

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON THURSDAY, THE 14TH DAY OF FEBRUARY, 2019
BEFORE THE HON. JUSTICE A. R. MOHAMMED
JUDGE

SUIT NO: FHC/ABJ/CS/1152/2017

BETWEEN:-

ENERGY LITE NIGERIA LIMITED PLAINTIFF

AND

1. FEDERAL MINISTRY OF TRANSPORTATION
2. BUREAU OF PUBLIC PROCUREMENT DEFENDANTS

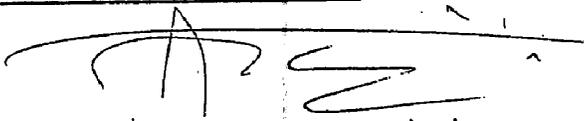
J U D G M E N T

By an originating summons dated and filed on 21/11/17, the Plaintiff seeks the determination of the following questions:-

1. Having regard to the provisions of the Public Procurement Act 2007, particularly Sections 14, 15 and 16 thereof, is the Plaintiff herein in view of Exhibits ENL3, ENL4, ENL5, ENL7, ENL 7A, ENL8 not entitled to be issued with a 'Certificate of

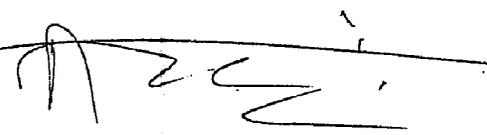
No Objection' by the Defendants for the award of the procurement contract, the subject matter of his suit?

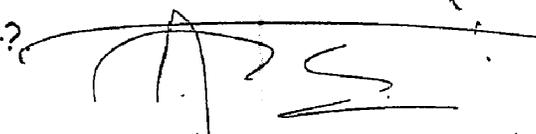
2. Was the 1st Defendant not under a duty to comply with the directives of the 2nd Defendant, as contained in Exhibits ENL7 and 7A - Due Process Review Report - and Exhibit ENL 8, to enable the issuance of 'Certificate of no Objection' to the Plaintiff with respect of the subject matter herein - CONSTRUCTION/PROVISION OF ELECTRIC POWER AND WATER SUPPLY TO RAILWAY STATION BUILDINGS?

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3. Having regard to Exhibits ENL5 by the 1st Defendant and the findings in Exhibit ENL7(A) by the 2nd Defendant particularly at pages 15, 16 and 19 paragraph 3.4 (vii)(viii) and 5.1, can the 1st Defendant purport to cancel, invalidate, terminate and/or in any way act contrary to the content and directives in the said Exhibits. Put differently, are Exhibits ENL7 and ENL 7(A) not directives to the 1st Defendant to do the needful for the issuance of the 'Certificate of No Objection' to the Plaintiff?

4. Having regard to Exhibits ENL3, 5, 7, 7A and 8, is there any evidence of contradiction in the bidding process hindering the

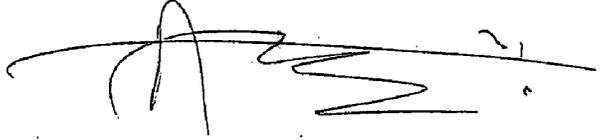
issuance of 'Certificate of No Objection' to the Plaintiff. Put differently, do Exhibit ENL9 & 10 fly in the face of Exhibits ENL 3, 5, 7, 7A and 8?

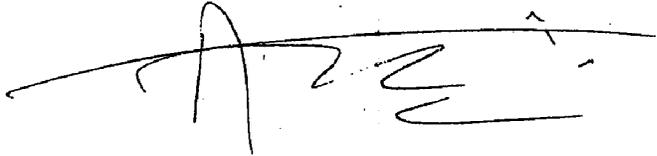
5. Having regards to Exhibits ENL3, 5, 7, 7A and 8, can the claim by the 1st Defendant in Exhibits ENL9 and 10 be correct and valid reason for the purported cancellation of the Procurement contract, the subject matter of this suit? 
6. Having regard to Exhibits ENL 5, 7, 7A and 8, is the Plaintiff not deemed entitled to be issued with 'Certificate of No Objection' by the 2nd Defendant?
7. Having regards to Exhibits ENL1, 2, 3, 4 and 5 inclusive of the processes activated/done there under, coupled with the public interest position of the 2nd Defendant as shown in Exhibits ENL7 and 7A, would suspension of the transaction herein pending the availability of funds (assuming it is true without conceding the fact) not a more reasonable option instead of the purported outright cancellation of the procurement contract by the 1st Defendant, if indeed, it was done in public interest?

8. Does a communal reading of Exhibits ENL 3, 6, 9, 10 and 18 not show a clear manifestation of bad faith, malice, selfishness and afore decision to award the procurement contract herein to a predetermined bidder contrary to Section 28 of the Public Procurement Act, 2007?
9. Having regard to Exhibits ENL1, 14, 15, 16 and 16A, is the subject matter in Exhibit ENL 1 successfully bid for by the Plaintiff different from that in Exhibit ENL 14? 
10. Having regard to the entire procurement contract herein particularly as shown in Exhibits ENL 3, 5, 7 and 8 was the purported cancellation of bid transaction by the 1st Defendant lawful and reasonable having regard to public interest and public policy?.

In consequence of the above questions, the Plaintiff claims from the Defendants the following declaratory reliefs:-

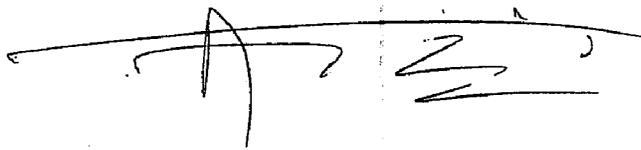
1. A DECLARATION that the Plaintiff is entitled to be issued with the 'Certificate of No Objection' by the Defendants.

2. A DECLARATION that 1st Defendant is under a duty to comply with the directives of the 2nd Defendant, as contained in Exhibit ENL 7, 7(A) and 8 to enable the 2nd Defendant issue the Plaintiff with the requisite 'Certificate of No Objection' accordingly.
3. A DECLARATION that by virtue of Exhibits ENL 3, 5, 7, 7(A) and, the Plaintiff is deemed entitled to be issued with 'Certificate of No Objection'.

4. A DECLARATION that Exhibits ENL 3, 6, 10 and 18 and the general conduct of the 1st Defendant clearly manifest, bad faith, malice, selfishness, and afore decision to award the contract the subject matter herein to a predetermined bidder contrary to Section 28 of the Public Procurement Act, 2007.
5. A DECLARATION that the procurement contract herein, successfully bid for by the Plaintiff per Exhibit ENL 1, is one and the same as that contained in Exhibit ENL 14, as shown by Exhibits ENL 15, 16 and 16A.

6. A DECLARATION that there is no iota of contradiction in the procurement contract herein as shown in Exhibit ENL 3, 5, 7, 7A and 8.
7. A DECLARATION that in the light of Exhibits ENL 3, 5, 7, 7A and 8, the reasons for the purported cancellation of the procurement contract herein in Exhibits ENL 9 and 10 are farfetched and bogus.

8. A DECLARATION that public interest and policy dictates having regard to Exhibits ENL 3, 5, 7, 7A and 8 that suspension of the bid process instead of outright cancellation was the best of option.
9. A DECLARATION that the purported cancellation of the procurement contract herein is wrongful, unreasonable, unlawful and contrary to public policy.
10. A DECLARATION that Exhibits ENL 9, 10, 12 and 13 being letters conveying the purported cancellation of the contract process have no basis in fact and or law are null and void of no legal effect whatsoever.

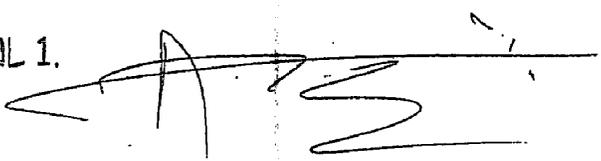
Flowing from the above, the Plaintiff seeks the following orders:-

1. AN ORDER OF MANDATORY INJUNCTION directing the 1st Defendant to stop forthwith, any further steps in the alleged 2017 Procurement contract bid, for same project for which the Plaintiff was adjudged winner of bid and deemed a proper person for the issuance of "Certificate of No Objection" for the award of the Contract for the CONSTRUCTION/PROVISION OF ELECTRIC POWER AND WATER SUPPLY TO RAILWAY STATION BUILDINGS advertised as Lot 2A 2016 bid advertisement. Exhibit ENL 1.

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2. AN ORDER OF MANDATORY INJUNCTION directing the 2nd Defendant to forthwith, issue in favour of the Plaintiff a 'Certificate of No Objection' pursuant to the successful completion of the 2016 Bid Process in which the 1st and 2nd Defendants adjudged the Plaintiff the winner and preferred bidder having fulfilled all righteousness for the purpose executing the 2016 contract for the CONSTRUCTION/PROVISION OF ELECTRIC POWER AND WATER SUPPLY TO RAILWAY STATION BUILDINGS referred to as LOT 2A in Exhibit ENL 1 herein.

3. AN ORDER OF MANDATORY INJUNCTION directing the 1st Defendant to award to the Plaintiff being the winner and the preferred bidder for the contract for the CONSTRUCTION/ PROVISION OF ELECTRIC POWER AND WATER SUPPLY TO RAILWAY STATION BUILDINGS referred to as LOT 2A in Exhibit ENL 1.

4. AN ORDER OF MANDATORY INJUNCTION restraining each and every one of the Defendants either by themselves, agents, privies and or through any person from issuing and or awarding the Certificate of No Objection and or the contract respectively to any other person or persons other than the Plaintiff having being adjudged the winner and preferred bidder of the 2016 bid for the CONSTRUCTION/ PROVISION OF ELECTRIC POWER AND WATER SUPPLY TO RAILWAY STATION BUILDINGS referred to as LOT 2A in Exhibit ENL 1. 

5. AN ORDER OF PERPETUAL INJUNCTION restraining the Defendants, their privies or anybody acting for them howsoever described from further interfering, or scuttling the process of issuance of the Certificate of No Objection, award of the contract and or executing and or actualizing the terms of Exhibit

ENL 7 and 7A, the Letter and Report dated 5th of June, 2017 referred to as Exhibit ENL5 which favourably adjudged the Plaintiff the winner and preferred bidder for the contract for CONSTRUCTION/PROVISION OF ELECTRIC POWER AND WATER SUPPLY TO RAILWAY STATION BUILDINGS referred to as Lot 2A as advertised in Exhibit ENL 1.

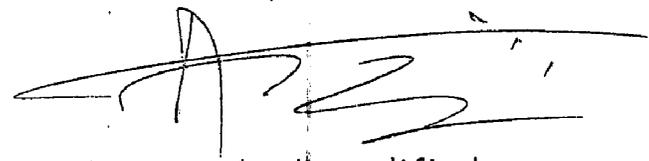
6. AN ORDER directing the Defendants to pay the sum of ₦100,000,000.00 (One Hundred Million Naira) only as compensatory damages to the Plaintiff.

ALTERNATIVELY,



7. AN ORDER directing the 1st Defendant to pay the sum of ₦10,000,000,000.00 (Ten Billion Naira) only to the Plaintiff in general damages for loss of business, goodwill, profit and business.

In support of the originating summons is an affidavit consisting of 27 paragraphs to which 18 exhibits were attached. The case of the Plaintiff as can be seen in the affidavit and accompanying documents could be stated briefly as follows:-

1. That the 1st Defendant, an agency of the Federal Government published an advertisement in the Daily Trust Newspaper of 13th June, 2016 inviting eligible contractors for bidding and pre-qualification in respect of CONSTRUCTION/PROVISION OF ELECTRIC POWER AND WATER SUPPLY TO RAILWAY STATION BUILDINGS (LOT 2A).
2. That the Plaintiff along with 43 other companies submitted their tender documents in consequence of which the Plaintiff having scored 32% was invited for the financial bid.
3. That subsequent to the above, MESSR TVONNE NIGERIA LIMITED won the bid and was recommended to the 2nd Defendant for the award of the contract and No objection Certificate.

4. That however, Tvonne Nig. Ltd was subsequently disqualified on the ground of non-compliance.
5. That the 1st Defendant however failed or refused to recommend the most responsible bidder to the 2nd Defendant contrary to the

provision of Section 32 (3)(i) of the Public Procurement Act until the 2nd Defendant requested for recommendation.

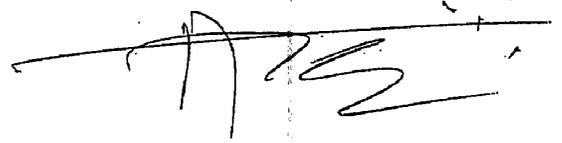
6. That subsequently vide its letter dated 6/5/17, the 1st Defendant recommended the Plaintiff at the tender price of N7,548,922,680.19 for the issuance of No objection Certificate for the award of the contract.
7. That however vide letter dated 6/6/17 addressed to the 2nd Defendant, the 1st Defendant requested that the Plaintiff be made to accept the bid price of Tvonne Nig. Ltd in the sum of N6,105,076,396.65 which request the 2nd Defendant rejected.
8. That as can be seen on exhibits ENL⁷ and ENL^{7A}, the 2nd Defendant stated that the Plaintiff is the only one entitled to No Objection Certificate.
9. That the above position of the 2nd Defendant notwithstanding, the 1st Defendant refused to comply with exhibits 7 and 7^A and instead cancelled the entire procurement transaction and informed the Plaintiff vide exhibit ENL¹⁰ that:-

a. that 2016 budget on which the project was predicated had collapse.

b. the whole process was bedeviled with contradictions.

10. That in reaction, the Plaintiff wrote the 1st Defendant a letter of protest. See exhibit ENL¹¹.

11. That despite the protest, the 2nd Defendant approved the cancellation.

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12. That in view of the above, the Plaintiff had forward a complaint to the 2nd Defendant for an administrative review of the matter and to reverse the decision of the 1st Defendant and to substitute same with its findings. See exhibit ENL 11^A.

13. That while awaiting the outcome of it's complaint, the 1st Defendant caused to be advertised a fresh bid for the same contract as can be seen in exhibit ENL 14.

14. That it has suffered incalculable damages which are itemized in paragraph 16 of the affidavit in support of the originating summons.
15. That the 1st Defendant's cancellation of the procurement transaction was activated by selfishness, malice, bad faith and not in public interest.
16. That exhibit ENL 18 shows that there were no contradictions, in the documents of the Plaintiff, a fact that is known to the 1st Defendant.
17. That the Plaintiff should be restored to its position and be issued with No objection Certificate and be awarded the contract.



In his written address in support of the originating summons, learned senior counsel for the Plaintiff argued the questions formulated in the originating summons in the following order:-

- A. Questions 1, 2, 4 and 6 together
- B. Questions 3 and 5 together

- C. Questions 7 and 10 together
- D. Question 8
- E. Question 9.

In arguing questions 1, 2, 4 and 6, learned senior counsel for the Plaintiff submitted that Section 16 of the Public Procurement Act (PPA for short) have made adequate provisions on how a bidder should act in pursuance of a procurement contract bid and that the Defendants having issued and caused to be put in the public domain exhibits ENL 3, 4, 5, 7, 7A and 8 were bound by and under a duty to comply with them. That exhibit ENL 3 adjudged the Plaintiff satisfactory and competent to be awarded the procurement contract. That the Plaintiff was not only entitled to the issuance of Certificate of No objection but was deemed to have been by reason of which the procurement contract was technically consummated.



It is the further submission of learned senior counsel for the Plaintiff that as at the time exhibits 7 and 7A were issued, the 1st Defendant cannot cancel the procurement contract as equity regards as done that which ought to have been done. The Court was referred to the case of IRAGUNIMA VS. RIVERS STATE HOUSING AND PROPERTY

DEVELOPMENT AUTHORITY (2003) 12 NWLR PART 834, 427 at 440 among others.

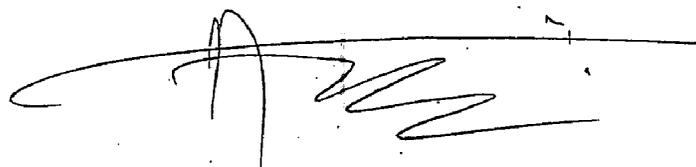
It is the further submission of learned senior counsel for the Plaintiff that the 1st Defendant in purporting to cancel the procurement contract did not give evidence of the alleged contradiction. That from the totality of exhibits 3, 5, 7, 7A and 8, the Plaintiff was not only entitled to be issued with a Certificate of No objection but is deemed to have been issued.



On questions 3 and 5, learned senior counsel for the Plaintiff submitted that the Defendants are bound by exhibits ENL5, 8 and 7A and they cannot act contrary to them. Learned senior counsel wondered how the 1st Defendant suddenly discovered that the budget had lapsed and the process was bedeviled with contradictions. It is learned senior counsel submission that the funds for the execution of the procurement contract was captured in the 2017 budget.

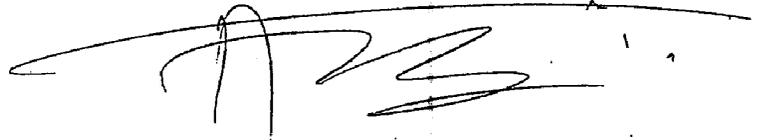
It was the learned senior counsel further submission that the 1st Defendant, in cancelling the contract process was due to self interest, bad faith and malice contrary to the reason stated in exhibits ENL9 and 10.

Arguing questions 7 and 10, learned senior counsel submitted that the 2nd Defendant adjudged the Plaintiff as the only person entitled to be awarded the Certificate of No objection and the procurement contract. Learned senior counsel further submitted that as at the time exhibit ENL7 was issued, the procurement contract had been consummated. That the purported cancellation contained in exhibits ENL9 and 10 was contrary to public interest and public policy and that the cancellation be voided.



Arguing question 8, learned senior counsel for the Plaintiff submitted that it is because the 1st Defendant had a preferred bidder that culminated in the bad faith, malice of the 1st Defendant against the Plaintiff that there were no contradictions from I.T.F. It is the further contention of learned senior counsel that the 1st Defendant in issuing exhibits ENL 9 and 10 was acting contrary to public interest and public policy contrary to the policy of PPA. The Court was referred to the definition of malice contained in the Black's Law Dictionary which definitions were adopted in the cases of SUNDAY D. BAYAM VS. JOB AGANA (2010) LPELR 9159 (CA) and AKINIWO VS. NSIRIM (2003) 1 NWLR PART 1093, 439.

On question 9, learned senior counsel submitted that the procurement contract in exhibit 1 is the same as that in exhibit ENL 14. The Court was referred by senior Counsel to exhibits ENL 15, 16 and 16A which all emanated from the 1st Defendant and it was submitted that a cursory look at the exhibits leaves no one in doubt as to the fact that they are one and the same procurement contract. Learned senior counsel for the Plaintiff therefore urged the Court to grant all the reliefs sought.

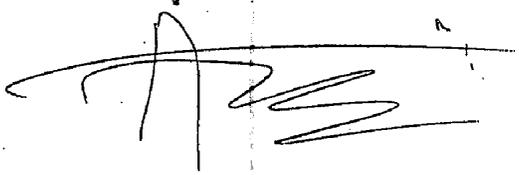
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In reaction to the originating summons, the 1st Defendant through it's counsel filed a Notice of preliminary objection dated and filed on 30/4/18 praying the Court to decline jurisdiction on the following grounds:-

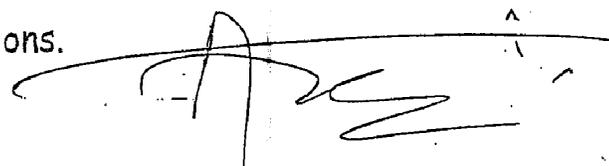
- a. that the action of the claimant is statute barred and offends Section 2 (a) of the Public officers Protection Act Cap P41 LFN 2004.
- b. that the subject matter of the suit deals with issues of contract which the Federal High Court has no jurisdiction to entertain.

- c. that the mode of commencement of this suit is not the appropriate mode required by this Court.
- d. that the 1st Defendant is a non-juristic person and action cannot lie against it.

Learned 1st Defendant's counsel in his written address in support of the preliminary objection formulated the following issues for determination:

1. Whether the Federal High Court has jurisdiction to handle claims that are premised on contract. 
2. Whether this action is not statute barred for non-compliance with Section 2(a) of the Public Officers Protection Act.
3. Whether this action is not liable to be struck out/dismissed for want of jurisdiction, the Federal Ministry of Transport being a non-juristic person as such an action cannot lie against it.
4. Whether the mode of commencement of this suit is the appropriate mode required by the Rules of this Court.

Arguing issue one, 1st Defendant's counsel referred to Section 251 of the 1999 Constitution and submitted that the said Section itemized the subject matters that fall within the jurisdiction of the Federal High Court. 1st Defendant's counsel then submitted that the Plaintiff's claim is that the 1st Defendant cancelled a contract bidding process which ought to have been given to the Plaintiff, therefore the subject matter is outside the jurisdiction of the Federal High Court and reference was made to some judicial decisions.



On issue two, 1st Defendant's counsel submitted that this suit having been instituted outside the three months provided for in Section 2(a) of the Public Officers Protection Act is statute barred. It was 1st Defendant's counsel further submission that the cause of action arose on 26/7/17 when the 1st Defendant conveyed it's decision to cancel the procurement process. That the issue of an action being statute barred touches on the jurisdiction of the Court.

On issue three, 1st Defendant's counsel submitted that there are two categories of persons that can sue or be sued, that is, natural and other bodies having juristic personality and counsel further submitted that even when a person is a juristic personality, the person must be sued with it's statutory name, 1st Defendant's counsel then submitted

that by the Constitution, the 1st Defendant ought to have been the Minister of Transportation and that the Ministry of Transportation is not a juristic person.

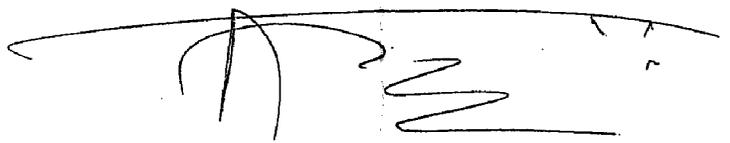
On the fourth issue, 1st Defendant's counsel submitted that this suit which does not call for interpretation of a statute ought to have been commenced by a writ. That the present suit is obviously contentious and may require examination and cross examination of witnesses. The Court was referred to the case of CHIEF ADEBISI ADEDGUYI VS. A.P.C. (2014) LEGAL PEDIA S.C. 1317 r. 8. The Court was urged to decline jurisdiction and strike out this case.

Plaintiff's senior counsel in reaction to the preliminary objection filed a written address dated and filed on 4/5/18, to the 1st Defendant's preliminary objection.

Learned senior counsel for the Plaintiff who responded to the preliminary objection in the order it was argued submitted on the 1st issue that it is the 1999 Constitution that confers juristic legitimacy and recognizes the 1st Defendant as an agent and organ of the Federal Government pursuant to Section 251 of the 1999 Constitution. That the 1st Defendant had submitted in paragraph 2.4 of it's written

address that it is an agency of the Federal Government and therefore comes within the jurisdiction of the Federal High Court. The Court was referred to Section 251 (1) (a), (p) and (r) of the 1999 Constitution and the case of FEDERAL MINISTRY OF COMMERCE AND TOURISM VS. BENEDICT EZE (2005) LPELR 3626 (CA) and submitted that the 1st Defendant is a juristic personality.

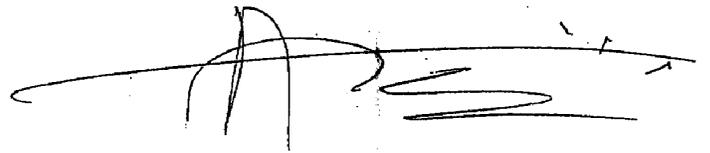
In arguing issue two, senior counsel for the Plaintiff submitted that the Plaintiff's claim and the subject matter of this suit is far from being premised on simple contract. That the subject matter in this suit is predicated on the interpretation, application and administration of the Public Procurement Act, 2007 by the two Defendants who are agencies of the Federal Government. Learned senior counsel further submitted that the subject matter of this suit arose or relates to the revenue of the Federal Government and further that the present suit seeks for declaration and injunction against the action or inaction of the 1st Defendant.



On the third issue, learned senior counsel submitted that before the 1st Defendant can claim the defence in the Public Officers Protection Act, the 1st Defendant must meet the conditions stated in the case of PROF. JIBO VS. MINISTRY OF EDUCATION (2016) LPELR -

40616 (CA) at pages 33-334 paragraphs F-D as the onus is on the 1st Defendant. Learned senior counsel contended that Public Officers Protection Act does not apply to contracts, relying on some judicial authorities.

Learned senior counsel submitted rightly in my view that time start to run after the exhaustion of the dispute and grievance mechanism in Section 54 of the Public Officers Protection Act 2007. Learned senior counsel added that the defence cannot avail a public officer who acted outside the colour of his office or outside his statutory or constitutional duty.

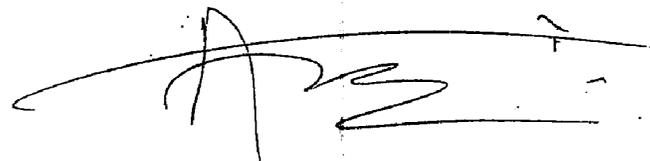
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On the final issue, it is the submission of learned senior counsel that the Defendants having not file any process countering the depositions in the originating summons, the 1st Defendant cannot object to the use of the originating summons in this dispute and the subject matter is for interpretation of contractual documents and an enactment. The Court was urged to resolve the fourth issue in favour of the Plaintiff.

The 2nd Defendant also filed a written address dated and filed on 7/5/18 in support of the 1st Defendant's preliminary objection. The 2nd Defendant adopted the issues formulated by the 1st Defendant in it's

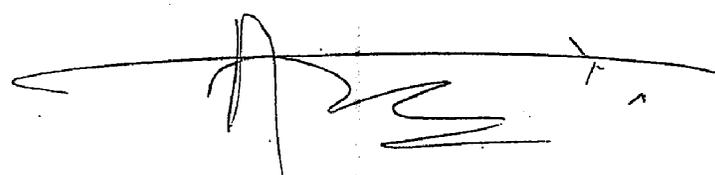
preliminary objection. The argument of the 2nd Defendant is essentially the same as that of the 1st Defendant.

In addition to its Notice of preliminary objection, the 1st Defendant also filed a counter affidavit on 30/4/18 to the originating summons. The counter affidavit consist of 52 paragraphs and in summary states as follows:-



- a. That the Plaintiff submitted its document for the bid alongside other prospective bidders and that TVONNE NIG. LTD emerged winner and was recommended to the 2nd Defendant for the issuance of a Certificate of No objection which company was later disqualified.
- b. After admitting most of the depositions of the Plaintiff, the 1st Defendant in paragraph 22 deposed that the Certificate submitted by the Plaintiff was fake.
- c. That the 2nd Defendant stated that Section 28 of the Public Procurement Act, allows the 1st Defendant to cancel any procurement process at any time for public interest.

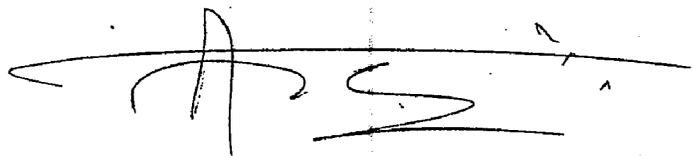
- d. That Section 16(b) of the Public Procurement Act allows the 1st Defendant to cancel any procurement process when fund is not available to meet the obligation of the contract.
- e. That the grounds for the cancellation were not contrived or consecrated.
- f. That the 2nd Defendant approved the cancellation.
- g. That what the Plaintiff is looking for is outside the jurisdiction of this Court.
- h. That at no time was the contract awarded to the Plaintiff, neither was it issued with Certificate of No objection.
- i. That there is no law that mandates any entity to award a contract to the most responsive bidder in a procurement process.



In his written address in support of the counter affidavit, learned 1st Defendant's counsel formulated three issues for determination:

- a. Whether the Federal High Court has jurisdiction to handle cases premised on contract.
- b. Whether this Court can restrain the 1st Defendant from performing it's statutory duties.
- c. Whether in the circumstance, there is a valid contract created between the Plaintiff and the 1st Defendant such that the 1st Defendant will be unduly influenced to execute same.

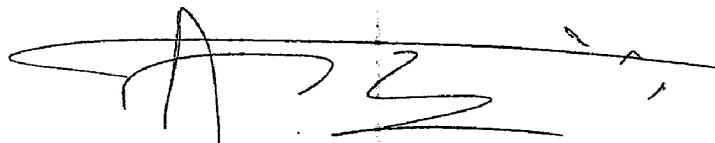
On the first issue, I noticed that it is the same argument proffered by the 1st Defendant on issue one on the Notice of preliminary objection. I do not need to repeat same here.

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On the second issue, 1st Defendant's counsel submitted that by Section 28 of the Public Procurement Act, the 1st Defendant has the power to cancel any procurement process in the public interest. That the declaratory relief is in respect of a completed act as the procurement process has long been cancelled. 1st Defendant's counsel further submitted that Section 28 (b) provides that no procurement proceeding shall be formalized until the procurement entity has ensured that funds are available to meet the obligation of the contract. That the Plaintiff which failed to bid for the contract

advertised in the Daily Trust cannot validly seek a restraining order as he has no locus.

On the third issue, 1st Defendant's counsel referred to the ingredients of a valid contract, to wit: offer, acceptance and furnishing of consideration in the presence of witnesses which learned counsel said are lacking in this case. That there was no valid contract between the Plaintiff and the 1st Defendant. 1st Defendant's counsel further submitted that the Plaintiff has failed to state how a contractual relationship has been established between the parties such that a breach can be remedied by the Court. That the procurement process was at the preliminary stage as at the time the cancellation was made. 1st Defendant's counsel further submitted that what transpired between the Plaintiff and the 1st Defendant was merely an intention to create legal relationship which is never a contract. 1st Defendant's counsel relied on the case of MRS T. CHUKWUMA VS. MR. BABAWALE IFELO (2009) LRCN VOL. 168 page 47 at page 51 ratio 4.



On 4/5/18, the Plaintiff filed a reply to the 1st Defendant's counter affidavit. It consists of 10 paragraphs to which one document was attached as exhibit ENL PADO1.

In support of the reply is the Plaintiff's written address dated and filed on 4/5/18. In the said written address, learned senior counsel formulated two issues for determination:

- a. Whether the Federal High Court has jurisdiction to entertain this suit.
- b. Whether the Court can restrain the 1st Defendant from performing it's statutory duties.

Again, I observed that the argument of learned senior counsel for the Plaintiff on issue one is essentially a repetition of his argument in opposition to the Notice of preliminary objection of the 1st Defendant. I do not deem it necessary to repeat the argument here.

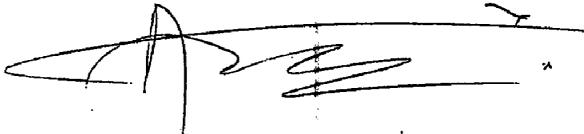
On the second issue, learned senior counsel submitted that the claim of the Plaintiff is that the 1st Defendant do not and never acted in the interest of the public in cancelling the contract as envisaged by the conditions set out in Section 28 (a) and (b) of the Public Procurement Act. That the bid had been duly accepted and recommended by the 1st Defendant and also accepted by the 2nd Defendant for the issuance of the Certificate of No objection. That the purported cancellation of

the contract came about as an afterthought and was maliciously and spitefully done. Also, that the 1st Defendant contravened Sections 37 (2) and 57 (8) (a), 10, (12) and (13) of the Public Procurement Act and it never displayed the ethical standard and concealed it's conflict of interest and relationship with TVONNE NIG. LTD.

Reacting to the issue of non-existence of a valid contract between the Plaintiff and the 1st Defendant, learned senior counsel submitted that acceptance of an offer may be demonstrated by conduct of the parties, by their words and by documents that have passed between them. Reference was made to the case of UNION BANK NIG. LTD VS. OZIGI (1991) 2 NWLR PART 176. That the contract is regulated by Public Procurement Act.

The Plaintiff also filed a Further and Better Affidavit to which it attached two exhibits.

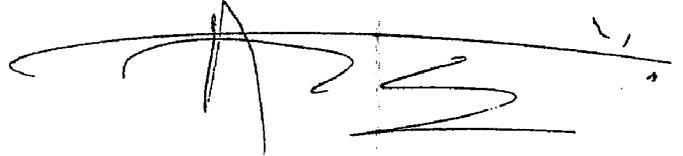
The 2nd Defendant also filed counter affidavit to the originating summons on 2/1/18. The counter affidavit which is comprised of 24 paragraphs is to the effect that:-

- a. It is not in a position to either admit or deny paragraphs 1, 2, 15, 19(i) and 20(i - vi).
- b. It is not disputing paragraphs 3, 4, 5, 6 (i) - (vi), 7(i), 7(iv), 9(iv), 11(iii), and 14 of the affidavit in support of the originating summons.
- c. It only requested from the 1st Defendant the recommended bidder in its evaluation processes.
- d. The disqualification of TVONNE NIG. LTD was done by the 1st Defendant.

- e. It was in a bid to save cost that the 1st Defendant short listed the Plaintiff with a review cost of N6,105,076,396.65 as the renewed cost of the contract.
- f. The 1st Defendant has the statutory powers to cancel a procurement process and that the 2016 budget had lapsed.
- g. It approved the cancellation of the procurement process by the 1st Defendant.

In its written address in support of the counter affidavit, the 2nd Defendant formulated two issues for determination, namely:-

1. Whether the Plaintiff is entitled to the reliefs sought:
2. Whether the justice of the case demand that this Court should restrain the 2nd Defendant from performing its statutory duties.

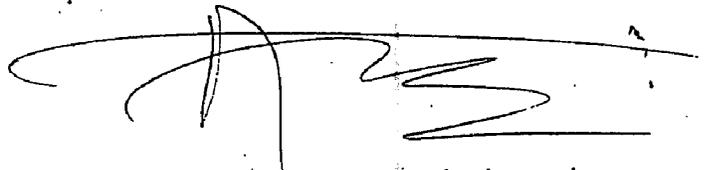
Arguing issue one, 2nd Defendant's counsel cited Section 28(b) of the Public Procurement Act and submitted that the 1st Defendant in cancelling the procurement process merely exercised its statutory power. Learned 2nd Defendant's counsel submitted that the Court cannot possibly restrain a party on a subject that has been completed. That since the contract no longer exists, no injunction can be granted to restrain the 2nd Defendant.



Learned 2nd Defendant's counsel further submitted that the Court cannot grant a mandatory injunction in respect of the present contract which is different from the subject matter of this suit. That to be entitled to the grant of mandatory injunction, the Plaintiff must meet the conditions stated in the case of KOTOYE VS. CBN (1989) 1

NWLR PART 98, 409 among others. Learned 2nd Defendant's counsel urged the Court to refuse to grant the reliefs sought.

On 14/11/18, both the preliminary objection and the originating summons were heard together in line with the Rules of this Court. See also the case of LAU VS. P.D.P. (2018) 4 NWLR PART 1608, 60 at 121 paragraphs C-H.



I have gone through all the processes filed by the parties including the written addresses in support thereof.

The position of the law is that where the issue of jurisdiction is raised, it has to be considered first. See the case of HERITAGE BANK LTD VS. BENTWORTH FIN. (NIG) LTD (2018) 9 NWLR PART 1625, 420 at 433 paragraph D. Consequently, I shall now consider the issue of jurisdiction raised by the 1st Defendant and supported by the 2nd Defendant.

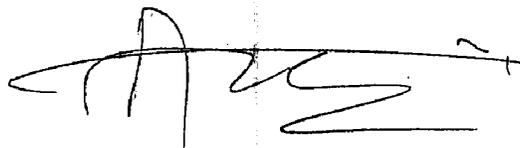
In its preliminary objection dated 30/4/18 and filed same date, the 1st Defendant challenged the jurisdiction of this Court to hear and determine the case on four grounds.

The 1st ground is that the action is statute barred for failure to comply with the provision of Section 2(a) of the Public Officers Protection Act as the action was filed outside the mandatory 3 months period stipulated in the said law for bringing the action.

The law is that in determining jurisdiction, the Court considers the statement of claim and in this case the affidavit in support of the originating summons and the reliefs sought. See the case of A.G. FEDERATION VS. A.G. ANAMBRA STATE (2018) 6 NWLR PART 1615, 314 at 348 paragraphs E-F and F.U.T. MINNA VS. OLUTAYO (2018) 7 NWLR PART 1617, 176 at 195 paragraph A.

From the affidavit evidence in support of the originating summons and the reliefs sought, it is manifestly clear to me that the Plaintiff is challenging the decision of the Defendants in failing to comply with the provisions of the Public Procurement Act in failing to issue to it Certificate of No objection and consequently award the contract in issue to it. As can be seen on exhibit ENL 10 and paragraph 9 (iv), the 1st Defendant vide it's letter dated 26/7/17 conveyed to the Plaintiff it's decision cancelling the procurement transaction complained of.

By the clear provision of Section 54(7) of the Public Procurement Act, the period of limitation will start to run after the Bureau must have rendered a decision on the application for administrative review. Before then, the period of limitation cannot run against the Plaintiff. Contrary to the submission of the learned counsel for the Defendants, I am of the opinion that the Plaintiff is not caught up by the provision of the Public Officers Protection Act.



I have no hesitation in rejecting the argument of the Defendants to the effect that this suit deals on issue of contract. Section 54(7) of the Public Procurement Act specifically provides that a bidder who is not satisfied with the decision of the Bureau may appeal to the Federal High Court for redress.

I equally have no hesitation in rejecting the argument that the use of originating summons is not appropriate. The facts to my mind are not in dispute and the suit seeks the interpretation of the Public Procurement Act and certain documents. To that extent, the Plaintiff is on track in commencing this suit by originating summons.

As clearly seen in the decided cases cited by the learned senior counsel for the Plaintiff, the Plaintiff is a juristic person. Consequently, I find no merit in the preliminary object and it is hereby dismissed.

In the light of the above, I shall now consider the merit or otherwise of the Plaintiff's claim.

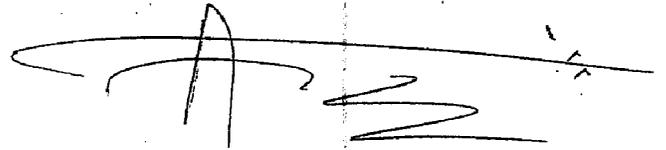
In the affidavit in support of the originating summons, the Plaintiff deposed that along with 43 other companies, it was invited for bidding and pre-qualification in respect of the construction/provision of Electric Power and Water Supply to Rail Station Building (LOT2A) and that having meet the minimum pass mark, it was invited for financial bid by the 1st Defendant. That at the end of the day, Messrs TVONNE NIG. LTD was awarded the contract and No objection Certificate issued to it. However, according to the Plaintiff, Messrs TVONNE NIG. LTD was disqualified as it was non-compliant and as the next most responsive bidder, the Plaintiff was recommended for the award of the No objection Certificate and the contract. That sadly however, it was not given the No objection Certificate, so also the contract, and the procurement was cancelled by the 1st Defendant.

It is in view of the above that the Plaintiff instituted this suit claiming some declaratory and injunctive reliefs.

The law imposes a duty on the Plaintiff which claims declaratory reliefs to succeed on the strength of it's case and not to rely on the weakness

of the defence. See the cases of UMAR VS. GEIDAM (2019) 1 NWLR PART 1652, 29 and ANAGBODO VS. FARUK (2019) 1 NWLR PART 1653, 292.

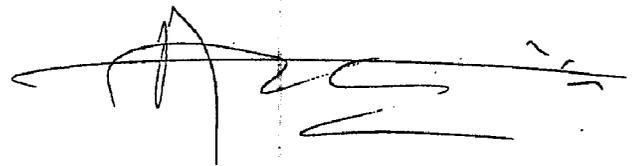
However, I observe that the Defendants have admitted the above depositions of the Plaintiff in their respective counter affidavits. Facts admitted need no further proof. See the case of F.M.H. VS. C.S.A. LTD (2009) 9 NWLR PART 1145, 193 at 214 paragraphs D-F. See also the case of D.M.V. (NIG.) LTD VS. N.P.A. (2019) 1 NWLR PART 1652, 163 at 185 paragraphs E-G, 186 paragraphs B-C. The Plaintiff is entitled to take advantage of the evidence proffered by the Defendants.

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From the evidence adduced by the parties and the submissions thereon, the only germane issue that is in contention between the parties is whether the 1st Defendant in cancelling the procurement process in circumstances of which the Plaintiff was denied the issuance of the No objection Certificate and the eventual contract in issue, was done in public interest. While the Plaintiff is saying that the cancellation was borne out of malice and selfishness, the Defendants are saying that the 1st Defendant in cancelling the procurement process acted in the public interest.

In resolving the issue, I am constrained to go back to the affidavit evidence proffered by all the parties and the documents attached thereto. To this end, I find paragraphs 7(iii), (iv), (v), 8(i) - (iii) apt. See also exhibits ENL 5, 6, 7, 7A, 9 and 10 in addition to paragraphs 13, 14, 15 and 24 of the 1st Defendant's counter affidavit.

Learned 1st Defendant's counsel cited Section 28(b) of the Public Procurement Act and submitted that in cancelling the procurement process, the 1st Defendant was merely carrying out its statutory powers and functions.



I reject this line of argument as the 1st Defendant can only rely on the said provision if it demonstrates that it is doing so in the public interest. As can be gleaned from the depositions of the Plaintiff referred to above, the 1st Defendant indeed cancelled the procurement process when it became obvious that the Plaintiff refused the amount quoted by the Messrs TVONNE NIG. LTD.

In consequence of the above findings, I find the declaratory reliefs sought by the Plaintiff established. However, in view of the fact that the contract had been cancelled, this Court is wary of granting the

mandatory injunctions sought. See the case of NKPORNWI VS. EJIRE (2009) 9 NWLR PART 1145, 31 at 170, paragraphs G-H.

Since the Plaintiff is claiming in the alternative general damage, this Court is of the view that the Plaintiff is entitle to grant of general damages. See the case of BASS & MATT ENT (NIG) LTD VS. KEYSTONE BANK LTD (2015) 1 NWLR PART 1441, 609 at pages 625-626 paragraphs E-A, 629-630 paragraphs H-C.

Consequently, the Plaintiff is hereby granted the sum of N100 million Naira as general damages.



HON. JUSTICE A. R. MOHAMMED
JUDGE
14/2/2019.

APPEARANCES:

Oladipo Okpeseyi SAN with Chris Nevo Esq., Abimbola Akintola (Miss) and Christiana Okoh (Miss) for the Plaintiff.

I. A. Charles-Okoli (Mrs.) for the 1st Defendant.

[Handwritten signature]

G. E. Adole Esq. holding the brief of M. M. Hirse Esq. for the 2nd Defendant.