

IN THE FEDERAL HIGH COURT OF NIGERIA  
IN THE ABUJA JUDICIAL HEADQUARTER  
HOLDEN AT ABUJA  
ON FRIDAY THE 28TH DAY OF OCTOBER, 2016  
BEFORE HIS LORDSHIP, HONOURABLE JUSTICE H.F.M. NYAKO  
JUDGE

SUIT NO: FHC/ABJ/CS/1053/2015

BETWEEN:

MR. BABATUNDE OSIBOWALE OSINUBI ..... APPLICANT

AND

1. THE ATTORNEY GENERAL OF THE FEDERATION
  2. THE HON. MINISTER OF FINANCE
  3. THE DIRECTOR GENERAL OF THE BUREAU OF PUBLIC PROCUREMENT
  4. THE BUREAU OF PUBLIC PROCUREMENT
- } RESPONDENTS

Parties - Absent  
Counsel - H. C. Ugwu for 3<sup>rd</sup> & 4<sup>th</sup> Defendants  
- Tolu Olorunfemi for Applicant.

JUDGMENT

The Applicant by Originating Summons has applied to seek the determination of the following question:

- Whether the proviso to Section 38(3) of the Public Procurement Act, 2007 is constitutional in the light of Section 6(6)(b), Section 36(1), Section 241(1) and Section 287(3) of the 1999 Constitution of the Federal Republic of Nigeria, as amended.

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT  
ABUJA

*16/11/16*  
*Abu S. O*  
*(e o ad)*

1907 3602 3825  
FEDERAL HIGH COURT  
16 NOV 2016

**AND UPON THE DETERMINATION** on the above question, the Plaintiff seeks the following reliefs:

- i. **A DECLARATION** that the proviso to Section 38(3)(a), (b) and (c) of the Public Procurement Act, 2007 is unconstitutional and void to the extent of its inconsistency with Section 6(6)(b), Section 36(1), Section 241(1) and Section 287(3) of the 1999 Constitution of the Federal Republic of Nigeria, as amended;
- ii. **AN ORDER OF THIS HONOURABLE COURT** deleting the proviso portion of Section 38(3) of said Act that is inconsistent with the 1999 Constitution of the Federal Republic of Nigeria, as amended, saving only the portion that is not inconsistent with the said Constitution i.e. "(3) A disclosure of procurement proceeding records, prior to award of contract may be ordered by a Court".
- iii. **AND SUCH ORDER** or other orders as this Honourable Court may deem fit to make in the circumstances.

The Applicant in his Affidavit avers that Section 38(3)(a), (b), and (c) of the Public Procurement Act, 2007 is unconstitutional and void to the extent of its inconsistency with Section 6(6)(b), Section 36(1), Section 241(1) and Section 287(3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

That Section 38 of the Public Procurement Act has provided for right to public procurement proceedings, and the proviso in sub-section 3 of Section 38 of the Act, curtails the said

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT  
ABUJA

  
16/11/15

in sub-section 3 of Section 38 of the Act, curtails the said right as stated in Section 38 of the same act by empowering a procuring entity to disobey an order of the Court as in Section 38(3)(a)(b) and (c) of the Act.

That the Act is in force and largely operational under the direction of both the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and are of interest to members of the public who are interested in public procurement matters.

That the pre-action was served on the 3<sup>rd</sup> Defendant on 18<sup>th</sup> day of November 2015, copy is attached and marked as Exhibit A.

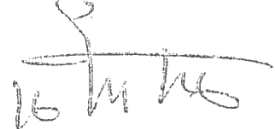
Learned Counsel formulated a sole issue for determination to wit:

- Whether the Plaintiff is entitled to the reliefs sought?

Learned Counsel submitted that the Plaintiff has complied with the provision of Section 14(4) of the Public Procurement Act, 2007 by serving the 3<sup>rd</sup> Defendant notice of intention to commence this suit.

That Section 38(3) of the Public Procurement Act has abrogated the judicial powers of court as vested by Section 6(6)(b) 1999 Constitution of the Federal Republic of Nigeria, which vested such judicial powers in a procurement entity in a matter in which it is a party and that it is also contrary to Section 36(1) of the 1999 Constitution as fair hearing will not exist where one party, is a judge in a matter between him and the other party, he refer to the judgment of Supreme Court in Abah Vs Monday & Ors (2015) LPELR - 24712(SC):

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT  
ABUJA

  
16/11/15

*"The Constitutional right to fair hearing guaranteed by Section 36(1) of the 1999 Constitution of Nigeria (as amended) is founded upon the twin pillars of natural justice: i.e audi alteram partem (hear the other side) and nemo iudex in causa sua (no one should be a judge in his own case)... It is also well settled that any proceedings conducted in breach of a party's right to fair hearing, no matter how well conducted would be rendered a nullity. ...." Per KEKERE-EKUN, J.SC (Pt 24) 652".*

Learned Counsel argue that National Assembly has no power to make any law contrary to the express provisions of the Constitution and where it goes ahead to do so the Court has a duty to strike down inconsistent part, using its blue pencil, by virtue of Section 1(3) of the 1999 Constitution of the Federal Republic of Nigeria, he also refer to the Supreme Court Judgment in the case of INEC VS MUSA (2003) LFELR 1515 (SC) where it was held thus:

*"The Supremacy of the National Assembly is subject to the overall supremacy of the Constitution. Accordingly, the National Assembly which the Constitution vests powers cannot go outside or beyond the Constitution. Where such a situation arises, the Court will, in an action by an*

aggrieved party, pronounce the Act unconstitutional, null and void". Per TOBI, JSC. (P100, paras A-C)".

And the case of A.G. OF ABIA STATE & ORS VS A.G. FEDERATION (2002) PELR - 611 (SC) thus held:

"The 'blue pencil' rule is applied to sever a part of a legislation that is good in the sense that it is valid, from the part that is bad, in that it is invalid. That is, the blue pencil is run over the part that is bad. If what remains of the impugned legislation, that is the part that is good can stand, then it is applied. But if what remains cannot stand on its own, the impugned legislation is declared invalid. .." Per OGUNDARE, JSC (P 129 - 131, paras G - D).

He urge the Court to grant the Plaintiff's reliefs.

1<sup>st</sup> Defendant filed his Counter Affidavit, preliminary objection and written address, that the public procurement proceedings is not of interest to members of the public, and that the right to public procurement proceedings provided in Section 38 of the Public Procurement Act is for suppliers, contractors or consultants that submitted tender, proposals, offers or quotation or application for pre-qualification.

That the proviso in Section 38(3) of the Public Procurement Act does not empower procurement entity or any other entity

5

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT

ABUJA

16/4/16

howsoever, to disobey any law of the legislature (National Assembly and State Assembly) have the power to make, delete, amend or repeal law in the federation.

That the Plaintiff lacks locus to institute this suit and that the Plaintiff has not disclosed any cause of action against the Defendants particularly the 1<sup>st</sup> Defendant in this suit.

Learned Counsel formulated a sole issue for determination to wit:

- Whether the Plaintiff's reliefs are grantable in law?

Learned Counsel submitted that the power to make, delete, amend, or repeal any law is exclusively reserved in the legislature. Section 4(2) of the Constitution of the Federal Republic of Nigeria 1999, that Section 25(1)(9) on the other hand gave the Federal High Court the powers to interpret laws.

He argues that the power given to the Federal High Court in relation to the Constitution or any other law is interpretation and not deletion. He relied on the Supreme Court Judgment in *Rotimi Williams Akintokun v Practitioners Disciplinary Committee (LPDC) (2014) 1 (Pt-1423) @ pp. 74 - 75.*

He urge the Court to dismiss the Plaintiff's suit for merit with substantial cost.

On the Preliminary Objection, Learned Counsel has two issues for determination to wit:

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT  
ABUJA

  
16/11/16

- Whether the Applicant has locus standi to institute this suit?
- Whether the Plaintiff has disclosed any cause of action against the 1<sup>st</sup> Respondent

On issue one Learned Counsel argue that the Applicant has not disclosed any of his right, obligation or interest which has been or is about to be violated in respect to which this Honourable Court will determine. He relied on the authority in Umar Vs W-G.G. (Nig. Ltd 2007) 7 NWLR (Pt 1032) 117 CA and urge the Court to hold that the Applicant has no locus standi to institute this action.

On issue two (2), Learned Counsel submitted that the Plaintiff has not disclose any wrongful act done by the 1<sup>st</sup> Defendant nor any allegation of any consequential damage as stated in the case of A.G. Federation Vs Abubakar (2007) 10 NWLR (P 1041) @ pp.1.

He urge the court to strike out this suit in its entirety with substantial cost.

2<sup>nd</sup> Defendant filed Counter Affidavit with Written Address and formulated some issues for determination to wit:

- Whether or not the Plaintiff has the locus standi to institute this suit?
- Whether or not the Plaintiff has a cause of action against the 2<sup>nd</sup> Defendant?
- Whether or not this Honourable Court has the power to make an order amending a provision in an Act passed by the legislature?

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT  
ABUJA

7  
16/11/16

Learned Counsel submitted that the Plaintiff has not shown any special interest above that of other citizens of the country whom the said Act also affects, to confer the right to be able to institute this action before this Court.

He relied on the decision in the case of Adekunle Vs Adelugba (2013) ALL FWLR (Pt 675) 333 @ 340, paras D-G and urge the Court to hold that the Plaintiff has not shown his special interest in the suit.

On the 2<sup>nd</sup> issue, Learned Counsel submitted that the Plaintiff has no interest whatsoever against the 2<sup>nd</sup> Defendant, that the 2<sup>nd</sup> Defendant was not responsible in enacting the said law sought to be amended by the Plaintiff. That assuming this Court grants the reliefs of the Plaintiff it has no direct effect on the 2<sup>nd</sup> Defendant.

He urge the Court to dismiss the suit of the Plaintiff against the 2<sup>nd</sup> Defendant as it is frivolous and the Court does not have the power to grant such order(s).

3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their Counter Affidavit/Written Address and raise a sole issue for determination to wit:

- *Whether the Plaintiff's suit disclose any cause of action and thereby possessed a locus standi to institute this suit?*

Learned Counsel submitted that the suit of the Plaintiff did not disclose any reasonable cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. That the Plaintiff did not show in his supporting affidavit his special/legal right or sufficient legal right and/or that his interest has been adversely affected in

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT

16/11/16



the performance of the public duty to be performed by virtue of Section 38 of the Public Procurement Act 2007.

That the Plaintiff did not at any material time submit any complaint to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in respect of any dispute the Plaintiff had/or having with any procuring entity arising from any bid.

Learned Counsel submitted that the Plaintiff suit did not disclose any cause of action to possessed the locus standi to institute this matter. He relied on the decision in Osige Vs PSPLS Management Consortium Limited (2009) ALL FWLR 609 @ 623 paras E-F.

Learned Counsel also submitted that the Plaintiff Affidavit is very bad as regards to any judicial proceedings wherein the right of fair hearing of the Plaintiff has been violated or breached and that the disobedience of a valid order of a Court does not amount to lack of fair hearing.

That the submission of the Plaintiff is just an academic exercise, and court are not to indulge in academic exercise, he cited the case of Ogudo Vs State (2011) 18 NWLR (Pt 1778) SC1 @ 24 and the case of Shibkai VS A.G.Zamfara State (2010) ALL FWLR (Pt 553) C.A 1684 @ 1705. On the issue of Section 6(6)b of the Constitution of the Federal Republic of Nigeria 1999, he urge the Court to dismiss the Applicant suit for lack of locus standi.

Applicant filed further Affidavit to all Counter Affidavit with Written Addresses and reply to the 2<sup>nd</sup> Defendant preliminary

9

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT  
ABUJA



objection. In his Written Address to the preliminary objection, Learned Counsel formulated a sole issue for determination to wit:

- *Whether the issue of locus standi is necessary in matters that bothers on Constitutional issues?*

Learned Counsel relied on the authority in *Sambo & Anor Vs Ndatse & Ors (2013) (PELR - 2085) (CA)*, that any person who is convinced that there is infraction of Section 1 and 4 of the Constitution can go to Court and ask for the appropriate declaration and consequential relief.

That the Applicants' has engaged in procurement activities in various Federal Ministries, thereby putting him at an advantage not only to identify that of proviso of Section 38(3) of the Public Procurement Act is bad law. He cited the case of *INEC Vs MUSA (2003) (PELR-1515 (CS))* and *Ondo State Vs A.G. Federation & Ors (2002) CPELR - 623 (SC)*.

He urge the Court to dismiss the 2<sup>nd</sup> Defendant's preliminary objection and grant his application on merit.

The 1<sup>st</sup> defendant filed a Notice of objection seeking to be strick out of the suit and that the Public Procurement Act is not of interest to the public but Section 38 thereof is for suppliers, contractors or consultants.

That the defendant lacks the locus standi to institute this suit and no reasonable cause of action has been shown against them.

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT  
ABUJA

*S*  
16/11/14

The 1<sup>st</sup> defendant is the Hon. Attorney General of the Federation. He is the Chief law officer of the Federation. Any action that involves a Ministry, department or agency of the Federal Government involves him even if as a nominal party. It is irrelevant if these Ministries, department or agencies have legal units or not. A cause of action need not be disclosed against him specifically. He is therefore a proper party in the suit.

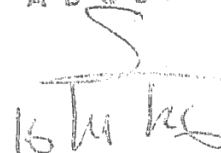
On whether there is a cause of action disclosed, I have looked at the Originating process and the interpretation sought is the cause of action. The argument of the parties also confirm that there is a cause of action. Whether it is in the public or private realm is a different consideration. Whether it will succeed or not is not the issue.

The cause of action here is the request for the interpretation of Section 38 (3) of the PPA.

On whether the Applicant has the locus standi to institute this suit, I refer to the case of **FAWEHINMI VS. THE PRESIDENT & ORS (2007) LPELR 9005** where the Court of Appeal held per Aboki JCA that -

"I believe that it is the right of any citizen to see that law is enforced where there is an infraction of that right or a threat of its being violated in matters affecting the public law...". Per Aboki

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT  
ABUJA



"It would, in my view, be a grave lacuna in our system of public law if a single public spirited taxpayer was prevented by outdated technical rules of locus standi from bringing the matter to the attention of the courts to vindicate the rule of law and get the unlawful conduct stopped" per Lord Diplock.

This is the new thinking and position on locus standi consequent upon which I find that the Applicant being a public spirited individual and a legal practitioner at that, has the public duty to ask that sections of the law be interpreted. His interest does not have to be over and above that of the public.


Cases of public interest ideally ought to be instituted by the Chief Law Officer of the Federation or State but where they have not done so, then the public or a member of the public has the moral right to do so.

The preliminary objection then fail and are all struck out.

On the Originating Summons I have looked at Section 38 (3) of the PPA and reproduce same for ease of reference.

38 (3) - A disclosure of procurement proceeding records, prior to award of contract, may be ordered by a Court, provided that when ordered to do so by a court, the procurement entity shall not disclose such information, if its disclosure would:-

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT  
ABUJA

  
16/11/16

- (a) Be contrary to law;
- (b) Impede law enforcement; or
- (c) Prejudice legitimate commercial interests of the parties.

The basic principle of interpretation of statutes is to give them their rational and ordinary English meaning.

It is settled law that the legislature makes laws to be executed by the executive and interpreted/enforced by the Judiciary.

So it is clear that the Judiciary does not make laws. But it has a constitutional duty to ensure that laws made by the legislature are not in contravention of the constitution itself.

A clear and ordinary reading of the above provisions will show that the courts are empowered to order disclosure of procurement proceeding of records prior to award of contracts when so asked to.

Then comes a proviso. This proviso now says or provides that the procuring entity whose records the courts have ordered to be disclose can now refuse to obey. The order made by the court on grounds provided hereunder -

This is the crux of the litigation. If the procuring entity can refuse to obey the order of the court for any reason whatsoever, it implies that it will either be disobeying an order of court or sitting on appeal over an order of court.

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT  
ABUJA

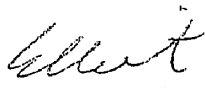
S  
16/11/15

A legislation cannot encourage impunity. The reasons why the courts should not make the order in the first place ought to have been placed before the court at the time of seeking the order for disclosure not to encourage parties to take the law into their own hands by encouraging parties to a litigation to disobey orders made by a competent court.

By this proviso, the legislature has inadvertently given the executive the power to disobey the legitimate exercise of the function of the Judiciary. This is not the intention of the constitution and I am certain also not the intention of the legislature.

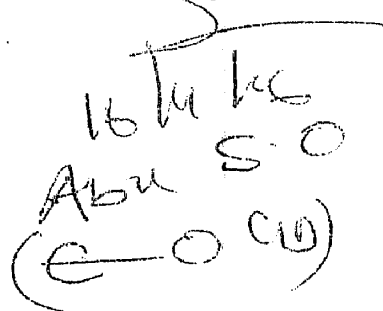
Consequent upon this I align myself with the finding of Ogundare JSC in AG of Ondo State Vs. AG of the Federation Supra and hereby apply the blue pencil rule to run over the proviso to Section 38 (3) of the PPA.

I so find and Order.



HON. JUSTICE B.F.M NYAKO  
JUDGE  
FEDERAL HIGH COURT  
ABUJA.  
28/10/16

CERTIFIED TRUE COPY  
FEDERAL HIGH COURT  
ABUJA



16/10/16  
Abu S.O  
(E.O.C.O)