CURRENT FEATURES OF THE SUMMARY JUDGEMENT PROCEDURE UNDER THE HIGH COURT OF LAGOS STATE (CIVIL PROCEDURE) RULES 2004*

The declared objective of the 2004 Lagos High Court Civil Procedure Rules is the *"achievement of just, efficient and speedy dispensation of justice"*.[1] In line with this objective, the 2004 Rules introduce some new provisions while at the same time made radical changes to some old ones.

One of the old provisions to which radical changes have been made is the Order 11 relating to the summary judgement procedure. The summary judgement procedure contained in Order 11 of the 2004 Rules represents a clear departure from the position under the 1994 Rules in many regards.

While the changes made to the summary judgement procedure in the 2004 Rules are necessary for the purpose of fast tracking the procedure, the interpretation and application of some aspects of the provision cannot be without some controversy.

It is proposed in this paper to examine the procedure laid down under Order 11 of the 2004 Rules and to highlight some of the critical changes against the background of the established procedure under the old rules. Suggestions will be made, where appropriate, as regards the effective interpretation and application of some of the contentious aspects of the provision.

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[1] See Or.1 r.1(2), Lagos State High Court (Civil Procedure) Rules, 2004.(hereafter referred to as "the 2004 Lagos Rules")

CLAIMS TO WHICH THE PROCEDURE APPLIES

Summary judgement procedure under Order 11 of the 2004 Rules applies to any claim *"where a claimant believes that there is no defence to his claim"*.[2]

On the face of it, there is no restriction as to the category of claims to which the procedure applies. All that matters is that the claimant must believe that there is no defence to his claim. As long as the claimant believes that there is no defence to his claim, he can adopt the procedure whatever the nature of his claim.

This is a clear departure from the position under the 1972 and 1994 Rules. Under those Rules, certain claims were specifically excluded from the ambit of the procedure. Summary judgement procedure did not apply to cases of libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage or a claim based on allegation of fraud.[3]

The rational for excluding such claims from the purview of the summary judgement procedure under Order 14 of the English Rules (from which Order 11 was copied) has always been that such claims entitle a party to trial by jury.[4] To apply summary judgement procedure to any of such claims would amount to denying a party his right to jury trial.[5]

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[2] See Or.11 r.1, 2004 Lagos Rules.

[3] See Or.11 r.1 and Or. 4 r. 4, 1994 Lagos Rules.

[4] See The English Administration of Justice (Miscellaneous Provisions) Act, 1933.

[5] See Fidelis Nwadialo, Op. Cit. p.527

However, since we do not have trial by jury in Nigeria, the exclusion of these claims from the scope of Order 11 cannot be justified.[6] Furthermore, there is no basis for insisting that some claims must go to trial even where it is obvious that the defendant has no defence to the claim. In any event, such an insistence would have been antithetical to the philosophy behind the 2004 Rules which is that all cases must be speedily, effectively and justly determined.

It is submitted that the inclusive provision making the summary judgement procedure applicable to all cases where the claimant believes that the defendant has no defence to his claim is in line with the general tenor of the 2004 Rules and is long overdue.

COMMENCEMENT OF THE ACTION AND THE FILING OF APPLICATION FOF SUMMARY JUDGEMENT

Order 11 rule 1 provides that:

> *"where a claimant believes that there is no defence to his claim, he shall file with his originating process the statement of claim, the exhibits, the deposition of his witnesses and an application for summary judgement which application shall be supported by an affidavit stating the grounds for his belief and a written brief in respect thereof"*

[6] Ibid.

Therefore, a claimant who believes that the defendant does not have a defence to his claim and intends to apply for summary judgement must file the following documents

(1) Writ of summons
(2) Statement of claim
(3) Depositions of his witnesses
(4) Exhibits referred to in the depositions
(5) Motion on notice for summary judgement supported by an affidavit
(6) A written brief containing argument in support of the application

The claimant must deliver to the Registrar as many copies of these documents as there are defendants to the case and they must be served personally or, with leave of court, through substituted means, in accordance with Order 7 of the Rules.[7]

Order 11 Rule 1 talks of "*originating process*" without specifying the particular form of originating process to be used by a claimant who intends to apply for summary judgement.

We humbly submit, that originating process for this purpose means the writ of summons. This view is reinforced by the requirement that the originating process must be accompanied, among other things, by the statement of claim. It goes without saying that pleadings are normally used only in proceedings commenced by writ of summons.

[7] See Or.11 r.2&3, 2004 Rules.

It is interesting to note that the old controversy whether to use ordinary writ (Form 1) or specially endorsed writ (Form 2) no longer arises.[8] Under the 2004 Rules, there is only one general form of writ of summons.[9] The only other form of writ is one for service outside jurisdiction.[10]

Again, Or.11 r.1 talks of "*an application for summary judgement*" without specifying whether the application shall be by way of summons or by way of motion. This is a clear departure from the old Rules which expressly provided that "*application for summary shall be by way of summons returnable in chambers not less than four clear days after service*".[11]

It is our humble submission that under the 2004 Rules, application for summary judgement shall be by way of motion on notice. This is in view of Order 39 of the same Rules which provides that where any application is authorised by the rules to be made to a judge, such application shall be made by motion and except where an application *ex-parte* is required or permitted under any law or rules, every motion shall be on notice.[12]

It must be remembered that under the old rules, a plaintiff cannot apply for summary judgement unless and until the defendant has entered appearance. Where a defendant has failed to appear, all a plaintiff could

[8] See Ajalyn Shoes v. Akinwande [1991] 2 NWLR (pt.174) 432; Texaco Plc. V. Lukoko [1997] 6 NWLR (pt.510) 651.
[9] See Or.3 r.3, and form 1 in the 2004 Rules.
[10] See Or.3 r.4 and form 2 in the 2004 Rules.
[11] See Or.11 r.2, 1994 Rules.
[12] . See Or.39 rr.1&3, 2004 Rules.

apply for was judgement in default of appearance under Order 10 of the rules.

This is clearly no longer the position. Under the 2004 Rules, the application for summary judgement must accompany the writ of summons. The claimant cannot wait for the appearance of the defendant. Summary judgement can now be obtained whether or not the defendant appears.

As to the nature of the affidavit in support of the application for summary judgement, all that Order 11 r. 1 of the 2004 Rules requires is that the application "*shall be supported an affidavit stating the grounds*" for the claimant's belief that the defendant has no defence to his claim. On the face of it, this provision appears to be different from the requirement under the old rules.

The requirement under the old rules was that the affidavit in support of the summons for judgement must be made by the claimant himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed and stating that in the deponent's belief, there is no defence to the action.[13]

Commenting on the above requirement in the old rules in **Onyemelukwe v. West African Chemical Company Ltd**,[14] the court held that for the provisions of the rules to be satisfied, the plaintiff in the affidavit in support of summons for judgement must justify or substantiate the cause

[13] See Or.11 r.1(a), 1994 Rules.
[14] [1995] 4 NWLR (pt.387) 44; See also Osinbajo & Ipaye, Annotated Civil Procedure Rules of the Superior Courts of Nigeria, (Butterworth, 2003), HC51.

of action. In other words, he must depose to facts that there is not only a valid cause of action, but that he is entitled to the relief sought.

Where any liquidated sum is claimed, the rules expect the plaintiff to verify the amount claimed. It is not enough merely to depose that the defendant owes a specific sum, the plaintiff must go further to prove that the amount claimed is owed.

The plaintiff is also expected to exhibit documents to substantiate the amount owed if there are such documents. If there are no documents, a court of law must be satisfied by factual depositions in proof of the amount owed.

It is our humble submission that notwithstanding the apparent difference in the wordings, the affidavit in support of an application for summary judgement under the 2004 Rules must still substantially comply with the requirements as analysed in Onyemelukwe case.[15]

However, since a court of law has a duty to take into consideration all materials before it in coming to a decision on any matter and since depositions of witnesses and exhibits attached thereto also qualify as evidence,[16] we further submit that a judge confronted with an application for summary judgement under the 2004 Rules cannot restrict himself to the affidavit in support of the application.

[15] Supra.

[16] See Black's Law Dictionary, (8th ed.)

He must take into account the depositions of the witnesses and exhibits attached thereto filed by both the claimant and the defendant in deciding whether or not to enter summary judgement in favour of the claimant and thereby shutting out the defendant from a trial on the merit.

WHAT MUST THE DEFENDANT DO?

A defendant who is not disputing the claim and has no intention to defend the case does not need to do anything. After the expiration of the time limited for defence and upon proof of service of the relevant processes upon him, summary judgement will be entered against him in favour of the claimant. Even if the defendant is in court on the hearing date he will not be allowed to take part in the proceedings.

In this regard, we submit that the position now under the 2004 Rules is similar to the position under the undefended list procedure which was applicable under Or.60 of the 1994 Lagos Rules and still applicable under the Federal High Court, F.C.T. High Court and the States' High Court (Uniform) Rules.[17]

In **U.A.C. (Technical) Ltd. v. Anglo-Canadian Cement Ltd.**,[18] it was held that under the undefended list procedure, if the defendant is not disputing the plaintiff's claim, he does not need to do anything. On the date fixed for hearing, the suit will be heard as an undefended suit, and the Court may give judgement for the plaintiff without his calling

[17] See Or.24, Federal High Court Civil Procedure Rules, 2000; Or.21, FCT Civil Procedure Rules,2004; Or.23, Uniform Rules for the States.

[18] (1966) NMLR 349 at 350.

witnesses in proof of his claim. Even if the defendant is present in court at the hearing, he will not be permitted to take part in it.

This is unlike the position with summary judgement under the old Lagos rules. Under the old rules and as pointed out elsewhere above, appearance by the defendant was a condition precedent to an application for summary judgement. Where the defendant failed to do anything, for instance, by filing an appearance, a plaintiff could not apply for summary judgement. The best he could do was to apply for judgement in default of appearance.

On the other hand, a defendant who intends to resist summary judgement under the 2004 Lagos Rules must comply with Order 11 r.4 which provides that:

> "*Where a party served with the processes and documents referred to in Rule 1 of this order intends to defend the suit he shall, not later than the time prescribed for defence file:*
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> *(a) his statement of defence,*
> *(b) depositions of his witnesses,*
> *(c) exhibits to be used in his defence; and*
> *(d) a written brief in reply to the application for summary judgement."*

The above documents must be filed by the defendant within forty two (42) days after service on him of the claimant's originating processes and

the application for summary judgement being the time limited by the rules for filling of defence.[19]

It is interesting to note that the rules conspicuously omit to mention counter affidavit as one of the documents to be filed by the defendant. Under the old rules, a defendant who intends to resist an application for summary judgement was required to file a counter affidavit, though, if he filed a statement of defence instead, the court was obliged to examine the statement of defence in deciding whether or not to allow him to defend.[20]

It is submitted that the omission of counter affidavit under the 2004 Rules is deliberate. A counter affidavit is unnecessary. The rules has already provided that the defendant must file not only a statement of defence but the depositions of his witnesses and exhibits.

These are enough materials from which the court can determine whether or not to allow him to defend. Though, it is trite law that in the absence of a counter affidavit, the facts in the affidavit are generally deemed to be admitted. On the other hand, however, it must be remembered that the Court is bound to consider all processes duly filed before it and cannot close its eyes to any such process.

Therefore, in coming to a decision on an application for summary judgement, the court must take into account the statement of defence, the deposition of witnesses in support thereof and the exhibits. Even if a

[19] See Or.15 r.1(2), 2004 Lagos Rules.

[20] See Nishishawa Ltd. v. Jethwani (1984) 12 S.C. 234; Macaulay v. Nal Merchant Bank [1990] 4 NWLR (pt.144) 283

counter affidavit is filed, it cannot contain anything more than that contained in those documents.

It is our humble submission that the duty imposed on the defendant under the old rules to show good defence on the merit still remains the same under the 2004 rules. In this regard, the documents filed by the defendant must show a *bona fide* or good defence on the merit and not a defence calculated to delay.[21]

To show a good defence, the defendant must descend on particulars. To descend on particulars implies a true and real disclosure of facts from which the court can readily discern a good defence.[22] It is not sufficient for a defendant to show a case of hardship that creates no enforceable right, a mere inability to pay or an allegation that the plaintiff has given time for payment.[23]

WHAT MUST THE COURT DO?

The first step to be taken by the court is to fix a return date for the application for summary judgement. It is interesting to note that the 2004 Rules is conspicuously silent on this issue. This is unlike the old rules which specifically provided that the summons for judgement shall be returnable not less than four clear days after service.[24]

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[21] See Macaulay v Nal Merchant Bank (Supra)

[22] See Cotia CEISA S.A v Sanni Brothers (Nig.) Ltd. (2000) 6 S.C. (pt.III) 43

[23] See Somotex Nig. Ltd. v Hanaco Nig. Ltd. [2001] 2 LHCR (PT. 13) 87; See also Osibajo & Ipaye Op. Cit p. HC 52

[24] See Or. 11 r.2 , 1994 Lagos Rules.

It is our humble submission that upon the claimant's filing of the originating processes together with an application for summary judgement, the application must be given a return date by the Registry of the court. The return date must be long enough to accommodate the 42 days after service to which the defendant is entitled to file his defence and other necessary documents.

Upon the return date, if the defendant has not filed the necessary documents and there is proof of service on him of all the necessary documents in respect of summary judgement procedure, the appellant must be allowed to move his application for judgement.

The Court must proceed to enter summary judgement against the defendant unless the interest of justice demands otherwise. Even if the defendant is in court, he should not be allowed to take part in the proceedings unless, again, the interest of justice demands otherwise. In short, such a defendant should be treated like a defendant who has failed to file a notice of intention to defend under the undefended list procedure.[25]

On the other hand, if by the return date, the defendant has filed the necessary documents with a view to defend, and it appears to the judge that the defendant has a good defence and ought to be permitted to defend the claim, he will be granted leave to defence.[26] Where it appears to the

[25] See U.A.C. (Technical) Ltd. v. Anglo-Canadian Cement Ltd (supra**);** U.T.C. (Nig.) Ltd. v Pamotei [1989] 2 NWLR (pt.103) 244.

[26] See Or. 11 r.5(1), 2004 Lagos Rules.

judge that the defendant has no good defence, the judge may thereupon enter judgement for the claimant.[27]

Where it appears to the judge that the defendant has a good defence to part of the claim but no defence to the other, the judge may thereupon enter judgement for that part of the claim to which there is no defence and grant leave to defend that part to which there is defence.[28]

Also, where there are several defendants and it appears to the judge that any of them has a good defence and ought to be permitted to defend and the other defendants have no defence and ought not to be permitted to defend, the defendant that has a defence may be permitted to defend and the judge shall enter judgement against those that have no defence.[29]

As regards the factors which the court must take into consideration in deciding whether to enter summary judgement or allow the defendant to defend, we humbly submit that the principles applicable under the old rules remain substantially the same under the 2004 rules.

In this regard, the court must always bear it in mind that the purpose of Order 11 procedure is to enable a plaintiff to obtain summary judgement without trial if he can prove his claim clearly and if the defendant is unable to set up a bonafide defence or raise an issue against the claim which ought to lead to the case being tried on the merit.[30]

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[27] See Or.11 r.5(2), 2004 Lagos Rules.

[28] See Or.11 r.5(3), 2004 Lagos Rules.

[29] See Or.11 r.6, 2004 Lagos Rules.

[30] See Cotia CEISA v Sanni Bros. Nig. Ltd. (Supra); FMG v Sanni [1990] 4 NWLR (Pt. 147) 688 ; UTC v Pamotei (Supra).

The procedure is not intended to shut out a defendant who can show that there is a triable issue from making his defence before the trial court, unless it is clear indeed that he has no defence to the action.[31]

The trial court must look at the facts put forward by the defendant in the various documents filed by him and see if they can, prima facie, afford a defence to the action. For this purpose, a complete defence need not be shown. It will suffice if the defence set up shows that there is a fair probability of defence or a triable issue or question or that for some other reason there ought to be a trial.

The issue whether the defence is proved or not, or whether it will constitute a complete defence to the action on the merit is not an issue at this stage. That issue can only arise when the trial judge has given the defendant leave to defend so that the proof is an issue for determination after the hearing of evidence and at the time of evaluating the totality of the evidence adduced by the defendant.[32]

The court can enter summary judgement only where, assuming all the facts to be in favour of the defendant, they do not amount to a defence in law.[33] Where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be prevented from laying his defence before the court by having summary judgement entered against him.[34]

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[31] See Macaulay v NAL Merchant Bank Ltd. (Supra)

[32] Ibid.

[33] See Macaulay v NAL Merchant Bank Ltd. (Supra); FMG v Sanni (Supra).

[34] Ibid.

Above all, the decision as to whether to enter summary judgement or to allow the defendant to defend is a discretionary one. However, like any other judicial discretion, it must be exercised judicially and judiciously and on well settled principles.[35]

It appears that under the 2004 Rules, the court is simply to decide whether to enter summary judgement or to grant unconditional leave to the defendant to defend.[36]

There is no provision in the rules for granting a conditional leave to defend. This is unlike the position under the old rules where "*leave to defend may be given unconditionally, or subject to such terms as to giving of security or time or otherwise as the judge may think fit*".[37] We humbly submit that since there is no provision for granting of conditional leave to defend in the 2004 rules, this should not be read into the rules.

Also, there is no provision in the 2004 rules for entering interlocutory summary judgment in respect of unliquidcted damages subject to ascertaining the exact amount due. Again, this is unlike the old rules which allowed such judgement under the summary judgement procedure.[38]

It is our humble submission that such provision is unnecessary under the 2004 Rules. This is in view of the fact that the claimant must have filed together with his originating processes the deposition of his witnesses and

[35] Ibid.

[36] See Or. 11 r.5, 2004 Lagos Rules.

[37] See Or. 11 r. 6, 1994 Lagos Rules.

[38] See Or. 11 r. 7, 1994 Lagos Rules.

exhibits from which the court can always ascertain any amount due either as liquidated or unliquidated claim. The court should be able to ascertain the amount due from the documents filed by the parties and should be able to give a final judgement as appropriate whether the claim is for a liquidated or unliquidated demand.

Finally, Order 11 r. 7 of the 2004 Rules provides that each party shall be at liberty to advance oral submission to expatiate on his written brief in respect of the application for summary judgement.

It is our submission that the provisions of Order 11 relating to written briefs must be read in conjunction with the provision of Order 31 which governs filing of written addresses generally and applies to all applications and final addresses. To that extent, the content of the written briefs in respect of the application for summary judgement must comply with the requirements of Order 31 and each party shall not have more than twenty minutes for oral argument.[39]

NATURE OF JUDGEMENT OBTAINED UNDER THE PROCEDURE

There had always been the controversy under the old rules whether a summary judgement under the rules was a judgment on the merit or a default judgement.[40] This question had some fundamental legal consequences. If a judgement is one on the merit, it can generally not be

[39] Or. 31 r. 4 , 2004 Lagos Rules.

[40] See the various arguments in U T C v Pamotei (Supra)

set aside by the court that enters it. It can only be set aside on appeal.[41] On the other hand, if it qualifies as a default judgement, the defendant can always apply to the court that enters it or another court of co-ordinate jurisdiction to have it set aside.[42]

Defining a judgement on the merit in Cardoso v Daniel,[43] Oputa J. S. C said:

> *"A judgement is said to be on the merit when it is based on the legal rights of the parties as distinguished from mere matters of practice, procedure, jurisdiction, or form. A judgement on the merit is therefore a judgement that determines, on an issue either of law or fact, which party is right".*

His Lordship expatiated further on the meaning of judgement on the merit in U T C v Pamotei,[44] wherein he stated:

> *"A judgement on the merit is one rendered after argument and investigation, and when it is determined, which party is in the right as distinguished from a judgement rendered upon some preliminary or formal or merely technical point or by default and without trial. A judgement on the merit is thus a decision that was rendered on the basis of the evidence led by the parties in proof or disproof of the issues in controversy between them. Normally, a judgement based solely on some procedural error is not, as a general rule, considered as a judgment on the merits. A judgement on the merits is therefore one arrived at, after*

[41] See F. Nwadialo, Civil Procedure in Nigeria, (2nd ed.), ULP, Lagos, (2000) p. 530
[42] See U T C v Pamotei (Supra)
[43] [1986] 2 NWLR (pt.20) 1 at 20.
[44] Supra at p.119-120

considering the merits of the case. The essential issues, the substantive rights presented by the action, as contra-distinguished from mere questions of practice and procedure. … A judgement on the merits is thus one that takes cognisance of the true bearing of the law on the rights of the parties where pleadings have been filed, issues are settled on those pleadings and the right of the parties are decided on the resolution of those issues. Where this happens, the ensuring (sic: ensuing) judgement is on the merit. But where, as in this case the judgement set aside by Longe, J. was obtained by and because of the failure of the Defendant to file it's affidavit as prescribed by Order 10 r. 3 Lagos High Court Rules, then the ensuring (sic: ensuing) judgement was one obtained because of the default of the Defendant to comply with the said Order 10 r. 3. In my humble view, such a judgement is certainly a judgement in default and by default. It is a default judgement and not a judgement on the merits of this case as pleaded in the plaintiff's statement of claim and the Defendant's statement of Defence."

However, under the 2004 Rules, while the distinction may still be drawn between a default judgement and a judgement on the merit, such distinction is no longer of much practical consequence. This is because all default judgements now are as good as judgements on the merit. Default judgements like any judgement on the merit can now be set aside only on grounds of fraud, lack of jurisdiction or lack of service. According to Order 20 rule 12:

"Any judgement by default whether under this Order or under any Order of these Rules shall be final and remain valid and may only be

set aside upon application to the judge on grounds of ***fraud, non-service or lack of jurisdiction*** *upon such terms as the court may deem fit*"[45]

It is therefore clear that every summary judgement shall be final and can only be set aside on ground of fraud, lack of service or lack of jurisdiction. This position accords with the overall policy thrust of the 2004 Rules. It does not give room for setting aside at the instance of a defendant who has been duly served and afforded every opportunity to defend the case but failed to do so, unless the court lacks jurisdiction or there is incidence of fraud.

CONCLUSION

Summary judgment procedure is without doubt a veritable tool of speedy dispensation of justice in civil litigations. Its importance is underscored by the fact that it has remained a permanent feature of the English as will as Lagos State civil procedure rules for a considerable length of time. It has been part of the Lagos Rules since 1972 and the English Rules even before then. The procedure has now been drastically improved in the 2004 Lagos Rules to make it even faster.

However, the efficacy of the improvement will largely depend on the appreciation, by judges and practitioners alike, of the affect of the various provisions constituting the new Order 11 procedure. We have tried to examine some of the provisions but their judicial applications will certainly throw up new challenges.

[45] Or.20 r.12, 2004 Lagos Rules.

We only hope that the courts will pay close attention to the interpretation of the provisions to make for easy and effective utilisation of the procedure by the litigants.