Fanta and Sprite – How fit for consumption? FijabiAdebo Holdings Limited &Anor v Nigerian Bottling Company Plc &Anor Revisited

Relevant Facts:

1. By an amended Writ of Summons and Statement of Claim sealed out of the High Court of Lagos State, Nigeria FijabiAdebo Holdings Limited and its alter ego, Dr. Emmanuel FijabiAdebo ("Claimants") filed the suit against Nigerian Bottling Company Plc and National Agency for Food and Drug Administration and Control ("1st and 2nd Defendants") and sought for declarative as well as monetary reliefs. The principal relief of the Plaintiffs was for a declaration by the Court that the 1st Defendant was negligent and breached the duty of care owed to their valued customers and consumers which includes the Claimants in the production of contaminated Fanta and Sprite soft drinks with excessive benzoic and sunset yellow addictives. The crux of the Claimants case upon their pleadings was that sometime in 2007, the 1st Claimant purchased from the 1st Defendant, large quantities of its products; Coca Cola, Fanta Orange, Sprite, Fanta Lemon, Fanta pineapple and Soda Water for export to the United Kingdom for retail purposes and supply to their valued customers in the United Kingdom. The Claimants further asserted that when the first consignment of the soft drinks from the 1st Defendant arrived in the United Kingdom, they were subjected to laboratory test by the Stockport Metropolitan Borough Council's Trading Standard Department of Environment and Economy Directorate and the products were found to have excessive levels of Sunset Yellow and Benzoic Acid which are unsafe for human consumption as the addictives are probable cause for cancer. Consequently, premised on the findings of the United Kingdom food control agency and collaborated by the Coca Cola European Union, the consignments were destroyed and as a result the Claimants lost huge sums of money.

2. The Claimants further contended that the 1st Defendant knew that the products were for export and that the 1st Defendant by making Fanta and Sprite products which were unfit for human consumption, especially as the Benzoic acid and Sunset Yellow contents were far above the recommended level for safe human consumption, the 1st Defendant was negligent and by extension of same material facts, the 2nd Defendant was negligent in carrying out its duties of proper and diligent administration and control of food and drugs in Court to find and hold that the Defendants were negligent and hence liable to them in damages.

It is important to mention that the main evidence relied upon by the Claimants in urging the Court to find and hold that the Defendants, particularly the 1st Defendant was negligent, hence liable in damages, was the laboratory test result issued by the United Kingdom food control agency. A poring of the said report will reveal that it recognized that although the level of the chemical addictives in the 1st Defendant's soft drinks exported to the United Kingdom by the Claimant was in excess of the United Kingdom approved limit, the benzoic acid and sunset yellow addictives levels in soft drinks are country specific; hence different countries have different limits for the addictives.

3. In its defense, the 1st Defendant vehemently denied that the Claimants informed it that its products that were purchased by the 1st Claimant was for export as the manufactured products were for local distribution and consumption only. The 1st Defendant went further to contend that the percentage of the alleged chemical addictives, particularly benzoic acid are very well within the prescribed national limit set by the 2nd Defendant, while there is no national limit set for the sunset yellow component of its Fanta Orange by the 2nd Defendant. The 1st Defendant maintained the position that its products purchased by the Claimants are safe for human consumption. In its further defense, the 1st Defendant stated that in recognition of its adequate precaution in the manufacturing, bottling and selling of its products, the 2nd Defendant as the appropriate regulatory authority in the country, had after very rigorous and intensive inspections, certified its products safe for human consumption and consequently issued it with Certificates of Registration for a period of five years. The 1st Defendant therefore denied that it was negligent and liable to the Claimants in damages.

4. It is also pertinent to state at this point that the 2nd Defendant did not file any defense, however its personnel (Head of its Laboratory) was subpoenaed by the 1st Defendant as a witness. In its testimony while analyzing the result of its laboratory examination of the 1st Defendant's products as ordered by the Court, the witness stated unequivocally that the chemical component particularly the benzoic acid in the 1st Defendant's soft drinks is satisfactory and within prescribed national limit for human consumption. The witness went on to state that the sunset yellow addictive has no limit in Nigeria and that the percentage of the sunset yellow found in the 1st Defendant's soft drinks was accordingly safe for consumption in Nigeria.

The Decision:

5. Upon considering the totality of the pleadings and evidence adduced in the case, particularly as it relates to the Claimants' onus to prove that the 1st Defendant was negligent and liable to them in damages, the Honourable Court in its very well considered judgment of 15 February, 2017 per Honourable Justice (Mrs.) A.A Oyebanji, held that there was no breach of the duty of care by the 1st Defendant and consequently the 1st Defendant was not liable to the Claimants in damages. The Honourable Court pronounced this at pages 18 -20 of its judgment as follows:

"Considering the totality of the pleadings and evidence led in this case particularly Exhibits C, C1 and C2, the certificates issued by the 2nd Defendant to the 1st Defendant certifying the 1st Defendant's soft drinks, Exhibit D1 issued by the 2nd Defendant pursuant to orders of the Court and the testimony of DW2 before this Court, all of which are to the effect that all soft drinks manufactured by the 1st Defendant were certified by the 2nd Defendant (the regulatory body charged with the responsibility of setting standards for the manufacture of consumable products in Nigeria) as being fit for human consumption, the chemical component of same being within acceptable limits, the Court has therefore come to the inevitable conclusion that there was no breach of duty of care on the part of the 1st Defendant in this case."

In other words, based on pleadings and evidence led in this case, the 2nd Defendant having certified all soft drinks manufactured by the 1st

Defendant as being fit for human consumption, the 1st Defendant cannot in the circumstance be held to have breached its duty of care to the Claimants because of the chemical component of the said products. The Court would have arrived at a totally different conclusion if Exhibits C, C1 and C2 were not issued by the 2nd Defendant in favour of the 1st Defendant.

May I add that from the pleadings and evidence led in this case, it is manifest that the regulation governing the chemical component of Coca Cola products in Nigeria is different from that which is applicable in the

United Kingdom. Whilst it was the Claimants' case that the product bought from the 1st Defendant was exported to the United Kingdom with the knowledge of the 1st Defendant, the 1st Defendant has vehemently denied being aware of such export stating that its products are meant for consumption in Nigeria and that there was a different Coca Cola franchise holder in the United Kingdom. The position of the law remains that he who asserts must prove.

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In the instant case, the Claimants have not led any evidence or exhibited any document to substantiate the allegation that the 1st Defendant was aware that the products bought were for export.

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In considering whether the Claimants' are entitled to damages claimed, the position of the law is that in a case of negligence, the damages claimed must have a causal link with the breach of duty of care.

In the instant case, having come to the conclusion that there is no evidence before the Court in proof of the alleged breach of duty of care on the part of the 1st Defendant, principally because the 2nd Defendant has certified the soft drinks of the 1st Defendant fit for human consumption inspite of the chemical content of the products, can the claim of the Claimants against the 1st Defendant for damages succeed? I think Not.

The claim of the Claimants against the 1st Defendant must in the circumstances of this case fail.

The Court has carefully considered the claim of the Claimants against the 2nd Defendant. Considering the fact that though served with the originating processes and other processes in this suit, the 2nd Defendant has failed to file a defence, the Court would have been inclined to

enter judgment against the 2nd Defendant in default of pleadings. However, the Court has observed that the only relief sought by the Claimants against the 2nd Defendant in this case was "An Order directing the 2nd Defendant to conduct and carry out routine laboratory tests of all the soft drinks and allied products of the 1st Defendant to ensure and guarantee the safety of the consumable products produced from the 1st Defendant's factory". A relief which has been granted by the Court during pre-trial conference. From the reliefs sought by the Claimants before this Court, the Claimants clearly have no claim in negligence against the 2nd Defendant.

For the reasons herein adumbrated, the claims of the Claimants for general and special damages must fail. Upon the failure of reliefs I, II and III, relief V must also fail and I so hold."

6. However, upon coming to the above conclusion, the Court went further to hold as follows:

"Upon a careful reading of Exhibit B5 wherein the Stockport Metropolitan Borough Council, United Kingdom came to a conclusion that the 1st Defendant's Fanta orange exported to the United Kingdom failed the sample test due to an excess in sunset yellow and both Fanta orange and lemon soft drinks samples failed for excessive levels of benzoic acid for which reason the said products were destroyed. A consideration of Exhibits C, C1 and C2 certificates issued by the 2nd Defendant to the 1st Defendant wherein the 2nd Defendant confirmed the safety of the 1st Defendant's soft drinks. Also considering Exhibit F1, the publication in the Guardian Newspaper wherein the 2nd Defendant re-assured Nigerians of the safety of the products manufactured by the 1st Defendant and a careful consideration of Exhibit D1, the 2nd Defendant's laboratory result showing the level of chemical components of the 1st Defendant's products, and stating that the percentage of the chemical components of the 1st Defendant's Fanta and Sprite soft drinks are within the maximum permitted by the 2nd Defendant for consumption in Nigeria.

In addition, a consideration of

the testimony of DW2 before this Court, particularly her evidence under cross-examination which to quote her verbatim is reproduced as follows:

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From the aforementioned, it is manifest that the 2nd Defendant has been grossly irresponsible in its regulatory duties to the consumers of Fanta and Sprite manufactured by the 1st Defendant. In my respectful view, the 2nd Defendant has failed the citizens of this great nation by its certification as satisfactory for human consumption, products which in the United Kingdom failed sample test for human consumption and which become poisonous in the presence of Ascorbic Acid ordinarily known as Vitamin C, which can be freely taken by the unsuspecting public with the 1st Defendant's Fanta or Sprite.

As earlier stated, the Court is in absolute agreement with the learned counsel for the Claimants that consumable products ought to be fit for human consumption irrespective of race, colour or creed. In spite of the fact that different countries have different limits for addictives. The applicable limit for addictives in Nigeria must be safe for human consumption when taken with other consumables. In the event that the applicable limit for addictives becomes unsafe for human consumption when taken with other consumables, then there must be a clear warning to consumers on the dangerous effect of taking the products with other consumables then there must be a clear warning to consumers on the dangerous effect of taking the products with other consumables.

By its certification as satisfactory, Fanta orange and sprite products manufactured by the 1st Defendant without any written warning on the products that it cannot be taken with Vitamin C, the 2nd Defendant would have by its grossly irresponsible and unacceptable action caused great harm to the health of the unsuspecting public.

Though this is strictosensu, not a consumer protection case, the Court in the light of the damming evidence before it showing that the 2nd Defendant has failed to live up to expectation, cannot close its eyes to the grievous implications of allowing the status quo to continue as it is.

For the reason herein adumbrated in this judgment, the Court hereby orders as follows:

That the 2nd Defendant shall henceforth mandate the 1st Defendant to within 90 days from the date hereof, include on all the bottles of Fanta and Sprite drinks manufactured by the 1st Defendant, a written warning that the content of the said bottles of Fanta and Sprite soft drinks cannot be taken with Vitamin C as same becomes poisonous if taken with Vitamin C".

7. Following the raging controversy that this decision has generated in the public domain both locally and internationally, it became imperative that the above decision of the Court be set out in verbatim for purposes of public knowledge, and consequently put to rest the misconstrued facts. It is therefore settled that from the above set out decision of the Court and the pleadings of the parties as well as the adduced evidence, the following are deducible from the conclusions of the Court.

a. The 1st Defendant's products that were destroyed by the United Kingdom food control agency was because the benzoic acid and sunset yellow chemical component levels contained in the products were above the limit approved in United Kingdom.

b. The 1st Defendant's products are produced locally and for local consumption only. Therefore, they are not produced for export as the levels of their benzoic acid and sunset yellow chemical components differ with that of other countries.

c. The result of the laboratory test carried out by the United Kingdom food control agency showed that although the 1st Defendant's products imported into the United Kingdom contained chemical components whose levels were above the approved limit, benzoic acid and sunset yellow levels in consumable products such as the 1st Defendant's are country specific. In other words, the approved levels for the chemical components differ from country to country.

d. The result of the laboratory test carried out by the United Kingdom food control agency cannot be used as a basis to reach a valid conclusion that the 1st Defendant's products that are produced locally in Nigeria and for local consumption only is unfit and dangerous for human consumption.

e. The 1st Defendant's products produced in Nigeria for local consumption are well within the levels approved by both the national regulators for Nigeria such as National Agency for Food and Drug Administration and Control ("NAFDAC") and the international levels set by CODEX, the joint intergovernmental body responsible for harmonizing food standards globally. The 1st Defendant's products are in complete compliance with the levels of the chemical components approved by the regulators.

f. In the United Kingdom, the limit approved for benzoic acid in soft drinks is a maximum of 150 mg/kg. The Nigerian regulatory limit for benzoic acid in consumables is 250 mg/kg. The 1st Defendant's Fanta and Sprite have benzoic levels of 200 mg/kg which is lower than the Nigerian regulatory limit of 250 mg/kg when combined with ascorbic acid and 300 mg/kg without ascorbic acid and also lower than the 600 mg/kg international limit set by CODEX.

g. The permissible chemical component levels set by countries for their food and beverage products are influenced by a number of factors such as climate. Hence the United Kingdom as a temperate region has lower level that Nigeria which is a tropical country.

h. Going by the fact that the benzoic and ascorbic acid levels in Fanta as well as the benzoic acid level in Sprite produced and sold by the 1st Defendant in Nigeria are in compliance with the levels approved by all relevant national regulators and the international level set by CODEX, there was no credible evidence before the Court that these products would become poisonous if consumed alongside
Vitamin C.

Our Critique:

8. No doubt that the judgment of the Court set out above is sterling, erudite and well considered. Issues for determination raised by the parties were painstakingly considered by the learned trial Judge on preponderance of evidence adduced by the parties and indeed in very minute details. The judgment hence re-affirmed the

laid down legal precedents as well as extended the frontiers of the Nigerian law on negligence. Certainly, the judgment met with the demands of justice as it relates to what is required of a Claimant to prove in an action for tortious liability of negligence.

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9. However, while it is agreed that the Court was right in law to have found and held that the 1st Defendant did not breach the duty of care it owes the Claimants and consequently not liable to them in damages, the Court's finding and conclusion that the 1st Defendant's Fanta Orange and Sprite when consumed with Vitamin C is poisonous to the human body, with due respect, failed to represent the law as well as the evidence tendered by the parties in the matter. In respectfully begging to disagree with the decision of the erudite Honourable trial Judge, it is our considered view that there was no basis and/or support whatsoever in law for the Order that the Court subsequently made requiring the 2nd Defendant to forthwith mandate the 1st Defendant to within 90 days from the date of judgment, include on all its product bottles of Fanta and Sprite soft drinks, a written warning to members of the public, that the contents of the two products cannot be taken with Vitamins C as a combination of the two would be poisonous to the human body. The grounds for this assertion shall be discussed in the preceding paragraphs.

10. Firstly, it is settled principle of Nigerian law that the decision of a law Court proceeds not only on the basis of pleaded facts but also on the basis of the facts as established by credible evidence in that behalf. Therefore, any decision of a Court which proceeds in the absence of the party's pleadings and/or evidence in proof of the pleadings, being perverse, would not endure.[1] In the instant case, a look at the aggregate of facts pleaded and relied upon by the Claimants, would reveal that the Claimants did not plead any fact, albeit material to say that the

[1] See Okonkwo v. C.C.B. Nigeria Plc (2003) 8 NWLR (Pt. 822) 347, Thompson v. Arowolo (2003) 7 NWLR (Pt.818) 163 and Adake v. Akun (2003) 14 NWLR (Pt.840) 418.

1st Defendant's Fanta Orange and Sprite when consumed with Vitamin C becomes poisonous to the human body. Also, the Claimants did not lead any evidence before the Court in this regard. The question that then arises is, on what facts and evidence was the Court's finding and conclusion premised upon? The only evidence which the Court relied upon in coming to its conclusion as stated above is at page 20 – 21 of the judgment, where the 2nd Defendant's witness under cross-examination stated that the chemical component of benzoic acid if not at the approved level in Fanta and Sprite and subsequently consumed with Vitamin C would be poisonous to the body. In other words, the witness unequivocally stated that when the benzoic acid level as approved by NAFDAC is in Fanta orange and Sprite and the products are consumed with ascorbic acid, otherwise known as Vitamin C, it would not be harmful to the body, and to that extent because the 1st Defendant maintains the approved level in the referenced products, the products are not injurious to the body when consumed with Vitamin C. It is therefore, respectfully submitted that the Honourable trial Court's decision is perverse in this regard.

11. Furthermore, the inference which the Honourable Court drew from the evidence allegedly elicited under cross examination from the 2nd Defendant's witness, with all due respect, is one that the Court [2] is not allowed in law to make. Although a Court of law can draw inferences from evidence before it, however such inference must be premised on facts before it. It is trite law that for the Court to legally and lawfully draw an inference in a case before it, such inference must be one drawn from facts before the Court. It has been held by the Court of Appeal that the law recognizes inferences which are drawn from facts before the Court and not what the Judge thinks are the possible or probable facts. An inference drawn completely outside the facts of a case is likely to let the Judge into the arena of litigation and he could be soiled in the process [3]. The same goes for a speculating Judge. The appellate Court has also held that a trial Judge cannot draw inference in vacuo or in vaccum but in relation to facts which justify such inference. And since an inference is an act of deducting or drawing a conclusion from existing premises by way of facts, the facts upon which the inference is deducted or drawn must be in proximity or intimacy with the inference. Where an inference is at large, it cannot perform inferential function

[2] *Akinbisade v The State[2005] 24 W.R.N 108 at 136, Lines 35 -46*
[3] *Akinbisade v The State (supra)*

of drawing a conclusion from premises [4]. It is also our respectful view that assuming the learned trial Judge could draw such evidential inference as done in this matter, such evidence must be supported by facts pleaded by the Claimants, the 1st Defendant having categorically denied that its products are harmful. Parties in the circumstance have joined issues. It is settled principle of law that evidence cannot be led on facts not pleaded [5]. Equally, it is settled law that for a Claimant to be entitled to the reliefs which he seeks from the Court, the reliefs must succeed on the strength of the Claimant's case, and not on the weakness of the Defendant's defense.[6] Again, with due respect, the trial Court's conclusion in this regard is perverse.

12. Secondly, the finding of the Court is one which the Honourable Court made suomotu and which did not emanate from the facts as presented by the Claimants. The finding was based on the evidence obtained under cross examination from the 2nd Defendant's witness. Respectfully, it is a finding that the Honourable Court should have invited the parties to address it on before coming to a conclusion as it did. It is settled principle of law, that where a Court makes a finding outside facts and evidence before the Court and the Court suomotu raises an issue thereto, the Court is obligated to invite the parties to address it on that point before coming to a conclusion. In the instant case, the finding of the Court that the 1st Defendant's Fanta and Sprite when consumed with Vitamin C is harmful to the body was not one that arose from the facts and evidence before the Court. The Court made the finding from evidence elicited from the 2nd Defendant's witness. It is respectfully submitted that, in compliance with the tenets of fair hearing, the Honourable trial Court ought to have invited the parties to address it on the issue before arriving at its conclusion. tGenerally, a Court is duty bound to confine itself to the issues raised by the parties. A Court does not have the power to go outside the issues raised and formulate cases for the parties.[7]

13. Lastly, the order of the Court thatthe 2nd Defendant shall henceforth mandate the 1st Defendant to within 90 days from the date the judgment, include on all the bottles of Fanta and Sprite drinks manufactured by the 1st Defendant, a written warning that the content of the said bottles of Fanta and Sprite soft drinks cannot be taken with Vitamin C as same becomes poisonous if taken

[4] *Ezeadukwa v Maduka&Anor [1997] 8 NWLR [Pt.518] 635 at 663, paras D- E*
[5] *Durosaro v Ayorinde [2005] 8 NWLR [Pt.927] 407 at 425 and Arabambi v Advance Beverages Industries Limited [2005] 19 NWLR [Pt.959] 28, paras. E- G.*
[6] *Nwokidu v Okanu (2010) 3 NWLR (Pt.1181) 362*
[7] *A.S.E.S.A v Ekwenem (2009) 13 NWLR (Pt.1158) 410 and Ngere v Okuruket "XIV" (2017) 5 NWLR (Pt.1559) 440 at 478, paras A-D*

with Vitamin C, is a claim granted to the Claimants which was not part of what they claimed before the Court. It is respectfully submitted that the trial Court played "Santa Claus" in this circumstance. It is trite law that the Court is not a charitable organisation, hence it cannot therefore grant any relief not sought or claims not pleaded by a party. [8]

14. In conclusion, while the Court's decision remains law until set aside on appeal, it is hoped that the Defendants would exercise their respective rights of appeal, and consequently appeal against that part of the trial Court's judgment as reviewed above.

[8] *Ekpeyoung v Nyang (1975) 2 SC 71 at 81 -82.*

About AO2 Law:

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Chinedu (MCIArb- United Kingdom) is the firm's Managing Partner/Head of the Litigation, Arbitration & ADR practice group. A seasoned litigator and arbitrator with over twelve (12) years cognate experience. He specializes in commercial litigation and has litigated on extensive range of issues, including that pertaining, but not limited to corporate recovery, receiverships and insolvency, company and partnership disputes, oil and gas, environmental maters, maritime, real estate, intellectual property, telecommunications, finance and banking contracts, commercial law transactions, family law and general litigation both at trial and apallete levels.

Chinedu has represented different clients including banks, oil companies, telecommunication companies, professional service providers and high net worth individuals in litigation and advises on a wide range of commercial transactions.

Chinedu's litigation strategy in representing his clients is to add value to their businesses and reduce costs or financial exposures. He also offers criminal law pro-bono services.

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