**MAINSTREET BANK REGISTRARS LIMITED**

**V**

**MR. UDOH FRIDAY ETIM**

COURT OF APPEAL (LAGOS DIVISION)

9TH DAY OF MARCH 2016

CA/L/1255/2014

**LEX (2016) - CA/L/1255/2014**

OTHER CITATIONS

2PLR/2017/196 (CA)

**BEFORE THEIR LORDSHIP**

JIMI OLUKAYODE BADA, JCA (Presided)

ABUBAKAR D. YAHAYA, JCA (Read the Lead Judgment)

JOSEPH SHAGBAOR IKYEGH, JCA

ONYEKACHI A. OTISI, JCA

BOLOUKOROMO MOSES UGO, JCA

**BETWEEN**

MAINSTREET BANK REGIESTRARS LIMITED – Appellant

AND

MR. UDOH FRIDAY ETIM – Respondent

**ORIGINATING COURT**

NATIONAL INDUSTRIAL COURT, LAGOS JUDICIAL DIVISION

**REPRESENTATION/LAWYERS**

CHARLES D. MEKWUNYE, Esq. - for the Appellant.

PAUL I. OKOH, Esq. - for the Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

CONSTITUTIONAL LAW - JUDICIAL POWERS - SECTION 295 (2) OF THE 199 CONSTITUTION:- Case stated - Questions therein - Conditions precedent to trial court referring to Court of Appeal for determination.

CONSTITUTIONAL LAW - JUDICIAL POWERS - SECTION 295 (2) OF THE 199 CONSTITUTION:- Court of Appeal - Questions referred to it by counsel to a party – Whether may determine and give decision thereon.

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - COURT OF APPEAL:- Questions referred to by counsel to party - Whether may determine and give decision thereupon - Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 295 (2) considered

APPEAL - QUESTIONS IN CASE STATED:- Conditions precedent to trial court referring to Court of Appeal for determination - Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 295 (2) considered

APPEAL - RATIO DECIDENDI AND OBITER DICTUM:– Distinction between - Appeal - Mandatoriness of challenging ratio decidendi

APPEAL - WRONGFUL ADMISSION OF EVIDENCE - Right of party to appeal against or seek expulsion of - Court - Power of to suo motu do - Whether fatal

COURT - ACADEMIC EXERCISE - Attitude of courts thereto.

COURT - COURT OF APPEAL - Questions referred to by counsel to party - Whether may determine and give decision thereupon - Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 295 (2) considered

EVIDENCE - WRONGFUL ADMISSION OF EVIDENCE - Right of party to appeal against or seek expulsion of - Court - Power of to sou motu do - Whether fatal

JUDGMENT AND ORDERS - RATIO DECIDENDI AND OBITER DICTUM - Distinction between - Appeal - Mandatoriness of challenging ratio decidendi

ACTION - QUESTIONS IN CASE STATED - CONDITIONS PRECEDENT TO TRIAL COURT REFERRING TO COURT OF APPEAL FOR DETERMINATION:- Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 295 (2)

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The respondent commenced an action in the National Industrial Court, Lagos State against the appellant. The appellant filed its defence and a motion praying for order striking out the action. The trial court dismissed same.

On the adjourned date, the appellant and his counsel were absent at the hearing but sent a letter seeking an adjournment on ground that a letter had been written to the president of the National Industrial Court to transfer the case from the trial court. The court held the view that since the president of the National Industrial Court did not act to transfer the case, the counsel had no right to assume and stay away from proceeding. It refused the application for adjournment and hearing commenced. The respondent gave evidence and tendered several documents which were admitted without objection.

At the subsequent hearing of the case, the appellant’s counsel filed a motion to enable him object to some of the documents admitted. The application was refused. Appellant’s counsel thereafter moved a motion for a case to be stated to the Court of Appeal for answers to be provided in respect of questions stated in the motion paper. The respondent objected to the application.

The trial court refused the application which grieved the appellant and caused it to file an appeal to the Court of Appeal.

**DECISION(S) APPEALED AGAINST**

The trial Court made a Ruling, refusing the Appellant’s application. Dissatisfied, the Appellant appealed to the Court of Appeal.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

(a) Whether the learned trial judge of the National Industrial Court erred in law and acted without jurisdiction, thereby occasioning a miscarriage of justice when he unconstitutionally refused to state a case for the decision of the Court of Appeal on the substantial question of law on whether he can depart from the Evidence Act as provided under section 12 (2) of the National Industrial Court Act, 2006 in the light of the provision of section 6 (3) (5) (cc), section 254 (a) and (d) (1) and section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) as required by section 295 (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (distilled from ground three);

(b) Whether the learned trial judge of the National Industrial Court of Nigeria erred in law when he held that no constitutional question ever arose in any of its proceedings in the suit to warrant stating a case for the opinion of the Court of Appeal and thereby occasioned a miscarriage of justice. (Distilled from ground one);

(c) Whether the National Industrial Court has jurisdiction to admit or exclude any evidence (documentary or oral) contrary of the rights and obligations of the defendant guaranteed under section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). (Distilled from ground two)

*BY RESPONDENT:*

Whether the apparent conflict on the application of the provisions of the Evidence Act, 2011 and section 12 (2) (a) and (b) of the National Industrial Court Act, 2006, constitutes a substantial question deserving of a referral to the Court of Appeal.

*AS ADOPTED BY COURT:*

[The Court adopted the issues formulated by the Appellant].

**MAIN JUDGMENT**

YAHAYA JCA (DELIVERING THE LEAD JUDGMENT):

This appeal is interlocutory, arising from the ruling of the National Industrial Court, Lagos division, delivered on 26 November 2014, in suit No. NICN/LA/513/2013.

The respondent herein, was the claimant at the National Industrial Court, and the originating processes were filed on 26 September 2013. The appellant herein, was the respondent and it filed its defence to the claim. Thereafter, the then claimant filed a reply. As the defendant was opposed to it, he filed a motion dated 24 January 2014 to strike it out. He argued the motion on 5 March 2014 (page 237 of the record). The court on the same date, refused the application, holding that it was competent. The case was then adjourned to 27 May 2014, for hearing, with consent of both counsel. On the resumed date of 27 May 2014 for hearing, the defendant and his counsel were both absent, but a letter was written to the court praying for adjournment as counsel for the defendant, had written to the President of the National Industrial Court to transfer that case and others, away from the judge. Since the President of the National Industrial Court did not act to transfer the case, the presiding judge held the view that counsel had no right to assume and then stay away without attending the hearing.

He therefore refused the application for adjournment and hearing commenced. The claimant gave evidence and several documents were tendered and admitted as exhibits without objections, in the absence of the defendant and his counsel.

Then on 17 July 2014, learned counsel for the defendant, argued a motion, dated 15 July 2014, but filed on 17 July 2014.

Counsel informed the court, that the motion is: to enable us object to some of the documents admitted on 27 May 2014, in the absence of defendant counsel.”

After taking arguments from both counsel, the trial National Industrial Court, on the same day, refused the application. It observed that “all the much needed right to fair hearing,” had been extended to the defendant, but his counsel stayed away. If the application was granted, it would “draw back the hands of the clock and wheel of progress.” The case then continued.

On 26 November 2014, learned counsel for the appellant moved a motion dated 27 August 2014, for a case to be stated to the Court of Appeal for answers to be provided in respect of questions 1(a) - (f) in the motion paper. The claimant objected to the application. The trial court refused the application to make a case stated to the Court of Appeal. This is what led to this appeal.

The appellant’s brief, settled by learned counsel, Dr. C. D. Mekwunye, was filed on 14 April 2015, but deemed filed on 28 May 2015. A reply brief was filed on 22 May 2015, but was deemed properly filed on 28 May 2015. The respondent’s brief was filed on 12 May 2015, by learned counsel Paul I. Okoh, but was deemed properly filed on 28 May 2015.

In the appellant’s brief, the following three issues were submitted for determination:

(a) Whether the learned trial judge of the National Industrial Court erred in law and acted without jurisdiction, thereby occasioning a miscarriage of justice when he unconstitutionally refused to state a case for the decision of the Court of Appeal on the substantial question of law on whether he can depart from the Evidence Act as provided under section 12 (2) of the National Industrial Court Act, 2006 in the light of the provision of section 6 (3) (5) (cc), section 254 (a) and (d) (1) and section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) as required by section 295 (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (distilled from ground three);

(b) Whether the learned trial judge of the National Industrial Court of Nigeria erred in law when he held that no constitutional question ever arose in any of its proceedings in the suit to warrant stating a case for the opinion of the Court of Appeal and thereby occasioned a miscarriage of justice. (Distilled from ground one);

(c) Whether the National Industrial Court has jurisdiction to admit or exclude any evidence (documentary or oral) contrary of the rights and obligations of the defendant guaranteed under section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). (Distilled from ground two)

The respondent submitted only one issue for determination, and it is:

Whether the apparent conflict on the application of the provisions of the Evidence Act, 2011 and section 12 (2) (a) and (b) of the National Industrial Court Act, 2006, constitutes a substantial question deserving of a referral to the Court of Appeal.

I shall utilise the issues identified by the appellant in deciding this appeal.

Issues A and B together:

(a) Whether the learned trial judge of the National Industrial Court erred in law and acted without jurisdiction, thereby occasioning a miscarriage of justice when he unconstitutionally refused to state a case for the decision of the Court of Appeal on the substantial question of law on whether he can depart from the Evidence Act as provided under section 12 (2) of the National Industrial Court Act, 2006 in the light of the provision of section 6(3) (5) (cc), section 254(a) and (d) (1) and section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) as required by section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (distilled from ground three);

(b) Whether the learned trial judge of the National Industrial Court of Nigeria erred in law when he held that no constitutional question ever arose in any of its proceedings in the suit to warrant stating a case for the opinion of the Court of Appeal and thereby occasioned a miscarriage of justice. (distilled from ground one);

Learned counsel for the appellant referred to section 295 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) on the requirements for stating a case to an appellate court, the case of Federal Republic of Nigeria v. Ifegwu (2003) FWLR (Pt. 167) 703, (2003) 15 NWLR (Pt. 842) 113 at page 150, (2003) 45 WRN 27 on the conditions precedent for a case to be stated, and also the cases of Rossek & Ors. v. African Continental Bank Ltd & 2 Ors. (1993) 8 NWLR (Pt. 312) 382, (1993) 10 SCNJ 20, (1993) LPELR - 2955; Industrial and Commercial Service (Nig.) Ltd v. Balton BU (2002) LPELR - 7108 and Obi v. Independent National Electoral Commission (2007) All FWLR (Pt. 378) 1116, (2007) 11 NWLR (Pt. 1046) 560 at page 488. Counsel then argued that the requirements for a case stated had been met in this instance, since the trial court had relied on section 12 (2) (b) of the National Industrial Court Act, 2006, to hold that the documents admitted are admissible. He opined that such reliance amounts to applying and interpreting “the constitutional and statutory provisions wrongly,” as sections 254, 36(1) and 6 (3) (5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) had been put in issue. Section 12 (2) (b) of the National Industrial Court Act, 2006, as it relates to the applicability of the Evidence Act, 2011 had therefore arisen in the course of proceedings and it must be considered along with other sections of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) aforementioned on issue of admissibility. Since neither the Supreme Court nor the Court of Appeal had interpreted section 12 (2) of the National Industrial Court Act, 2006, it has become a substantial issue of law requiring the question to be referred to this court, he argued.

He emphasised, by referring to several dictionaries and Rossek v. A. C. B. (supra), that the ruling of the trial court which puts section 12 (2) of the National Industrial Court Act, 2006 in issue, arose in the proceedings.

Counsel argued also, that since sections 254 (d) (1) and 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) had been argued comprehensively in the written address in support of the motion of 15 July 2014, and since the learned judge had refused to consider the written address, the right of fair hearing guaranteed the appellant had been breached.

It was submitted further, that the trial court ought to have made the reference on the question formulated by the appellant, since a request was made. The court was only required to consider whether there was a substantial question of law to be decided and not that no question arose relating to the interpretation or application of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), requiring a reference to the Court of Appeal.

He referred to Coca-cola (Nig.) Ltd v. Akinsanya (2013) 1 ACELR 28, (2013) 18 NWLR (Pt. 1386) 255 at page 371; Bamaiyi v. Attorney-General, Federation (2001) FWLR (Pt. 64) 344, (2001) 12 NWLR (Pt. 727) 468, (2001) LPELR - 730 (SC) 14 and National Union of Electricity Employees v. B.P.E. (2010) All FWLR (Pt. 525) 201, (2010) 7 NWLR (Pt.1194) 538. It was also the submission of counsel for the appellant, that fair hearing is inherent in any judicial proceedings and once a court delivers a decision admitting inadmissible evidence, contrary to the Evidence Act, issues of interpretation and application of constitutional provisions guaranteeing fair hearing are triggered.

He then referred to cases on fair hearing and the effects on the trial, arguing extensively, on why the National Industrial Court cannot depart from the provisions of the Evidence Act, 2011. All the submissions in that respect, are geared towards this court accepting that the trial court was wrong and we should hold that it is bound at all times, by the provisions of the Evidence Act, 2011, thus, setting down for consideration, and considering the questions referred by a party (the appellant) not the court, and providing the answers to the question.

Learned counsel for the appellant emphasized the error by the trial court in stating that no question arose for interpretation or application of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), relying heavily on Coca-cola (Nig.) Ltd v. Akinsanya (supra) at page 371, paragraphs C - E. I have also studied the reply filed by the appellant and it is virtually a repetition of the arguments and submissions made in the appellant’s brief. It re-captured the points made in the respondent’s brief and re-stated the position as found in the main brief. On the point made by the respondent that it is not in every situation that a court is enjoined to refer a case to the appellate when requested by a party, counsel for the appellant placed heavy reliance on the dictum of Aderemi JSC in Abubakar v. AttorneyGeneral, Federation (2007) 6 NWLR (Pt. 1031) 626, where he said, it was held that it is mandatory once any of the parties so requests.

In arguing to the contrary, learned counsel for the respondent submitted that even if a party requests a court to make a reference to the appellate court, the judge has to determine whether the question is substantial or not - Coca-cola (Nig.) Ltd v. Akinsanya (supra) at page 360. Not only does the court need to decide the point, but the issue must also have arisen from the proceedings before that court, he said - Bamaiyi v. Attorney-General, Federation (2001) FWLR (Pt. 64) 344, (2001) 12 NWLR (Pt. 727) 468 at page 489, (2001) LPELR - 730 (SC) 14. Counsel then argued that in the instant appeal, no substantial question of law deserving a reference had arisen, and that the questions being referred to this court, did not infact arise from the proceedings, as no section of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) has arisen for interpretation or application. All that is involved, is an indirect request to this court, to construe the provision of the Evidence Act, 2011 and section 12 (2) (b) of the National Industrial Court Act, 2006 and declare which is superior.

Learned counsel for the respondent then enumerated three conditions which he said must co-exist before a case can be stated to the Court of Appeal. He referred to First Bank of Nigeria Plc. v. Ladgroup Ltd (2004) 14 NWLR (Pt. 893) 443, (2004) 18 WRN 100; Obi v. Independent National Electoral Commission (2007) All FWLR (Pt. 378) 1116, (2007) 11 NWLR (Pt. 1046) 560 and Gamioba v. Esezi II (1961) All NLR 608, (1961) 2 SCNLR 237.

Now, it is important to observe and remember, that the trial court did not make any reference to this court. The questions we are asked to consider and give answers to, are questions that were formulated by counsel for the appellant, not the court. Section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides:

“Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Federal High Court or the National Industrial Court or a High Court, and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Court of Appeal; and where any question is referred in pursuance of this subsection, the court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.”

From the above provision, it is clear that the jurisdiction of this court, is to give its decision “upon the question’ so referred by the trial court. I do not see any provision, permitting this court, to entertain and give decision upon the question referred to it by a counsel to a party. I raise this because of the prayer in the appellant’s brief, urging us to: “set down for consideration and consider the questions sought to be referred as case stated and to provide the interpretation or answers to the case stated and to declare section 12 (2) of the National Industrial Court Act, 2006, unconstitutional.”

In other words, it is the questions formulated by counsel for the appellant that we should accept, consider and answer. When this appeal was being argued, and this issue put, learned counsel for the appellant was sceptic, as to the prayers. Be that as it may, I shall proceed to the merit of the appeal. The following, are the questions proposed by counsel for the appellant, for consideration by this court:

(a) Whether the National Industrial Court of Nigeria having been created and made a superior court of records by virtue of the provisions of section 6(3) (5) (cc) and section 254(a) and (d) (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) can operate as an inferior court to which the Evidence Act, 2011 do not mandatorily apply?

(b) Whether the National Industrial Court of Nigeria having been accorded with the same powers as that of the High Courts in Nigeria by virtue of section 6(3) (5) (cc) and section 254 (a) and (d) (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the National Industrial Court of Nigeria can in any of its judicial proceedings rely on the provisions of section 12 (2) (b) of the National Industrial Court (NIC) Act, 2006 to depart from the provisions of the Evidence Act, 2011 which mandatorily binds all superior courts of records in Nigeria thereby making the National Industrial Court of Nigeria more powerful than the other High Courts in Nigeria.

(c) Whether in the determination of the civil rights and obligations of the defendant guaranteed under section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the defendant is not entitled to have its civil rights and obligations determined in the National Industrial Court of Nigeria in accordance with the provisions of the Evidence Act, 2011?

(d) Whether the powers granted to the National Industrial Court by virtue of the provisions of section 12 (2) (b) of the National Industrial Court Act, 2006, to depart from the provisions of the Evidence Act, 2011 is not inconsistent with the provisions of section 6 (3) (5) (cc), section 254 (a) and (d) (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 252 and section 256 of the Evidence Act, 2011 and therefore unconstitutional in view of the provisions of the 2nd Schedule, Part 1, Item 23 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)?

(e) Whether the National Industrial Court’s reliance on the provisions of section 12 (2) (b) of the National Industrial Court Act, 2006, in the admission and/or exclusion of documentary evidence or other exercise of discretion in the admission or exclusion of evidence which should not be admitted and/or excluded under the provisions of the Evidence Act, 2011 in the determination of the civil rights and obligations of the defendant will not amount to a breach of the fair hearing right of the defendant guaranteed under the provisions of section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

(f) Whether the National Industrial Court’s reliance on the provisions of section 12 (2) (b) of the National Industrial Court Act, 2006, or on Order 26 rule 13 of the National Industrial Court Rules, 2007 (as amended) in adopting rules of civil procedure which could not have been adopted by the Federal High Court, or any State High Court in the determination of the civil rights and obligations of the defendant is not unconstitutional in view of the provisions of section 6(3) (5) (cc), section 254 (a) and (d) (1) and section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)? (See pages 177 - 210 of the records).

By the provision of section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), stated above, there are conditions which need to be satisfied before a reference can be made by a High Court or the National Industrial Court, in a case stated, for the consideration of the Court of Appeal. These conditions which must co-exist, are:

(1) The question to be referred to the Court of Appeal must be in respect of the interpretation or application of the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

(2) The constitutional question must have arisen in the proceedings relating to the issue of the reference.

(3) The constitutional question for reference, must be a substantial question of law; the substantiality of which is the duty of the court making the reference, to decide.

(4) The court making the reference to the appellate court, must refrain from giving its opinion on the question under reference. See Abubakar v. Attorney-General, Federation (2007) 6 NWLR (Pt. 1031) 626 at pages 639 and 645; Bamaiyi v. Attorney-General, Federation (supra); Gamioba v. Esezi II (supra); Federal Republic of Nigeria v. Ifegwu (2003) FWLR (Pt. 167) 703, (2003) 15 NWLR (Pt. 842) 113, (2003) 45 WRN 27; Audu v. Attorney-General of the Federation (2013) All FWLR (Pt. 667) 607, (2013) 8 NWLR (Pt. 1355) 175 at page 199 and African Newspaper (Nig.) Ltd v Federal Republic of Nigeria (1985) 2 NWLR (Pt. 6) 137.

The first condition, which is the foundation of making a reference to the Court of Appeal, is that the question must be as to the interpretation or application of the provision of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The Supreme Court per Aderemi JSC in Abubakar v. Audu (supra) at pages 644 - 645 infact emphasised this by holding that this condition is indeed:

“... the fundamental basis upon which such a reference must be predicated.”

In the instant appeal, the motion filed on 15 July 2014, (page 144) of the record, was principally for leave to object to the admissibility of some named documents, which had infact already been admitted in evidence. The motion was brought pursuant to sections 85 - 89 of the Evidence Act, 2011; the National Industrial Court Rules and section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). There was no issue for the interpretation of section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) at that stage. No section of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) was raised for any interpretation or application, being a substantial question of law. Section 12 (2) (b) of the National Industrial Court Act, 2006 was never mentioned therein. Even in the address of counsel, in support of the motion, section 12 (2) (b) of the National Industrial Court Act was never canvassed or referred to let alone, that it was in conflict with any named section of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), for a substantial question to arise. There was thus no constitutional question arising for interpretation or application therein. The ruling of the trial court (page 248) of the record is:

“I hold that the documents admitted in this case on 27 May 2014 are admissible.”

No section of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) was referred to in the ruling. The statement as to section 12 (2) (b) of the National Industrial Court Act, 2006 only came in as obiter, not the ratio decidendi of the decision to admit the documents or the refusal to give leave to object to their admissibility. No ground of appeal can arise from an obiter dictum of the court. There is a distinction between ratio decidendi and obiter dictum of a case. The ratio decidendi, is the principle, or the ground upon which the court based its decision on the point in issue, but obiter is a passing remark which is not necessary in determining the issue in controversy. See Dairo v. U.B.N. Plc (2007) All FWLR (Pt. 392) 1846, (2007) 16 NWLR (Pt. 1059) 99; A.I.C. Ltd v. N.N.P.C. (2005) All FWLR (Pt. 270) 1945, (2005) 1 NWLR (Pt. 937) 563 and Afro-Continental (Nig.) Ltd v. Ayantuyi Traders Ltd (1981) 5 SC 81. A complaint can only arise from a ratio of the case, not obiter. An issue for determination must arise from the ground of appeal attacking the ratio of the judgment. So here, when the issue was raised from a ground of appeal affecting the obiter of the judgment, not its ratio, it was incompetent - Amuzie v. Asonye (2011) 6 NWLR (Pt. 1242) 19 at page 36.

So when the appellant filed the motion on 27 August 2014, for a reference (page 177 of the record), the trial judge held that they did not arise from the proceedings as no section of the constitution was referred to, in line with counsel for the respondent Mr. Okoh, who in opposing the application, also stated that “there is no constitutional provision being sought for interpretation here.” The judge held: “No section has arisen or any controversy arose relating to the interpretation or application of any section of the Constitution. No such issues have been raised before the ... learned counsel ... could not point to any specific section of the Constitution that arose in that ruling ...” (pages 253 - 254 of the record)

The trial judge was right as he was to consider the proceedings in tendering the documents and the proceedings of the application for leave to object to the admissibility of the documents, being the relevant issues at stake, to determine if there was a substantial question of the interpretation or application of the Constitution arising from the proceedings. He determined there was none.

I am entirely in agreement with counsel for the respondent that all the appellant has succeeded in doing, is raising the applicability of section 12 (2) (b) of the National Industrial Court Act, 2006, in the face of the Evidence Act, 2011, and say which is the governing provision. Not only was this not the ratio of the decision to admit the documents and so not arising from the proceedings, it is not a constitutional point of reference, going by section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), since no section of the Constitution was called to question. All the references to sections 36, 6, 254 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) were nothing but a red herring, introduced to enable this court to assume jurisdiction and act. The claimant never referred to the Constitution and no section arose for interpretation or application. The defendant/respondent did not do so. The trial court did not do so. The issue cannot drop from the sky, as such.

The appellant has also raised the issue of fair hearing. Surely, if the appellant was not given fair hearing when the documents were admitted, it is a ground of appeal to be determined by the court, and not a ground of constitutional reference to this court!

At any rate, as stated by the Supreme Court in Audu v. Attorney-General of the Federation (supra) at page 200, paragraphs D -E, the civil rights and obligations of the parties are not considered or determined as:

“The issue of denial of fair hearing does not arise and cannot arise.”

It is my considered opinion, that from the facts gleaned in this appeal, no constitutional provision had arisen for interpretation or application. Whatever arose, was not such that section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) can be brought to play. The constitutional provision being sacrosanct, the basis had been knocked off the bottom. There was nothing constitutional about the admission of the documents. No section of the Constitution was relied upon, let alone show that the section needs a special reference to the Court of Appeal for an answer. The trial court never relied upon any section of the Constitution to admit the document, and this is the crux of the matter and the real issue in controversy.

Further, even if it is to be argued, that a constitutional provision had arisen, the obligation to refer it to the Court of Appeal arises only after the judge is satisfied that there is a substantial question requiring the answer of the Court of Appeal. If he is not so satisfied, a fundamental condition has failed and he is then not compelled to make the reference. In the instant appeal, the trial judge had held that no section of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) had arisen for interpretation or application. Learned counsel for the appellant had attacked this. It is legalese, to argue as the counsel for the appellant had done, that a judge is only to decide whether a question for reference is substantial or not, and not whether there was in fact a question arising. This is because the constitutional question must first arise, before it can be determined whether it is substantial or not. If no constitutional question has arisen, the issue of its being substantial or not, is superfluous and does not at all arise. At any rate, the position taken by counsel for the appellant, shows that he is aware of the law, that it is not mandatory for a judge to make a reference just on the asking, by any of the parties.

He has the right, nay the duty, to first determine whether the constitutional question is substantial or not. In the instant appeal, the trial judge, having come to the conclusion that no constitutional question had arisen for interpretation or application, he was not bound to make the reference. We agree with his stand.

As has been stated, wrongful admission of evidence is an appealable ground, even as an interlocutory appeal. An aggrieved party could invite the court in an address at the end of the trial, to expunge the evidence or discountenance it in its judgment. That right is there. The court itself may, when writing its judgment, expunge an in-admissible evidence it inadvertently admitted, even without a prompting by any of the parties. That is not a breach of fair hearing. At any rate, it is not every wrong admission of evidence that is fatal to a case. The court must have relied upon it in arriving at its decision. If it did not, the wrong admission of the evidence would not affect the outcome of the case.

Furthermore, to come to the appellate court on a case stated, when an opinion had already been given by the lower court on the issue, is wrong. This is because it is a condition precedent for a case to be stated, that the question to be answered was not required to be answered by the trial court making the reference. It must also not have given an opinion on it - Audu v. Attorney-General of the Federation (supra) at page 200, paragraphs D - E. If the lower court had given an opinion, the whole basis of the reference is defeated, since it is supposed to refer the question, get an answer from the appellate court, and then take that answer in arriving at its decision in the case. If it gives an opinion, and a reference is still made to the appellate court which takes a contrary view, then it means the appellate court has decided the point and has reversed the lower court, without a ground of appeal filed in that respect. That will open up another vista all together.

In the instant, if it is to be taken, as the appellant has submitted, that the trial court had held that section 12 (2) (b) of the National Industrial Court Act, 2006, has given it the right to jettison the provision of the Evidence Act in certain cases, then it means that it had already taken a stand and had given an opinion of law on that point. Then why is there the need for any reference to this court? Such an action may result in this court giving a different opinion! The purpose for the reference would then have been defeated. Is it not a wiser decision, to opt to raise the point in an address as counseled by the court itself or appeal? It cannot be an appropriate option, to seek to make a case stated for the consideration of the Court of Appeal.

Since the trial court here, had given its opinion on the admissibility of the documents and, as submitted by counsel for the appellant, on section 12 (2) (b) of the National Industrial Court Act, 2006, it is no longer open to this court to consider same on a reference. It has become an academic exercise as it is no longer a live issue in this respect, even if the reference had been validly made, in compliance with section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). This court and indeed all courts, do not partake in academic exercise, which obviously would be at the expense of live issues. In sum, issues A and B are answered in favour of the respondent and against the appellant. The need to make a reference to this court on the stated questions, on the basis of section 295 (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) never arose.

It is obvious to any discerning mind, that counsel for the appellant had issues with the National Industrial Court and sought to transfer the cases away from that court. He wrote to the registrar of the court instead of the president, a procedure which obviously helped to delay matters further. When he could not succeed, he stayed away to the detriment of his client and now seeks to make reference to this court without complying with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). All these do not help his client or the administration of justice at all.

Issue C

Whether the National Industrial Court has jurisdiction to admit or exclude any evidence (documentary or oral) contrary to the rights and obligations of the defendant guaranteed under section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

This issue concerns the merit of the question paused for consideration in this court. I have already held above, that there was no reference to this court by the trial court. The questions identified by the counsel for the appellant have not been in accordance with section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Their merits do not therefore arise at all. Again as stated earlier, all the arguments canvassed on breach of fair hearing go to no issue because that can only arise in an appeal and cannot arise or be considered in a case stated to the appellate court - Audu v. Attorney-General of the Federation (supra) at page 200, paragraphs D - E. Issue C is therefore misconceived and it is therefore struck out. On the whole, this appeal lacks merit in toto and it is dismissed with N50,000 (fifty thousand naira) costs to the respondent.

**BADA JCA:**

I had the advantage of reading in draft, the lead judgment just delivered by my lord, Abubakar Datti Yahaya JCA. His lordship has exhaustively dealt with the issues for determination in this appeal. I agree with and adopt his lordship’s reasoning and conclusion. Having also read the records of appeal and the briefs of argument filed and exchanged by the parties, I assert my concurrence that the inevitable conclusion is that the appeal lacks merit. The appeal is also dismissed by me and I abide by my lord’s order on costs.

**IKYEGH, JCA:**

I had the honour of reading in print, the lucid judgment written by my learned brother, Abubakar Datti Yahaya JCA., with which I agree with nothing extra to add.

**OTISI JCA:**

My learned brother, Abubakar Datti Yahaya JCA, made available to me, a draft copy of the lead judgment, dismissing this appeal. All the issues formulated for determination in the appeal have been fully addressed by my learned brother and I am entirely in agreement with his reasoning and conclusion, which I adopt as mine. I will only make these few comments for emphasis. It is well settled law that for grounds of appeal to be valid and competent, they must be related to the decision being appealed against and should constitute a challenged to the ratio of the decision on appeal. An appeal must be against a ratio and not against an obiter, except in cases where the obiter is so closely linked with the ratio as to be deemed to have radically influenced the ratio. But even in that event, the appeal would principally be against the ratio; Xtoudos Services Nigeria Limited v. Taisei (W.A.) Ltd (2006) LPELR - 3504 (SC), (2006) All FWLR (Pt. 333) 1640, (2006) 15 NWLR (Pt. 1003) 533. The Supreme Court in Saraki v. Kotoye (1992) 11-12 SCNJ 26, (1992) LPELR-3016 (SC), (1992) 3 NSCC 331, (1992) 9 NWLR (Pt. 264) 156 at page 184, per Karibi Whyte JSC, restated the position of the law thus:

“It is a well settled proposition of law in respect of which there can hardly be a departure, that the grounds of appeal against a decision must relate to the decision and should constitute a challenge to the ratio of the decision - See Egbe v. Alhaji (1990) 1 NWLR (Pt. 128) 546 at page 590, (1990) 3 SC (Pt. III) 63. Grounds of appeal are not formulated in nubibus.

They must be in firma terra, namely arise from the judgment. However, meritorious the ground of appeal, based earlier on points of critical constitutional importance or general public interest, it must be connected with a controversy between parties. This is the precondition for the vesting of the judicial powers of the Constitution in the courts ... parties ... are not at liberty to argue grounds not related to the judgment appealed against.”

See also: Chami v. United Bank for Africa Plc (2010) LPELR - 841 (SC), (2010) All FWLR (Pt. 520) 1287, (2010) 6 NWLR (Pt. 1191) 474, (2010) 3 SCM 59; Balonwu v. Governor, Anambra State (2009) 18 NWLR (Pt. 1172) 13, (2010) All FWLR (Pt. 516) 473; Ikweki v. Ebele (2005) All FWLR (Pt. 257) 1401, (2005) 11 NWLR (Pt. 936) 397, (2005) 2 SC (Pt. 11) 96, (2005) 2 SCNJ 227, (2005) 7 MJSC 125; Cooperative and Commerce Bank Plc. v. Ekperi (2007) All FWLR (Pt. 355) 412, (2007) 1 SC (Pt. 11) 130, (2007) 3 NWLR (Pt. 1022) 493, (2007) 4 MJSC 172.

The lower court refused an application filed by the appellant on 15 July 2014 (at pages 144 - 148 of the record of appeal) seeking leave of court to enable the appellant, inter alia, “object to the admissibility” of documents which were already exhibits before the lower court. The said documents were admitted as exhibits, without objection, on 27 May 2014; albeit in the absence of learned counsel for the appellant. The lower court refused the said application, stating, at page 248 of the record of appeal, that:

“Defendant was afforded all the much need (sic) right to fair hearing to be heard on 27 May 2014. Counsel to defendant chose to be extremely disrespectful to court and stayed away. To grant this application is to draw back the hands of the clock and wheel of progress in this case...

I hold that the documents admitted in this case on 27 May 2014 are admissible.”

That was the decision of the lower court on the application submitted by the appellant before it.

However, the lower court thereafter remarked thus:

“Indeed section 12 (2) (b) of National Industrial Court Act, 2006, allows ample lead way(sic) to admit documents outside of the Evidence Act where the interest of justice so dictate (sic).”

This remark or observation remains what it was, a remark or an observation. It cannot be elevated to a decision. No competent ground of appeal can therefore arise therefrom; Agbaka v. Amadi (1998) 11 NWLR (Pt. 572) 16, (1998) 7 SCNJ 367; Akpan v. Bob (2010) 17 NWLR (Pt. 1223) 421, (2010) All FWLR (Pt. 501) 896.

For these reasons and for the more comprehensive reasons set out in the lead judgment, I also dismiss this appeal as it is without merit. I abide by the orders made in the lead judgment, including the order as to costs.

**UGO, JCA:**

I had the privilege of reading in draft, the lead judgment delivered by my most noble and learned brother, A. D. Yahaya JCA and I agree with the reasoning and conclusions, which closely coincide with mine. I also agree, and order, that the appeal be dismissed; just as I also abide with the consequential order for costs as made by learned brother.

Appeal dismissed