HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON WEDNESDAY 19TH DAY OF JUNE, 2019
BEFORE HIS LORDSHIP: HON. JUSTICE V. V.M. VENDA
SUIT NO: FCT/HC/CV/795/14

BETWEEN:

JIREH HABITATION INTEGRATED SERVICES LTD……PLAINTIFF

AND

FIDELITY BANK PLC……DEFENDANT

JUDGMENT

By a writ of summons dated and filed on the 12th day of February, 2014 the claimant claims from the defendant as follows:

1. ***A declaration*** *that the mode, manner and timing of the Defendant's disbursement of the sum of N84,915,812.78 (Eighty-four Million, Nine Hundred and Fifteen Thousand, One Hundred and Eighty Two Naira, Seventy Nine Kobo) being project funds advanced to the Plaintiff by the Federal Ministry of Works, is in breach and violation of the terms, tenor, intent and purpose of the Advance payment Guarantee Agreement and the subsequent working Agreement duly executed between the parties hereto.*
2. *The sum of N333,562,010.00 as special damages arising from Defendant's breach of its obligations under the contract.*

3. *The sum of N50,000,000.00 (fifty Million Naira) as general damages arising from the breach of the contract between the Plaintiff and the Defendant.*

The claimant and the Defendant are both limited liability companies; the defendant being Banker to the claimant.

The claimant's case is that by a letter reference number FMW/DPP/230/Vol. II/330, dated 14th November, 2013, the Federal Ministry of Works conveyed the award of a Road construction Contract to the claimant to construct the Ikemba Drive Spur on Oba-Okigwe Road through the Permanent site of the Nnamdi Azikiwe University Teaching Hospital, Anka Anambra State, at a total contract sum of N625, 690, 820.32 (Six hundred and twenty-five million, Six hundred and ninety thousand, eight hundred and twenty naira, thirty-two Kobo) with a completion period of 14 months.

The evidence before the court as presented is that the claimant was in addition to the award letter also given an order contained in the Federal Ministry of Works' Engineer's Order, dated 20th November, 2013. In this proceedings, this letter of award of contract and the Engineer's order are admitted as exhibits 1 and 5 respectively.

In order to pay 15% of the contract sum for the claimant to commence Work, the Federal Ministry of Works requested of the claimant a Bank Guarantee in form of Advance Payment Guarantee in the sum of N93,853, 623.06 (Ninety Three Million, Eight Hundred and Fifty Three Thousand, Six Hundred and Twenty-Three Naira, Six Kobo) (including VAT and withholding Tax) to enable

the claimant execute the 1st phase of the contract. Throughout this judgment the Advance Payment Guarantee shall be referred to, as the APG.

According to the claimant, the requirement for an APG from a reputable Bank was to ensure prompt disbursement of funds and for timely completion of that phase within a time frame of 8 weeks. The claimant therefore, approached the defendant, for the APG and the Defendant, after thoroughly studying all the contract documents agreed to issue the APG at a consideration of N640, 550.98. (Six hundred and forty thousand, five hundred and fifty Naira, Ninety-Eight kobo) in addition to other terms.

Claimant said they paid the N640,550.98 and satisfied all the other conditions whereupon the Federal Ministry of Works after deducting the VAT and withholding Tax paid the sum of N84,915,182.78 into the claimant's Bank account No 5080009098 domiciled with the Defendant bank who warehoused the funds for use by the claimant for the contract.

That the Defendant indicated to disburse the project sum in 3 (three) tranches of 50:30:20% respectively to ensure diligent application of the funds.

That on the 27/02/2014 the Defendant offered to commence payment to the claimant which was accepted, but the actual disbursement of the first tranche of 50% of the said APG was done on the 04/3/2014 in the sum of N42, 457,591.39k which was utilized by the claimant on materials for the Job i.e. earth work and payment of 50% to the subcontractor for drainage.

According to the claimant the defendant appointed Messrs Nuks Associates Ltd as project consultants at the claimant's expense, to diligently monitor the Project execution by the claimant, value, certify, and recommend same for further disbursement of funds if deserving.

That on April 3, 2014 the claimant applied to the defendant for disbursement of the 2nd tranche of funds to facilitate further execution of the project and a certification from Nuks Associate Ltd in its report dated April, 9th 2014, recommending that the 2nd tranche of 30% of the funds be disbursed to the claimant, was issued.

Rather than a speedy and immediate disbursement of funds to the claimant, the defendant commissioned its team of risk management staff to re-inspect and re-value the project. The Defendant, consistently delayed the disbursement of the funds thereby causing delayed project execution, erosion of earthwork and stone based compact, by torrential rain fall, attendant cost of man-hours and materials in remedial works and substantial financial loss and project set back.

With this delay, the early rains of 2014 commenced and eroded most of the earth work previously completed, forcing the claimant to work during the rains to avoid a complete and wholesome damage by the rains thus incurring the following expenses in the process:

(i) Stone base-544.6m^3 @ 15,000.00 =8,169,000.00.

(ii) Cost of earth filling washed away by rainfall-6,080.90m^3 @ 1;400.00 = 8,513,260.00.

(iii) Bitumen Emulsion brought condemned due to long stay -46 drams @ 36,000.00 = 1,656,000.00.

(iv) MD/CEO payment for 6 months = 4,800,000.00.

(v) Payment made to staff due to delay for 6months =5,886,000.00.

(vi) Payment made to temporarily staff team (A) =3, 455,000.00.

(vii) Payment made to temporarily staff team (B) 1, 393,000.00.

That the project is now in ruins due to erosion and attendant but unbudgeted expenditure of repairs and maintenance, before defendant eventually offered to disburse the 2nd tranche (30%) on the 22nd April, 2014 which the claimant accepted immediately and the sum of N25,424,554.83 was credited into the claimant's account on the 24th April, 2014.

The claimant applied for the final tranche of the funds on September, 2nd 2014 and emphasized the need for prompt disbursement so that the project will be accomplished during the break, in rain fall, and to avoid damage by heavy latter rainfalls. After the defendants project consultant, Messrs Nuks Associates Ltd had certified, in its report of September, 8, 2014, that the Plaintiff deserved disbursement of the last tranche. Which defendant failed to do. That on the 11th September, 2014, the defendant eventually responded proposing to disburse 80% of the last tranche of funds in the sum of N13, 386,429.25 to withhold 20% thereof in the sum of N3.396m until the claimants are discharged from their APG which condition is alien to the terms of the agreement executed between the claimant and the Defendant at their instance and proposal.

That the claimant rejected the proposal, as funds offered, would not accomplish the project, but defendant did not yield as indicated in its letter of September, 17, 2014 (exhibit 23) thereby causing the Plaintiff to compel defendant by a demand notice through its solicitors, the receipt of which caused defendant eventually to yield to the release of 100% of the outstanding tranche disbursement of N16,983,036.56 contained in its offer dated October, 3rd, 2014 (exhibit 27); same was received by the Plaintiff on the 8th October, 2014 and accepted that same day. (Exhibit 28 refers).

However, the defendant did not disburse the funds until 13th October, 2014 after the heavy rains had substantially washed away the previously completed laterite/earthwork. That the claimant notified the defendant of the losses/damages and invited them to a verification visit which defendant failed and/or declined to yield to the demands of the claimant in a mail dated November, 21st, 2014 denying liability. (Exhibits 29,30,31&32 refers).

The claimant contends further that the funds meant for the prompt execution of the project was not promptly disbursed; thus defendant breached the agreement between the parties by delaying/refusing to promptly disburse the funds especially the 2nd and 3rd tranches as they fell due, which caused the loss incurred by the claimant.

In the claimant's reply to statement of defence and defence to counter-claim dated and filed on the 28th of October, 2016 claimant's PW1 stated that the Defendant was aware that time of the project was of the essence, in terms of fund disbursement as that phase of the project was to be completed within 8 weeks to which extent, these details were submitted to the defendant who vetted same and forwarded it to their consultant, M/S Nuks Associates Ltd for

analysis whose report of January, 13th , 2014 was duly accepted by the defendant.

That it was in acknowledgement of the need to meet the time-constraints and urgency that the parties prepared all necessary documentation for prompt fund disbursement even before Federal Ministry of Works remitted the advanced fund of N84,915, 182.78 on 21/2/2014, and was received by the defendant that same day but was not reflected in the claimants account until 24/2/2014 and immediately moved to defendants warehouse account on 25/2/2014 but did not make an offer of utilization to the claimant until 27/2/2014 of which the claimant accepted on the same day.

That it was at the point of disbursement as envisaged by the Advanced Payment Guarantee agreement that the defendant remembered new conditionalites for disbursement other than those earlier listed in the said agreement and previously satisfied by the Plaintiff.

That by its mail of 4th March, 2014, defendant acknowledged and admitted the delay in the claimant's access to the APG funds and requested for the said new documents not listed in the APG agreement.

That the delay in disbursement of funds and subsequent damage to the claimant's project was as a result of defendant's laxity and new conditions introduced at the point of draw down and acceptance of the money by the claimant which was not in condonation of the defendants delay but in order to ameliorate the damage to the project as disbursement could have been made promptly even on weekends especially in view of electronic banking.

On the issue of damages, claimant contends that remoteness of damages does not apply, as defendant was expressly warned, and in writing, of the attendant consequences to the project, if they delay in disburdening the funds.

That payment of fees to M/S Nuks Associates Ltd, agents of the defendant, was debited from the claimant's account by the defendant even without notice or approval of the claimant.

Claimant contends further that due process in the release of subject funds by the defendant was limited to compliance with the terms and conditions of the operating APG agreement, and that claimant never approbated and reprobated in its demand or appropriation of subject funds to the contract as the production of an IPC was not a condition for drawdown of funds under APG agreement.

Claimant stated that timeous execution of the project was the reason why funds were put in the custody of the defendant and the use of such funds for that purpose and does not create a waiver to a redress of the defendants breach of that main purpose, as losses suffered by the claimant are not remote but arose directly from defendants delay in funds disbursement.

In claimant's defence to counter-claim, it denied the averments contained in paragraphs 33 to 35 of the counter claim and contended that the defendant solely imposed the obligation to obtain letter of discharge but by the nature of the APG, no such letter is issuable and in the instant case, due to the defendants delay in funding, the client (MOW) is yet to make payment or complete its deductions under the contract to qualify for the discharge letter. Furthermore, that defendant solely appointed insurers of their own choice

and negotiated the insurance policy before deducting the fee from the claimant account; a policy that covers defendants own risk during the execution of the Project.

Claimant further contends that the counter claims are misconceived, vexatious, face-saving and should be dismissed.

PW1, Mr. Ejigah Bartholomew Anyebe, the project, Engineer with the claimant company testified and tendered several exhibits and was cross examined.

Under cross examination, PW1 said he is aware that the Plaintiff is to collect a letter of discharge from the Federal Ministry of Works but not before completion of the work and that even though the defendant completed payment of the funds, they delayed and did not pay as at when due. That the Claimant rejected the 80% offer of the last tranche and it took the defendant almost 6 months before payment of the 100%. He said he is not sure if the insurance of the sum for the APG has been renewed, but also said he knows only about the construction and not about the APG.

There was no re-examination of PW1.

PW2, Stephen Okei Akportobora, the Managing Director and CEO of the claimant's company filed 2 depositions on oath in respect of this matter dated 12/12/2014 and 20/10/2016 respectively. He adopted both statements as his oral evidence in this case, and was cross examined on same.

Under cross examination, PW2 conceded that they do not have any letter of discharge from the Ministry of Works because work is still in progress and

that renewal of the insurance policy is not part of the contract. He emphasized that the claimant has a contract with Federal Ministry of Works and another contract of APG with the defendant.

There was no re-examination of PW2.

Through PW2, 49 exhibits were tendered in evidence:

PW3 a subpoenaed witness, one Abdulrasheed Abubakar, Managing Director and CEO of Fresh field Bureau de Change Ltd and a former bank branch manager. In his oral evidence before the court he stated that an advance payment guarantee agreement (APG) is a document given by the bank to a principal awarding a contract on behalf of the bank's customer pledging to ensure that the contract for which an agreed sum will be advanced will be executed. He stated, that the APG is to guarantee that the funds released by a client will be applied to the execution of the contract and that the bank releases the funds as soon as the customer executes an offer letter given by the bank. Usually, the first tranche is released once the offer letter is executed and subsequent tranches are released in line with the schedule contained in the offer letter.

PW3 stated further that the bank has a duty to ensure that funds are properly and timely released to the customer.

He informed the court that in May/June2014 the exchange rate was between N160 to N170 to the US dollar on the parallel market (black marked) and that the present rate of Naira to U.S. dollar on the parallel market is N376.00 to a dollar while N360.00 to a dollar is the official rate.

Under cross examination, PW3 said that the APG is a documentary agreement and not everything is contained in the APG as there is an offer letter that goes with the APG. He also asserts that the exchange rates fluctuate. He could not answer the question whether his evidence was necessary in view of the fact that the APG and the offer letter were both documentary evidence.

There was no re-examination of the PW3.

The defendant filed their defence and counter claim dated and filed on the 14/4/2015 and also called one witness, Anthony I. Nwodo as DW1, who adopted his written depositions as his oral evidence before the court. The defendant in their statement of defence, admits paragraphs 1,2,3,7,8,9,11 and 13 and denies paragraphs 4, 5,6, 10, 12, 15 to 36 of the claimants statement of claim.

In answer to the denied paragraphs the defendant states that paragraph 6 and 7 are true to the extent that the defendant issued an Advance Payment Guarantee (APG) to the Plaintiff upon the condition specified therein and completely denies paragraphs 3, 4, 5,6, 8 to 10 of the claim and states that defendant is not a party to any commitment in respect of time made by the Plaintiff to the employer.

Defendant admits that the guaranteed sum would be disbursed in tranches of 50:30 20% as execution of the project progresses and upon the report of diligent execution of the project by the project consultant and upon completion of due process by the Defendant.

Defendant states that further to its mail of February, 27, 2014, the 1st of March, 2014 was a Saturday while 2nd of March, 2014 was a Sunday and the sum was approved on Monday 3rd March, 2014 and released on Tuesday 4th March, 2014 indicating that there was no delay on the part of the defendant.

DW1 states that the Plaintiff caused much of the delay as he failed to access N13,586,429.25 for three weeks and states further that defendant is not subject to whatever conditions are imposed upon the Plaintiff rather, the Plaintiff applied for an Advance payment Guarantee (APG) knowing clearly the procedure and conditions thereof and that the defendant is entitled to withhold 20% in the sum of N3.396m of the last tranche of fund to be released upon the plaintiff obtaining and submitting to the Bank a letter of discharge from the Federal Ministry of Work which the Plaintiff rejected but the defendant exceptionally disbursed the whole amount without the letter.

That the defendant released funds to the Plaintiff even when same did not comply with such conditions as submitting interim payment certificate (IPC). While defendant declines liability for any purported loss as stated in defendants letter of November, 21st 2014, defendant urges the court to dismiss the suit as the Plaintiff is not the right person to sue and in any case, the losses claimed are too remote.

DW1 states that it is the Defendant's position that the APG imposed obligations on the claimant who has failed to discharge same and that the conditions precedent for this action, have not been met, viz:

a. *That the Claimant has not obtained a letter of discharge from the Federal Ministry of Works and*

b. Claimant has not renewed the insurance cover on the sum disbursed.

Whereupon, the defendant counter claims against the Claimant as follows:

a. *An Order of court directing the Plaintiff to obtain letter of discharge from the Federal Ministry of Works discharging the defendant from all liabilities on the advance payment guarantee, which proceeds the plaintiff has fully received from the Bank.*
b. *An Order of court directing the Plaintiff to renew insurance cover on the sum disbursed to the Plaintiff pending the letter discharging the Bank from Federal Ministry of Works.*
c. Costs of this action.

Under cross examination, DW1 stated that the APG is meant for the ministry of works to pay an agreed sum usually percentage of the contract through the bank. That this agreed sum was paid by Ministry of Works to the defendant through the claimant account which by then could not be accessed by the claimant except by the Banks approval.

DW1 admitted to have received some correspondence from the Plaintiff complaining about threat of damage to the project, if funds were not released timely.

There was no re-examination of DW1.

Parties filed their final written addresses.

In an amended, defendant's written address dated and filed on the 26th of September, 2018, counsel on behalf of the defendant contends that the purpose of Exhibit 3 is for the parties to enter into an APG which the parties executed. He argued that having issued the APG, the purpose of Exhibit 3 has been fulfilled and it is no more a live issue. Counsel submitted that exhibit 6 has now become the basis of the relationship between the parties hence even the claimant is quoted to state "nothing after or Subsequent can be contrary to the APG". It is defendants counsels position that the parties herein are the product of the APG and the claimant herein being only a beneficiary of the said APG lacks the locus standi to institute this action and that when the locus standi of a party to institute an action is challenged as in this case, the onus is on that party to satisfy the court that he has the locus to institute the action. Counsel cited: **EZEAFULUKWE VS. JOHN HOLT LTD (1996) 2 NWLR (432) 511 @ NO 2 @ PG 513.**

Counsel submits that the Plaintiff having failed to discharge the onus on them that they having the locus to institute this action raises the issue of jurisdiction which is so fundamental that it must first be heard before any trial can be said to be fair. **PANALPINA WORLD TRANSPORT (NIG) LTD VS. GLENYORK (NIG) LTD (2009) ALL FWLR (455) 1808-PARE.**

Defendant counsel submits further that claimant's contention that defendant has not considered and deliberated on the substantive issue, is not important because the defendant is relying on the threshold issue of jurisdiction on the basis that the Plaintiff lacks the locus standi. Counsel cited **SA'AD VS. MAIFATA (2009) ALL FWLR (466) 1930 AT PG 1948 F-G** and urged the court not to attached any weight to this issue of the substance of the case but

to end this proceedings and dismiss the case brevi manu for lack of Jurisdiction.

At a resumed date of 7/2/2019, the court, unclear about certain facts in this case as regards paragraphs 10, 13 and 15 of the statement of claim and paragraphs 30 and 33 of the statement of defence, formulated 3 issues to be addressed by both parties viz:

1. *Why was there need to further evaluate after Nuks had done so as agreed?*
2. *How it was common grounds that time is of the essence?*
3. *Was there any provision for withholding tax at the beginning of the agreement for the APG?*

In answering the courts quarry, defendant filed a supplementary final written address dated 13th February, 2019 and filed on the 14th February, 2019 and contends that the claimant conceded that the defendant was not a party of the alleged common ground hence the claimant claim against the defendant collapse. Counsel contends that claimant's compliant of delay on the part of the defendant to disburse funds was only 4 days delay from 27th February, 2014 to 4th March, 2014. That the defendant never agreed to forego the withholding tax payable by the claimant as the payment of withholding tax is a statutory requirement and the defendant or the parties cannot by agreement override a statutory requirement.

Lastly, counsel contends that Nuks associates Ltd are an agent and the agent of a known principal is not liable. That the defendant as the known principal can go the extra mile to ensure that it does not incur liability as it is a

custodian of other peoples' money hence the need to confirm the evaluation done by its agent before incurring liability.

Counsel adopted his written address as his argument in support of his defence and urged the court to dismiss the claimant's claims for lack of locus standi and grant the uncontested defendant's counter claim.

Claimant's counsel filed an amended final written address dated 17/9/2018 and filed on the 18/9/2018 wherein counsel on behalf of claimant brought 3 issues for determination viz:

1. *Whether the Plaintiff was in contractual relationship with the defendant.*
2. *Whether there was breach of the terms of that contract by the defendant and*
3. *Whether damages are accruable from the defendant's breach of contract.*

On issue one, claimant's counsel submits that the defendant assumed wrongly that the substance of the claimant's complaint is the Advance Payment Guarantee (APG) by means of which the defendant entered into an obligation to guarantee that the claimant would apply the funds paid by the Federal Ministry of Work to the execution of the project when by paragraph 8 of PW2's statement on Oath, the defendant studied all document relating to the subject contract award letter before agreeing to issue an APG. That Exhibit 3 dated December, 3, 2013 consists of an offer from the defendant to the claimant and tendered by PW2 is an agreement between the parties.

That the breach which claimant put in issue in this suit is that the agreement for issuance of the product (APG) which consists of terms as to how the product would be issued and how parties would relate (Exhibit 3) and working agreement subsequently executed between the parties (exhibit 7), was not abided by.

Claimants' Counsel contends that defendant misconceived the basis of the claimant's claims and its submissions on locus standi is of no effect as **BEWAJI VS. OBASANJO (2008) 9 NWLR (PT 1093) PG 540 @ PG 568 PARAGRAPHF-H** provides the 2 acid tests for determining whether or not a person has locus standi in initiating a suit.

On issue two, counsel on behalf of the claimant contends that the terms of the contract between the parties were contained in Exhibit 3 and Exhibit 7 and that claimant satisfied all the conditions including insurance indemnity policy, personal guarantee of PW1 and payment for services of consultants appointed by the defendant to monitor performance even when these conditions were not listed as at the time when both parties contracted to issue APG and thus not included in the contract agreement (Exhibit 3).

That Exhibit and testimonies of PW1 and PW2 which are un-contradicted to the effect that after plaintiff met all conditions with certification from defendants agent and the in house team of risk management staff, defendant still delayed payment of the 2nd tranche for 21 days after claimants' application for disbursement, and this constituted breach of the contract listed in Exhibit 7 and breach of fundamental obligation which all parties accepted that, time was of the essence of the contract between the parties.

That the evidence of both PW1 and PW2 were un-contradicted and uncontroverted.

On issue three, counsel on behalf of claimant submits that the direct consequence of the defendants breach of duty of prompt disbursement of funds was that project scheduled to be completed within 8 weeks of March, to April, 2014 resulted in slow work progress while daily running costs (which amounted to N291,072,000.00 of construction equipment escalated.

Counsel submitted that these facts are not challenged contradicted by contrary evidence or discredited under cross examination. That exhibits 35,14,15,19,20,21 and 22 were all unchallenged by the defendant in evidence nor under cross examination.

Plaintiff claims special damages of N333, 562, 010.00 and general damages of N50,000,000.00.

In claimant's further final address dated and filed on the 26/2/2019 counsel referred the court to paragraph 10 of claimant's statement of claim, Exhibit 11. Exhibit 1 and Exhibit 14, all buttresses the fact that it was common knowledge to both parties that time was of the essence of contract as the entire projected was to be executed in 14 months and the first Phase was to be executed within 8 weeks.

Counsel contends further that the APG fund of N87, 804,979.80 paid into claimant's account with the defendant after VAT and withholding tax was deducted by the Ministry of Work and subsequently a disbursement plan in

three tranches of 50:30:20% respectively which was not subject to any other tax thereon was agreed upon.

So the 20% withholding tax on the last tranche by the defendant which caused another 6 weeks delay was in direct breach of its own disbursement plan.

Counsel submits that the defendants importation of extraneous terms and conditions particularly commissioning a risk management team to inspect and value the project after Nuks Associates had done theirs is a gross breach of the terms of contract between the parties and this occasioned undue delay in the disbursement of the 2nd tranche.

Counsel, adopted his written address as his oral submission before the court and urged the court to grant all the claims of the Plaintiff.

In the considered opinion, of this court, the issues for determination in this case are:

(1) Whether the Plaintiff has locus standi to bring this action.

(2) If yes, whether the Defendant has breached the terms of their agreement/Relationship as claimed.

(3) Whether the Plaintiff is entitled to any claims in view of the facts and evidence in this case before the court.

The Plaintiff is of the view and has approached the court on the facts, that he had a contractual relationship with the defendant, which terms the defendant has breached, therefore, he is entitled to both his claim and damages.

I will first pose the question what constitutes a valid contract in the eyes of the law and whether one existed between the parties, conferring locus standi on the claimant to qualify him to bring this action.

A contract is a legally binding agreement between two or more persons by which rights are acquired by one party in return for acts or forbearances on the part of the other party. See **SOCIETY GENERAL BANK (NIG) LTD VS. SAFA STEEL & CHEMICAL MANUFACTURING LTD (1998) 5 NWLR (PT 548) 168 CA.** Simply put, a contract is a formal agreement which the law will enforce.

Not all agreements, though are legally binding. Examples are social agreements or domestic agreements which are usually not enforceable.

A contract or agreement that the court will enforce must of necessity comprise of these five elements or factors.

(1) Offer; (2) Acceptance; (3) consideration; (4) intention to create a legal relationship and (5). Capacity to contract. **ENEMCHUKWU VS. OKOYE (2016) LPELR-40027 (CA).** Closely related to this, which is often regarded as the 6th element is the fact that the parties must express their agreement and terms thereto in a form which is sufficiently clear or certain, to enable the court to enforce when necessary. All these elements must be present in a valid contract as a contract cannot be said to have been formed if any of these elements is absent.

See ***AMANA SUITS HOTELS LTD*** **VS. PDP (2007) 6 NWLR (PT 1031) 453 (CA).**

It is pertinent to note that these elements are not just said to be there. There has to be a formal procedure or a legal principle adopted for an agreement to crystallize in a contract. That is, there must be an unmistaken and precise offer and an unconditional acceptance of the terms of the agreement as mutually agreed upon. This is consensus ad idem. The parties must be ad idem on the terms. The consensus must be free and voluntary. The terms must also be certain and not vague. I am not mindful.

Applying this principle to the instant case I note that exhibits 3.7 "12" and "15" are relevant. In exhibit "12" which is a document from the Defendant to the Plaintiff, the opening paragraph is:

> *"Further to the **approval of your application** by the management of Fidelity Bank Plc, we are Pleased to advise offer of the above facility to your company under the following **terms and conditions**…."*

The terms and conditions are succinctly set out in the said document dated 27th February, 2014. At the last page of the document it is stated thus:

> *"Availability and usage of this facility will be at the discretion of Fidelity and is subject to Jireh maintaining a satisfactory relationship with Fidelity and an acceptable financial condition."*
>
> *This **offer letter**, **agreement** and **related documents** will be governed by Nigerian Law.*
>
> *Please indicate your **acceptance** of the terms of **this offer** by signing and affixing your company seal on this and other attached copies of this letter. The copies should please be returned to Fidelity together with your board resolution authorizing the acceptance of **this offer."***

The offer was duely accepted by Jireh and stated thus:

> *The company seal of Jireh Habitation Integrated services Limited is here affixed in acceptance of the credit facility under the terms and conditions herein stated this 23rd day of February 2014.*

It is signed by, a Director and a director/secretary.

Exhibit "13" is the Board Resolution requested for by the Defendant as one of the conditions. Therein, the Board of Jireh Habitation authorized the company to accept the APG granted the company by Fidelity Bank Plc under cover of a letter dated 27th February, 2014 (referring to exhibit "12").

Exhibits 3 & 4 are also of similar affect.

Exhibit "3 A" is the Cash Collateral Agreement wherein paragraph 5 thereto states that the charge therein contained shall be binding not only on the Plaintiff but on her successors –in-title and assigns. These conditions pose an intention of creating a legal relationship.

The evidence before the court and as can be gleaned from exhibit "3" the security for this transaction is the APG proceeds of N93,853, 623.06 which domiciled with Fidelity Bank and the consideration for this transaction termed management/Guarantee fee is N610, 048, 55 representing 0.65% of the APG.

Though exhibit 3 is said to have been discharged after the APG, same can be said to be the basis for the claimant's belief that the relationship is a formal

and legally binding one. It is also the foundation on which the whole APG contract was built.

The parties intended this agreement to have a binding effect on them even as their terms and condition were reduced into writing and both parties affixed their respective seals especially the claimant in fulfillment of condition precedent to the Defendant concretizing the agreement.

Clearly, there was an offer when the claimant approached the Defendant and a counter offer by exhibits 3&12 both of which the claimant accepted when they willingly fulfilled all the terms and conditions, in accepting the said offer. The parties have shown via the exhibits tendered that they had an intention to creat a legal relationship, by the Defendant's proposal of conditions to be fulfilled by and the claimant's acceptance of same. A consideration of 65% of the sum was also paid, same which is not denied nor disputed.

The parties are all legal personalities and none of them, neither the claimant nor the Defendant is a minor, meaning they have the capacity to contract. They can sue and be sued there being no objection on this on any grounds.

There is nothing missing about the fact that there was a valid contractual relationship between the claimant and the Defendant.

I find from the foregoing therefore, that, the claimant has the locus standi to bring this action being an action against the manner and time of disbursement of the funds of the APG and I therefore resolve issue one in favour of the claimant.

Issue two:

Whether the Defendant has breached the terms of their agreement/Relationship.

A breach of contract connotes that the party in breach had acted contrary to the terms of the contract either by the non-performance, or by performing the contract not in accordance with its terms or by a wrongful repudiation of the contract. A party who had performed the contract in consonance with its terms cannot be said to have been in breach thereof. See **PAN BISBILDER (NIG) LTD VS. FIRST BANK OF (NIG) LTD (2000) LPELR-2900 (SC).**

The pieces of evidence before the court which are most crucial to this case are those contained in paragraphs 4, 8,9, 11-37 of the claimant's PW2, Okei A. Stephen and these of Anthony I. Nwodo, Defendants' DW1 contained in paragraphs 1-29 of his evidence on oath. Both witnesses adopted their written evidence and were cross examined on same.

Claimant also presented one Mr. Ejiga, Bartholomew Anyebe as PW1. He tendered in evidence photographs of the construction work and the extent of damage caused by the rains and urged the court to adopt his evidence as his oral testimony. He said under cross examination that he only knows about the construction and not the APG. He also informed the court that he is aware that the Plaintiff is to collect a letter of discharge but that was not to be before the completion of the work and that he wouldn't know if the letter had been collected, as work

Witness also said, though the Bank has completed disbursement of the funds, there was a delay as the Defendant did not disburse as at when due. Asked whether they rejected the payment because of the delay, witness said the Plaintiff rejected the 80% offer and it took the defendant **almost 6 months** before the defendant paid the 100%, and that the Plaintiff accepted the 100%.

Witness also is not aware if the insurance has been renewed.

Since these two issues are what constitute the Defendant's defence and counter claim, upon which also the claimant's witness was cross examined, I will concentrate on them.

On the issue of whether discharge letter had been received and if the insurance policy had been renewed PW2 testified and was cross examined, the answer of which he stated thus:

(Q) *Have you got any letter of discharge from the Ministry of Works?*

(A) We have not, because work is still in progress.

(Q) Have you renewed the insurance policy?

(A) No. Renewal is not part of the contract.

(Q) Your contract is with federal ministry of works?

(A) Yes, but I have another contract of APG with Fidelity Bank.

These answers raised vital issues which were never addressed, that is; that the discharge letter from the Federal Ministry of Works is said to be due only at the completion of work and that the work is still in progress.

Defendant did not disprove this fact of work still being in progress, the reason for not obtaining the discharge letter. In fact defendant needs to prove three

things –One, that work is already completed so they ought to have obtained the discharge letter. And/or to prove that even if work is still in progress, claimant could obtain the said letter from the Federal Ministry of Works, which they failed to do. Secondly, it is in evidence under cross examination that the issue of renewal of insurance is not part of the contract. Defendant has failed to prove or disprove that the issue of renewal is part, of their agreement with the claimant.

In the widest presumption of the court, he is unable to believe that the claimant was under obligation to renew the insurance policy but has failed to do so, there being no evidence to that effect. what

Thirdly, the defendant's defence has been that they have no contract with the claimant. That their contract was with the Federal Ministry of Works. When defendant's counsel asked the PW2 this question:

Q. *Your contract is with Federal Ministry of Works?*

PW2 said:

A. Yes, but I have another contract of APG with Fidelity Bank.

Fidelity Bank is the Defendant.

There is no contrary evidence to this assertion which is in consonance with the documentary evidence before the court, hence my finding that there is a contract between the claimant and the defendant on how and when funds should be disbursed.

Facts not denied are deemed admitted. In **HARUNA VS. LABARAN (2013) LPELR -22802 (CA)** the court held:

Generally, a fact which is not denied is deemed to have been admitted.

That agreement had terms and conditions which the defendant has not shown that the claimant failed to meet or satisfy. The claimant on the other hand, has proved with credible evidence that they satisfied the conditions for the disbursement of funds and same was disbursed except that they were disbursed late and not as at when due, thereby causing a delay in the execution of the contract which form the basis of this suit.

In my opinion, the Defendant's counter claim as at the time of bringing this action that a discharge letter ought to have been obtained has not been proved neither has their claim for renewal of the insurance policy, as there is no evidence that the issue of renewal was part of the agreement. The

The counter claim therefore, fails and is hereby dismissed.

Now to the claimant's case.

The defendant's witness, Anthony Ikechukwu Nwodo, DW1, while denying paragraphs **3**,6,**7**, **8** and **9** of the statement of claim, however, admitted paragraphs 1-**3,7,8,9**, 11and 13 in the Defendant's Witness Statement on Oath, the same paragraphs so denied in their pleadings. I see this as a clear case of a witness' evidence being at variance with his pleadings.

In a Plethora of decided authorities the courts have held that evidence at variance with the pleadings goes to no issue.

In **EKITI STATE GOVERNMENT & ORS VS, ABE & ORS (2016) LPELR - 40152 (CA)** the court held:

> *Indeed the courts have consistently been admonished not to countenance evidence that is at variance with pleaded facts as such evidence go to no issue.*

In **ONISILE VS. APO (2013) LPELR -22330 (CA)** the court held:

> *Evidence at variance with pleadings is not admissible. See* ***OJO ADEBAYO VS. MRS. F. IGHODALO (1996) 5 SCN 5 @ 23. SEE ALSO AJAYI VS. OSUNUKU (2008) LPELR-8332 (CA), OLADIMEJI VS. AJAYI (2012) LPELR-20408 (CA) AND KEHINDE VS. KEHINDE (2014) LPELR-24062 (CA).***

In the light of the above I find the evidence of DW1 contained in those paragraphs at variance with the Defendant's pleadings and do hereby discountenance the evidence of the DW1 on those facts and declare same as of no moment. Leaving that of the claimant also uncotradicted.

Weighing the evidence in this case on the legal imaginary scale, which side does the same tilt?

The claimant's claim in a nut shell, is that the Defendant failed, neglected or refused to release on time, funds meant for the execution of the contract awarded to the claimant by the Federal Ministry of Works, thereby causing the claimant to incur extra expenditure in trying to remedy the damage caused by the rain which came at the teething stage of the work, while the claimant did everything possible to no avail, to persuade the defendant to release timeously the said funds to enable the claimant to quickly complete

that stage of work before the down pour of the rains, and to forestall the damage and the loss eventually suffered.

Therefore, it is claimant's claim that the defendant is in breach of the contract thereof. There is no evidence that the defendant disbursed the money as at when due with the exception of the first tranch, to persuade the court in favour of the Defendant.

The contents of paragraph 10 of the claimant's statement of claim and paragraph 11 of the witness statement on oath of Okei A. Stephen who is the key player in the two contracts, that is the contract between the claimant and the Federal Ministry of Works and that between the claimant and Fidelity Bank, the Defendant, whose witness testified as DW2, were brought to the attention of both counsel to the parties in this case to wit: how was it common knowledge to both parties that time was of the essence in this agreement. Both counsel addressed the court on the issue. I have looked at the exhibits tendered without objection in this case, and I take note of the fact that exhibit 1 is the award of contract letter wherein it is contained that the whole contract be completed in 14 months. In order to be properly guided the claimant made a chart of how to segment and execute the work. This is contained in exhibits 11 and 11A wherein details of week by week accomplished of the work, on availability of funds, is provided. I am also referred to exhibit 14 which I have perused and on the last page and last paragraph thereto, the claimant, in requesting for additional Advance payment funds, stated and urged the Defendant to expedite action in releasing the funds early in the following week as a delay is dangerous in view of the short time they had to work before the onset of the rains.

The Defendant over looked the content of exhibit 14 and has stated in paragraph 18 of their statement of defence that they must released the funds only after due process which had nothing to do with the weather which is an act of God.

Due process must be followed in doing things right particularly where it involves finances as in this case. However there is nothing wrong in considering some circumstances special enough to abridge the time within which due process should be completed. Especially in view of constant reminder that time is of the essence. What should normally take three day could have been done in a day in order to meet up with time and beat the rains. To be cold towards the state of affairs and let things get to the state they are in this case was deliberate. If the defendant, upon receipt of the claimant's application for APG and submission of all the contract documents saw that the time for completion of the contract (14 months) was too short for their due process, they were at liberty to reject the application, or, in their terms & condition state the time within which their due process could be done, giving the claimant for warning that there could be delay.

This goes also for the Defendant's position in paragraph nine of his statement of defence where the defendant says as long as they took the necessary steps before disbursing the funds there was no delay even if in actual fact there was a delay.

In preparing the agreement between the parties, the Defendant did not include a clause, bringing to the attention of the claimant that for each disbursement it would take them so and so length of time to be through with their "due process" which would have put the claimant on guard in

management of their time and resources in this regard. This is an implied term in this APG contract.

I have critically looked at the exhibits before the court and, looking through same, I see that there was an implied term that time was of the essence which the Defendant was at liberty to reject if it so wished. The contract was to be completed within 14 months; the first segment of the work to be completed within 8 weeks; the chart of how much time each segment of the work would required to be completed was made available to the Defendant in the letters requesting for each tranche of disbursement and all stated that rains must not come while the work was at the stage it was, as such, appealing to the Defendant to timously disburse the next tranche for the work.

The defendant knew that the claimant was pressed for time; therefore making time of the essence in this case. This to my mind constituted an implied term of this contract for APG as I have said an implied term of a contract is something which, in the circumstance of a particular case, as in the instant case, the law may read into the contract if the parties are silent on it, would be reasonable to do so. It is something over and above the ordinary incidents of a particular type of contact. The term "implied term" can be used to denote a term inherent in the nature of the contract which the law will imply in every case unless the parties agree to very or exclude it. See **NIGER INSURANCE COMPANY LTD VS. ABED BROTHERS LTD & ANOR (1976) LPELR 1995(SC).**

For this contract of APG, where 14 months completion time was stipulated and the Defendant was constantly being reminded of the need to complete the

work before the rains which admit which admit there was an implied term that time was of the essence and the claimant couldn't have agreed with the defendant to omit.

In **LEUINS VS. UBA PLC (2016 LPELR-40661 (SC)**, the Supreme Court held:

> *In the construction of a contract, the meaning to be placed on it is that which is plain, clear and obvious result of the terms used. A contract or document is to be construed in its ordinary meaning. When the language of a contract is not only plain but admits of one meaning, the task of interpretation is negligible. See* ***UNION BANK OF NIG. LTD & ANOR VS. NWAOKOLO (1995) 6 NWLR (PT 400) 127….***

There is nothing in the documents tendered before the court either by the claimant or Defendant to show that it is agreed that each time the claimant applied for the disbursement of the next tranche the process will be started all over again, taking the whole time without regard to the contract period which the APG is meant to service.

In exhibit 12, and under the heading "EVENTS OF DEFAULT" all the events therein contained, which, when they occur, shall be construed as a default, are all events against the interest of the claimant. In this relationship/contract, it does appear that the intendment of the drafter of that agreement was that only the claimant could default. There are no acts of the defendant that would be considered a default. The acts therein contained are such that the failure to do, or the doing of, or acts already done which negatively affect the contract or

the defendant, must only be those done by the claimant, meaning that anything done or failure to do by the Defendant is perfect.

There is no corresponding obligation on the part of the Defendant leaving the defendant the latitude to do and leave undone whatever pleases it without regard to the Plight of the claimant. These events of default are repeated in exhibit "15" a similar document to exhibit "12". I find therefore, that time was of the essence and that the Defendant did not disburse the funds as at when due.

Next for consideration on the issue of delay, is the content of paragraph 14 of the claimant's statement of claim.

At the expense of the Plaintiff, the defendant had appointed Messrs NUKs Associate limited as project consultants to diligently monitor the execution of the project by the claimant, certify and value same and also recommend further disbursement of founds for next stage of project execution, if deserving. See paragraphs 14-19 of the statement on oath of PW2. However, after NUKs Associates had valuated the works and filed in its report dated 9th April, 2014, wherein it certified that the claimant had already expended more than the fund disbursed and recommended that the second tranche of 30% of the funds be disbursed, the Defendant (on a frolic of its own) commissioned another team of risk management staff to further inspect and value the project. See exhibits 17 E at paragraph 4.0 titled "Recommendation".

It is in evidence that this team also certified the project and stated that the value of the executed project was more than the disbursed funds. See paragraph 5.0 titled "Remarks/Comments." The procedure of constituting

another monitoring team after NUKs had evaluated and given recommendation for disbursement is not contained anywhere is the agreement, and I cannot imagine it to be an implied term since there was NUKs to handle that, and which was specifically stated in the contract.

The defendant has no credible answer to bringing in a delay process or procedure that was not part of the agreement, although they have denied the said paragraph 14 of the statement of claim, Defendant has however, not proffered any contrary evidence to the said facts contained in paragraph 14.

In a Plethora of cases the courts have held that mere denial in a statement of claim will not amount to a proper traverse. See **ACHORU VS. INEC (2010) LPELR-3588 (CA), EKE VS. OKWARANYIA (2001) LPELR-1074 (SC).** A proper traverse arises when a party affirms a fact and the opponent traverses that fact specifically. Where a traverse is not supported by contrary fact it goes no issue.

With these finding, I am of the view that the Defendant acted without regard to the terms of the contract they and lost sight of the content of the letters which were written to them and which served as a reminder that time was of the essence at every stage of disbursement. They therefore acted in breach of the terms of their agreement of the contract of and relating to the disbursement of the APG.

In a long line of decided authorities, the position of the law is and the courts have held that where a party is in breach, same is liable to damages. Thus in **SHELL BP PETROLEUM DEVELOPMENT COMPANY VS. JAMMAL ENGINEERING (NIG) LTD (1974) LPELR-3045 (SC)** the court held:

"The Principle of assessment established by the authorities is clear generally. It is that a party in breach of his contract is liable in damages and the aggrieved party is entitled to such an owing necessary from the breach in that either the injury suffered by the aggrieved was in the contemplation of both parties at the time of the institution of the contract or is an inevitable consequence of the breach."

Similarly in **OLAOPA VS. OAU ILE-IFE (1997) LPELR-2571 (SC)** the Supreme Court held:

The principle of law is that a party to an entire contract partly performed by him and was by the act of the other party, prevented from proceeding further with performance, the law entitles him to be paid for the fruit of the labour he has already rendered. In situations like this, two ***alternative*** *remedies are open to him:*

(a) Damages for breach of contract and

(b) Reasonable remuneration in quantum meruit for the work already done. See ***PLANCHE VS. CORBUN (1831) 5 C AND P 58.***

None of the evidence in this case was effectively controverted or contradicted by the defendant.

The court of appeal defined contradiction in evidence, in the case of **USEN VS. STATE (2012) LPELR-20063 (CA)** thus:

Now, a piece of evidence is said to contradict another in law when it affirms the opposite of what the other evidence has stated. Two

pieces of evidence contradict one another when they are themselves inconsistent on material facts and not when they are just a minor discrepancy between them….

See the cases of **GABRIEL VS. THE STATE (1989) 5 NWLR (PT 122)451; (1989) 12 SCNJ 33; OGOALA VS. THE STATE (1991) 2 NWLR (PT 175) 509; AKPAN VS. STATE (1991) 3 NWLR (PT 182) 646; AGBO VS. STATE (2006) ALL FWLR (PT 309) 1380; IDIOK VS. STATE (2006) ALL FWLR (PT 333) 1788.**

See also the case of **IKPEAMAGHIEZE VS. AZUMARA & ORS (2014) LPELR - 22502 (CA), DIBIE VS. THE STATE (2005) ALL FWLR (PT 259) 1995 2023 C-DIND ABOKOKUNYANRO VS. STATE (2011) ALL FWLR (PT. 597) 700.**

All that the Defendant is saying is that the delay was for the defendant to comply with its due process.

Even the denied paragraphs were on a second thought, admitted, and those maintained in denial, no sufficient evidence to prove otherwise.
The defendant's contention that the claim for damages is too remote does not hold water in the sence that the claimant's inability to finish the jobs on time due to the none timely release of funds leading to his trying to reduce damage caused by the rains was a direct result of the none performance on the part of the Defendant i.e. (failure to timely disburse fund meant for the job).

The late release of funds was the main and actual cause of the loss incurred by the claimant; i.e loss of reputation, loss of future contract from the Federal Ministry of Works and loss of funds. For this, the claimant is therefore entitle to damages.

It is pertinent to define damages here as the pecuniary compensation or award given by process of law (e.g. court or tribunal) to a person who suffered loss or injury, whether to his person or property either through an unlawful act or omission, whether deliberately or inadvertently of another person. The reason for awarding damages to an aggrieved party is to compensate him or place him in a position in which he would have been, if he had not suffered the damages caused by that party or injury so caused.

Finally, there is a contention of whether or not the defendant was supposed to retain a percentage of the sum for V.A.T, and or any other taxes.

It is in evidence that the full sum for the first phase of the contract was N93,853, 623.06 as was covered by the APG. However, the Federal Ministry of Works paid to the claimant's account with the Defendant, the sum of N84,915,182.78 for the said first phase of the works, having deducted the value added Tax (V.A.T) and withholding Tax which the defendant knew.

There is no contrary evidence from the defendant disputing the fact that V.A.T and withholding tax had been deducted. Defendant has also not explained why he released only N84,915,182. 78 instead of N93,853, 623.06, if not for the fact that of the V.A.T & withholding Taxes had been deducted.

I think, for the Defendant to raise afresh, the issue of withholding tax having been aware of the fact above stated, is a deliberate ploy to frustrate the claimant's contract, which they did.

Conclusion:

(1) In the letter of award and subsequent letter to the Defendant it is shown that the claimant made it clear to the defendant that this project is within a limited time and therefore time is of the essence and also appealed to the Defendant not to delay in disbursing the funds in order to prevent the threatening rain fall from destroying the already commenced work. See exhibits 19. The Defendant therefore knew that time was of the essence but did nothing about it until the rains came and destroyed the work as feared. The Defendant called this "act of God". Defendant was therefore in breach of the contract.

(2) In every contract of this nature where "Good faith" is the foundation, there is usually a force Majeure Clause. A Force Majeure clause is defined by Black's law Dictionary 9th edition page 718 as "A contractual provision allocating the risk or loss if performance becomes impossible or impracticable, esp as a result of an event or effect that the parties could not have anticipated or controlled". This contract prepared by the defendant did not have the force Majeure Clause, yet the Defendant wants to use this lapse of his to its advantage. This, to my mind will be overreaching if allowed.

(3) In drawing up the terms of the agreement, which was done solely by the defendant, the Defendant did not make it clear therein, that each time the claimant completed one phase, the Defendant will go through the whole process of what they referred to as "due process"

before the claimant can have access to the funds to proceed to the next phase.

(4) The defendant has not given any cogent reason for failing or refusing to disburse the funds timely.

Putting all the evidence before the court on the legal imaginary scale, there is no credible defence from the defendant to this action. The scale tilts in favour of the claimant. I find that the claimant has proved his case on a balance of probabilities and is entitled to judgment.

In the circumstance, I hereby enter judgment in favour of the claimant as follows:

1. I find, hold and declare the mode, manner and timing of disbursement, by the defendant, of the sum of N84,915,182.79 (Eighty four million, nine hundred and fifteen thousand, one hundred and eighty two Naira, Seventy nine Kobo)which is the project funds, advanced to the claimant by the Federal Ministry of Works to be and is in breach and in violation of the terms, tenor, intent and purpose of the Advance payment Guarantee (APG) Agreement and subsequent agreements duly executed between the claimant and the Defendant.
2. The Defendant is ordered to pay the claimant the sum of **N33, 872,260.00** being the loss suffered by the claimant resulting from the breach, which loss, the claimant incurred while trying to rescue the damaging works caused by rain as a result of none timely work done, consequent upon the failure by the defendant to disburse timely, funds

meant for that phase of work - a loss which the defendant has not denied.

Claimant is entitled to either damages in quantum merit or general damages but not both. I therefore make no orders for this head of claim.

This is the judgment of the court.

Signed
Hon. Judge
19/6/2019

Appearance:

1. **Daniel Alumun Esq**, for Claimant.
2. **Dr. S.S. Ameh (SAN)** and **Dr. (Mrs.) Adetutu Pelemo** Defendant.

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2. PANALPINA WORLD TRANSPORT (NIG) LTD VS. GLENYOK (NIG) LTD. (2009) ALL FWLR (455) 1808.
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4. BEWAJI VS. OBASANJO (2008) 9 NWLR (PT 1093) PG 540.
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