

IN THE HIGH COURT OF LAGOS STATE
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT COURT NO. 22
BEFORE THE HON. JUSTICE ADEDAYO A. OYEBANJI (MRS.)
TODAY WEDNESDAY THE 15TH DAY OF FEBRUARY, 2017

BETWEEN:

SUIT NO. LD/13/2008

1. FIJABI ADEBO HOLDINGS LIMITED
2. DR. EMMANUEL FIJABI ADEBO

CLAIMANTS

AND

1. NIGERIA BOTTLING COMPANY PLC
2. NATIONAL AGENCY FOR FOOD AND DRUG
ADMINISTRATION AND CONTROL (NAFDAC)

DEFENDANTS

JUDGMENT

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This suit was commenced against the Defendants herein, by a Writ of Summons sealed on 08/01/08. A Statement of Claim was filed along with the Writ. In opposition, the 1st Defendant filed a Statement of Defence dated 08/05/08. Though served with the Originating Processes and other processes filed in this suit, the 2nd Defendant failed and/or neglected to file a Defence to this suit. With the leave of Court, pleadings were severally amended.

At the trial, the Claimants relied on an Amended Statement of Claim dated 26/01/2010 and filed on 27/01/10, while the 1st Defendant relied on an Amended Statement of Defence dated 10/03/10. In compliance with the Rules of Court, frontloaded documents were filed and exchanged.

The Claims of the Claimants as per their Amended Statement of Claim dated 26/01/10 were as follows:

1. A DECLARATION 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 acid and sunset yellow" additive (sic).

- ii. The sum of N150,000,000.00 (One Hundred and Fifty Million Naira) only as general damages against the 1st defendant for their negligence and/or breach of duty of care owed to the Claimants.
- iii. The sum of N15,119,619.37 (Fifteen Million, One Hundred and Nineteen Thousand six Hundred and Nineteen Naira, Thirty Seven Kobo) against the 1st Defendant as special damages being the cost incurred by the Claimants due to the negligence and breach of duty of care to the Claimants, by the 1st Defendant.
- iv. The interest of 18% on the total judgment sum from the date of judgment till the day of total liquidation of the total judgment sum.
- v. An Order directing the 1st Defendant to refund immediately to the Claimants the sum of N1,622,000.00 (One Million, Six Hundred and Twenty Two Thousand Naira) only being the sum which was admitted had and received from the Claimants by the 1st Defendant.
- vi. An Order directing the immediate return to the Claimants their 1,277 empty crates of Coca-Cola and other product's bottles deposited as an agreed pre-sale of product condition held at the 1st Defendant's Apapa Plant.
- vii. The interest of 21% on the total sum of N1,622,000.00 (One Million, Six Hundred and Twenty Two Thousand Naira) admitted owed the Claimants by the 1st Defendant from the 15th of June, 2007 until same is liquidated by the 1st Defendant and interest of 21% per annum on the total judgment sum until same is liquidated by the 1st Defendant.
- viii. 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.

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- ix. The sum of N3,000,000.00 (Three Million Naira) only as the cost of instituting and prosecuting this suit."

Case management conference was conducted by my learned brother, Honorable Justice O. A. Taiwo (Mrs.). The case was thereafter assigned to my learned brother, Honourable Justice O. A. Dabiri before its assignment to this Court for trial. At the trial, 3 witnesses testified. The Claimant testified for himself, Mr. Michael Nwosu, the Sales Operations Manager of the 1st Defendant testified on its behalf while Mrs. Abiodun Falana, the Head of the Central Laboratory of the 2nd Defendant testified under subpoena.

The case of the Claimants upon their pleadings was that sometime in the months of January and March, 2007 respectively, the 1st Claimant purchased from the 1st Defendant, large quantities of Coca Cola, Fanta Orange, Sprite, Fanta Lemon, Fanta Pineapple and Soda Water for export to the United Kingdom for retail purposes and for supply to their valued customers in the United Kingdom. The purchase was made through different orders for the supply of about 4,300 crates of different soft drinks. Out of the initial order for the 1st Defendant's products, only 1,899 crates were loaded and received at Tibuny Port in United Kingdom by the Claimants from the 1st Defendant.

The value of the soft drinks supplied by the 1st Defendant to the Claimants was given as N1,371,000.00, leaving a balance of N1,629,000.00 (One Million, Six Hundred and Twenty Nine Thousand Naira) to be refunded by the 1st Defendant to the Claimants, the Claimants having paid to the 1st Defendant, the sum of N3,000,000.00 (Three Million Naira) for the initial order of the products. Till date the 1st Defendant has failed and/or neglected to refund the said sum of N1,629,000.00 (One Million, Six Hundred and Twenty Nine Thousand Naira) to the Claimants.

1,277 empty crates of Coca Cola bottles were deposited by the Claimants, as an agreed pre-sale of products condition and till date the said crates remain in the possession of the 1st Defendant at their Apapa Plant.

The Claimants averred that till date, they have not been paid the 5.5% discount they are entitled to for the quantity of 1st-Defendant's products purchased in January and March, 2007 respectively, as earlier agreed with all other purchasers of its products, worldwide.

It was the Claimants' case that when the Claimants' first consignment of soft drinks purchased in January 2007 from the 1st Defendant arrived in United Kingdom, fundamental health related matters were raised on the contents and composition of the Fanta and Sprite products, by the United Kingdom Health Authorities, specifically the Stockport Metropolitan Borough Council's Trading Standard Department of Environment and Economy Directorate.

The findings of the said United Kingdom authority were also corroborated by the Coca Cola European Union and the products were found to have excessive levels of "Sunset Yellow" and "Benzoic Acid" which are unsafe for human consumption.

According to the Claimants, due to these irregularities and the harmful content of the soft drinks produced by the 1st Defendant which can cause cancer to the consumers of the drinks, the Claimants could not sell the Fanta and Sprite products resulting in appreciable financial losses, as they were certified unsuitable for consumption and were seized and destroyed by the United Kingdom health and Environmental Department in Stockport, Piccadilly United Kingdom.

The Claimants contended that by making Fanta and Sprite products which were unfit for human consumption, especially as the "Benzoic Acid" and "Sunset Yellow" content were far above the recommended level for safe human consumption, the 1st Defendant was negligent and by the same facts, the 2nd Defendant was negligent in carrying out its duties of proper and diligent Administration and Control of Food and Drugs in Nigeria.

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The Claimants contended that the 2nd Defendant failed to carry out necessary tests to determine if the 1st Defendant's products were safe for human consumption. As a result, the 2nd Defendant did not detect the high level of "benzoic acid and sunset yellow" in the 1st Defendant's Sprite and Fanta soft drinks. Consequent upon the 1st Defendant's negligent act of non-conformity with the required health standards, the Claimants incurred the sum of N2,053,874.61 for transportation to United Kingdom, storage and clearing from the port of the products, before same was seized by the United Kingdom Authorities for destruction.

The total cost of special damages to the Claimants was alledged to be N15,119,617.37.

The Claimants further contended that due to the negligence of the 1st Defendant in the production and bottling of its Fanta and Sprite soft drink products as regards the excessive benzoic acid and sunset yellow additives shown to be 185-188 Mgl (as shown in the Eurofin certified analysis) which was above the 150Mgl permissible for safe consumption for human beings, the Claimants were unable to market or sell the 1st Defendant's products exported to United Kingdom.

It was the Claimants case that as a registered Exporter with the Nigerian Export Promotion Council, the Claimant could lawfully export the 1st Defendant's products to any part of the world. According to the Claimants, the 1st Defendant was aware that the soft drink products purchased by the Claimants were meant for export as 3 numbers of 20 feet Containers marked for export were brought in from Grimalde Shipping Lines and were all loaded inside the 1st Defendant's premises with the help of the 1st Defendant's staff and Management.

The Claimants demanded for the refund of the sum of N1,629,000.00 (One Million Six Hundred and Twenty Nine Thousand Naira) from the 1st Defendant being the difference between the amount paid for soft drinks and the value of the quantity supplied by the 1st Defendant. The Claimants in their pleadings also demanded for the payment of 5.5% discount and interest thereon, all of which amounted to N1,700,000.00 (One Million Seven Hundred Thousand Naira).

According to the Claimants, the 1st Defendant admitted being in custody of the 1,277 empty crates and the sum of N1,622,000.00 (One Million Six Hundred and Twenty-two Thousand Naira) but refused to refund the purchase price for the contaminated and sub-standard Sprite and Fanta drinks containing high levels of "benzoic acid and sunset yellow" additive. It was the Claimants' case that because of the damages and/or loses suffered by the Claimants, which was caused by the 1st Defendant's negligence, the Claimants' business suffered financial losses due to loss of capital, anticipated earnings and loss of profit.

According to the Claimants, due to this matter, the 2nd Claimant had to make several unbudgeted trips to Nigeria incurring several expenses, trauma and inconveniences. As a result of the above stated, the 1st Defendant till date has caused untold hardship to the Claimants who could not pay the salaries of their staff, meet their business and social obligations and other financial needs.

In reply, the 1st Defendant admitted that the 1,277 empty crates of bottles deposited by the Claimants were in its possession due to the failure of the Claimants to collect same. According to the 1st Defendant, it had made several requests to the Claimants to pick up its empty crates as well as a refund of the N1,622,000.00 (One Million Six Hundred and Twenty-two Thousand Naira) but the Claimants failed and/or refused to do so.

It was the case of the 1st Defendant that on or about January 2007, the 1st Claimant requested for the supply of the 1st Defendant's soft drinks. In line with the 1st Defendant's policy, it requested that the 1st Claimant deposit an equal number of empty crates as well as payment in advance for the supply of the products in question. According to the 1st Defendant, the products manufactured by the 1st Defendant are meant for local distribution and consumption as the 1st Defendant does not manufacture its products for export, as the Coca Cola brand of soft drinks is manufactured and bottled by various Coca Cola franchise holders in most countries in the world, including the United Kingdom. It was stated that the parties had a prior understanding that the products purchased from the 1st Defendant were meant for internal distribution since NBC is a local bottler.

According to the 1st Defendant, on or about 2nd March, 2007, the 1st Defendant received an e-mail from its United Kingdom counterparts, stating that its products had been sighted in the United Kingdom. The 1st Defendant therefore commenced enquiries which revealed that the 1st Claimant had exported its products, without its knowledge and/or consent and that the products were being held by the United Kingdom Customs Service. Upon the 1st Defendant's discovery of this breach, the 1st Defendant reiterated its standard policy position that its products are meant for internal distribution only. In response, the 2nd Claimant denied that its goods had been seized as alleged, contending that it had lawfully exported the products in question.

In view of the 2nd Claimant's response, the 1st Defendant informed the 2nd Claimant that it would supply the remaining batch of soft drinks requested, on the condition that the 1st Claimant would sign an agreement barring it from exporting the products. The Claimants did not agree to this condition, and the 1st Defendant did not comply with the 1st Claimant's request for the supply of remaining crates of soft drinks.

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The 1st Defendant denied that the Claimants were entitled to any discount on the transaction in question as its list of rebates was only applicable to purchasers where within an initial period of 3 (three) months, a customer had purchased over 200 (two hundred) crates of its products each month, by separate orders. In this instance, the Claimants made only 1 (one) order for products which was spread out over a 2 (two) month period due to their inability to provide the corresponding number of empty crates at the time the order was placed with the 1st Defendant. The 1st Defendant denied that it was negligent in the manufacturing of its products as alleged as stringent quality control procedures were adopted in its production process to ensure that its products are safe for the consumption of the final user.

It was the case of the 1st Defendant that the percentage of the chemical components in the 1st Defendant's soft drinks, particularly benzoic acid are well within the prescribed limit for human consumption set by the 2nd Defendant, while there is no national limit set for "sunset yellow" component of its fanta orange product by the 2nd Defendant. The 1st Defendant maintained that the content of its products is not harmful to human health.

According to the 1st Defendant, in recognition of its adequate precaution in the manufacturing, bottling and selling of the 1st Defendant's products, the 2nd Defendant which is the highest regulatory body in Nigeria had after intensive and rigorous inspections certified its products safe for human consumption and issued certificates of Registration for a period of 5 (five) years to the 1st Defendant in respect of same. Reliance was placed on the Certificates of Registration issued by the 2nd Defendant.

The 1st Defendant denied that the damages alleged by the claimants was occasioned by its negligence or any fault from the 1st Defendant. It was stated that the allegedly "unsafe" level of the chemical components in its soft drinks is safe for consumption in Nigeria.

According to the 1st Defendant, the Claimants cannot recover any damages from the 1st Defendant, occasioned by their unlawful exportation of products, which are meant for local distribution within Nigeria. The 1st Defendant contended that the Claimants' claims are speculative, frivolous and vexatious and should be dismissed with substantial costs.

Evidence was led in line with pleadings by the above stated parties.

At the trial, CW1 was **DR. EMMANUEL FIJABI ADEBO**, the 2nd Claimant in this suit. Witness confirmed and adopted his written statement on oath dated 27/01/10 as his evidence in these proceedings.

The following documents were tendered through this witness:

1. Exhibit A – Letter dated 15/6/07
2. Exhibit A1 – Letter dated 17/9/07
3. Exhibit A2 – Nigerian Bottling Company Plc Letter dated August 23, 2007
4. Exhibit A3 – Samira International Ltd Invoice No. 225 dated 16/7/07
5. Exhibit A4 – Photocopy of Nigeria Export Proceeds Form
6. Exhibit B – Temporary Receipt dated 21/2/02
7. Exhibit B1 – N.B.C. Plc New rebate structure
8. Exhibit B2 – Exporters Registration Certificate dated 8/1/07
9. Exhibit B3 – Letter dated 30/11/11
10. Exhibit B4 – Exporters Registration Certificate dated 8/5/08
11. Exhibit B5 – Stockport Metropolitan Borough Council letter dated 11/4/07
12. Exhibit B6 – Letter to NBC PLC dated 7/5/07

Under cross examination, CW1 explained that since the products sold to the Claimants were rejected in the United Kingdom as being unfit for human consumption, if the products were not fit for human consumption in United Kingdom they should not be fit for human consumption in Nigeria. CW1 confirmed that previous products bought from the 1st Defendant were cleared when exported. CW1 admitted that nowhere in the letters from the regulatory agencies in the UK was it stated that the excessive levels of the chemicals in the products can cause cancer but explained that the officer in charge told him so.

CW1 explained that he was aware that for products, there are different levels of component tolerable by the regulation of different countries. CW1 admitted that there was no document wherein he informed the 1st Defendant that the products bought were meant for export but asserted that the 1st Defendant was aware the products were to be sold in the United Kingdom because he told the 1st Defendant and they loaded the products. CW1 confirmed that the Claimants' outstanding sum of N1.6m had been paid.

DW1 was **MICHAEL NWOSU CHIMA**, the Sales Operations Manager of the 1st Defendant. Witness adopted his written statement on oath dated 11/3/10 as his evidence in chief in these proceedings.

The following documents were tendered and admitted in evidence through this witness.

1. Exhibit C – Certified true copy of Certificate of Registration dated 2/4/03
2. Exhibit C1 – Certified true copy of Certificate of Registration dated 31/07/03
3. Exhibit C2 - Certified true copy of certificate of Registration dated 31/07/03
4. Exhibit C3 - Copy of statement of account of the 1st Claimant for the year ended December, 2007
5. Exhibit D – Letter dated 23/8/07
6. Exhibit D1 – Copy of 2nd Defendant's Laboratory Report dated 20/1/09
7. Exhibit E – Copy of E-mail dated 27/3/07
8. Exhibit E1 – Copy of E-mail dated 03/02/07
9. Exhibit E2 – Copy of E-mail dated 27/3/07
10. Exhibit E3 – Copy of E-mail dated 03/12/07
11. Exhibit F - Certified true copy of the Guardian Newspaper of 12/07/08
12. Exhibit F1 - Certified true copy of the Guardian Newspaper of 30/10/08

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Under cross examination, DW1 explained that the Claimants did not inform the 1st Defendant that the products were to be exported neither was any agreement signed authorizing the Claimants to export the products or precluding them from exporting same. DW1 explained that the products of the 1st Defendant were locally produced and meant to be locally consumed. He explained that the 1st Claimant did not satisfy the condition to warrant the grant of a rebate.

ABIODUN ADEOLA FALANA, the Head of Central Laboratory of the 2nd Defendant testified as DW2. The witness was subpoenaed at the instance of the learned silk for the 1st Defendant. Witness adopted statement on oath dated 3/3/13 as her evidence in chief in these proceedings. The witness confirmed Exhibits C1, C2 and D1.

Under cross examination, DW2 explained that the composition standards for each jurisdiction are set by countries, that same standards are not set because of environmental factors.

Under further cross examination, DW2 explained that Benzoic acid is a derivative from Sodium Benzoate which at a level is no longer poisonous but becomes poisonous in the presence of Ascorbic acid which is vitamin C.

Learned counsel on both sides thereafter filed and exchanged final written addresses. The learned counsel for the 1st Defendant in their final written address formulated the following issues for determination:

- "1. Whether the 1st Defendant was negligent and breached the duty of care owed to its valuable customers including the 1st Claimant, in the production of its Fanta and Sprite Soft drinks which, according to the Claimants, allegedly contained excessive Sunset Yellow and Benzoic Acid.
2. If the answer to issue one is answered in the negative, whether the Claimants are entitled to the reliefs sought in their claims"

On their part, the learned counsel for the Claimants formulated the following issues for determination:

- "1. Whether the 1st Defendant was not negligent in the production and bottling of its products in relation to the excessive benzoic acid and sunset yellow additives therein contained at 185 – 188 Mgl (as evidenced in the Eurofin Certified Analysis) which is above the 150 Mgl permissive level for the consumption of human beings
2. Whether the 1st Defendant was not aware that the product bought by the Claimants were meant for export as 3 numbers of 20 feet containers brought from Grimald Shipping Lines were loaded inside the 1st Defendant's premises, with the help of the 1st Defendant's staff and management supervision, having collected money from the 1st Claimant for these services.

3. Whether the level of additives marked as safe for human consumption in Nigeria is actually safe for human consumption as same is confirmed unsafe in the United Kingdom and Europe for human consumption, bearing in mind that the human body is made of same composition irrespective of race or colour.
4. Whether the franchise agreement between Nigeria Bottling Company and Coca-Cola International is binding on the Claimants.
5. Whether the Claimants' exportation of the 1st Defendant's product is unlawful or not.
6. Where (sic) there existed any term(s) of pre agreed agreements between the parties to the effect that the 1st Defendant products procured were not to be exported.
7. Whether the Claimants are entitled to 5% discount on all purchases as a major purchase/distributor of the 1st Defendant's products."

The Court has given a careful consideration to the pleadings, evidence led, exhibits tendered and the submissions of learned counsel on both sides. Reference will be made to the arguments of the learned counsel on both sides as contained in their final written addresses where deemed appropriate.

Now, it is an established common law principle that civil cases are decided on preponderance of evidence and the balance of probabilities. See the cases of **AMADI VS. ORISAKWE (2005) 7 NWLR (PT. 924) 385**, **MOGAJI VS. ODOFIN (1978) 4 SC pg.1** and **ONWUAMA VS. EZEOKOLI (2002) 5 NWLR (PT. 760) 35**.

From the pleadings and evidence led, the following facts are not in dispute between the parties:

1. That the Claimant bought from the 1st Defendant crates of soft drinks which were exported to the United Kingdom.
2. That while the Coca cola soft drinks exported were allowed into the United Kingdom, the Fanta and sprite soft drinks were destroyed in the United Kingdom on the ground that the Benzoic acid and sunset yellow content exceeded the recommended level for safe human consumption.

3. That the 2nd defendant is the regulatory body in Nigeria saddled with the responsibility of ensuring inter alia that the consumable products manufactured in Nigeria are safe for human consumption.
4. That the 2nd Defendant upon the orders of the Court made on 13/10/08 and 27/11/08 carried out routine laboratory tests of all the soft drinks and allied products of the 1st Defendant and as a result issued a report – Exhibit D1.
5. That pursuant to a Court order made on 15/09/08 the 1st Defendant has refunded to the Claimant, the sum of N1,622,000 (One Million Six Hundred and Twenty-two Thousand Naira) being the sum admitted had and received from the Claimants by the 1st Defendant.
6. That pursuant to the orders of the Court made on 13/10/08 the 1,277 empty crates deposited with the 1st Defendant by the Claimants has been converted to cash and the said sum refunded to the Claimants.

In the light of the above, reliefs 4(v), (vi), (vii) and (viii) of the Amended Statement of Claim of the Claimant have been overtaken by events.

The Court will adopt the issues for determination as formulated by the learned counsel for the 1st Defendant which I consider apt. All other issues are subsumed thereunder.

Negligence is the omission to do something, which a reasonable man guided upon those considerations that ordinarily regulate the conduct of human affairs, would do or doing something, which a prudent and reasonable man would not do. The three basic components of the tort of negligence are:

- (a) duty of care;
- (b) breach of the duty of care; and
- (c) damage caused by the breach.

See **EDWARD OKWEJIMINOR VS. G. GBAKEJI & ANR. (2008) 5 NWLR (Pt. 1079) 172.**

In **AGBONMAGBE BANK LIMITED VS. C.F.A.O LIMITED (1967) N.M.L.R 173**, Bairamian J.S.C, delivering the judgment of the Supreme Court said on the applicability of the tort of negligence at page 177 that; 'the Plaintiff must show that the Defendant owed him a duty of care, and that he has suffered damage in consequence of the defendant's failure to take care.'

On whether the 1st Defendant owes to the Claimants a duty of care.

In paragraphs 4 and 8 of the Amended Statement of Claim it was averred thus:

- "4. The 1st Defendant is a Public liability company incorporated in Nigeria and is into the production and bottling of soft drinks and allied products under authority and licence from the owners of each brand trade mark or patent.
8. The Claimants avers that sometime in the months of January and March, 2007 respectively, the 1st Claimants purchased from the 1st Defendant large quantities of Coca cola, Fanta Orange, Sprite, Fanta-lemon, Fanta-Pineapple and Soda Water for export to the United Kingdom for retail purposes and for supply to their valued customers in the United Kingdom."

While the 1st Defendant in its Amended Statement of Defence admitted paragraph 4 of the Amended Statement of claim it denied paragraph 8 and averred that the Claimant shall be put to the strictest proof thereof but in paragraph 7 and 9 admitted that the Claimant purchased its products whether the products purchased were to the knowledge of the 1st Defendant meant for export will be dealt with later in this judgment.

It is manifest that the 1st Defendant being a manufacturer of soft drinks which are meant for consumption, must undoubtedly exercise reasonable care in the production of the said soft drinks. It is therefore clear that the 1st Defendant owed a duty of care to the Claimants and indeed to all consumers of its products to ensure that its products are safe for human consumption. The Claimants have therefore established that the 1st Defendant owes the Claimants and all other consumers of its soft drinks products, a duty of care.

On whether there has been a breach of the duty of care owed the Claimants by the 1st Defendant.

In the instant case, the Claimants alleged in paragraphs 18 to 24 of the amended statement of claim that the 1st Defendant was negligent in the production and/or manufacture of its Fanta and Sprite soft drinks, in that it allowed excessive chemical component to go into the production of the said products consequent upon which the said products were seized and destroyed by the United Kingdom authorities where the products were exported, on the grounds that they were unsafe for human consumption, and consequent upon which they suffered general and special damages for the shipment, transportation, seizure and destruction by the United Kingdom. In support of this assertion, the Claimants relied on Exhibit B5.

The content of Exhibit B5, a letter dated 11/04/07 from StockPort Metropolitan Borough Council with attached certificate of Analysis by Eurofins Laboratories Limited United Kingdom is hereunder reproduced:

Dr. E. Adebo
E. FAD Ltd
8 Heddon Close
Heaton Mersey
Stockport
SK4 3RS

Our Ref: GH/731726

Date: 1th April 2007

Dear Dr. Adebo

RE: FOOD SAFETY ACT 1990

I write further to our recent telephone conversation following the analysis of the Nigerian 'Fanta' orange and lemon soft drinks I sampled to confirm this Authority's position and the action you must take.

The 'Fanta' orange sample failed due to an excess in sunset yellow colour and both samples failed for excessive levels of benzoic acid. Please find a copy of the certificates enclosed.

As discussed, the 'Fanta' cannot be supplied or exposed for sale because it is non-compliant with EU legislation. The issue has been raised with all Trading Standards Services throughout the UK and the Food Standards Agency. A copy of this letter will be sent to Manchester City Council as you have premises located within their area.

Following the results of the two samples, I have submitted samples of the Nigerian Coca Cola and Sprite you recently imported for analysis.

I would recommend that any future imports are subjected to analysis before you import a vast quantity to ensure that products are compliant with EU legislation. It appears that different countries have different limits for additives.

Please do not hesitate to contact me if you have any queries.

Yours sincerely

SGD.

Gareth Hollingsworth

Trading Standards Officer"

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Whilst from the content of Exhibit B5, it would appear that the 1st Defendant has breached its duty of care to the Claimants and indeed the other consumers of its Fanta and Sprite soft drinks products. However prior to the determination of whether the alleged breach has occurred, it is necessary to consider the case of the 1st Defendant on this issue. The 1st Defendant pleaded and led evidence denying the alleged negligence and asserted that stringent quality control procedures were adopted in its production process to ensure that its products are safe for the consumption of the final user. Specifically in paragraph 21 of its Amended Statement of Defence, the 1st Defendant asserted thus:

"21. The 1st Defendant denies paragraphs 18, 19, 20, 21, 22 and 23 of the Amended Statement of Claim and states as follows:

- i. The 1st Defendant was not negligent in the manufacturing of its products as alleged as stringent quality control procedures were adopted in its production process to ensure that its products are safe for the consumption of the final user.
- ii. The percentage of the chemical components in the Defendant's soft drinks, particularly benzoic acid was well within the prescribed limit for human consumption set by the 2nd Defendant. The 1st Defendant shall rely at the trial of this suit on the Sun newspaper publication of 29th March 2008, wherein the Director General of the 2nd Defendant affirmed this position.

- iii. The 1st Defendant further avers that there is no national limit set for "sunset yellow" component of its fanta orange product by the 2nd Defendant and maintains that the content is not harmful to human health.
- iv. Furthermore, the 2nd Defendant had tested the 1st Defendant's products, certified same as safe for human consumption and had issued to the 1st Defendant certificates of compliance for its products as safe for human consumption.
- v. In recognition of its adequate precaution in the manufacturing, bottling and selling of the 1st Defendant's products, the 2nd Defendant which is the highest regulatory body in Nigeria had after intensive and rigorous inspections issued Certificates of Registration for a period of 5 (five) years to the 1st Defendant in respect of its products. The 1st Defendant hereby pleads and shall rely on the Certificates of Registration issued in respect of its products by the 2nd Defendant at the trial of this suit."

Evidence was led in line with pleadings.

Exhibits C, C1 and C2 are certificates issued by the 2nd Defendant to the 1st Defendant confirming unequivocally the safety standards of the soft drinks manufactured by the 1st Defendant. In other words, attesting to the safety of the 1st Defendant's soft drinks.

In Exhibit F1, the 2nd Defendant in a publication in the Guardian Newspaper of 30/10/08 went ahead to reassure Nigerians that the soft drinks of the 1st Defendant had been found to conform with required standards.

Furthermore, the 1st Defendant tendered Exhibit D1, this being the result of the tests conducted on the products of the 1st Defendant as ordered by the Court. Exhibit D1 contains the following:

"LABORATORY REPORT

Thursday, November 22, 2007

NAME: FANTA ORANGE

DATE RECEIVED: October 31, 2007

CERTIFIED TRUE COPY

TEST PERFORMEDRESULTEXPECTED
PERMITTED"

COLOUR

SUNSET YELLOW AND TETRAZINE YELLOW

"LABORATORY REPORT"Thursday, November 22, 2007

NAME: SPRITE

DATE RECEIVED: October 31, 2007

TEST PERFORMEDRESULTEXPECTED

BENZOIC ACID (MG/L)

161.5MG/L

250MG/L MAX"

"LABORATORY REPORT"Monday, June 30, 2008

NAME: FANTA ORANGE DRINK

DATE RECEIVED: June 09, 2008

TEST PERFORMEDRESULTEXPECTED

BENZOIC ACID (MG/L)

188.64mg/l

250MG/L MAX

ARTIFICIAL COLOURS

SUNSET/YELL.TAR

PERMITTED"

"LABORATORY REPORT

CERTIFIED TRUE COPY

"Tuesday, May 20, 2008

NAME: SPRITE

DATE RECEIVED: April 04, 2008

TEST PERFORMEDRESULTEXPECTED

BENZOIC ACID (MG/L)

201.06mg/l

250MG/L MAX"

DW2 the Head of Laboratory of the 2nd Defendant, (the subpoenaed witness) in analysing Exhibit D1 was unambivalent that the chemical component particularly benzoic acid in the 1st Defendant's soft drinks was as stated therein, satisfactory and within the prescribed limit for human consumption set by 2nd Defendant. The said witness went on to state that sunset yellow had no limit in Nigeria, the percentage of sunset yellow found in the 1st Defendant's soft drinks was according to the witness, safe for consumption in Nigeria.

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 the 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 is 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.

With due respect to the learned counsel for the Claimants, the Court cannot come to the conclusion that the 1st Defendant was aware that the Claimants intended to export the products merely because the products were loaded into containers marked for exports. A purchaser of products is at liberty to use any means to convey the products supplied.

In the instant case, the Claimants has 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.

In exporting consumables to other countries, I believe the Nigerian exporter has a duty to ascertain the quality acceptable in the country to which the export is intended before the goods are exported. Failure to meet the standard in another country cannot be laid at the door step of the manufacturers.

However, it is imperative to state that the knowledge of the 1st Defendant that the products were to be exported is immaterial to its being fit for human consumption. The Court is in absolute agreement with the learned counsel for the Claimants that soft drinks manufactured by the 1st Defendant ought to be fit for human consumption irrespective of colour or creed. This issue will be revisited later in this judgment.

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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 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 filed 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 Claimant 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.

Upon a careful reading of Exhibit B5 wherein the Stockport Metropolitan Borough Council, United Kingdom came to the 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 product 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:

A: The World Standard Organization set a standard for flavour at six hundred milligram for a litter. Nigeria is using 250, it becomes a poison in the presence of Ascorbic Acid which is vitamin C.

Q: You said it is poisonous when it comes in contact with Vitamin C, Vitamin C is one of the component?

Q: The question is Vitamin C is one of the most common vitamins in Nigeria,?

A: It is common because it is not in this product.

Q It is in the product, it is in the Coke yes or no?

A No. No Vitamin C in Coke?

Q In Orange, is there Vitamin C there?

A That is Orange. Though ordinary Orange contains Vitamin C

Q If a child is drinking orange that child cannot drink Coke?

A If it is dangerous the World body will not set a level .

Q Are you aware that in this case, the product that was exported to UK it was destroyed about 5,000 containers was destroyed by UK authority?

A Because the claimant did not find out from the country he is exporting to, he did not find out their standard."

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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 additives. The applicable limit for additives in Nigeria must be safe for human consumption whether on its own or when taken with other consumables. In the event that the applicable limit for additives 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.

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

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

1. That the 2nd Defendant shall forthwith mandate the 1st Defendant to, within 90 days from the date hereof, include on all the bottles of Fanta and Sprite soft 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.

The Court has also considered the Claimants' argument that they are not bound by the franchise agreement between Nigeria Bottling Company and Coca Cola International and the Court agrees with the argument on the premise that a contract affects only the parties to it and cannot be enforced by or against a person who is not privy to the contract, however the Claimants who were the exporters had the responsibility of confirming the acceptable limit of additives in United Kingdom before exporting the products to that Country.

May I commend the Claimants for bringing this gross irresponsibility to the limelight at great cost to them particularly as their claim for general and special damages have failed for reasons adumbrated in this judgment.

Lastly, on the claim for N3m as the cost of instituting and prosecuting this suit. This is specie of special damages which must be specifically proven. Sadly, the Claimants' pleadings and written statement on oath are bereft of facts which will entitle the Claimants to this claim. The Claimants have failed to prove the said claim. It therefore fails.

In the final analysis, based upon the pleadings and evidence led in the case, the claim of the Claimants fails.

The Court shall be addressed on costs.

Mrs. Onakoya – We appreciate the Court for the judgment delivered. We ask for costs of N500,000.

Mr. Oremuyiwa – We are most grateful for the well-considered judgment. I leave the issue of costs to the Court.

Court – In the circumstances of this case, I make no Order as to costs in favour of the 1st Defendant.

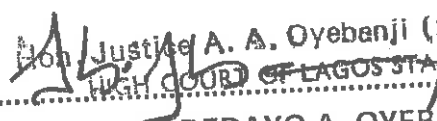
Mr. Oremuyiwa – I ask for costs of N2m against the 2nd Defendant.

Court – In consideration of the fact that this case was filed in 2008 and that it has been in Court for about 9 years, costs of N2m is awarded against the 2nd Defendant.

Interest shall be paid on the costs awarded at the rate of 10% per annum until liquidation of the said sum.

This is the judgment of the Court.

DATED THIS 15TH DAY OF FEBRUARY, 2017.


HON. JUSTICE A. A. OYEBANJI (MRS.)
HIGH COURT OF LAGOS STATE
HON. JUSTICE ADEDAYO A. OYEBANJI (MRS.)

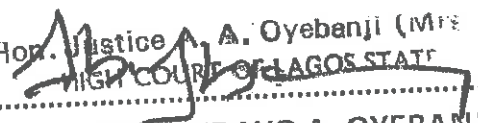
Appearances:


Abiodun Onidare Esq. with him Kayode Otaru Esq. and Nkem Amaechi (Miss) for the Claimants.

T. O. Busari SAN with him Funke Oladosu (Miss), T. A. Sotayo Aro (Miss), Omolola Banjo (Miss) and K. A. Bamgbose Esq. for the 1st Defendant.

No appearance for the 2nd Defendant.

DATED THIS 15TH DAY OF FEBRUARY, 2017.


HON. JUSTICE ADEDAYO A. OYEBANJI (MRS.)


WILLIAMS A. AKINTOLA
ADMIN. OFFICER
COMMISSIONER FOR OATH

