

IN THE HIGH COURT OF LAGOS STATE
HOLDEN AT IKEJA JUDICIAL DIVISION
SITTING AT COURT 22, SPECIAL OFFENCES COURT, IKEJA
BEFORE HON. JUSTICE O. A. TAIWO (MRS.) JUDGE
TODAY WEDNESDAY THE 6TH DAY OF NOVEMBER, 2019.

SUIT NO: LD/2650C/16.

BETWEEN:-

THE STATE OF LAGOS

----- COMPLAINANT

AND

1. JOSEPH ADEKUNLE
 2. OMOTADE ABIMBOLA
 3. TECHNIX ENERGY SERVICES LIMITED
 4. OPI INTERNATIONAL NIGERIA LIMITED
- DEFENDANTS

JUDGMENT

The Defendants were brought to this court on 13 counts charge bordering on conspiracy to commit, obtain credit by fraud contrary Section 409 and 313(1) (a) of the Criminal Law of Lagos State 2011, obtaining credit by fraud contrary to Section 313(1)(a) of the Criminal Law of Lagos State, stealing contrary to Section 278(1)(b) and 285 of the Criminal Law of Lagos State and issuance of dud cheque contrary to Section 1(1) of the Dishonoured cheque (Offences) Act Cap D11, Laws of the Federation of Nigeria, 2004 before this Court.

Prosecution opened their case on the 11th January, 2017.

PW1 is one **EDDY HENSHAW** of Fidelity Bank Plc ("the Bank") who gave evidence on 11th January, 2017, when the Prosecution opened its case. His evidence was that the Bank availed credit facilities to the 3rd Defendant for which the 4th Defendant offered a guarantee for the repayment. He testified that the cheques issued for the repayment were returned unpaid, hence the report of the case to the EFCC. Upon cross-examination by Counsel to the Defendants, he admitted that there were negotiations between the Bank and the 3rd Defendant before the facilities were granted. His evidence did not establish the elements of the offence of issuance of dud cheque. Owing to the fact that the evidence of this particular witness was very terse, the Court granted the application of the Counsel to the

Defendant for liberty to recall this witness for further cross-examination once the exhibits in respect of the Charge had been tendered.

PW2 is one **JONATHAN BARDE**, an investigator with the EFCC, Cyber Crime Section Team E. He gave his evidence-in-chief on 29th March, 2017 and was cross examined on 5th March, 2018. It was through PW2 that all the exhibits for the prosecution were tendered. They are:

Exhibit A – Petition to EFCC;

Exhibit B – Statement by the 1st Defendant (Joseph Adekunle) to the EFCC;

Exhibit C – Statement made by the 2nd Defendant to EFCC (Omotade Abimbola) to the EFCC;

Exhibit D – Additional Statement made by the 1st Defendant (Joseph Adekunle) to EFCC;

Exhibit E – Reply by the Corporate Affairs Commission to Exhibit E;

Exhibit F – F9 – Copies of cheques;

Exhibit G and G1 – Certified True Copies of the 3rd Defendant's Statement of account with Union Bank of Nigeria Plc and the letter of certification issued by the said UBN. These exhibits were tendered through this witness by Counsel to the 1st and 4th Defendants in the course of cross-examination.

Exhibit H – EFCC's letter to Union Bank of Nigeria Plc dated 11th January, 2016.

Exhibit H1 – Union Bank of Nigeria Plc's response to EFCC dated 19th January, 2016.

The evidence of PW2 confirmed that as at 20th May, 2015 when the cheques were presented for payment, the account against which the cheques were drawn sufficiently funded and that even up to the time of giving evidence, the witness (an investigator with the EFCC) did not know why the cheques were returned unpaid.

PW3 is one **EMEKA UKPAI** another investigator with the EFCC. PW3 gave evidence on 13th April, 2018 to the effect that he was the team leader for the investigation of the petition in Exhibit A. This witness testified that the value of the facility granted by the Bank was **N894, 822,291.13**, a position which is in conflict with the evidence of PW2 who stated that the loan amount was **N100,000,000.00**. During his examination-in-chief, PW3 on his own expressed surprise why the cheques were returned unpaid despite the fact that the account was sufficiently funded at the time the cheques were presented.

The 1st and 4th Defendants in this case called only one witness, Ms. **EBUN AWOSIKA** – DW1 who is the general Counsel for the 4th Defendant. She gave her evidence-in-chief on 7th March, 2019 and was cross-examined on the same day. The following documents were tendered through this witness all of which were admitted in evidence as follows:

Exhibit DF1 – Facility agreement dated 15th March 2012 between Fidelity Bank Plc and the 3rd Defendant.

Exhibit DF2 – Facility agreement dated 20th March 2012 between Fidelity Bank Plc and the 3rd Defendant.

Exhibit DF3 – Letter of domiciliation dated 6th March 2012 written by the 4th Defendant to Fidelity Bank Plc.

Exhibit DF4 – Letter dated 19th May 2015 written by the 4th Defendant to Fidelity Bank Plc.

Exhibit DF5 – Letter dated 20th May 2015 by Fidelity Bank Plc to the 4th Defendant.

DW1's evidence was to the effect that the 4th Defendant has a subsisting contract with Shell Petroleum and Development Company ("SPDC" or "Shell") and that in carrying out that contract, the 4th Defendant subcontracted a portion of it to the 3rd Defendant. She testified further that for the 3rd Defendant to carry out the subcontract, it obtained a loan facility from Fidelity Bank Plc and that the 4th Defendant provided a corporate guarantee on the said loan. This witness testified further that in accordance with the facility agreements between the parties, the source of repayment for the loan was from the contract proceeds domiciled with Fidelity Bank Plc.

DW1 testified that at some point, the 4th Defendant started having issues with carrying out the contract and consequently was no longer being paid by Shell. That Fidelity Bank Plc however was getting impatient and was mounting serious pressure on the 4th Defendant to pay back the loan. DW1 led evidence to show that the 4th Defendant explained to Fidelity Bank Plc that it would seek an alternative source of repaying the loan which was a contract it has with a company called Afren Energy Resources Limited ("AFREN"). However, Fidelity Bank Plc insisted that the 4th Defendant should provide it with cheques so as to show the Central Bank of Nigeria that it was working towards getting the loan repaid. The 4th Defendant then provided Fidelity Bank Plc with ten different undated cheques in the sum of N10,000,000.00 (Ten Million Naira) each and told the bank that it will inform it as soon as it receives money from AFREN so that the bank can then date and present the cheques for payment.

DW1 also testified that subsequently after providing Fidelity Bank Plc with the cheques, AFREN went into administration and money consequently did not come from the AFREN contract as expected. Consequently, the 4th Defendant wrote to Fidelity Bank Plc by a letter dated 19th May, 2015 (Exhibit DF4), informing the bank of the issues that it was facing and asked the bank not to present the cheques for payment yet. She testified further that the bank received the said letter on the

19th May, 2015 and also acknowledged receipt of same in the bank's response/reply to the 4th Defendant dated 20th May, 2015 (Exhibit DF5). Despite the receipt of the letter on 19th May 2015 at 12:38pm while the rest were presented for payment on 21st May, 2015.

The 2nd Defendant in this suit, **MR. OMOTADE ABIMBOLA - DW2**, was called as a witness for the 2nd and 3rd Defendants. He gave evidence-in-chief on 3rd April, 2019.

He stated that Fidelity Bank Plc wrote a petition to the EFCC against Technix Energy Limited (3rd Defendant).

He stated that his name is not on the said petition. And that he knows Technix Energy Services Limited and OPI that was mentioned in the petition.

DW2 stated that OPI had a transaction with Shell and some portion of the work was sublet to Technix to execute and because of that an application was made to Fidelity Bank for a loan for the execution of the contract which loan was guaranteed by OPI.

He stated that Fidelity Bank took steps to recover the loan both at the Federal High Court and State High Court. That the matter is suit numbers FHC/C/CS/410/2006 and LD/ 1780CMW/2016.

DW2 stated that he did not issue any cheque to Fidelity Bank Plc. And that he or the 3rd Defendant are signatory to any account operated by the 4th Defendant at or with Union Bank Plc.

DW2 stated that Exhibits F-F9 are OPI cheques and that his first encounter with these cheques was at EFCC. He stated further that he was not signatory to these cheques or OPI. He stated further that he was not aware when the cheques were issued.

He stated that he did not have any relationship with the 4th Defendant.

DW2 was also cross-examined on the same day by both the prosecuting counsel and counsel for 1st & 4th Defendants before being discharged.

The case was adjourned for adoption of final written address.

The 2nd and 3rd Defendants filed a final address dated 24th April, 2018. Also filed is a Reply dated 13th September 2019 to the final address of the prosecution.

Issues raised for determination are thus:

- a. *Whether the 2nd and 3rd Defendants can validly be convicted of offence of issuance of dud cheque when cheques; the subject of the charge in the instant case were not issued by the 2nd and 3rd Defendants and or neither does the cheque belong to the 2nd and 3rd Defendants.*

- b. Whether having regard to the totality of the evidence adduced by the prosecution in this trial, the prosecution has proven the offence of issuance of du cheques in the instant case against the 2nd and 3rd Defendant.

Learned Counsel for 2nd and 3rd Defendants submitted that the defendants cannot be validly convicted for the offence of issuance of dud cheques as the cheques were not that of the 2nd and 3rd defendants and neither were the cheques issued by the 2nd and 3rd Defendants.

He stated that a careful perusal of the cheques marked Exhibit F to F9 will reveal that the cheques are instruments of the 4th Defendant which was admitted by both the prosecution and the defence witnesses.

He stated further that it is not in dispute that the 2nd Defendant is not a signatory to the account on which the exhibit F series was drawn.

Counsel submitted further that criminal liability is personal and the doctrine of vicarious liability cannot be imported into a criminal case except where there is conspiracy to commit crime. He stated further that this court has discharged the 2nd and 3rd Defendants of the offence of conspiracy in its earlier ruling on no case submission. And that in the absence of the offence of conspiracy, the 2nd and 3rd Defendants cannot be jointly liable for offence of issuance of dud cheques where the said cheques were neither issued nor belong to the 2nd and 3rd Defendants. He referred to the case of PML NIGERIA LTD VS. FRN (2017) LPELR-43480 (SC).

He submitted that while not conceding that the cheques are dud, the 2nd and 3rd Defendants cannot be responsible for the act of the 4th Defendant (if any).

He stated further that the fact that the 3rd Defendant applied for the loan that was guaranteed by the 4th Defendant leading to the issuance of the cheques is immaterial. And that these facts alone do not impute criminal liability on the 2nd and 3rd Defendants.

On the second issue raised, Counsel for 2nd and 3rd Defendants submitted that the intentment of the dishonored cheques offences Act is given in the long title and that the elements of the offence are:

- a. The person obtained credit for himself or any other person;
- b. The cheque was presented for payment within three months from the date of issue of the cheque;
- c. Upon presentation of the cheque it was dishonored on the ground that no funds or insufficient funds were standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn.

He cited the cases of ABRAHAM VS. FRN (2018) LPELR- 44136(CA) and STATE VS. UGOKWE (2018) LPELR- 46075(CA).

On the first point, counsel stated that it is not in doubt that the 2nd and 3rd Defendants obtained credit from Fidelity Bank to execute a contract sub-contract to it by the 4th Defendant and that the loan was guaranteed by the 4th Defendant. He stated further that from all the evidence given by the witnesses, especially PW1 the loan was obtained after obtaining the necessary approvals from the management of Fidelity Bank, the complainant. And that it was not obtained by fraud and neither was there any intention not to pay back the facility. He stated that it was basically a genuine contract with no criminal connotation whatsoever. He stated that there was no evidence before this court that the proceeds of the contract was diverted or that the 2nd and 3rd Defendants are in receipt of the contract sum and has refused to pay the facility.

On the second point, counsel stated that the prosecution has not been able to prove this element of the charge as the cheques in issue are not of the 2nd and 3rd Defendants. That Exhibit F series were not of the 2nd and 3rd Defendants neither were they issued by them.

He stated that at a look at these exhibits will reveal that the cheques in questions are that of the 4th Defendants which was never in contention as both prosecution and witnesses had admitted.

Counsel stated that it was in evidence that the 2nd Defendant is a director of the 4th defendant, the drawer of the cheques. He submitted that assuming without conceding that 2nd Defendant was a director at the material time, when a cheque is issued by a corporate body, all the directors are not jointly liable for any wrong that may arise from the issuance of the cheque. He stated further that mere being a director of a company which issued a cheque does render such a director guilty of dud cheque if and when the corporate body is found liable. He referred to Section 2 of the Dishonoured Cheques (Offences) Act.

He stated that from Section 2 of the Dishonoured Cheques (Offences) Act, the corporate body must first be proved to have committed the offence; the offence must be committed with the consent of or connivance of the director, etc; the offence is attributable to any neglect on the part of any director, etc.

He stated that from the evidence before the court, the prosecution has not proved that the 4th Defendant committed the offence of issuance of dud cheque. He stated further that there is no evidence before this Court to show that the 2nd Defendant consented to or connived with anyone to issue dud cheque (if any) to Fidelity Bank Plc.

He stated further that the 2nd Defendant is not a signatory to the account on which the cheques were drawn and is also not involved in the day to day running of the 4th Defendant. He stated that this fact was corroborated by the only witness called by the 1st & 4th Defendants.

He therefore submitted that having regard to the so called status of the 2nd Defendant as a director of 4th Defendant cannot work against his innocence, in the absence of evidence to discredit the unshaken testimony of DW1 and the evidence proffered by the 2nd Defendant himself.

On the last element of the offence, Counsel for Defendants aligned himself with the submission of 1st and 4th Defendants on this point and also stated that the prosecution failed to prove this element of the offence.

He stated that there are evidences that the account on which the cheques were drawn was in credit.

Counsel point to the case of OCEAN SECURITIES INT LTD VS. BALOGUN & ORS (2012) AFWLR (PART 643) 1880 AT 1906 PARAS B-D where the court held that the inscription DAR on a cheque by a bank on presentation does not mean that the cheque is dishonoured or that there is no money in the account of the drawer except there is concrete evidence to the effect that such inscription connotes such meaning or inference.

Counsel stated that given the facts of this case and the un-contradicted evidence of credit in the account on which the cheques were drawn, the prosecution needed to do more. That the prosecution ought to have called a witness from the 4th Defendant's banker-Union Bank of Nig Plc to state precisely what they meant when they wrote DAR on the cheques at the point of presentation. He cited the case of KOLAWOLE VS. STATE (2015) 8 NWLR (PART 1460) 134 AT 159-160 PARAS H-G and OCEAN SECURITIES INT LTD VS. BALOGUN & ORS (2012) LPELR- 9218(CA).

Counsel urged the court to hold that the prosecution has not proved this element of the alleged offence against any of the Defendants.

In conclusion he urged the court to discharge and acquit the 2nd and 3rd Defendants on account of failure of the prosecution to prove the ingredients of the offence charged against the 2nd & 3rd Defendants and lack evidence to link the 2nd and 3rd Defendants to the alleged and unsubstantiated crime.

1st and 4th Defendants filed final address 17th May, 2019. Also filed is a Reply dated 27th September, 2019 on point of law to the final address of prosecution.

Sole issue for determination is thus:

Whether the prosecution proved the offence of issuance of dud cheques beyond reasonable doubt as to warrant a conviction by a court of law.

Counsel for 1st & 4th Defendants Funke Agbor SAN, submitted that it is trite that the burden of proving the guilt of an accused person in a criminal trial is on the prosecution and that same must be discharged beyond reasonable doubt. She cited

the case of OLORUNFEMI VS. STATE (2018) LPELR-45894 PAGES 20-24 PARAGRAPHS C-D and Section 135(1) and (2) of the Evidence Act.

She stated further that before the prosecution can be said to have proved an alleged offence beyond reasonable doubt, the prosecution must prove every ingredient of the offence charged. And that where one of the ingredients of the offence is left out, it cannot be said that there had been proof beyond reasonable doubt. She cited the case of ALABI VS. STATE (1993) 7NWLR (PART 307) 511 AT 523.

She stated that where however there is a slightest doubt in the evidence so adduced by the prosecution as to the guilt of the accused, the doubt must be resolved in favour of the accused person or defendants. She cited the case of AFOLAHAN VS. STATE (2017) LPELR-43825 PAGES 29- 32 PARAGRAPHS F-A.

She stated that the 1st & 4th Defendants in this case were charged for issuance of dud cheque contrary to section 1(1) of the dishonoured cheque offences Act Cap D11, Laws of the Federation of Nigeria 2004.

She stated that from this section the following are the ingredients of the offence:

- a. That the accused person obtained credit for himself or any other person;
- b. That the cheque was presented for payment within three months from the date of the cheque ; and
- c. That upon presentation of the cheque it was dishonoured on the ground that no funds or insufficient funds were standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn.

Counsel stated that for a prosecution to prove the second element of the offence, it must first establish that the cheque carried a date inserted by the accused at the time same was issued. And that for the third ingredient of the offence, the prosecution must show to the satisfaction of the court that the cheque was presented but dishonoured on the ground of no funds or insufficient funds.

Learned Counsel 1st & 4th Defendants, Funke Agbor SAN stated that from Exhibits F-F9 the copies of the cheques that were allegedly dishonoured, they were all undated as at the time they were handed over to Fidelity Bank Plc. Counsel referred to Exhibit DF4 which shows that the cheques were undated.

She stated that the bank in its response to DF4 in DF5 did not deny the fact that Exhibits F-F9 were undated when the 4th Defendant handed them to the bank. She therefore submitted that it is the law that facts not disputed are deemed admitted. She referred to OGOLO VS. FUBARA (2003) 11NWLR (PART 831) and PALI VS. ADBU & ORS (2019) LPELR-46342 (SC). She also referred to the testimony of DW1.

She stated further that the testimony of DW1 was also corroborated by PW1 in the course of his cross examination.

accommodate the N100 Million as a whole and not N10 Million individually. When cheques are presented for payment and payment is refused the cheque is said to be dishonoured. See Section 47(1) Bills of Exchange Act. I also refer to the case of JIGNA FARMS LTD VS. UNION BANK OF NIG. PLC (2016) LPELR-40231 (CA). See also the case of STB VS. ANUMMU where it was held that:-

'Drawers confirmation required', 'drawer attention required' and 'refer to drawer' mean the same thing in banking operations, as they are warnings to dishonouring a cheque. A cheque is returned unpaid after being so marked. The connotation to a third party is that there is no fund or insufficient fund in the account to accommodate the dishonoured cheque'.

The 10 cheques subject matter of this case was issued by the 4th Defendant; this fact is not in issue however, the 4th Defendant a limited liability company although a legal person, is an artificial one which can only act through its human agent and officers. It has no mind of its own any more than it has a body of its own. Therefore, it can only act through its human agent and officers.

See the cases of WILLIAMS VS LSDPC (1978) 3 S.C. 8, TRENCO (NIG.) LTD VS. AFRICAN REAL ESTATE and INVESTMENT CO. LTD ABJ ANOR. (1978) ALL NLR 124.

In the case of BALTON (ENGINEERING) COMPANY LTD VS GRAHAM & SONS (1957) 1 QB, it was held that Directors and Managers represent the directing mind and will of the company and controls what it does.

In the case of AMINU MUSA OYENBANJI VS. THE STATE, which involved an allegation of stealing, the veil of corporation was lifted in the interest of justice and the Defendant who as the Managing Director of the company was convicted of stealing. Similarly, in the instant case, the 1st Defendant who stated he is the Finance Manager in OPI international Nig. Ltd admitted that the cheques were issued by OPI.

Section 2 of the Dishonoured Offences Act made provision for offences under the Act committed by a body corporate and stated thus:-

Offences by body corporate

'Where any offence under this Act by a body corporate is proved to have been committed with the consent of or connivance of, or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer, servant or agent of the body corporate (or any person purporting to act in any such capacity), he, as well as the body corporate, shall be deemed to be guilty of the offence and may be proceeded against and punished in the same manner as an individual.'

Counsel therefore submitted that the prosecution failed to prove that Exhibits F-F9 were returned unpaid on the ground that there was no funds or insufficient funds standing to the credit of the 4th Defendant at the time they were presented.

Counsel submitted that it is trite that where the prosecution fails to establish any of the elements of the offence charged, it means that the charge has not been proved beyond reasonable doubt and the accused is entitled to an acquittal. She referred to OLOJEDE VS. STATE (2018) LPELR-46148(CA).

Counsel submitted that based on the failure of the prosecution to establish the essential elements of the offence against the defendants, they are entitled to be discharged and acquitted on counts 4-13 of the information.

Counsel for 1st & 4th Defendants submitted that without prejudice to the above argument the facts and circumstances of this case as they relate to the issuance and the communication between the parties by Exhibits DF4 and DF5, there is no mens rea or any manifest intention to commit the offence charged. She stated that the law is that a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will. She cited Section 24 of the Criminal Code Act Cap C38, Vol. 4 Laws of the Federation of Nigeria 2010 and the case of AYO VS. STATE (2007) LPELR-8817(CA) AT PAGES 23-24 PARAGRAPHS G-C. She also referred to Exhibit DF4.

She submitted that based on the absence of the mens rea in regard to counts 4-13 of the information, the 1st and 4th Defendants ought to be discharged and acquitted on all the counts. She therefore urge the court to discharge the 1st and 4th Defendants on counts 4-13 of the information.

Prosecution filed their final address dated 24th June, 2019.

Sole issue raised for determination is thus:

'Whether from the totality of evidence, the prosecution has proved the offence of issuance of dishonoured cheques against the Defendants.'

Learned Counsel for prosecution, F. Ofoma Esq., submitted that the following elements needs to be prove for the offence of issuance of dishonoured cheques:

- a. That the accused person obtained credit for himself or any other person;
- b. That the cheque was presented for payment within three months from the date of the cheque ; and
- c. That upon presentation of the cheque it was dishonoured on the ground that no funds or insufficient funds were standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn.

Counsel stated that the 4th defendant issued a Union Bank Cheque of N100,000,000.000 (Exhibits F-F9) and upon presentation of the said cheques to the bank,

same was returned unpaid and this brings the 4th Defendant within ambit of Section 1(1) (a) of the dishonoured cheques offences Act.

Counsel submitted that Exhibit DF4 was an afterthought and was hurriedly prepared by the defendants to frustrate the petitioner from presenting the cheques for payment and thus making it a worthless document.

Counsel stated that from exhibit DF4, the court can see:

- a. That after three months from the date on the cheques, it automatically becomes invalid and worthless cheques/document.
- b. That no other cheques were issued to the petitioner to discountenance the ones already in their possession.
- c. That cheque is not issued in perpetuity.
- d. Till today the account of the defendants was never funded to meet its obligations with respect to cheques already issued.
- e. That the petitioner has every right to present cheques signed and dated accordingly issued to him for payments, on any date not later than 3 months from the date on the cheque.

Counsel submitted that from the evidence of prosecution witnesses, it is obvious that there were no funds in the 4th Defendant's account to fulfill its obligation with respect to the cheques already issued and as such as established all the ingredients of the offence of issuance of dishonoured cheques.

Prosecution counsel referred to these salient points:-

1. That the 4th Defendant admits signing and issuing the said cheques (Exhibit F-F9) to Fidelity Bank Plc.
2. That the cheques were issued to Fidelity Bank by OPI International Nigeria Limited on behalf of Technix Energy Services Limited.
3. That Technix was the beneficiary of the loan; One Hundred Million Naira (N100, 000,000) obtained from Fidelity Bank and not the beneficiary of the Cheques with Fidelity Bank.
4. That the cheques were post-dated cheques, issued to the petitioner to be cashed any date or presented for payment any date from 18th day of May, 2015 but not later than three months from the date on the cheques.
5. That the cheques were issued and signed.
6. That cheques are not issued in perpetuity.
7. No fund was standing on the account of the 4th defendant as at the time the cheques were presented.
8. That the 4th Defendant admitted under oath during cross examination, that from the date the cheques were issued till date, that there was no sufficient

fund in the account of the 4th Defendant to meet up with its representation to Fidelity.

9. That the 2nd to 4th Defendants cannot frustrate the petitioner after waiting for over four years, from the date of issuance sometimes in 2011 to be presented any date from 18th day of May, 2015, as was initially agreed by all the parties.
10. That Exhibit DF4 is inconsistency not legal accommodated or supported, not stating any date of the cheques already issued to be drawn/presented for payment as specified by Law.

He also referred to these points:-

1. These post-dated cheques were not issued ab initio by OPI International Nigeria Ltd to Fidelity Bank Plc on the ground that certain company has to pay them first, before Fidelity Bank Plc can present the cheques on the date written on it.
2. That a party guilty of a fundamental breach cannot rely on an exemption clause to escape liability.
3. These monies in question, with respect to the Loan to Technix Energy Services Ltd, consequent upon which the cheques were issued by OPI International Nigeria Ltd, are tax payers money and as such Public Funds.
4. That a certain company fails to pay OPI International Nigeria Ltd is not a defense known to Law with respect to issuance of a dud/dishonoured Cheque.
5. That a certain company fails to pay OPI International Nigeria Ltd is not a ground or right for the Defendants to hold onto public funds since 2011 till date.
6. That a Cheque is an instrument of instruction for immediate payment, upon presentation, not a payment upon fulfillment of a certain condition or requirement, to wit; a company or certain persons has to pay the issuer first before he can meet its obligation.
7. That the defendants cannot be allowed to hold onto public and tax payers funds, property of Fidelity Bank since 2011, simply because they quickly produced exhibit DF4 a day a day after the dates on the dishonoured cheques they issued.

Counsel submitted that the defendants had criminal and fraudulent antecedents.

By an information dated 31st March 2016, the four Defendants were jointly facing a one count of conspiracy to obtain credit by fraud contrary to Section 409 and 313(1)(a); one count of obtaining credit by fraud contrary to S313(1)(a); stealing contrary to Section 278(1)(b) and 285 of the Criminal Law of Lagos State 2011 and ten counts of issuance of dud cheque contrary to Section 1(1) of the Dishonoured Cheque (Offences) Act Laws, of the FRN 2004.

However after the close of the prosecution's case, the defendants filed a no case submission and by a ruling delivered on the 29th January 2019, the court held that the prosecution failed to prove the offences in counts 1, 2 and 3 of the information and discharged the defendants on the said counts, thus leaving counts 4- 13. The defendants were called upon for their defence in respect of these counts.

The prosecution's case against the Defendants is that a Petition was written to the EFCC by the Solicitors of Fidelity Bank PLC to investigate a case of financial misappropriation/diversion and issuance of dud cheques against the 3rd and 4th Defendants who are companies. They claimed that the 3rd Defendant obtained an invoice discounting facility from the bank valued at N200,000,000 which later enhanced to N1,500,000,000.00. That the 4th Defendant, OPI International Nigeria Ltd gave its corporate guarantee to the bank on the facility granted to 3rd Defendant Technix Energy Services Ltd and issued post-dated cheques with a value of N100,000,000.00k for the purpose of payment to the bank in fulfilment of its domiciliation payment undertaking and corporate guarantee in favour of Technix Energy Ltd.

That the bank complained that when the cheques which are all dated 18th May, 2015 were presented for payment, they were all returned unpaid. That OPI International Nigeria Ltd, the 4th Defendant had diverted the payments due to the bank into their use.

That based on the Petition, EFCC conducted an investigation and in the process the 1st and 2nd Defendants as Directors of the 3rd and 4th Defendants were invited for questioning and eventually charged to Court.

The Defendant's case is that the 1st and 2nd Defendant's statement to the EFCC which are tendered before this Court as Exhibits B, C and D, therein the 2nd Defendant stated that the 4th Defendant had a contract with SDPC awarded in 2011 and a portion of the contract was subcontracted to the 3rd Defendant. That the

Defendant admitted that a loan was received from Fidelity Bank and that 3rd Defendant has been unable to repay the loan due to difficulties in executing the contract and variations in the contract which delayed completion and problems with their financing bank First Bank Plc. The 1st Defendant also stated that they gave out post-dated cheques in anticipation of OPI returning back to work to complete the project. The Defendants denied diverting funds due to Fidelity Bank Plc into other use and further stated that they always had the intention of repaying the loan. That they wrote the bank not to present the cheques for payment and promised to forward a copy of the letter to the Commission as soon as possible. PW2 admitted during cross-examination that they do not have any evidence to show any account or venture belonging to the 2nd and 3rd Defendants into which any sum of money was diverted. Thus, the main issue for the prosecution is the issue of dud cheques.

The Defendants in counts 4-13 of the information, as charged with the offence of issuance of dud cheques contrary to Section 1(1) of the Dishonoured Cheque (offences) Act 2004. The Law is settled that in a case of dud cheques, the prosecution must establish the following ingredients:-

- a. That the Defendant obtained credit for himself or any other person;
- b. That the cheque was presented within three months of the date of issue of the cheque; and
- c. Upon presentation of the cheque it was dishonoured on the ground that no funds or insufficient funds were standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn.

The prosecution has presented 10 cheques for the sum of N10,000,000 each allegedly issued by the 4th Defendant OPI International Nigeria Ltd in favour of the complainant Fidelity Bank Plc/Technix. This fact is not denied by the 1st and 2nd Defendants in the statement to the police. The two Defendants are also the alter egos behind the 3rd and 4th Defendants' companies. It is further established by the prosecution that the cheques upon presentation were returned unpaid. The defence has submitted that the prosecution have failed to prove the above ingredients of the offence as the prosecution witnesses stated during cross-examination that at the time the cheques were presented there was N81, 000,000 in the said account with Union Bank but the cheques were returned unpaid and the prosecution gave no explanation for this except to say that the drawers attention was required. The Defendants alleged that they had written to Fidelity Bank not to present the cheques but they ignored the plea.

In the instant case, the 4th Defendant admitted signing and issuing the cheques EXH.F- F9 in favour of Fidelity Bank. The 3rd defendant was the beneficiary of the loan. The cheques were undated cheques which were presented for payment within three months of the time of issuance of the cheques. There were insufficient funds to cover the value of the 10 cheques being N100, 000,000. Thus the prosecution established a prima facie case against the 1st and 4th defendants as it was the 4th Defendant that issued the cheques signed by the 1st Defendant.

Section 135 (3) of the Evidence Act 2011 states that if the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on to the defendant. See also Section 136 of the Evidence Act which states thus:-

- (1) The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person, but the burden may in the course of a case be shifted from one side to the other.
- (2) In considering the amount of evidence necessary to shift the burden of proof regard shall be had by the court to the opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.

Having considered the facts as presented by the prosecution, it is the view of this court that the burden of proving reasonable doubt has shifted to the defence. Therefore, the duty of this court is to determine whether the defences raised by the defendants can avail them in this case.

Learned Counsel for the 1st and 4th defendants submitted that for the prosecution to prove the second ingredient of the offence of issuance of dishonoured cheque the prosecution must first establish that the cheque carried a date inserted by the accused person at the time same was issued. He submitted that all the cheques were undated as at the time they were handed over to Fidelity Bank PLC which is stated in Exh. DF4 being a letter dated 19th May, 2015 from the 4th Defendant to the bank prior to the bank's presentation of the cheques appealing to them to exercise further patience in the presentation of the cheques. That the bank acknowledged receipt of Exh. DF4 by its letter dated 20th May 2015 i.e. Exh.DF5 but still went ahead and presented the cheques for payment.

The defence also submitted that the inscription "DAR" written on the cheques (Exh.F-F9) by Union Bank of Nigeria Plc is not in any way proof that the cheques were dishonoured for lack of funds standing to the credit of the 4th defendant at the time. That the inscription DAR simply means drawer's attention required which could be for any reason. Learned defence counsel referred to the testimony of PW3 who investigated the matter and who stated that at the time the cheques were presented, the sum of N81, 000,000 was in the account. PW3 stated that they could not tell why the cheques were returned unpaid. PW3 also conceded that the account could have conveniently paid eight of the cheques.

The defence further drew the court's attention to the fact that EFCC had written to Union Bank to confirm why the cheques were returned unpaid i.e. Exh. H and the bank responded by Exh. H1 a letter dated 19th January 2016. Therein the bank stated that the cheques were returned because the drawer's attention was required.

In the light of the response of the bank the defence counsels are of the view that the prosecution ought to have done more by calling a witness from the bank to explain precisely what they meant by DAR written on the cheques when the account was in credit of N81,000,000.

I have carefully considered the arguments of the defence counsel as it relates to the 1st and 4th Defendants and the evidence before the court. DW1 Ebunolu Awosika the general counsel to the 4th Defendant testified before the court that 4th Defendant issued the cheques undated. This fact is confirmed by the letter dated 19th May, 2015 to Fidelity Bank (Exh.DF4) wherein the 4th Defendant appealed to the bank to exercise further patience as regards the presentation of the cheques and promised to inform them as soon as the account is credited with any funds. The bank by ExhDF5 indicated that they had prior to the receipt of the 4th Defendants letter presented the cheques issued to them for payment. This means that the bank lodged the cheques for payment before the 19th May. A close perusal of the said cheques shows that the cheques are all dated 18th May, 2015 and stamped by Fidelity Bank Plc. From Exh. G the 4th Defendants statement of account, there was a little over N81,000,000 standing to the account as at 20th May 2015 and there is no explanation why at least 8 of the cheques were not honoured for payment.

Thereafter, the same cheques were noted for the drawer's attention.

The point has to be made that when a person issues an undated cheque duly signed it gives the drawee discretion to present the cheque at anytime for payment. A dated cheque on the other hand indicates that you cannot present the cheque before

the date written on the space provided for the date on the cheque. It is clear that as at 19th May 2015 the 4th defendant knew that there was insufficient funds in their account hence the letter to the bank which the bank received on the 19th May but went ahead to present the cheques which are dated 18th May 2015 and duly stamped by the bank. By the 20th May Union Bank reacted to the said cheques and returned them unpaid.

DW1 testified that the company OPI Nigeria Ltd had taken over the outstanding liability of the 3rd Defendant in order to ensure an orderly repayment of the amounts outstanding but indicated that the company was having challenges servicing its obligations to the bank due to internal and external factors beyond the control of the company.

The Dishonoured Cheques Act provides only one defence to the offence and this is available under Section 1(3) of the Act which provides as follows;

'A person shall not be guilty of an offence under this section if he proves to the satisfaction of the court that when he issued the cheque he had reasonable grounds for believing, and did believe in fact that it would be honoured if presented for payment within the period specified in subsection (1) of this section.'

From this provision the defendant must have reasonably grounds for believing and did believe in fact that the cheque will be honoured if presented for payment.

DW1, the general counsel to OPI, the 4th Defendant in this case stated in her testimony before the court that the source of the payment of the facility is stated in Exhibit DF1 and DF2. Exhibit DF1 is an offer for N200 Million invoice discount facility and Exhibit DF2 is an offer for N500 Million. Looking through the two exhibits it is stated clearly that the repayment source is from contract proceed domiciled to Fidelity Bank Plc from OPI international Nigeria Ltd. Exhibit DF3 further confirms this fact. It is titled 'Domiciliation of Contract Payments for Technix Energy Services Limited. During DW2's examination-in-chief, she stated that they were unable to pay back the loans because they were having problems in concluding the contract. They offered Fidelity Bank another source, a contract with AFREM. However, AFREM money was not domiciled with Fidelity Bank but with Union Bank hence the issuance of Exhibit F to F9 of Union Bank cheques signed by the 4th Defendant. DW1 admitted they gave the cheques to Fidelity Bank and that they were undated. That Fidelity Bank came to disrupt their operation that they needed to give them something because CBN was auditing.

DW1 also stated that they were still expecting money from AFREM, the alternative contract however, there is no indication from Exhibit G the statement of account of OPI domiciled with Union Bank that they ever received any sum from this contract. Therefore, there is no ground of reasonable believe that the account would be funded from AFREM or any other source. There is nothing to show before this court that the 4th Defendant ever paid any contract proceed with the account domiciled with Fidelity Bank PLC and this is further emphasized in the suit filed by Fidelity Bank Plc against the 2nd Defendant; and the 4th Defendant (Exhibit DF6 and DF7), document tendered by the Defendant. Therein Fidelity Bank averred that the indebtedness of the Technix to it as at 20th October, 2015 was N1, 000, 170, 271. 34 (One Billion, One Hundred and Seventy Thousand, Two Hundred and Seventy-One Naira). The plaintiff claimed that the Defendant diverted payments to other banks to facilitate the loans to other banks. Therefore, the inference from this is that the 4th Defendant had no reasonable grounds to believe that the account domiciled in Fidelity Bank will be funded enough to cover their indebtedness to the bank thus should not have issued undated cheques to the bank. The Defendant created a situation of robbing Peter to pay Paul. In support of the court's view, I refer to the statement of 1st Defendant dated 8th October, 2015 wherein he stated that:

'However, due to the work not being completed on schedule, our bankers First Bank Plc decided to pay Technix subcontractors directly since Technix has failed to deliver as expected. Payment from Shell for work done were paid to our First Bank account. However, First Bank refused to release Technix portion of the payment because OPI is still owing First Bank'.

The 1st Defendant also indicated that even when Shell paid about \$21.5 Million, First Bank refused to release the portion due to Technix. That First Bank refused to pay OPI because OPI still owes First Bank. The refusal was based on the fact that OPI still owes First Bank.

The court's conclusion on this is that the defence raised by the Defendant cannot avail them.

In the instant case the inscription 'DAR' which means Drawer's Attention Required was written on all the cheques dated 18th May 2015. Thus, it is clear that the 10 cheques Exhibit F-F9 were treated as one therefore; upon presentation the sum in the accounts of the 4th Defendant could not cover the N100 Million. Hence the connotation is that there is no fund or insufficient funds in the account to

She stated that it is the law that a court is bound to accept uncontroverted evidence as the correct version of events and act upon it. She cited the case of IMO V. STATE (2001) 1 NWLR (PART 694) 314 AT PAGE 321.

She submitted that the prosecution has failed to prove that the Defendants issue Exhibits F-F9 with dates when they were handed over to Fidelity Bank Plc by the 4th Defendant. And that the prosecution has consequently failed to establish the second ingredient of the offence.

Counsel stated that there is no shred of evidence before this court that Exhibits F-F9 were dishonoured on the ground that no funds or insufficient funds were standing to the credit of the drawer of the cheque in the bank. That the only piece of evidence placed before the court is that Exhibit F-F9 was simply returned with the inscription DAR.

She referred to the case of OCEANIC SECURITIES INT. LTD VS. BALOGUN (2012) LPELR 9218 PP. 36-37 where the effects of inscription 'DAR' were held thus:

'Can it also be said that the inscription 'DAR' written on a cheque by a bank, on presentation, means that the cheque is dishonoured and that there is no money in the account of the drawer? That cannot be so, except there is concrete evidence to the effect that such inscription connotes such meaning or inference. Ordinarily, the inscription 'DAR' is an acronym usually interpreted to mean DRAWERS ATTENTION REQUIRED. Of course, the drawer's attention can be required by a bank for myriads of reasons, for example to explain some things before a cheque is cashed, mostly to protect the interest of the customer (drawer) and the Bank. It would therefore be wrong for the drawer to run to town with the evil news that the cheque has been dishonoured simply because the cashier or accountant of the bank has written 'DAR' on the cheque.'

Counsel submitted that on the authority of OCEANIC SECURITIES INT. LTD VS. BALOGUN, the inscription 'DAR' written on Exhibits F-F9 is not in any way proof that Exhibits F-F9 were dishonoured because that there was no funds or insufficient funds standing to the credit of the 4th Defendant at the time. And that the inscription 'DAR' simply means that drawer's attention is required and that the 4th Defendant's attention could have been required for any reason.

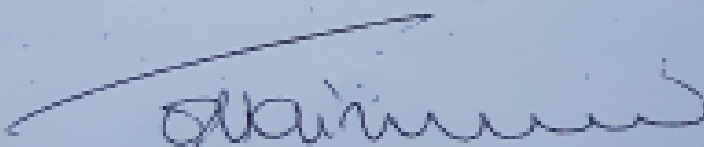
She stated that there is no evidence before this court to show that Exhibits F-F9 were returned on the ground that there were no funds or insufficient funds standing to the credit of the 4th Defendant. But that the evidence elicited from PW2 and PW3 shows that the 4th Defendant's account was funded at the time Exhibits F-F9 were presented for payment.

Therefore, in this case, the 1st Defendant and 4th Defendant are jointly liable for issuing cheques knowing there was insufficient funds in the account and up till date that money has not been paid and the Defendants failed to provide any evidence of their belief that they were expecting or likely to receive funds to cover the debt.

In the light of the foregoing I am satisfied that the Prosecution as proved the offence alleged against the 1st and 4th Defendants.

In respect of the 2nd and 3rd Defendant, there is ample evidence to show they never issued any cheques in favour of Fidelity Bank. DW2 testified under examination in chief that the 3rd Defendant never issued any cheque to Fidelity nor are they signatories to any account operated by the 4th Defendant at or with Union Bank Plc. Also, DW1 who testified on behalf of the 1st and 4th Defendant stated that the account on which the cheques were drawn is solely operated by the 4th Defendant as its corporate account. And that the 2nd Defendant did not play any role in the issuance of the cheques nor does he play any role in the day to day running of the 4th Defendant. These facts were not controverted under cross-examination: Technix was the one that was indebted to Fidelity Bank but OPI signed the dishonoured cheques. It is the finding of this court that the 2nd Defendant and 3rd Defendant are not guilty of the offence under the Dishonoured Cheque Act and I so hold. The 1st and 4th Defendants are guilty of the offences under Count 4-13 of the information.

This is the judgment of the court.



HON. JUSTICE O.A. TAIWO (MRS.)

JUDGE

6/11/19

ALLOCUTUS

GABRIEL UDUAK:- We pray this Honourable Court to temper justice with mercy.

The 1st and 4th Defendants did not incur liability and they only gave protection to the party which was in financial distress. There is no criminal record on the part of

1st and 4th Defendants. Also the Court is urged to take cognizance of the economic condition of the country which is affecting the performance of contracts. We appeal to the court to grant an option of fine. The 1st Defendant is just an employee of the 4th Defendant. He is a young father with two children and a wife. He is the breadwinner of his family. We urge the court to grant an option of fine.

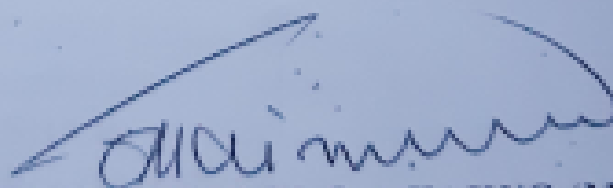
COURT: - I have carefully considered the allocutus of Learned Counsel for the 1st and 4th Defendants and I am inclined to agree that it is unfortunate that the 1st & 4th Defendants would have to incur liability for the indebtedness of the 3rd Defendant who benefited from the loan. However, the issue of issuance of dud cheques has become very rampant and the drawer is often in the habit of rushing to the drawee telling him/her not to present the cheques.

There is no doubt that the offence of issuance of dud cheques emanated from a contractual relationship between the 4th Defendant and Fidelity Bank, therefore I am inclined to exercise the courts discretion under Section 316 (1) Administration of Criminal Justice Law 2015 which allows the court to impose a fine in lieu of imprisonment.

The 1st Defendant is an employee of the company and did not issue a personal cheque but was aware that the cheques were issued. The real culprit here is the 4th Defendant.

I hereby sentence the 1st Defendant to 1 year imprisonment or a fine of N250, 000. By virtue of Section 1 (I) (b) (II) a body corporate shall be sentenced to a fine of not less than N5, 000. I therefore sentence the 4th Defendant to a fine of N500, 000 only.

The 1st Defendant is to be remanded at Ikoyi Correctional Centre if the fine is not paid immediately.



HON. JUSTICE O.A TAIWO (MRS.)

JUDGE

6/11/19.

Defendants present.

Gabriel Uduak and Nosike Omaliko for 1st & 4th Defendants

R.U. Augustine and John Paul Okoli for 2nd & 3rd Defendants.