was not proved by documentary evidence. She maintained that the evidence proffered by the claimants is improbable and not credible. She relied on the case of **Dumez V Ogbolu (Supra)** and urged the court to dismiss the claims of the claimants for failure to prove their entitlement to special damages.

Mrs. Nwano submitted on issue four that the claimants must discharge both the legal and evidential burden of proof, relying on **Akinyele V. Afribank Plc (2005) 17 NWLR (Pt. 955) 504; Onuigbo V. Nwekeson (1993) 3 NWLR (Pt. 283) P. 533.** Learned Counsel submitted that the claimants have alleged that after the Gulder beer was served to their customer but before same was opened or consumed, an object was found in the bottle. The claimants also claim that the effect of the alleged discovery of foreign object was that they suffered loss as their lodgers checked out on that basis and prospective customers deserted the hotel. She contended that having made these assertions of fact, the law places a burden of Proving these assertions on the claimants, citing **N.B.C. Plc,. Olanrewaju (2007) 5 NWLR (Pt. 1027) 255 at 267,** maintaining that the claimants have the onus of establishing the nexus between the incident and their alleged loss, which they failed to establish. She submitted that failure to discharge this burden on a balance of probabilities is fatal to the case of the claimants citing the case of **Yusuf V. Dormier (2004) 10 NWLR (Pt. 880) 1 at 14 – 15.**

Learned Counsel contended on issue five that in the light of the role of Ralfosa Global Resources Limited in the issues leading up to the commencement of this suit, the said Ralfosa Global Resources Limited ought in the circumstances of this case to have been joined as a party. This is especially important in the light of the fact that parties joined issues on the validity of the claimantsô allegation that Ralfosa Global Resources Limited is a distributor of the Defendant which was not rebutted by the claimants in any way, neither was Ralfosa Global Resources Limited made a party to establish through the said Ralfosa, the claimantsô claim. She maintained that the effect of the evidence of CW1 and 2nd claimant under cross-examination is that issues germane to the effective determination of this suit have been aided in the partiesô pleadings and indeed evidence, submitting that only Ralfosa could have aided in the determination of these issues hence the need to have joined Ralfosa as a party to the suit; failure to join Ralfosa as a party renders the suit incompetent She relied on **Lawal V. P.G.P. (Nig.) Ltd. (2001) 17 NWLR (Pt. 742) 393; Obla V. Otagoyi (2007) 5 NWLR (Pt. 1027) 304 at 323.** She contended that in the light of the failure of the claimants to rebut the express denial of Ralfosa as a distributor by the Defendant, the claimants are deemed to have admitted the truth of the Defendantôs denial, submitting that the effect of such estoppel is that Ralfosa did not and does not get its supplies from the Defendant especially in the light of the express admission of CW1 that there are cases of adulterated drinks and in the light of the Defendantôs express assertion that it does not manufacture unwholesome products and that the particular bottle of Gulder could not have emanated from it.

In conclusion, Mrs. Nwano urged the court on the basis of the foregoing submissions to dismiss the claimantsô claim in its entirety and award costs to the Defendant.

Learned Counsel for the claimants Imafidon Aghayere Esq., in his written address raised two issues viz:-

a. Whether or not the claimants have proved negligence to entitle them to the reliefs sought?

b. Whether or not the claimants have proved that they are entitled to the special or General Damages as sought?

Learned Counsel submitted on issue one that the claimants have proved the negligence of the Defendant in the production of Exhibit B by preponderance of evidence as required in civil cases. He defined negligence as given in Blackôs Law Dictionary Ninth Edition By Bryan A. Garner and contented that the duty imposed by law in the instant case includes the production of a beer that is free from foreign objects, which duty was not observed by the Defendant in the production of Exhibit B. He submitted that negligence is actionable when actual damage is proved and the only proof that is required is casual connection. He relied on **R. O. Iyere V. Bendel Feed and Flour Mill Ltd (2008) 12 M.J.S.C. Pg. 102 at 108 – 109 also 129 – 130.** He maintained that the claimants have been able to establish that they have a casual connection with the Defendant by the purchase of their product Exhibit B. He argued that paragraphs 4, 5 and 7 of the statement of claim wherein the claimants pleaded that the said Ralfosa Global Resources Limited was a distributor, agents/dealer/retailer to the Defendant and led

evidence on same which was not controverted. He submitted that it is trite law that any piece of evidence not denied by a party is deemed admitted by that party. He

relied on the case of **Dr. Augustine N. Mozie & 6 Ors V. Chike Mbamalu & 2 Ors (2006) M.J.S.C. Pg. 118 at page 121**. He submitted that this averment which is contained in paragraph 10(ten) of the statement of Defence does not qualify as an evasive denial and/or general denial. He submitted that a denial of a material allegation of a fact must not be general or evasive but must be direct, citing **Dr. Rasaki OShodi & Ors V. Yisa Oseni Eyifunme & Anor (2000) 3N.S.C.Q.L.R. pg. 320 at 326.** Learned Counsel posited that the onus of proving that Exhibit B is not the product of the Defendant or that Exhibit B was tampered with is on the Defendant. He submitted that any averment in a pleading which has not been established and is not clearly admitted by the other party is deemed abandoned. He relied on **Popoola Babagbegbin & Ors V. Jimoh Atanda Oriari & Ors (2009) 6 MJSC Pg. 149 at 156**; **Livestock Feeds PPlc V. Alhaji Rabiu Umaru Funtua & Anor (2005) All FWLR Pg. 753 at 757 -758.** The Institute of Chartered Accountants of Nigeria (**ICAN) V. Mazi Okechukwu Unegbu & Ors (2012) 2 NWLR (Pt. 1284) pg. 216 at 222.** He submitted further that Exhibit J does not meet the requirement of the law as contained in section 104(1) of the Evidence Act 2011 and urged the court to expunge same in accordance with the decision in the case of **Okere & 4 Ors V. Otunba Oyewole Fashawe (2005) 12 MJSC Pg 68 at 73; The House of Representatives & 6 Ors V. The Shell Petroleum Company of Nigeria & Anor (2011) 11 NWLR (Pt. 1205) Pg. 213 at 220 – 222; Tangale Traditional Council V. Alhaji Alhassan Mohammed Fawu & Anor (2001) 17 NWLR (Pt. 742) Pg 293 at 301 – 304**. Learned Counsel submitted that

Exhibits J and L were made for the purpose of this case. He submitted that any evidence procured/made for the purpose and/or during the pendency of action is against the law. He relied on **section 83(3) of the Evidence Act 2011; Samson Owie V. Solomon E. Ighiwi (2005) Vol. 3 MJSC Pg. 82 at 88.** He submitted that the non-tendering/production of the certificate from the NIGERIAN INDUSTRIAL STANDARD (NIS) and any of the awards at the trial, it is presumed that the said certificate and the awards would have been unfavourable to the Defendant. He relied on section 167 (d) of the Evidence Act 2011. He submitted that as sophisticated as the state of the art equipments of the Defendant according to the Defendant, the Defendant have not been able to prove by credible evidence that their equipments have been inspected by the relevant authorities i.e NAFDAC, SON & NIS prior to the institution of this case.

Learned Counsel submitted that although Exhibits H and H1 specify the standard requirements for the effective food safety management system which work throughout the food and beverages chain, to ensure that both are safe at the time of human consumption, it does not absolve/exonerate the Defendant from the standard of compliance required in the production of consumables. He submitted that Exhibits H and H1 at best qualify as documents procured/obtained in anticipation of an action.

Mr. Aghayere submitted that the trial court is bound by the opinion of expert when there is no other evidence contrary to the opinion of the expert. A Court can only substitute the evidence of an expert when it is clearly justified to do so with contrary expert opinion evidence. He relied on **ESOP SAMSON EDOHO**

V. THE STATE (2004) 5 NWLR (Pt. 865) Pg. 17. He submitted that contrary to the submission of the Defendantôs Counsel, the expert witness do not need to state categorically that the process employed by the Defendant run contrary to his analysis but rather it was the Defendant that needed to give this Honourable Court a contrary expert opinion as it relates to its production. He submitted that the address of counsel cannot take the place of evidence of a witness. He relied on **Mallam Yusuf Olagunju V. Chief E. O. Adesoye & Anor (2009) 4 MJSC (Pt. 1) 76 at 78**. He urged the court to hold that the claimants have proved negligence to entitle them to the relief sought.

Mr Aghayere submitted on issue two that special damage is damage which the law cannot infer from the nature of the act which gave rise to the claim, it must be specifically pleaded and proved. The claimants has proved special damages haven been able to prove casual connection with the act of the Defendant in line with Exhibits A and B. Exhibits C, D, E1, E2 and E3 and F also aids the claimants in proof of special damage. He submitted that general damages are those damages that the law will presume as the direct natural or probable consequences of the act complained of. He relied on **Xtoudus Services Nigeria Limited & Anor V. Taiset (W.A.) Limited (2006) 11 MJSC Pg. 167 at 170 – 172**. He submitted that it is only when a statement is made in the course of negotiation of settlement out of court that such a statement will not be used in the proceedings. He relied on section 196 of the Evidence Act, 2011. Learned Counsel submitted that Exhibit F although marked ñwithout prejudiced was not used in the course of negotiating out of court settlement as same as mere letter to the claimants by the Defendants wherein the Defendant admitted liability in a round about manner. The said Exhibit was not written during the pendency of the action, but long before the

commencement of the action. He urged the court to hold that the claimants have been able to prove special and general damages against the Defendant.

In conclusion, Mr, Aghayere reacted to issues one, four and five in the Defendantôs written address and urged the court to give judgment in favour of the claimants

On 5/10/2015, the Defendantôs counsel filed a reply on points of law in reaction to the claimantôs final written address.

The evidence led by the parties have been carefully perused by me and the legal arguments have been thoroughly read. Before dealing with the main issue, the question of the competence of the 1st claimant or even the claimants as raised by the defendant must be looked into, I find that the 1st claimant is an artificial person and by being a registered company, the proof of this fact which is within its special knowledge rests with the 1st claimant and the usual way to prove this capacity to sue is the production of the certificate of incorporation . **See Reptico S. A. Geneva V. Afribank Nig Plc 2013 (Vol 225 LRCN Pt 1) 102**. In the circumstance I agree with learned counsel for the Defendant that the 1st claimant lacks the competence to sue. Consequently the suit by the 1st claimant is ordered struck out. However, I do not agree that because the 2nd claimant is the Managing Director of the 1st claimant as contended by Mrs. Nwano this suit is incompetent. The suit as instituted by 2nd claimant in his name remains and it is competent. The issue of the non joinder of Ralfosa Global Resources Limited as a defendant is not a very necessary requirement in that the non joinder of a party is not fatal to the suit. See OR 13 Rules 16(1) of the Edo State High Court (Civil Procedure) Rules 2012.

In the light of the above, I do not find that the non joinder of the said Ralfosa Global Resources is fatal to the claimantôs case. Now as for the case proper, the claimant led evidence as to how they bought carton of drinks from Ralfosa Global Resources and tendered Exhibit A, the receipt in proof of this. A look at Exhibit A reveals that the name written on it is Marrott whereas the name of the hotel is DeMarriott Hotel as can be seen from Exhibit C. The receipt was not signed by CW2 who said she went to buy the drinks. The goods as described in Exhibit A do not show that Gulder beer was purchased. I have also examined exhibit B, the bottle of Gulder beer, it is clear that there is a foreign body in the bottle but it is my view that to establish itôs case the claimant should have done more by taking the bottle before a regulatory body like NAFDAC or SON or even to a chemist to determine what exactly is the content of the bottle, it is not for the court to speculate that the bottle contained Gulder drink and condom, moreso when the evidence from the claimant and his witness is to the effect that the bottle was not opened. There are two material witnesses that ought to have been called for this case to be established ie the customer in the hotel who was served with the drink and the trader who allegedly sold the drink to the CW2. Failure to call these two witnesses creates a dent in the claimantôs case. There is another point that raises some concern in my mind, the fact that the foreign body in the bottle is so conspicuous that it beats my imagination that the steward in the hotel who took it to serve their customer did not notice it. The drama surrounding the discovery of this very visible object in the bottle (Exhibit B) was over the top i.e there was over

dramatization of the whole experience by the claimant and this creates some doubt in my mind making it appear stage managed. The next issue I wish to determine is whether there is any nexus between the Exhibit B and the defendant. The

defendant by its sole witness established by credible evidence its standard practice in the Industry. This evidence led was not discredited in any way. The Ralfosa Global Resources has not been proved to be the distributor of the defendant. As earlier found by me, the Exhibit A does not show that what the CW2 bought was Gulder rather it shows she bought guld. It is my finding that the claimant has failed woefully to prove that they bought Gulder from the distributor of the defendant that would make the defendant liable for negligence.

In the circumstances, it is so considered by me unnecessary and a mere academic exercise to go into examining whether there has been negligence on the part of the defendant. Exhibit D, proves nothing and to show its irrelevance the solicitor who wrote it did not appear in court as witness. In sum, I hold that the case is not proved on the preponderance of evidence rather the claim for N120,000, 000.00 smacks of gold digging and lacks sincerity. The Claimantôs case is ordered dismissed with N50,000 costs to the defendant.

HON. JUSTICE E. F. IKPONMWEN

J U D G E

COUNSELS:-

Imafidon Aghare Esq., For the Claimants

Mrs. O. S. Nwano with Miss T. O. Abiodun For Defendant